



BUYNAK LAW FIRM

Trust Defense – Attorneys Fees and Costs (Recoverable? Sometimes & Sometimes Not)

While a Trustee of a Trust is empowered to hire an attorney to assist the Trustee (1) in the administration of the Trust, and (2) for litigation to defend the Trust. However, if there is litigation that also benefits the Trustee, as a beneficiary (or otherwise) the Trustee must bear his or her own costs and fees incurred; they are entitled to reimbursement from the Trust.

Many Trusts have Trustees who are also beneficiaries. *Zahnleuter v. Mueller* (2023) 88.Cal.App.5th 1294 has recently evaluated the duty of impartiality of a trustee under Probate Code, Section 16003. When a Trust has two or more beneficiaries, the Trustee has a duty to deal impartially with them and to act impartially in investing and managing the Trust property, taking into account any differing interests of a beneficiary. That is a hard standard to apply.

Basically, if the Trustee is also a beneficiary, their defense of their interests is not entitled to reasonable attorney fees or costs. The Trustee, as an individual, must pay their own attorneys fees and costs without payment or reimbursement by the Trust. In the accounting, the Trustee will be surcharged and thus required to disgorge any fees and costs gained through the litigation.

Takeaways:

The following should be considered whenever a Trustee, who is a beneficiary, is involved in trust litigation –

- (1) The Trustee is advised to avoid taking sides between beneficiaries in disputes as to the validity of amendments unless there is a specific provision directing a Trustee to defend against such claims; and,
- (2) If the Trustee knows of a dispute that might not support the Trustee's use of trust assets for attorney's fees, the Trustee is well advised to be protective of their interest with a petition for instructions to the Court for guidance and clarification as to whether the Trustee may use trust assets to pay the Trustee's attorneys fees. Alternatively, the Trustee may use the Trustee's own, personal assets to pay the attorney fees and after litigation is completed seek reimbursement from the Trust with Court approval.
- (3) Approval of the payment of attorney's fees during litigation should be gained by the Trustee, who should submit detailed accounts to the Court at regular intervals. To the extent that some of attorney fees incurred are for the administration or litigation unrelated to this dispute for Trustee's benefits, those fees should be identified and Court approval gained for their payment.

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S. Timothy Buynak, Principal