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One court's view of bad faith trust contests and fee shifting

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Powell v. Tagami, 26 Cal. App. 5th 219 (2018), illustrates the California Court of Appeal's expansive application of Probate Code Section 17211, which allows for attorney fee shifting in cases involving a bad faith contest of a trust accounting. The court in *Powell* not only holds a bad faith contestant liable for the trustee's attorney fees incurred in her capacity as trustee, but also for the trustee's attorney fees which were incurred in her *individual* capacity.*

Background Facts

Kenneth Matazo and Kazu Tagami created a trust. They had three children: Kenneth, Barbara and Charles, who were beneficiaries of the trust. Claudia Powell, a professional fiduciary, was the trustee.

Prior to the objection at issue, Powell had already provided the beneficiaries with two trust accountings, both of which had been approved by the court. Thereafter, Charles requested a third accounting, which Powell timely provided. This third accounting contained all information required by law, and there were no significant changes in the administration of the trust since the last accounting was produced.

Nonetheless, Charles thereafter filed an extensive objection to the third account. In response, Powell submitted a supplement with an explanation of all administrative expenses and their benefit to the trust, and provided Charles with supporting documentation. But even after receiving this documentation, Charles then proceeded to file extensive supplemental objections (consisting of approximately 200 pages, including 38 exhibits)

which made accusations against Powell both in her capacity as trustee and in her individual capacity — necessitating that Powell retain additional counsel to represent her individually.

Unsurprisingly, the court rejected all of Charles' objections, concluding that Charles' objections were made and maintained without reasonable cause and that there was substantial evidence to support the court's finding that the objections were brought in bad faith. The court awarded attorney fees and costs and held Charles personally liable — both for Powell's trustee's counsel's fees and for her personal attorney fees.

Charles appealed and the Court of Appeal affirmed.

Reasonable Cause and Bad Faith Under Section 17211

The *Powell* court evaluated the "reasonable cause" standard as an objective analysis of "whether any reasonable person would have filed and maintained the objection." See also *Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 926-27 (2010). And the court then determined whether the objections were made in bad faith by using a subjective determination of the contesting party's state of mind, and specifically, whether they acted with an improper purpose. See also *Uzyel*, at 926.

In so doing, the court found all of Charles' objections were brought without reasonable cause. For example, the court opined that "a substantial portion" of Charles' supplemental objections concerned issues which had already been settled in previous court-approved accountings (to which Charles was served and did not object), and were therefore not subject to re-litigation, noting that: "Settlement of an account is conclusive

to all interested parties and releases the trustee from future claims arising from those actions." See also Prob. C. Section 7250. Charles also "raised irrelevant issues regarding actions in the postaccounting period, which were not yet before the court." Finally, Charles complained about billing amounts that were minimal when compared to the overall value of the trust estate.

The court also affirmed the lower court's finding that Charles' objections were filed in bad faith. Charles made broad demands for bills and agreements without examining what was already provided by Powell, or whether there was even a need for such information. And Charles complained about the reasonableness of Powell's attorney fees despite (as the court concluded): "the higher fees were a result of Charles' contentious approach to the Trust administration." The court concluded that "the only reasonable explanation for the unreasonable objections to the Third Account is that Charles intended to perpetuate family disputes; or to gain a personal advantage in distributions from the Trust; or both." Further, the court described Charles' pleadings and correspondence as "vitriolic and contentious" in nature, and his unmeritorious objections, and his personal attacks against Powell, the attorneys, and his siblings support the court's inferred finding of bad faith.

The court found that the evidence of Charles' unreasonable and bad faith objections justified an award of costs and fees under Section 17211, that Charles should be responsible both for fees incurred by Powell's counsel as well as those incurred by counsel for Powell individually, and that Charles would be required to pay these fees from his share of the trust or personally if his share was inadequate.

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Section 17211 is a remedial statute intended to discourage frivolous litigation and ensure that beneficiaries, trustees and attorneys involved in trust administration or litigation continually evaluate their actions and claims to comply with the requirements of the Probate Code. *Chatard v. Oveross*, 179 Cal. App. 4th 1098 (2009).

The court in *Powell* demonstrates the intent of the statute being put into practice by holding that "when objections are devoid of merit, the beneficiary who brought them should bear the cost," which in this case, included attorney fees incurred both by attorneys representing the office of the trustee, and the trustee individually.

** When there are allegations levied against a trustee personally, it often makes sense for the trustee to retain individual counsel separate and apart from their trust counsel. One reason to do this is to maintain the privilege with respect to all attorney-client communications between the trustee and their individual counsel, as the trustee's communications with trust counsel may be discoverable by a successor trustee. For a detailed discussion of this, see Keystone Quarterly: "Trustees Beware: Limitations of the Attorney-Client Privilege", April 2018; and "Caution: Attorney-Trustee Communications Are Discoverable by a Successor Trustee — Even if the Trust Says Otherwise", December 2018.*

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