

TRUSTS & ESTATES

QUARTERLY

TRUSTS AND
ESTATES

CALIFORNIA
LAWYERS
ASSOCIATION

INSIDE THIS ISSUE

TRUSTEE'S OBLIGATION TO MAINTAIN IMPARTIALITY IN TRUST LITIGATION:

ZAHNLEUTER V. MUELLER (2023) 88 CAL.APP.5TH 1294

By Denise E. Chambliss, Esq. and Clare Capaccioli Velasquez, Esq.

This article examines the tension between a successor trustee's duties to defend the trust and treat beneficiaries impartially. Central to the analysis is a review of the Court's ruling surcharging a trustee for trust assets expended defending against a beneficiary's contest to validity of an amendment.

PAGE 08

SETTLOR INCAPACITY AND FILLING A TRUST'S "EMPTY CHAIRS"

By Jeremy J. Ofseyer, Esq.

What circumstances require the successor trustee to replace the settlor as trustee due to the settlor's apparent incapacity? To whom does the successor trustee of a revocable trust owe duties upon the incapacity of the settlor? This article examines the application of Probate Code section 15800 and proposes answers to related questions.

PAGE 18

WHEN SHOULD AN IRC SECTION 645 ELECTION BE MADE? *ALMOST ALWAYS!*

By Lindsey Kernan, Esq.* and Simon A. LeBleu, Esq.

An Internal Revenue Code section 645 election can now be made to allow a "qualified revocable trust" to be treated as part of a decedent's estate for federal income tax purposes. This article addresses the various benefits to making the election, the mechanics of making the election, and the few situations when the election may not be advisable.

PAGE 27

THE PROFESSIONAL FIDUCIARY PRACTICE ADMINISTRATOR - A NEW KID IN TOWN

By Anne M. Rudolph, Esq. and Ralph E. Hughes, Esq.

New Probate Code sections 2469 and 9765 provide a procedure that allows the court to quickly appoint a Professional Fiduciary Practice Administrator to fill a vacancy caused by the death or incapacity of a licensed professional fiduciary. This article is a summary designed to familiarize practitioners with the procedure.

PAGE 34

2023 LEGISLATION: NEW LAWS THAT TRUST AND ESTATE PRACTITIONERS SHOULD KNOW

By Ryan Szczepanik

This article summarizes the most impactful laws enacted in 2023 related to the trusts and estates practice area.

PAGE 39

FROM THE CHAIR

PAGE 04

FROM THE EDITOR-IN-CHIEF

PAGE 06

TAX ALERT

PAGE 46

LITIGATION ALERT

PAGE 51

TRUSTEE'S OBLIGATION TO MAINTAIN IMPARTIALITY IN TRUST LITIGATION: *ZAHNLEUTER V. MUELLER* (2023) 88 CAL.APP.5TH 1294

Written by Denise E. Chambliss, Esq.* and Clare Capaccioli Velasquez, Esq.*

I. SYNOPSIS

In trust litigation, navigating the boundary between a trustee's right and duty to defend the trust, and the contrasting duty to remain impartial in disputes as to who is the rightful trust beneficiary, can prove to be complex and complicated.

This tension was at issue in the case of *Zahnleuter v. Mueller* (2023) 88 Cal.App.5th 1294 ("*Zahnleuter*"). In *Zahnleuter*, the trustee was surcharged in the amount of attorney's fees he paid from the trust in connection with a dispute over the validity of a trust amendment.⁰¹ The court held that Thomas Mueller ("the Trustee") incurred attorney fees to benefit the interests of his two children, Julie and Amy, not the interests of the trust estate.⁰² In *Zahnleuter*, the court reaffirmed that, for a trustee to avoid personal liability and a surcharge, the attorney's fee expenditures from the trust must benefit the trust rather than fund the trustee's engagement in a dispute over the identity of the proper beneficiaries.⁰³

Analyzing the holding in the *Zahnleuter* case starts with the general fiduciary duties set forth in the California Probate Code and continues with a survey of the developing case law addressing a trustee's ability or inability to use trust assets in trust litigation. Historically, trustees were provided a proverbial "blank check," at the trust's expense, to litigate nearly any issue subject only to a "reasonable" under the circumstances test.⁰⁴ The analysis in *Zahnleuter* is the latest

in a string of cases addressing the circumstances under which trustees are precluded from using trust assets to pay for their attorney's fees in litigation where one beneficiary is challenging the operative trust or amendment.⁰⁵

As addressed in greater detail in this article, the general rule applied in *Zahnleuter* is that a trustee is not entitled to reimbursement of litigation expenses from the trust estate when the trust instrument does not direct the trustee to defend the instrument in dispute and "[t]he dispute was, and continues to be, over who will enjoy the benefits and who will control the trust."⁰⁶ However, certain circumstances still exist where a trustee's attorney's fees can be paid from the trust or later reimbursed from the trust after the resolution of the dispute.⁰⁷

II. TRIAL COURT PROCEEDINGS: *ZAHNLEUTER V. MUELLER*

A. Establishment of the Trust

Richard Mueller ("Richard") and Joan Mueller ("Joan," collectively, "Settlors") had two children: Petitioner Katherine Zahnleuter ("Katherine") and Amy Mueller ("Amy").⁰⁸ Richard also had a daughter from a previous marriage, Julie Van Patter ("Julie").

In 2004, Settlors created a revocable living trust ("Trust").⁰⁹ Under the terms of the Trust, Katherine and Amy were equal remainder beneficiaries after payment of certain

expenses, including a \$10,000 gift to Julie.¹⁰ Amy and then Katherine were named as successor trustees.¹¹

The terms of the Trust authorized the Trustee in his discretion to initiate or defend, at the expense of the Trust estate, any litigation related to the Trust or any property of the Trust.¹² Of note, the Trust also included a no contest clause that read:

The Trustee is authorized to defend, at the expense of the Trust Estate any contest or other attack of any nature on this trust or any of its provisions. This paragraph shall not apply to any amendment of this document executed after the date of this document.¹³

B. Disputed Third Amendment

The Trust was purportedly amended three times.¹⁴ The First Amendment, which made no substantive changes to the Trust, was executed by Settlers in November 2005.¹⁵ The Second Amendment, executed by Richard after Joan's death in October 2017, named Amy and Katherine as successor co-trustees, but did not modify the distributive terms of the Trust.¹⁶ The Second Amendment included a no contest clause which stated that it applied to beneficiaries who sought to contest the validity of the amendment, but did not expressly authorize the trustee to defend any contest to the amendment at the expense of the Trust estate.¹⁷

The Third Amendment to the Trust, executed in April 2018, made significant changes.¹⁸ Amy, who by this time was living with Richard, emailed a handwritten letter to a local attorney, Gabriel Lenhart, that purported to express Richard's "final wishes" and outlined several changes to be made to the Trust.¹⁹

The following day, Attorney Lenhart e-mailed Amy the Third Amendment and Richard promptly signed it.²⁰ In it, Richard's older brother Thomas Mueller was named successor Trustee, replacing Amy and Katherine; Thomas' daughters would each receive a \$10,000 gift; Amy's caregiving services would be reimbursed from the Trust estate without any impact on her inheritance; and Amy would receive a life estate in the family home.²¹ The Third Amendment included a no contest clause that did not authorize the trustee to defend, at the expense of the Trust estate, any contest to an amendment to the Trust.²²

For unknown reasons, the week after Richard executed the Third Amendment, Attorney Lenhart sent a second version of the Third Amendment containing materially different terms.²³ The material changes went unnoticed at the time.²⁴ The Trustee provided the beneficiaries with a copy of the second version of the Third Amendment.²⁵

C. Petitions on Execution of Third Amendment and Invalidity of Third Amendment

After Richard's death, Katherine filed a petition to invalidate the Third Amendment for lack of due execution.²⁶ A few months later, she amended her petition to assert that the Third Amendment was invalid as a product of undue influence.²⁷ The Trustee opposed this petition. After hearing cross-motions for summary adjudication on the issue of due execution, the court found that the Third Amendment was validly executed.²⁸

The undue influence claim was set for a bench trial.²⁹ At trial, Attorney Lenhart presented troubling testimony, conceding that there were two versions of the Third Amendment with materially different terms.³⁰ Attorney Lenhart acknowledged that the version signed by Richard was not consistent with the directions he was given by Amy. Evidence was presented that the Third Amendment had been modified by Lenhart after it had been signed by Richard.³¹ The following day, Amy and the Trustee requested a mistrial or suspension of the trial, which was granted at the parties' mutual request.³²

Amy then filed her own petition to invalidate both versions of the Third Amendment based on lack of due execution.³³ No party objected to this Petition, including the Trustee.³⁴ In August 2020, the court granted Amy's petition and found that the Trust, as amended by the first and second amendments, was valid and enforceable and appointed a private fiduciary as successor trustee.³⁵

D. Petition to Compel an Accounting and Surcharge the Trustee

Meanwhile, Katherine requested an accounting from the Trustee twice, to no avail.³⁶ Katherine filed a Petition to Compel an Accounting and to Surcharge the Trustee for the Trust assets he expended to defend her contest of the validity of the Third Amendment.³⁷ The Trustee's accounting indicated that he expended \$201,164.15 in attorney fees from November 15, 2018 to May 11, 2020.³⁸ The accounting did not include any information regarding the specific services that were performed for the fees incurred.³⁹

E. Surcharge Award

In February 2021, the trial court granted Katherine's petition for surcharge, and ordered the Trustee to pay \$201,164.15 to the Trust for the full amount of the Trust assets he expended on attorney's fees.⁴⁰

The court held that the express terms of the Trust authorized the Trustee to defend, at the expense of the Trust estate, "any contest or other attack of any nature on

th[e] Trust or any of its provisions,” but not to defend at the expense of the trust estate “**any amendment**” to the Trust.⁴¹ The trial court concluded that neither the original Trust document nor the First or Second Amendments to the Trust authorized the Trustee to expend Trust assets to defend against a contest to the Third Amendment.⁴² Further, the court found the Trustee breached his duty to deal impartially with all beneficiaries because he did not take a neutral position in the dispute over the validity of the Third Amendment. Instead, he represented the interests of beneficiary Amy over Katherine.⁴³

On appeal, the Trustee argued that the surcharge must be reversed because he properly expended Trust assets to defend against the contest to the Third Amendment.⁴⁴ Citing an absence of adequate supporting records before the trial court, the appellate court rejected the Trustee’s arguments and affirmed the trial court surcharge award in full.⁴⁵

III. GROUNDS FOR IMPOSITION OF TRUSTEE SURCHARGE FOR BREACH OF DUTY OF IMPARTIALITY

A. California Statutory Authority on the Fiduciary Duty of Impartiality

The fundamental first step in trust administration is the trustee’s duty to administer the trust according to the trust instrument and according to the expressed intent of trustor, rather than how the trustee would personally prefer to administer the trust.⁴⁶ Closely related is the fiduciary duty to administer the trust solely for the benefit of the beneficiaries.⁴⁷

In furtherance of the fiduciary duty to act in the best interests of the beneficiaries, Probate Code section 16003 states that a trustee has a duty of impartiality. When a trust has two or more beneficiaries, “the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.”⁴⁸

This duty of impartiality is especially important when the trustee is also a beneficiary, as an appearance of self-interest could arise. Trustees are advised to prioritize the beneficiaries’ welfare and avoid transactions that could personally benefit them at the expense of the trust.⁴⁹ The law in California is consistent with American Jurisprudence, which states:

Trustees owe a duty to all trust beneficiaries and must treat all equally. Unless the trust instrument itself provides otherwise, the trustee’s duty to each beneficiary precludes it from favoring one party

over another. Thus, a trustee must act impartially with respect to all beneficiaries, doing his or her best for the entire trust as a whole. A trustee who violates his or her duties to deal impartially with all beneficiaries risks exposure to liability for breach of trust.⁵⁰

In litigation concerning a trust, the duty of the trustee and its counsel is to aid the court in deciding on the correct administration of the trust estate, without regard to conflicting interests of beneficiaries.⁵¹

In *Zahnleuter*, the Trustee violated the duty of impartiality by opposing the petition challenging the validity of the Third Amendment, which pitted the three beneficiaries against one another.⁵² Upon reflection, the Trustee could have: petitioned the court for instructions on his duty to defend the trust; or refrained from taking a position on the amendment challenge one way or the other; or personally advanced payment for his attorney’s fees followed by a request for reimbursement at the conclusion of the litigation.


B. Trustee’s Access to Trust Assets to Pay for the Trustee’s Attorney’s Fees

The Probate Code has numerous provisions governing the trustee’s allowable use of trust funds for attorney’s fees, whether incurred in trust administration or in litigation. In general, the Probate Code provides that the trustee may only pay expenditures from the trust estate in the course of administration or acts that benefit the trust.⁵³ 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.”

Similarly, Probate Code section 16243 states, “The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and **protection of the trust.**”⁵⁴


Further, whenever necessary for preservation of the trust or its proper administration or execution, the trustee is entitled to employ counsel and to be reimbursed from the funds of the trust for reasonable sums paid for attorney’s services.⁵⁵ “Attorneys hired by a trustee to aid in administering the trust are entitled to reasonable fees paid from trust assets.”⁵⁶

In the context of trust litigation arising during post-death administration, trustees are faced with the challenge of reconciling two conflicting fiduciary duties: the duty to



defend the trust and the duty to maintain impartiality. The analysis of this challenge is intertwined with the trustee's ability to use trust assets for payment of the trustee's attorney's fees.


Probate Code section 16011 provides that a trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust.⁵⁷ The Probate Code provides that trustees have a duty to defend and preserve the trust by litigation if necessary, and that a trustee is entitled to reimbursement for those expenditures out of trust funds.⁵⁸



“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,’ and not for the personal benefit of the trustee.”⁵⁹ “[I]f 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.”⁶⁰ In sum, the cost of litigation that benefits the trust, including reasonable attorney’s fees,⁶¹ may be paid out of the trust funds⁶² in accordance with the equity rule that allows such charges as a proper means of securing contributions from those entitled to participate in the benefits of litigation.⁶³ The burden is on the trustee to show that the fee for the attorney was a proper disbursement.⁶⁴ It is the trustee’s duty to reduce trust expenses and legal fees so as to preserve as much as possible of the trust’s remaining assets for the benefit of the beneficiaries.⁶⁵

“If the trustee acts in good faith, [the trustee] has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though he may not ultimately succeed in establishing the position taken by him as such trustee.”⁶⁶

Trustees are generally empowered, either through express trust provisions or Probate Code sections, to hire attorneys to assist them in the administration of a trust.⁶⁷ However, the exercise of that power, like all other powers authorized in either the trust language or the Probate Code, is not unchecked. Rather, under Probate Code section 16202, “[t]he grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of that power. The exercise of a power by a trustee is *subject to the trustee’s fiduciary duties*.”⁶⁸ Courts have thus held that,



[t]he underlying principle which guides courts 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... . If litigation is necessary for the preservation of the trust, the trustee is entitled to reimbursement for his or

her own 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.**⁶⁹

“The fundamental principle guiding the court’s approval of reimbursing costs and attorney’s fees from the trust estate in connection with litigation is that the litigation must contribute as a benefit and service to the trust.”⁷⁰ The trustee is not entitled to reimbursement for the costs of litigation that are of no benefit to the trust and are caused by no fault of the beneficiaries,⁷¹ or that the trustee commenced unnecessarily.⁷²

If the trust does not derive benefit from the litigation or would not have gained any advantage even if the trustee had succeeded, there is no foundation for the reimbursement of litigation expenses from the trust assets.⁷³ Further, it is proper to refuse to allow the trustee’s attorney’s fees where the services rendered were detrimental to the trust estate.⁷⁴

Conversely, when the litigation concerns interpretation of the instrument creating the trust and a determination of the proper execution of the trust, the trustee is directly interested in the trustee’s representative capacity, and is authorized to employ counsel on behalf of the trust.⁷⁵ Also, where the provisions of the trust are ambiguous and the commencement of an action for construction is necessary, or at least constitutes a reasonable step, an allowance for costs and attorney’s fees may be made either to the trustee or to the complaining beneficiary.⁷⁶ Where the trustee is faced with conflicting demands that threaten the trustee with possible liability, the trustee is entitled to bring an action for instructions, and, where the court finds that the action was necessarily brought, the trustee is entitled to be reimbursed out of the trust estate.⁷⁷

In trust litigation where one beneficiary stands to gain at another beneficiary’s expense, the trustee must maintain neutrality if the trustee seeks to have the trustee’s litigation fees and costs covered. “[W]hen a dispute arises as to who is the rightful beneficiary under a trust, involving no attack upon the validity or assets of the trust itself, the trustee ordinarily must remain impartial, and may not use trust assets to defend the claim of one party against the other.”⁷⁸ In contrast to the fiduciary duty to defend the trust, when dealing with challenges to trust amendments or restatements, courts have found that “the underlying action [is] not a challenge the existence of the trust; it [is] a dispute over who would control or benefit from it.”⁷⁹

In *Whittlesey*, the court was faced with a challenge to a trust amendment by the decedent’s niece who was the

named trustee and beneficiary under an earlier version of the trust.⁸⁰ The niece was contesting an amendment that named the decedent's second wife as the trustee and primary beneficiary.⁸¹ The court, in an implicit recognition of the trustee's statutory duty of impartiality amongst all named trust beneficiaries, noted that the trustee's counsel represented the interests of one named beneficiary over that of another beneficiary, and was not therefore representing the trust or the trustee.⁸²

In addition to authorization from the trust instrument itself, an underlying principle that guides the court in allowing costs and attorney's fees incidental to litigation is whether such litigation is a benefit and a service to the trust.⁸³ In some cases, the benefit is clear. For example, the defense of a lawsuit that has the potential for depleting trust assets would be for the benefit of the trust and justifies the employment of counsel paid by the trust. If a trustee is advocating for all beneficiaries as a group, then such an expenditure of trust funds would also be appropriate.⁸⁴

In *Zahnleuter*, the dispute over the validity of the Third Amendment created a situation that precluded the Trustee from using the Trust assets for payment of his attorney's fees to defend the validity of that instrument. The Trustee could not escape the conclusion that he was not representing or defending the Trust in his opposition.

C. Trust Provisions to Support a Trustee's Use of Trust Assets for Litigation Legal Fees

The general rule is that a trustee is precluded from using trust assets to participate in the defense of a trust contest among beneficiaries and instead must remain neutral.⁸⁵

But, if the trust document directs or instructs the trustee to defend against any contest brought by a beneficiary at the expense of the trust, such direction overrides the general rule.⁸⁶ In addition, the trustee's entitlement to use trust assets to retain and compensate attorneys may be expanded by the terms of the trust instrument.⁸⁷

The case of *Doolittle* is the only reported decision where a court authorized a trustee to use trust funds to defend against the contest of a trust amendment.⁸⁸ The *Doolittle* court faced a set of facts relatively similar to the facts in *Whittlesey*. However, in *Doolittle*, the trust amendment and restatement at issue included an extensive, detailed, and customized "no contest" provision that provided, in part:

[t]he trustee is hereby **directed to defend**, at the expense of any trust estate governed by this Agreement, any contest or other attack of any nature on this Agreement, on any of its provisions and amendments hereto, and on Trustor's Will, an attack of any nature on Trustor's estate planning

and the inter vivos disposition, or disposition at death, of her assets and estate.⁸⁹

In its analysis, the *Doolittle* court first confirmed the general rule set forth in both *Whittlesey* and *Terry* that because "a trustee is bound to deal impartially with all beneficiaries . . . the trustee ordinarily must remain impartial and may not use trust assets to defend the claim of one party against the other."⁹⁰

However, in *Doolittle*, the court also noted that, under Probate Code section 16000, "the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division."⁹¹ Accordingly, the court held that because the trust at issue included "an explicit directive to the trustee to defend claims challenging the validity of the amendment at the trust's expense," that directive overrode the trustee's duty of impartiality under Probate Code section 16003.⁹² The court further noted that "the trust agreements in *Whittlesey* and *Terry* did not contain an explicit directive to the trustee to defend claims challenging the validity of the amendment at the trust's expense."⁹³

In *Zahnleuter*, the Trustee argued that he properly expended Trust assets to defend against Katherine's contest of the Third Amendment.⁹⁴ The Court held that the Trustee's position was thoroughly undermined by the *Whittlesey* and *Terry* cases where the successor trustees used trust funds for litigation that benefitted them personally.⁹⁵

In *Whittlesey* and *Terry*, as in *Zahnleuter*, the essence of the underlying action was not a challenge to the existence of the trust; rather, it was a dispute over who would control and benefit from it. Regardless of whether Katherine's petition contesting the validity of the Third Amendment was successful, the Trust would remain intact.

D. Trustee Surcharge Arising from Control Over the Trust

A trustee is not allowed to use trust funds to pay for the defense in an action where the defense only benefits the trustee as an individual and is not otherwise a proper trust expense.⁹⁶

In *Zahnleuter*, the trustee paid his attorneys to respond to a series of litigation issues, including a challenge to due execution of the Third Amendment, and a response to a request for a trust accounting.

Zahnleuter gives trustees further guidance and clarification that a trustee, even one who has no personal interest

in a trust, can no longer take a position that favors one beneficiary's interest over another beneficiary's interest.

As addressed in both *Whittlesey* and *Terry*, the guiding principle is that, "if the litigation is specifically for the benefit of the trustee, the trustee must bear his or her own costs, and is not entitled to reimbursement from the trust."⁹⁷ Both *Whittlesey* and *Terry* held that, because the dispute is related to the benefits of the trust, rather than an attack on the trust itself, "there was no basis for the trustee to have taken other than a neutral position in the contest."⁹⁸ In *Whittlesey* and *Terry*, the gravamen of the underlying actions was not challenges to the existence of the trusts; rather, they were disputes over who would control and benefit from the trusts.⁹⁹ The court in *Whittlesey* observed that, to the extent the trustee represents the interests of one side of the contest over the other, the trustee must look to the parties who stand to gain from the litigation for reimbursement, not the trust.¹⁰⁰ Both courts concluded that the trustee was not entitled to reimbursement of litigation costs from the trust estate because they were representing one side of the dispute over the other, not the interests of the trust.¹⁰¹

In light of these considerations, trustees are encouraged to safeguard themselves from personal liability by maintaining a neutral stance, especially in cases of trust litigation that involve conflicting interests among beneficiaries.

E. Trustee's Unsuccessful Objections to Surcharge

In *Zahnleuter*, the Trustee challenged the surcharge petition by arguing that at least some of the fees were "legitimately incurred."¹⁰² However, the Trustee was unable to adequately identify and distinguish those "legitimately incurred" attorney's fees due to his inadequate recordkeeping.¹⁰³

The Trustee pointed to Probate Code provisions providing that a trustee is entitled to reimbursement for expenditures that were properly incurred in the administration of a trust, and that a trustee has the power to hire and pay attorneys to assist in the administration of a trust.¹⁰⁴ However, the Trustee failed to claim in the trial court that he incurred any attorney's fees related to the administration of the Trust.¹⁰⁵ For that reason, the surcharged amount was not reduced by attorney's fees incurred during the normal administration of the Trust.

Next, the Trustee sought to reduce the surcharge for the attorney's fees incurred in connection with his successful defense of the Third Amendment.¹⁰⁶ The court noted that,

[w]hile it is true that the trial court found in favor of Thomas with respect to Katherine's claim that

the third amendment was not properly executed and delivered, Thomas did not [have to]... participate in the underlying litigation as a neutral trustee to defend the trust and protect its assets for the benefit of the trust.¹⁰⁷

The court held that, "[a]s a consequence, [the Trustee] must bear his own litigation costs, rather than be reimbursed from the trust estate."¹⁰⁸

IV. PRACTICE TIPS: AVOIDING A LITIGATION SURCHARGE

If trust litigation frustrates or prevents a trustee from remaining impartial, what could or should the trustee do to retain the ability to use trust assets for litigation fees or to protect themselves from personal liability? With the *Zahnleuter* case and its teachings, trustees involved in trust litigation now have additional guidance and direction from established case law.

First, a trustee is advised to avoid taking sides between beneficiaries in disputes as to the validity of amendments—unless there is a specific provision directing the trustee to defend against such claims (*Doolittle* analysis).

Second, knowing a brewing dispute might not support the trustee's use of trust assets for attorney's fees, a trustee might consider being proactive with a petition for instructions for guidance and clarification as to whether the trustee may use the trust assets to pay the trustee's attorney's fees. Alternatively, the trustee may use the trustee's personal assets to pay the attorney's fees and later seek reimbursement from the trust.

Third, to secure approval for the payment of attorney's fees during litigation, a trustee may submit detailed accounts to the court at regular intervals, ensuring transparency and confidence in the trustee's use of trust assets for legal expenses. To the extent that some attorney's fees incurred are for administration or litigation unrelated to a dispute for the trustee's benefit, those fees should be identified and allocated accordingly.

V. CONCLUSION

Post-*Zahnleuter*, a trustee, even one who has no personal interest in a trust, should carefully consider using trust assets to pay for attorney's fees incurred in litigation and proceed with caution to avoid running the risk of personal liability for the attorney's fees if the litigation requires favoring one beneficiary's interest over another beneficiary's interest. In the event of uncertainty of the trustee's ability to use trust assets for attorney's fees, serious consideration should be given by the trustee and

counsel to seeking instructions from the court on the allowable use of trust assets.

Zahnleuter teaches an important lesson for estate planning attorneys as to both trust drafting and trustee recordkeeping. When consistent with the intent of the settlor, an estate planning attorney is advised to draft provisions to ensure that the trust (or amendment) explicitly authorizes the trustee to defend contests at trust expense. As an additional precaution, the trustee should keep diligent records identifying the trust funds that were expended in defense versus for general administration.

* *Hoge, Fenton, Jones & Appel, San Jose, California*

This article is available as an
ONLINE SELF-STUDY TEST.

Visit: cla.inreachce.com
for more information.

- 01 *Zahnleuter v. Mueller* (2023) 88 Cal.App.5th 1294, 1306-1307 (citing *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1231).
- 02 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1307 (citing *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1231).
- 03 *Id.* at p. 1307 (citing *Metzenbaum v. Metzenbaum* (1953) 115 Cal.App.2d 395, 399 ["[W]here litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense thereof, and the trustee is entitled to reimbursement for his expenditures out of the trust fund."]).
- 04 See, e.g., *Conley v. Waite* (1933) 134 Cal.App. 505, 506 (trustee allowed to use trust assets to defend unfounded beneficiary action); *Donahue v. Donahue* (2010) 182 Cal.App.4th 259 (trustee spent five million dollars in his successful opposition to a beneficiary's attack on trustee's asset management decisions).
- 05 The holding in *Zahnleuter* is developed from a trio of prior cases: *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221 ("Whittlesey"), *Terry v. Conlan* (2005) 131 Cal.App.4th 1445 ("Terry"), and *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529 ("Doolittle").
- 06 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1304; see also *Terry, supra*, 131 Cal.App.4th 1445.
- 07 See generally, Streisand & Sanqui, *Tapping the Trust to Fund the Battle: When Trustees Can Use Trust Funds to Litigate with Beneficiaries*, (Spring 2003) Cal. Tr. & Est.Q. vol. 9, issue 1.
- 08 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1297.
- 09 *Ibid.*
- 10 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1297-1298.
- 11 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1298.
- 12 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1298.
- 13 *Ibid.*
- 14 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1298-1299.
- 15 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1298.
- 16 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1299.
- 17 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1299-1300.
- 18 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1299.
- 19 *Ibid.*
- 20 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1299-1300.
- 21 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1299.
- 22 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1299-1300.
- 23 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1299-1300.
- 24 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1299-1300.
- 25 *Id.* at p. 1300.
- 26 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1300.
- 27 *Ibid.*
- 28 *Ibid.* (Trustee was successful on the Third Amendment execution issue, but ultimately lost on the validity of the Third Amendment dispute).
- 29 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1301.
- 30 *Ibid.*
- 31 *Ibid.*
- 32 *Ibid.*
- 33 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1301.
- 34 *Ibid.*
- 35 *Id.* at p. 1302.
- 36 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1302.
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.*
- 40 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1303.
- 41 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1303. (emphasis added).
- 42 *Ibid.*
- 43 *Ibid.*
- 44 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1303.
- 45 *Ibid.*
- 46 Prob. Code, section 16000; *Union Bank & Trust Co. v. McColgan* (1948) 84 Cal.App.2d 208; see, e.g., *Penny v. Wilson* (2004) 123 Cal.App.4th 596 (trustee's failure to administer trust according to its terms rendered act of trustee nonbinding).

- 47 Prob. Code, section 16002 (under the duty of loyalty, a trustee must administer the trust solely for the benefit of the beneficiaries).
- 48 Prob. Code, section 16003.
- 49 See also Prob. Code, section 16004 (trustee fiduciary duty to avoid conflicts of interest; no self-dealing or transaction adverse to beneficiary; duty not to use trust property for trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary).
- 50 *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1208.
- 51 *In re Gartenlaub's Estate* (1921) 185 Cal. 648, 655.
- 52 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1304-1305.
- 53 Prob. Code, sections 15684, 16243.
- 54 Prob. Code, section 16243 (emphasis added).
- 55 Prob. Code, section 16247 (trustee has power to retain attorneys to advise or assist the trustee); see, e.g., *In re Gartenlaub's Estate, supra*, 185 Cal. at p. 648.
- 56 *Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 235 (noting specifically that attorney's fees for preparing accounting and responding to beneficiaries' objections to accounting are aspects of trust administration); see *Estate of Beach* (1975) 15 Cal.3d 623, 644 (trustee entitled to reimbursement from trust for reasonable legal expenses incurred in defending trust in capacity as trustee); *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97 (successful defense of allegations against trustee benefited trust by eliminating questions regarding whether the trustee had properly administered trust); *Estate of Cassity* (1980) 106 Cal.App.3d 569, 574 (former trustee entitled to reimbursement of legal expenses where he successfully defended himself from surcharge for conduct determined to have been proper).
- 57 Prob. Code, section 16011; see also Prob. Code, section 16010 (trustee duty to take reasonable steps to enforce claims that are part of the trust property).
- 58 *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 535 (if trustee has successfully defended against removal or surcharge, trustee can be reimbursed from the trust for fees used in that successful defense) (citing *Hollaway v. Edwards, supra*, 68 Cal. App.4th at p. 99; *Conservatorship of Lefkowitz* (1996) 50 Cal. App.4th 1310, 1314).
- 59 *People ex rel. Harris, supra*, 16 Cal.App.5th at p. 534 (quoting *Whittlesey, supra*, 104 Cal.App.4th at p. 1230).
- 60 *Terry, supra*, 131 Cal.App.4th at p. 1461 (citing *Metzenbaum, supra*, 115 Cal.App.2d at p. 399).
- 61 *In re Gartenlaub's Estate, supra*, 185 Cal. 648.
- 62 *Whittlesey, supra*, 104 Cal.App.4th 1221.
- 63 *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274.
- 64 See, e.g., *In re Thompson* (1894) 101 Cal. 349.
- 65 *Donahue v. Donahue, supra*, 182 Cal.App.4th at p. 270 (trustee must subjectively believe the legal fees were necessary or appropriate to carry out the trust's purpose, and trustee must show those beliefs were objectively reasonable).
- 66 *Evans v. Super. Ct.* (1939) 14 Cal.2d 563.
- 67 See, e.g., Prob. Code, section 16247.
- 68 Prob. Code, section 16202 (emphasis added).
- 69 *Terry, supra*, 131 Cal.App.4th at p. 1461 (emphasis added).
- 70 *People ex rel. Harris v. Shine, supra*, 16 Cal.App.5th 524; *Donahue v. Donahue, supra*, 182 Cal.App.4th 259.
- 71 See, e.g., *Trolan v. Trolan* (2019) 31 Cal.App.5th 939.
- 72 See, e.g., *Conley v. Waite, supra*, 134 Cal.App. 505.
- 73 See, e.g., *Butler v. LeBouef* (2016) 248 Cal.App.4th 198.
- 74 See, e.g., *In re McLellan's Estate* (1936) 14 Cal.App.2d 271.
- 75 See, e.g., *In re Gartenlaub's Estate, supra*, 185 Cal. 648.
- 76 See, e.g., *In re Jones' Estate* (1955) 130 Cal.App.2d 196; see also *Breslin v. Breslin* (2021) 62 Cal.App.5th 801 (trustee filed petition for instructions to determine proper beneficiaries from a handwritten list of 24 charities found in the pocket of the estate planning binder; beneficiary's challenge to the trustee's attorney's fees was denied).
- 77 *Security-First Nat. Bank of Los Angeles v. Tracy* (1943) 21 Cal.2d 652.
- 78 *Doolittle, supra* 241 Cal.App.4th 529.
- 79 *Ibid.*
- 80 *Whittlesey, supra*, 241 Cal.App.4th at pp. 1224-1225.
- 81 *Whittlesey, supra*, 241 Cal.App.4th at p. 1226.
- 82 *Ibid.*
- 83 *Whittlesey, supra*, 241 Cal.App.4th at p. 1231.
- 84 *Metzenbaum, supra*, 115 Cal.App.2d 395.
- 85 See section, III. A *infra*.
- 86 *Doolittle, supra*, 241 Cal.App.4th at pp. 537-538.
- 87 *People ex rel. Harris v. Shine, supra*, 16 Cal.App.5th 524 (costs of a successful defense to a trustee removal or surcharge petition are generally chargeable against the trust even though trustee personally benefits as a result.); see also Prob. Code, section 15642, subd. (d) (if the probate court has found that a party filed a petition for removal of a trustee in bad faith, and that removal would be contrary to the trustor's intent, the court may order that the person who sought the trustee's removal shall bear all or part of the costs of the proceeding, including reasonable attorney's fees).
- 88 *Doolittle, supra*, 241 Cal.App.4th at p. 544.
- 89 *Id.* at p. 534 (emphasis added).
- 90 *Doolittle, supra*, 241 Cal.App.4th at p. 537.
- 91 *Doolittle, supra*, 241 Cal.App.4th at p. 544.
- 92 *Id.* at p. 538 (emphasis added).
- 93 *Ibid.*
- 94 *Zahnleuter, supra*, 88 Cal.App.5th at pp. 1305-1306.
- 95 *Ibid.*

- 96 *Whittlesey, supra*, 104 Cal.App.4th at p. 1228.
- 97 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1308.
- 98 *Id.* at p. 1308 (citing *Terry, supra*, 131 Cal.App.4th at p. 1462; *Whittlesey, supra*, 104 Cal.App.4th at p. 1231).
- 99 *Id.* at p. 1307.
- 100 *Id.* at p. 1308 (citing *Whittlesey, supra*, 104 Cal.App.4th at p. 1231).
- 101 *Id.* at p. 1307 (citing *Whittlesey, supra*, 104 Cal.App.4th at pp. 1230-1231; *Terry, supra*, 131 Cal.App.4th at pp. 1462-1464).
- 102 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1310.
- 103 *Id.* at pp. 1310-1311 (while the trustee's accounting provided date fees were paid, payee, and amount paid, accounting did not include any information regarding specific services performed for fees incurred).

- 104 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1310 (citations to Prob. Code, section 15684 (trustee is entitled to reimbursement for expenditures that were properly incurred in the administration of a trust); section 16247 (trustee's power to hire), and section 16243 (trustee authority to pay attorneys to assist in the administration of a trust)).
- 105 *Id.* at p. 1310.
- 106 *Zahnleuter, supra*, 88 Cal.App.5th at p. 1311.
- 107 *Id.* at p. 1311.
- 108 *Ibid.*

A WORLD OF DIFFERENCE

L/S
Law Street Media
Legal News

Fastcase
Legal Research

AI Sandbox
Legal Data Analysis

Full Court Press
Expert Treatises

Docket Alarm
Pleadings + Analytics

NextChapter
Bankruptcy Petitions + Filing

START YOUR JOURNEY

Fastcase is one of the planet's most innovative legal research services, see what you've been missing with data visualization tools. Did you know Fastcase is available as a free member benefit?

LEARN MORE AT
www.calawyers.org/fastcase

fastcase®