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Inside this Issue

TAPPING THE TRUST TO FUND THE BATTLE:

When Trustees Can Use Trust Funds To Litigate With Beneficiaries

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In litigation with a beneficiary, the trustee's ability to access the trust as a war chest is a major strategy consideration for both sides. By cutting off the trustee's money supply, a beneficiary can gain enormous leverage. Even if the beneficiary fails to cut the money supply short, the threat of removal and surcharge against a trustee for improperly tapping the trust to fund the battle can be distracting (if not debilitating). Thus, it was with great consternation to trustees (and their attorneys) that on December 27, 2002, the Third District of the Court of Appeal, in *dictum*, made this remarkable statement:

> [L]itigation seeking to remove or surcharge a trustee for mismanagement of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust.[1]

Not surprisingly, petitions to remove and surcharge trustees are already quoting this language from *Estate of McAdams* with emphasis and fanfare. But the statement, which is nothing more than dictum (the opinion had nothing to do with removal and surcharge petitions), also contradicts long established California law. On the frontline of these battles, lawyers for trustees should be armed to respond and, in a broader sense, to advise their clients when they can use trust funds to litigate with beneficiaries. The following discussion is intended to help arm our fellow frontline lawyers.

I. A TRUSTEE ACTING IN GOOD FAITH CAN AND SHOULD USE TRUST ASSETS TO DEFEND AGAINST REMOVAL AND/OR SURCHARGE

When the settlor names a trustee to manage his or her trust, the trustee is a central part of the settlor's estate plan, which status can and should be defended using the assets of the trust. As long as the trustee is acting in objective and subjective good faith, the trustee is entitled to pay lawyers from trust assets to defend against a removal and/or surcharge action. The source of the trustee's right to a defense from trust assets is Probate Code § 15684, which provides that a trustee is entitled to recoup from the trust estate:

(a) Expenditures that were properly incurred in the administration of the trust; or

(b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust.[2]

Whether a trustee is entitled to a defense in a removal and surcharge proceeding depends on the latter principle, i.e., whether the litigation confers a benefit to the trust.[3] As a practical matter, of course, the courts uphold the trustee's right to pay for his defense from the trust when the trustee is successful in defending against a removal petition. As will be seen below, the cases provide that a trustee who is unsuccessful is not entitled to a defense unless he was acting with objective and subjective good faith in opposing the removal petition. However, the courts leave us with little guidance as to circumstances where it would be appropriate to mount an eventually unsuccessful defense against a removal and/or surcharge petition. Indeed, it seems improbable that the courts will ever find the right case to award attorneys' fees to a trustee who has been removed and/or surcharged.

A. A Trustee May Use Trust Assets To Defend Himself Against An Unmeritorious Removal Action

A trustee who successfully defends against a removal petition confers a benefit to the trust, because when "a trustee has been appointed by the trustor, the identity of the trustee is part of the trustor's plan to benefit the beneficiaries. In that event, the trustee has a duty to oppose any unmeritorious effort to have the selected trustee removed."[4] If the trustee prevails against a claim that he be surcharged or removed for misconduct, the attorneys' fees he incurred may be recoverable from the trust despite the fact that the trustee also benefited from the defense.[5]

Thus, despite the broad, categorical dictum in *Estate of McAdams*, a trustee who successfully defends against charges that he is guilty of mismanagement and/or breach of trust confers a benefit on the trust by dispelling such charges, allowing him to continue to serve as trustee as the trustor intended. Under such circumstances, the trustee may be reimbursed for the attorneys' fees he incurred.

Furthermore, a trustee who is *partially* successful may also be entitled to a defense. In *Estate of Cassity*, the court held that a trustee was entitled to attorneys' fees, because he successfully defended against a majority of the charges. The trial court found that the trustee "'made extensive and large purchases on margin and short sales, which resulted in extensive losses to the trust.'"[6] According to the lower court, these transactions were "'without authority and constituted a breach of trust.'"[7] The trustee was surcharged for some, but less than a majority, of these transactions. The trustee resigned before trial, but the lower court found that he would have been removed due to his breaches of trust. The trial court concluded that it would be inequitable to grant the trustee the attorneys' fees he incurred in his defense.[8] On appeal, the appellate court noted that the lower court's "findings justif[ied] the surcharges made against the trustee and would support an order denying him compensation and attorney's fees attributable to defending his wrongdoings resulting in the surcharges."[9] However, the court of appeal compared the amount of the surcharge against the amount of the claimed losses and concluded that the trustee was entitled to be reimbursed for the attorneys' fees he incurred in his defense. The court reasoned as follows:

> The fact that some surcharges were assessed against the trustee is not, in itself, grounds for completely denying him compensation and expenses.... Here the trustee admittedly was guilty of some malfeasance, however, most of the charges were disproven. A considerable portion of

> the trustee's efforts and expenditures must necessarily have been for the purpose of protecting himself from unjust surcharge for conduct in administering the trust which the court's findings . . . determined were perfectly proper. Such efforts and expenditures in the trustee's successful defense are chargeable against the trust estate."[10]

On the other hand, at least one court refused to permit a trustee to charge his successful defense to the trust.[11] But the case was before the appellate court in such a strange procedural posture that it really says nothing more than a bad trustee is not entitled to use trust assets for his defense. Mrs. Hartman, a beneficiary, filed a petition to remove the trustee, Mr. Burford. The lower court found that Mr. Burford's demeanor and conduct toward Mrs. Hartman was cold, aloof and defensive, and further that Mr. Burford "'presents a general picture of unwillingness to act except upon order of the court . . . . There has been an unrelieved and inexcusable want of diligence to proceed toward assumption of responsibility in performance of the clear mandate of the trust . . . .'"[12] But oddly enough, the trial court *denied* the removal petition.[13] The court also granted Mr. Burford's petition for attorneys' fees. As if that were not odd enough, Mrs. Hartman appealed the order granting attorneys' fees but *not* the order denying the removal petition.

The court of appeal reversed the award of attorneys' fees. The court reasoned that the findings of the lower court regarding Mr. Burford's temperament towards Mrs. Hartman, and his general unwillingness to follow the terms of the trust absent instructions from the court justified the beneficiary's efforts to remove him. Accordingly, the court found that "[t]here [was] no substantial evidence that would justify an award of attorneys' fees in connection with Mr. Burford's resistance of the justified efforts to remove him."[14] In other words, the fact that the trustee was successful was not determinative of whether he would be entitled to a defense from the trust. Although the trustee successfully avoided removal, the court found that there was sufficient evidence to establish that the petition to remove Mr. Burford was justified.

B. A Trustee Who Is Unsuccessful Against Claims That He Is Guilty Of Misconduct Is Ordinarily Not Entitled To A Defense

A trustee who unsuccessfully defends against removal and surcharge claims is ordinarily not entitled to a defense from trust assets.[15] *Metzenbaum* is often cited as the earliest case supporting the proposition that a trustee who unsuccessfully defends against a claim that he be surcharged not recover the attorneys' fees he incurred. *Metzenbaum* involved an appeal by the liquidating partner of two dissolved partnerships from an order denying him reimbursement for attorneys' fees allegedly incurred by him on behalf of one of the partnerships. In determining that the liquidating partner was not entitled to reimbursement, the court analogized to the trust context when it adopted the reasoning in *In re Drake's Will*[16], when the *Drake* court explained as follows:

> To say to a trust beneficiary that, even if he succeeds in having his trustee's account surcharged to the amount of $2,500, he must nevertheless pay the trustee's attorneys' fees and the trustee's fees for contesting the allowance of such a surcharge, is unreasonable.[17]

However, a trustee who unsuccessfully defends against a petition for removal may be entitled to use trust funds for his defense if it was *objectively reasonable* for him to defend *and* if the trustee had a *good faith belief* that the defense was for the benefit of the trust.[18]

> That both objective reasonableness and subjective good faith are necessary has been illustrated in cases dealing with . . . the issue of whether to compensate a fiduciary or its attorney for time and expenses incurred in opposing a meritorious petition to remove the fiduciary or otherwise terminate the fiduciary relationship.[19]

In *Lefkowitz*, a conservatee's son filed a petition to remove the conservator. The conservator defended and lost. Nevertheless, she sought reimbursement for attorneys' fees expended in her defense. The trial court granted the fee petition. On appeal, the court framed the question as follows: "Under what circumstances may a conservator be compensated for time and attorneys' fees incurred in unsuccessfully resisting a petition to remove the conservator?"[20] In answering this question, the court analogized the relationship between a conservator and a conservatee to the relationship between a trustee and a beneficiary.[21] The court explained that "a trustee may not be indemnified for an expense unless the trustee *subjectively believed* [good faith requirement] that the expense was necessary or appropriate to carry out the purpose of the trust and that belief was *objectively reasonable.*"[22]

In *Lefkowitz*, the court determined that the conservator was not entitled to recoup her fees from the estate because she did not have a good faith belief that the defense was for the benefit of the conservatorship estate.[23] The court's conclusion was based on the conservator's own testimony that it was her practice to relinquish her position whenever a family member was willing to replace her. She explained that she was not opposed to the conservatee's son replacing her but that she was opposed to the manner in which he sought to replace her. The conservator explained that "'[a] removal goes directly to ones [sic] character and ability to serve as a conservator.'"[24] In other words, a successful removal petition might have hurt her career. The court held that because her motivations were strictly personal and had nothing to do with protecting the conservatee, she lacked the required good faith.[25] Accordingly, she was not entitled to the attorneys' fees incurred in her defense.

Conversely, a trustee's subjective good faith does not justify reimbursement of attorneys' fees if the trustee's actions were objectively unreasonable.[26] In *Gilmaker*, the beneficiary of a trust, Joseph Gilmaker, petitioned for the removal of the trustee, Bank of America. The lower court denied the petition and granted a subsequent petition by the bank for attorneys' fees. Gilmaker appealed from the order denying the removal of the trustee. The California Supreme Court reversed.[27]

The Supreme Court's holding led Gilmaker to appeal from the order granting attorneys' fees to the bank. The court of appeal reversed the award of attorneys' fees and explained:

> It has thus been conclusively established [by the California Supreme Court] that the trustee erred in its administration of the estate and that it had no sound basis for its resistance to the beneficiary's petition for its

> removal. In the light of that determination, the trustee was not entitled to receive out of the trust estate its expenses of litigation, including attorneys' fees, incurred in defending its *untenable and partisan position*.[28]

The court of appeal noted that "[i]t cannot be said that it [was] the exercise of a reasonable judgment to assert or defend a position for which no reasonable support [could] be found in the trust provisions and the governing law."[29] The court stated that the fact that the lower court found that Bank of America had acted in good faith did not affect its decision because "the element of good faith, standing alone," cannot be the "criterion by which to determine whether the trust estate should bear the cost of the trustee's defense of its untenable position."[30]

Notwithstanding *Lefkowitz* and *Gilmaker*, the courts leave us with little guidance about what circumstances might constitute subjective and objective good faith that would justify an award of attorneys' fees even when the fiduciary is unsuccessful in defending against a removal petition.

II. A TRUSTEE CAN USE TRUST ASSETS TO PARTICIPATE IN LITIGATION BETWEEN BENEFICIARIES TO PROTECT OR PRESERVE THE INTEGRITY OF THE TRUST

In the previous section, we analyzed the propriety of using trust assets to defend a trustee in removal and/or surcharge proceedings. In this section, we discuss when it is proper for the trustee to participate in litigation between beneficiaries. Any such discussion must begin with § 16003 of the Probate Code, which provides:

> If 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.[31]

In Estate of Miller[32], the court explained the duty of neutrality, in reference to an executor, as follows:

> It is unquestionably true that, generally speaking, an executor or administrator of an estate should remain neutral in the estate proceedings as between parties such as heirs and devisees with conflicting claims to portions of the estate. In such circumstances, the administrator or executor should not act in favor of one group or the other.[33]

However, there are circumstances where a trustee has a duty to participate in litigation with a beneficiary, on behalf of the trust, and at the expense of the trust.[34] The following discussion differentiates between those occasions when a trustee should remain neutral and when the trustee should take sides.

In general terms, a trustee should litigate to protect and preserve the trust assets, to bring assets into the trust, or to defend the validity or integrity of the trust instrument. A trustee, however, should remain on the sidelines if the litigation will not enhance the trust estate, but instead would simply reallocate the assets among beneficiaries.

A. A Trustee Should Litigate To Protect The Assets Of The Trust, Or The Validity Or Integrity Of The Trust

In *Ferrall*, the Court explained that a trustee has a duty to protect the trust against attacks by third parties, including beneficiaries of a trust.[35] For instance, a trustee "may appeal from an order in [the beneficiaries'] favor that affects the estate as a whole."[36] A trustee "may appeal from a decree determining the relative rights of beneficiaries if some of them are unascertained or without representation, or are not competent to act for themselves."[37] A trustee may also "appeal from an order terminating a trust or from an order dissolving a spendthrift trust, even if all the beneficiaries consent to the immediate distribution of the trust estate."[38]

In *Ferrall*, Faye Hamilton, through her guardian, petitioned the probate court for an order requiring the trustee to pay her a monthly allowance from the income and *corpus of the trust* for her care and maintenance while confined to a sanitarium. The probate court granted the petition. The trustees appealed, arguing that the trust instructed the trustees to pay Ms. Hamilton the income of the trust, and, in the sole discretion of the trustees, any part of the corpus deemed necessary to meet her needs. The trustees determined that Ms. Hamilton's needs did not warrant invasion of the corpus. Ms. Hamilton's guardian moved to dismiss the trustees' appeal on the grounds that the trustees were not "aggrieved parties" entitled to appeal. The Court of Appeal disagreed. The Court held that this case represented an exception to the general rule that a trustee should remain neutral in litigation concerning competing claims by beneficiaries.[39] In this case, the integrity of clear instructions in the trust were put at issue by Ms. Hamilton's petition; hence, the trustees had a duty to oppose it:

> There is no substantial difference in this respect between an order that terminates a trust and an order that modifies it contrary to a specific provision. In either case the litigation does not involve merely the conflicting claims of beneficiaries to a particular fund, but concerns the performance of a duty by the trustees to protect the trust against an attack that goes to the very existence of the trust itself."[40]

Although *Ferrall* involved a trustee's standing to appeal, the reasoning applies equally to determining when a trustee may participate in the initial litigation. Thus, a trustee or executor may participate in litigation where a beneficiary or devisee seeks to invalidate the trust or will.[41] Similarly, a trustee or executor may participate in litigation to prevent the unwarranted diminution of the trust or estate.[42]

Miller involved, in part, an appeal from an order granting a petition by the trustee, Mr. Burford, for attorneys' fees incurred in defending against a contest of the will that created the trust. Mrs. Hartman sought to invalidate her mother's will, on the grounds that it violated a contractual promise by Mrs. Hartman's mother to leave her estate in equal parts to her three daughters. Mrs. Hartman argued that Mr. Burford was not entitled to be reimbursed for his attorneys' fees, arguing that he had a duty "to remain neutral in estate proceedings as between parties such as heirs and devisees with conflicting claims to portions of the estate."[43] The court,

however, distinguished the case. "Here, the question at issue *was whether the will of [Mrs. Hartman's mother] was paramount, or whether it never had any validity*, insofar at least as Mrs. Hartman was concerned, by reason of an alleged preexisting contract between her parents."[44] The court concluded that these facts "presented legitimate ground for the trial court . . . to direct Mr. Burford to resist the attempt to wipe out the will and the probate proceedings."[45]

In *Estate of Goulet*, Donald Goulet's will created a trust pursuant to which Esther Montello, a woman to whom Mr. Goulet was briefly married, would receive $75,000. Ms. Montello filed a petition for an order determining whether her proposed filing of a creditor's claim to enforce alleged greater rights under a premarital agreement would constitute a contest. One of the co-executor-trustees, John Ferry, filed opposition. The probate court determined that the proposed filing would not constitute a contest.[46] Mr. Ferry appealed but his appeal was dismissed on the ground that he lacked standing. The Supreme Court reversed, holding that the trustee had a duty to defend because Ms. Montello's claim could have taken assets out of the trust estate which otherwise would have been distributed to the trust beneficiaries:

> Montello's claim in this case may *substantially diminish the funds to be distributed* to Goulet's intended beneficiaries. The claim therefore implicates the trustee's fiduciary *duty to protect the trust corpus*. Insofar as Montello might ultimately articulate a claim sufficiently large to necessitate modification of Goulet's distributional scheme, the trustee's fiduciary *duty to administer the trust in accord with the trust instrument* is also implicated.[47]

In *Estate of Corotto*, the decedent's widow filed a quiet title action, claiming that half of the trust property was her separate property as a result of an agreement between her and decedent. Co-executor Bank of America, represented by the law firm of Burnett and Burnett, successfully defended against the claim. The law firm filed a petition for attorneys' fees. The widow objected. The court held that the fees were proper. On appeal, the widow argued that "the services for which compensation was awarded were for the benefit of one side in a dispute between legatees under the will and that it is therefore not chargeable to the estate."[48] She claimed that it was not the duty of Bank of America to oppose her action to quiet title. The court disagreed, finding that the quiet title suit attempted to deprive the estate of half of its assets.[49] Bank of America, as a fiduciary for all of the heirs, had the duty to defend the estate for the benefit of all the heirs against the widow's attack.[50] The court acknowledged that, as one of the beneficiaries, the widow would be paying for part of the defense to her suit, "[b]ut at least in her capacity as heir, she has been benefited by the executor's successful defense of the suit."[51]

B. It Is Improper For A Trustee To Participate In Litigation To Determine The Conflicting Claims Of Beneficiaries

In those cases in which attorneys' fees have been denied, the courts have held that the litigation involved competing claims of beneficiaries to an allocation of trust assets. In *Estate of Lynn*, the testatrix left the proceeds from the sale of her ranch to be divided equally among her friend, John Layous, and her two nieces. The ranch was sold but there were insufficient funds in the estate to pay the debts and expenses of the estate without invading the funds received from the sale of the ranch. Concerned that his share would be abated, Mr. Layous petitioned the court for an order establishing that he was entitled to one-third of the proceeds from the ranch. Notably, the two nieces did not contest this petition but the executor, the Monterey County Trust and Savings Bank, did contest it. The trial court held that Mr. Layous' legacy should be abated to the extent necessary before resort be had to the shares of the nieces.[52] Mr. Layous appealed from the order. In reversing the order, the appellate court explained that the executor should not have participated in the litigation because it merely involved conflicting claims on existing trust assets as among beneficiaries:

> The failure of the nieces to appear, when contrasted with the executor's role as an active litigant presents a rather puzzling situation. The only parties in interest in a proceeding such as this are the legatees and devisees, styled "claimants" by section 1080 [of the Probate Code]. The executor is not a "claimant" but is "a mere officer of the court, holding the estate as a stakeholder . . ." [citation]. "It is generally recognized that executors and administrators acting in their representative capacities are indifferent persons as between the real parties in interest and consequently cannot litigate the conflicting claims of heirs or legatees at the expense of the estate."[53]

Finally, we turn back to *Estate of McAdams*. Its actual holding is instructive as to when a trustee should litigate and when he should remain neutral. The trustee defended the validity of a trust amendment. The amendment changed the beneficiary from Joyce Whittlesey, a niece, to the settlor's new wife and her son. The court concluded that the amendment was void as a product of undue influence.[54] The trial court denied a petition for attorneys' fees by trust counsel, Timothy Stearns. On appeal, Mr. Stearns argued that the trustee had a fiduciary duty to defend against the challenge by Ms. Whittlesey and, therefore, had "a right to reimbursement for expenses incurred in that defense, including reasonable attorney fees. [He] further contend[ed] this duty and right of reimbursement is independent of his success in the litigation."[55] The court acknowledged that, "'[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.'"[56]

However, the court distinguished the instant case. The court explained that "the underlying action was not a challenge to the *existence* of the trust[,] it was a dispute over *who would control and benefit* from it. Whether or not the contest prevailed, the *trust would remain intact.*"[57] Although the court acknowledged that it would not have been proper for the trustee to have allowed a default in the litigation, the court stated that there was no reason for the trustee to have taken other than a neutral position in the challenge to the trust amendment.[58] Because the dispute was between the potential beneficiaries under the trust, to the extent that the trustee defended the amendment, "he was representing the interests of one side of the dispute over the other, not representing the interests of the trust or the trustee."[59]

III. CONCLUSION

What we learn from the case law is that a trustee can and should tap the trust to fund litigation against a beneficiary, if the essence of the claim is to preserve or enhance the trust. The trustee should remain neutral, however, when the litigation only effects who would benefit from the trust and by how much. On this point, *Estate of McAdams* is instructive. However, the Third District's dictum in McAdams — that a trustee never has a right to use trust assets to defend against a removal and surcharge petition — is just plain wrong. The court's statement that such a defense is always personal to a trustee ignores the paramount importance of the trustor's intent in naming the trustees, which can and should be defended against any unmeritorious challenge.

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ENDNOTES

1. Estate of McAdams, 104 Cal.App.4th 1221, 1228 (2002).
2. Probate Code § 15684(a)-(b).
3. See Conservatorship of Lefkowitz, 50 Cal.App.4th 1310 (1996) (*citing* Estate of Baird, 135 Cal.App.2d 343, 347 (1955); Dingwell v. Seymour, 91 Cal.App. 483, 513 (1928)).
4. Lefkowitz, 50 Cal.App.4th at 1315 n.3 (*citing* Jessup v. Smith, 223 N.Y. 203, 207 (1918)).
5. *See* Hollaway v. Edwards, 68 Cal.App.4th 94, 99 (1998) ("While defense against those allegations may have benefited Hollaway personally by eliminating the possibility of individual liability, they also benefited the trust by eliminating charges raising serious questions about whether she had and could continue to administer the trust properly."); Estate of Gump, 1 Cal.App.4th 582, 604 (1991) ("It is established that attorneys' fees and litigation costs incurred in the trustee's successful defense of an action brought by the beneficiary are recoverable."); In re Estate of Cassity, 106 Cal.App.3d 569, 574 (1980); Estate of Lair, 52 Cal.App.2d 222, 225 (1942) ("'[W]hen an unfounded suit is brought against [the trustee] by the *cestui que trust*, attorneys' fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation.'" (*quoting* Conley v. Waite, 134 Cal.App. 505, 506 (1933)).
6. 106 Cal.App.3d at 571.
7. *Id.*
8. *See id.* at 572.
9. *Id.* at 574.
10. *Id.*
11. *See* Estate of Miller, 259 Cal.App.2d 536, 546-49 (1968).
12. *Id.* at 546-47.
13. *See id.* at 546.
14. *Id.* at 547.
15. *See* Gump, 1 Cal.App.4th at 605; Cassity, 106 Cal.App.3d at 574; Estate of Gilmaker, 226 Cal.App.2d 658, 663 (1964); Metzenbaum v. Metzenbaum, 115 Cal.App.2d 395, 401-02 (1953).
16. 195 Minn. 464 (1935).
17. *Id.* at 468-469.
18. *See* Lefkowitz, 50 Cal.App.4th at 1314.
19. *Id.* (*citing* Estate of Gilmaker, 226 Cal.App.2d 658 (1964)).
20. *Id.* at 1313.
21. *See id.* at 1314.
22. *Id.* (emphasis added) (*citing* Gilmaker).
23. See *id.* at 1316.
24. *Id.*
25. See *id.*
26. *See* Gilmaker, 226 Cal.App.2d at 663.
27. *See* Estate of Gilmaker, 57 Cal.2d 627, 633 (1962).
28. Gilmaker, 226 Cal.App.2d at 660-62 (emphasis added) (*citing* Moore v. Bowes, 8 Cal.2d 162, 166-67 (1937); Loring, A Trustee's Handbook § 65, at 175 (6th ed. 1962); Bogert on Trusts § 525, at 344 (2d ed.); Nossaman, Trust Administration and Taxation § 32.07 at 620 (2d ed. 1963)).
29. *Id.* at 663.
30. *Id.*
31. Probate Code § 16003.
32. 259 Cal.App.2d 536 (1968)
33. *Id.* at 545 (*citing* Estate of Lynn, 109 Cal.App.2d 468, 473 (1952)).
34. *See e.g.*, Estate of McAdams, 104 Cal.App.4th 1221 (2002); Estate of Corotto, 125 Cal.App.2d 314 (1954); Estate of Ferrall, 33 Cal.2d 202 (1948); Estate of Duffill, 188 Cal. 536 (1922).
35. *See* 33 Cal.2d at 205.
36. *Id.* (*citing* Stringer v. Young, 191 N.Y. 157, 166 (1908); Estate of Kessler, 32 Cal.2d 367, 369 (1948)).
37. *Id.*
38. *Id.*
39. *Id.* at 204.
40. *Id.* at 206.
41. *See e.g.,* Estate of Miller, 259 Cal.App.2d 536 (1968).
42. *See* McAdams, 104 Cal.App.4th at 1227 ("For example, the defense of a lawsuit that has the potential for depleting trust assets would be for the benefit of the trust, justifying the employment of counsel."); Estate of Goulet, 10 Cal.4th 1074 (1995); Estate of Corotto, 125 Cal.App.2d at 319-20.
43. 259 Cal.App.2d at 545.
44. *Id.* (emphasis added).
45. *Id.*
46. *See id.* at 1079.
47. *Id.* at 1082 (citation omitted) (emphasis added).
48. 125 Cal.App.2d at 317.
49. *See id.*at 319-20.
50. *See id.* at 320.
51. *Id.*
52. 109 Cal.App.2d at 470.
53. *Id.* at 473 (*quoting* Estate of Kessler, 32 Cal. 2d 367, 369(1948)); see also Estate of Friedman, 176 Cal. 226, 229 (1917) ("It is no part of the duty of the executor to participate actively in a proceeding . . . to ascertain and determine the succession to the estate. [The executor] has no claim which he can set up in opposition to those of the rival claimants for the estate.").
54. 104 Cal.App.4th at 1225.
55. *Id.*
56. *Id.* at 1226-27 (*quoting* Metzenbaum v. Metzenbaum, 115 Cal.App.2d at 399).
57. *Id.* at 1228 (emphasis added).
58. *See id.* at 1231.
59. *Id.*