IMAGED

Inyo County Superior Court
168 North Edwards Street
Post Office Drawer U
Independence, California 93526
Tel: (760) 872-3038

FILED
JUL 13 2015
INYO CO. SUPERIOR COURT
PAMELA M. FOSTER, CLERK
BY DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF INYO

In re the Matter of the L.L. NUNN TRUST for the benefit of DEEP SPRINGS COLLEGE under Deed of Trust dated November 5, 1923	Case No. SICVPB 12-53232 RULING AND ORDER ON RESPONDENTS' MOTION FOR REIMBURSEMENT FROM L.L. NUNN TRUST OF ATTORNEY'S FEES AND LITIGATION EXPENSES

On March 30, 2015, Respondents filed a Motion for Reimbursement from the L.L. Nunn Trust of Attorney's Fees and Litigation Expenses. Said motion came on for hearing on May 22, 2015. Mr. Christopher L. Campbell and Mr. Dirk B. Paloutzian of Baker Manock & Jensen PC appeared for Petitioner, David Hitz, acting on behalf of the Board of Trustees of the L.L. Nunn Trust.[1] Mr. Eric M. George and Mr. Ira Bibbero of Browne George Ross LLP, along with Mr. Joseph C. Liburt of Orrick, Herrington & Sutcliffee LLP appeared for Respondents Kinch Hoekstra and

[1] Mr. Paloutzian appeared telephonically.

Edward Keonjian, Trustees of the L.L. Nunn Trust.[2] Mr. Jon Michaelson of Kilpatrick Townsend & Stockton LLP appeared telephonically for Real Party in Interest, Deep Springs College Corporation. The Court has considered the pleadings, evidence, arguments, and good cause appearing therefor, rules as follows:

Objections

Respondents' Evidentiary Objections, filed May 15, 2015, "...to Declaration of Jon Michaelson in Opposition to Respondents' Motion for Reimbursement From L.L. Nunn Trust of Attorney's Fees and Litigation Expenses," 1 through and including 11, are each overruled.

The Respondents' Evidentiary Objections filed May 15, 2015, "...to Declaration of David Hitz Filed in Opposition to Respondents' Motion for Reimbursement From L.L. Nunn Trust of Attorney's Fees and Litigation Expenses," 1 through and including 6 are overruled.

The Respondents' Evidentiary Objections filed May 15, 2015, "...to Amended Declaration of Christopher L. Campbell Filed in Opposition to Respondents' Motion for Reimbursement From L.L. Nunn Trust of Attorney's Fees and Litigation Expenses," 1 through and including 15 are overruled.

Respondents' Evidentiary Objections filed May 15, 2015, "...to Declaration of David Neidorf Filed in Opposition to Respondents' Motion for Reimbursement From L.L. Nunn Trust of Attorney's Fees and Litigation Expenses," 1 through and including 5 are overruled.

---

[2] Mr. Liburt appeared telephonically.

Jurisdiction To Make Award While on Appeal

> California Code of Civil Procedure § 916(a) provides that, "Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

Judgments and orders in probate proceedings are not expressly excluded from the automatic stay of CCP § 916 by any of the provisions of CCP §§ 917.1 - 917.9.

Whether a matter is "embraced" by the action or "affected" by the judgment depends on the impact of the particular proceeding on the effectiveness of the appeal. (*Cunningham v. Magidow* (2013) 219 Cal.App.4th 298, 304.) An award of attorney's fees as costs generally is a collateral matter which, although "embraced" by the action, is not "affected" by the judgment. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369; see *Hollaway v. Scripps Memorial Hospital* (1980) 111 Cal.App.3d 719, 723.)

Under CCP § 1033.5, attorney's fees are recoverable as an item of cots when an award of such fees is authorized by contract, statute, or law (CCP § 1033.5(a)(10).) Attorney fees authorized by Probate Code § 15684 thus should be considered a "cost" although no authority has been found exactly on point.

In any event, the judgment appealed from is not the order for attorney's fees, so the motion is not the same as the judgment or order appealed from. The motion for attorney's fees

would also not affect the appeal, and therefore, the Court finds that it has jurisdiction to rule on the motion.

Estoppel Argument

The Respondents have not met their burden of proof on this issue, as the language of the purported pledge by Petitioner David Hitz to "underwrite the incidental costs of going co-ed so as to make this decision financially neutral for the college," is so ambiguous that it is not clear that it referred to attorney's fees. It does not appear that Mr. Hitz' purported pledge would bind the Board or the Trust, or that it would obligate Mr. Hitz to personally reimburse the Trust for Respondents' attorney fees.[3] The Court does not find Respondents' estoppel arguments persuasive.

Probate Code § 15684

Probate Code § 15684 provides as follows:

> 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.

[3] The Court notes that Respondents came to the Board of Trustees seeking Board approval for the Trust to pay their attorney's fees, and that the same was denied in September 2013.

"Administering the Trust-Trustees' Duties"

The Court rejects Petitioner's argument that only a majority of the Board of Trustees can administer the Trust, and therefor, only the majority can be repaid for expenditures property incurred in the administration of the trust.

Similarly, Petitioner's argument that a minority of the trustees cannot pursue litigation absent a vote of the majority is not persuasive. Obviously, in the case of trustee misconduct, a sole trustee or minority trustees may initiate proceedings to remove the majority trustees. In such a case the majority would not vote to support litigation that would oust them. Each trustee has his or her own fiduciary obligations.

"The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties." (Probate Code § 16249) It is well-established that the trustee may hire attorneys and that the attorneys may be paid for out of the estate of the trust. (*Holloway v. Edwards* (1998) 68 Cal.App.4th 94, 97.)

Petitioner apparently filed this litigation with the belief that it was necessary to obtain court approval. The Court does not find Petitioner's suggestion persuasive that Respondents' should have merely filed their objection and refrained from further participation in this litigation. The Court can not accept the proposition that Respondents' should have relied entirely on the Court and the Attorney General to adequately handle the matter under their independent duties, without the benefit of evidence and argument from Respondents' side of the

table.[4] In any given case, the Attorney General's role may be attenuated and the Attorney General may not have an investment in any particular reading of the trust, so long as the public's interests are protected.

Under *Probate* Code § 16000, "...the trustee has a duty to administer the trust according to the trust instrument..." The heart of this litigation was whether administering the trust in a manner to provide for co-education would be in accordance with the trust instrument. Aside from the issue of modification, at least to date, Respondents' have prevailed on the issue whether the L.L. Nunn Trust could be interpreted to allow co-education.

Probate Code § 16013 provides as follows:

> "If a trust has more than one trustee, each trustee has a duty to do the following:
> (a) To participate in the administration of the trust.
> (b) To take reasonable steps to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust."

In acting to prevent Plaintiff from committing what Respondents believed, in good faith, to be a breach of the trust, it was not unreasonable for the Respondent trustees to have objected and hired counsel to contest Petitioner's action.

///

///

///

///

[4] The Court notes that it was basically at Respondents' insistence that the Attorney General was joined in this action.

"Incurred"

Petitioners argue that Respondents should not be able to recover for fees that they had no expectation of paying (because the services were rendered pro bono or on a contingency basis.)

The issue of whether actual payment was required was discussed in *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693. In that case, sanctions were imposed under Code of Civil Procedure § 128.5, which refers to attorney's fees "incurred." [5] The court noted that payment could always be used as evidence that the fees were charged and were reasonable. However, the court did not require proof of payment. "...The fact that a fee was not paid is no evidence that it has not been earned that the client is not obligated to pay it." (*West Coast*, at 707) There was no evidence that payment was *not* obligated, and the declaration provided by the attorney was evidence that the services were reasonable. (*West Coast*, 707.) This case, however, does not say what the outcome would be if there had been evidence that payment was not owed.

In re Marriage of Adams (1997) 52 Cal.App. 4th 911, 914, the court held that the trial court could award CCP § 128.5 sanctions to a party whose attorney represented her on a contingency basis. Although the client did not become liable to pay the attorney, this fact did not preclude imposition of sanctions. The court found ample evidence where the attorney documented his time and costs in his declaration. (*Adams*, at

[5] Under CCP § 128.5(a) "A trial court may order a party, the party's attorney, or both to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay..." (Emphasis added)

914.) The court held that in applying this statute, the courts cannot look to the fee agreement between a client and his or her attorney and whether the client will in fact be paying those fees. (*Adams*, at 915.)

Real Party in Interest suggests this Court should demand or obtain the attorney-client agreements to see if the fees were "incurred" or whether there truly was any expectation to be paid. This of course raises the question whether the attorney-client fee agreements are privileged. A very recent case held that billing invoices sent by an attorney to a client are protected by the attorney-client privilege from disclosure pursuant to the California Public Records Act (CPRA; Gov. Code, § 6250 et seq.) The court concluded that, because the CPRA expressly exempts attorney-client privileged communications from the CPRA's reach, the tension between government transparency and the attorney-client relationship must be resolved in favor of the privilege. The court held that the invoices are confidential communications within the meaning of Evidence Code section 952, and thus privileged from disclosure under Government Code section 6254, subdivision (k). (*Los Angeles County Bd. of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 1154, 1160.) By extension, the fee agreements may also be confidential.

The question was discussed in Willis v. Superior Court (1980) 112 Cal.App. 3d 277, 293, and the court reasoned that the determination of whether a client's fee arrangement with his attorney is a privileged communication will depend on an analysis of the facts of the case and the potential for harm to

the client if the compensation is compelled. The court will weigh the competing policies of guaranteeing, on the one hand, the right of every person to freely confer with and confide in his attorney in an atmosphere of trust and serenity while on the other hand, protecting "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings." (Willis v. Superior Court (1980) 112 Cal.App. 3d 277, 293.) The court in *Willis* held that the objection had been waived and thus did not go into details regarding the facts. Based on the holding in *Adams*, it would appear that the attorney-client agreement would not be especially relevant. (See also *Lolley v. Campbell* (2002) 28 Cal.4th 367,373; *IRMO Ward* (1992) 3 Cal.App.4th 618, 623-624)

The Court is also mindful that a lawyer's duty of confidentiality (a disciplinary standard) as provided in Business & Professions Code § 6068(e)(1), overlaps with and is broader than the evidentiary lawyer-client privilege. The scope of the duty of confidentiality encompasses more information than the privilege because the latter is confined to the statutorily defined concepts of a "confidential communication" between a "lawyer" and a "client." (See definitions in Evidence Code §§ 950-952) Other laws in California relate, and refer, to the duty of confidentiality. In particular Business and Professions Code § 6149, provides as follows:

> "A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code."

The Court concludes that the language used in Probate Code § 15684 does not necessarily require proof that the sums were actually owed or paid.

The Court further finds that Respondents' had a subjective good faith belief that the majority of the Board of Trustees were taking an action that was not administering the trust according to the trust instrument, and that Respondents' actions were objectively reasonable. Thus, the Court finds that within the meaning of Probate Code § 15684, Respondents' properly incurred expenses (attorney's fees and litigation expenses) in the administration of the trust.

"Benefit To The Trust"

Assuming for the purpose of discussion that Respondents' did not properly incur expenses in the administration of the trust, the Court finds the expenditures have benefited the trust within the meaning of Probate Code § 15684.

Focusing on the ultimate outcome of the litigation, Petitioner argues that Respondents did not provide a benefit to the trust. In essence, Petitioner argues that notwithstanding that fact that Respondents won some battles, they lost the war.[6] Even though both Petitioner and Respondents have appeals pending, the Court is of the impression that neither Petitioner

[6] Respondents prevented the transfer of trust assets to the Corporation (so-called Plan B); obtained joinder of the Corporation; have been successful to date (appeal pending) on the issue of "interpretation;" obtained joinder of the Attorney General; have been successful to date (appeal pending) on one of four theories of "modification;" and, were apparently persuasive in Petitioner's withdrawal of their Memorandum of Costs.

nor Real Party in Interest argue or challenge Respondents' right to seek reimbursement at this time.[7] In any event, the Court is not persuaded that the ultimate outcome of the litigation is determinative of Respondents' rights under Probate Code § 15684.

Respondents argue that they benefitted the trust by staying true to their fiduciary duties and required modification of the trust to be made only after due consideration by the Court.

In the case of *Dingwell v. Seymour* (1928) 91 Cal.App. 483, the trustor created two charitable trusts for one res. One trustee initiated an action against the other and prevailed. The court noted that although the trustee bank was unsuccessful, it had been drawn into the litigation by the pleadings, and it had a duty to defend its trust when attacked. Both trustees were found to have participated in good faith, and such participation was necessary for the determination of the validity or invalidity of the various instruments involved so that the uses and trusts could be determined. The court found that the action was similar to litigation to obtain an interpretation of trust provisions, for which trustees had commonly been paid. The litigation that cleared the way for the administration of the charity was held to be a benefit to the trust. (*Dingwell*, at 513-515.)

---

[7] The Court notes that Respondents argue they are not required to wait until the action is completed to obtain reimbursement from the Trust. The case cited by Respondents, *Kasperbauer v. Fairfield* (2009) 171 Cal.App. 4th 229, 236, supports this proposition. "Nothing in the Probate Code or case law requires that attorneys who aid a trustee in trust administration must await a final adjudication of the beneficiaries' claims against the trustee to receive compensation." (*Kasperbauer*, at 236.) Although *Kasperbauer* involved claims by beneficiaries and the issue was whether the fees could be claimed after the trustee was removed, the principle should apply to other aspects of probate proceedings. There is no final distribution that would require the parties to wait for final adjudication before awarding fees.

One practice guide summarizes the rule as being that the benefit to the trust may be conferred by litigation which resolves disputes, and noted that the doctrine is often utilized when there is a question of interpretation. The leading example is a Missouri case, *Trautz v Lemp*, which cites cases and notes that:

> Where an instrument that creates a trust estate is so ambiguous that two or more persons may fairly make an adverse claim to the fund, either may resort to a court of equity for correct interpretation, and the court is justified in not only assessing the cost of the litigation against the estate, but also in allowing reasonable attorneys' fees payable out of the trust estate both to the defeated and successful parties. [citations omitted.] (*Trautz v. Lemp* (Mo. 1934)| 334 Mo. 1085, 1094.) (Nossaman & Wyatt, Jr., Trust Administration and Taxation, § 20.03 (Matthew Bender 2014.)

The litigation in this case resolved disputes and benefitted the Trust in that manner. The trustees acted in good faith to interpret the trust instrument. The action is of the type that most commonly awards fees to both the defeated and successful parties.

In this Court's opinion, Respondent's have acted in good faith, their actions were objectively reasonable, and Respondents have not been defending an "untenable or partisan position." (*Estate of Gilmaker* (1964) 226 Cal.App.2d 658, 662-663.)

///

///

///

///

Reasonableness of Fees & Expenses

The financial condition of the college is relevant to the decision to award attorney's fees and costs in that it may bear on the reasonableness of such fees. The Court has considered the evidence related to the same, including the "Declaration of David Neidorf in Opposition to Motion by Respondents for Attorneys' Fees and Litigation Expenses" filed April 30, 2015.

The standard for determining the amount of fees is that the sum must be reasonable in amount and appropriate to the purposes and circumstances of the trust. To recover fees and costs, trustees must subjectively believe the expense was necessary or appropriate to carry out the trust's purposes, and they must show their beliefs were objectively reasonable. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268.) (For example of an unreasonable amount, in *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, the trustee imprudently spent $ 1.3 million in trust funds to obtain partially collectible judgment of $ 700,000.)

Neither Petitioner nor Real Party in Interest challenge any specific billing or expenses, nor do they specifically contend any of counsels' hourly rates were unreasonable. Finally, the amount of attorney's fees spent by Petitioner is very comparable to that spent by Respondents. ("Second Supplemental Declaration of Kinch Hoekstra in Support of Motion for Reimbursement From L.L. Nunn Trust of Attorney's Fees and Litigation Expenses" filed May 19, 2015, pg. 2). This relative equality raises the presumption that the fees are reasonable.

///

Conclusion

Good cause appearing therefor, Respondents' aforementioned Motion for Reimbursement from L.L. Nunn Trust of Attorney's Fees and Litigation Expenses is GRANTED in the sum of $1,354,694.21.

So Ordered.

Dated: July 13, 2015

Dean T. Stout
Judge of the Superior Court

DECLARATION OF SERVICE
CCP Section 1013

Case Number: SICVPM-12-53233

I, the undersigned, say: I am a citizen of the United States, a resident or employed in the County of Inyo, over the age of eighteen years, and not a party to the within action; that my business address is: Courthouse, 168 N. Edwards St., Independence, CA 93526, that on **JULY 13, 2015**, I served a copy of the foregoing document(s) described as:

RULING AND ORDER ON RESPONDENTS' MOTION FOR REIMBURSEMENT FROM L.L. NUNN TRUST OF ATTORNEY'S FEES AND LITIGATION EXPENSES

(X) BY MAIL: I am readily familiar with the County of Inyo's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Independence, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Said copy was mailed as indicated below:

CHRISTOPHER L. CAMPBELL, ESQ.
DIRK B. PALOUTZIAN, ESQ.
BAKER MANOCK & JENSON, PC
5260 NORTH PALM AVE., 4TH FLOOR
FRESNO, CA 93704

ERIC M. GEORGE, ESQ.
IRA BIBBERO, ESQ.
BROWNE GEORGE ROSS, LLP
2121 AVENUE OF THE STARTS, SUITE 2400
LOS ANGELES, CA 90067

JOSEPH C. LIBURT, ESQ.
ORRICK, HERRINGTON & SUTCLIFFE, LLP
1000 MARSH RD.
MENLO PARK, CA 94025

JON MICHAELSON, ESQ.
KILPATRICK TOWNSEND & STOCKTON LLP
1080 MARSH ROAD
MENLO PARK, CA 94025

( ) By facsimile, email and/or inter-office mail as indicated below.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: 7/13/15

D. ZELAYA, Deputy Clerk