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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRANKLIN HENRY MENLO  
et al.,

Plaintiffs and Respondents,

v.

LESLIE KLEIN, as Trustee, etc.,

Defendant and Appellant,

B281058

(Los Angeles County  
Super. Ct. No. BP136769)

APPEAL from an order of the Superior Court of Los Angeles County, Maria E. Stratton, Judge. Affirmed.

Parker, Milliken, Clark, O'Hara & Samuelian, Terence S. Nunan, Alan Weinfeld; Buchalter and Michael L. Wachtell, for Defendant and Appellant.

Donald L. Saltzman for Plaintiffs and Respondents.

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## INTRODUCTION

Leslie Klein, trustee of 24 irrevocable trusts for various members of the Menlo family, appeals from the order of the probate court denying his petition for instructions (Prob. Code, § 17200).<sup>1</sup> The beneficiaries have demanded distribution of trust principal as required by the various instruments. Fearing he could be surcharged by the beneficiaries in their ongoing, bitter litigation against him, Klein's petition for instructions seeks court permission to withhold from the distributions 50 percent of the assets to pay for his personal legal defense. We conclude that the probate court did not abuse its discretion in declining to render what is effectively an advisory opinion. Accordingly, the order denying Klein's petition for instructions is affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. *The 24 trusts at issue*

Sam and Vera Menlo<sup>2</sup> had five children, Franklin Henry Menlo (Franklin), Deborah Menlo Deutsch (deceased), Norine Eve Menlo, Judith Menlo Frankel (deceased), and Madelein Menlo Lipschitz. Sam amassed an extensive fortune and, together with Vera as trustors, established at least 96 separate irrevocable trusts for each of their children, grandchildren, and future generations. Only 24 of those trusts are at issue in this appeal (the Menlo Trusts).

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<sup>1</sup> All further statutory references are to the Probate Code, unless otherwise noted.

<sup>2</sup> For the sake of clarity, and intending no disrespect, we will refer to the Menlo family members by their first names.

Each of the Menlo Trusts is an express, irrevocable, inter vivos trust. They are funded by millions of dollars in cash, securities, and by approximately \$54 million in life insurance policies on Sam's and Vera's lives. The proceeds of these life insurance policies are to be paid out to the Menlo Trusts upon the last of Sam and Vera to die. Sam is alive but, because of a stroke, is no longer competent. Vera is alive and competent.

Klein has been the sole trustee of the Menlo Trusts for 18 years. According to Klein, the settlors' intention was that the initial policies would create sufficient cash value so that loans could be taken against them to pay the yearly premiums, and to enable the acquisition of other life insurance policies more favorable to all of the trusts. The premiums on the policies are extremely high.<sup>3</sup>

*2. The beneficiaries' petitions for accounting and for the removal of the trustee*

In late 2012 or early 2013, the Menlo Trust beneficiaries petitioned the probate court for removal of Klein as trustee and for an accounting. They asserted that they had never received any accounting from him. The 24 petitions were consolidated into one action with the lead case being that brought on behalf of the Franklin Henry Menlo Irrevocable Trust, established March 1, 1983 (the Franklin Menlo Trust). The probate court issued several orders to Klein to provide accountings. The litigation is

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<sup>3</sup> As of Klein's petition for instructions, the various trusts owned interests in \$37.5 million worth of life insurance policies on Sam's and Vera's lives, the total annual premiums for which were approximately \$659,201.

bitter and parties are still involved in extensive discovery (the consolidated proceeding).

3. *The demand for distribution of trust principal*

In March 2016, Franklin, the son of Sam and Vera who administers the Menlo family affairs and business, demanded a distribution of the assets in the Menlo Trusts pursuant to the requirements in each of those instruments. The language of the Franklin Menlo Trust is similar to that contained in the remaining Menlo Trusts. Franklin's demand cited Paragraph 2.B of his trust, requiring the trustee to distribute 1/4 of the then principal of the Trust to Franklin upon his 30th birthday, 1/3 of the then principal on his 35th birthday, and the remainder of the Trust estate upon his 40th birthday.<sup>4</sup> At the time, Franklin was age 56 and should have already received the full distribution 16 years earlier. Four of the 24 Menlo Trust beneficiaries were also beyond the age by which they were entitled to distribution of the entire principal and the others had passed various interim milestones (see Exhibit A to this opinion).

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<sup>4</sup> Paragraph 2.B reads: "During the term of this Trust and while Grantor [defined as Franklin] is alive, the Trustee *shall* distribute the principal of this Trust to Grantor as follows: [¶] 2.B.(1). Upon Grantor's thirtieth (30th) birthday, one-fourth (1/4) of the then principal of the Trust estate. [¶] 2.B(2). Upon Grantor's thirty-fifth (35th) birthday, one-third (1/3) of the then principal of the Trust estate. [¶] 2.B.(3). Upon Grantor's fortieth (40th) birthday, the remainder of the Trust Estate, whereupon, the Trust shall terminate." (Italics added.)

#### 4. *The trustee's petition for instructions*

Klein filed his verified petition pursuant to section 17200.<sup>5</sup> He sought instruction from the probate court about the Menlo Trust beneficiaries' requests for distribution and asked for permission "to withhold fifty percent (50%) of the current value of each Trusts' estate to cover each Trust's share of (1) taxes . . . , (2) accounting fees and taxes for future tax returns, (3) costs for a final accounting . . . , (4) reconciliation of amounts owned by any Trust to another Trust for money previously advanced; and (5) the *Trustee's future costs for attorneys*, accountants and other professionals advising and assisting him in this litigation." (Italics added.)

With respect to the beneficiaries' demands for distributions, Klein explained that when he became trustee of the Menlo Trusts in 1996, Sam "made it very clear that notwithstanding the provisions of the Trust documentation no distributions should be made from any of the Menlo Trusts to any of the beneficiaries without his (Sam's) prior approval. Sam also told the Trustee that if any of the Trust Beneficiaries demanded release of some or all of the assets of their respective Trusts without Sam's approval, they would be disinherited and totally cut out from any further distributions from Sam and Vera's estate, including the Menlo Trusts." Since Sam's stroke, Klein had sought Vera's advance approval each time a beneficiary requested release of

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<sup>5</sup> Two cases in the consolidated proceeding were not at issue in Klein's petition for instructions: the nonexistent Zisha Lipschitz Irrevocable Trust, and the Deborah Menlo Deutsch Irrevocable Trust.

Trust assets, primarily to enable beneficiaries to purchase housing.

Klein expressed his concern, because of the litigation against him as trustee, that he would be forced to use Trust assets to pay his attorneys. His petition sought probate court approval of the distribution while withholding half of the value of the Trusts “*so that he is not subject to subsequent criticism or surcharge* for the loss of the valuable insurance policies and their proceeds.” (Italics added.)

The record contains copies of the 24 Menlo Trust instruments. Of particular relevance, they empower the trustee to distribute the principal according to their schedules and to retain and pay professionals, including accountants and attorneys. (See Franklin Menlo Trust, arts. 5.A(9); 5.A(15), italics added) The instruments also set Klein’s compensation as trustee. (*Id.* at art. 7.D.)

#### 5. *The opposition*

The Menlo Trust beneficiaries argued that Klein had unjustifiedly failed to make the asset distributions to them as specified in each of the Trust instruments. Although Klein insisted he was simply following Sam’s orders, the beneficiaries observed that Klein did not produce a single document corroborating Sam’s oral instructions. Klein admitted he never attempted to amend the Menlo Trusts to reflect those instructions. Also, Vera was unaware that Klein had withheld distribution of funds based on discussions he had apparently had with Sam, as she had not been part of those discussions.

The beneficiaries also took issue with Klein's request to withhold 50 percent of the Trusts' principal from the distributions. The terms of the Menlo Trusts required distribution without deduction with the result, they argued, that Klein was not entitled to probate court instructions directing him to withhold any Trust property. They also argued that none of Klein's proffered reasons for withholding funds from the asset distributions was valid. First, the beneficiaries would pay their pro-rata share of the insurance premiums. They had already asked Klein for payment amounts. Second, they argued, the Trusts did not provide for creation of lines of credit, and Klein had taken millions of dollars from the lines of credit for which he had not accounted. Finally, they contended that Klein was not entitled to withhold " 'anticipated future litigation expenses' " from Trusts that by their terms had already called for a full or partial distribution to beneficiaries.<sup>6</sup>

#### *6. The trial court's ruling*

At the hearing on Klein's petition for instructions, the parties agreed that the probate court could rule on the papers without the introduction of evidence. Klein represented to the probate court that he proposed to distribute a portion of each Trust but "reserve[] the balance to cover attorneys' fees." The probate court denied Klein's petition for instructions

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<sup>6</sup> The beneficiaries asserted that Klein had taken between \$2 million and \$3 million in Trust funds to pay his attorneys and accountants in this litigation. They alleged that Klein had been stockpiling Trust money to pay his attorneys since 2008, five years before petitions for accounting and removal were filed. They wanted that money reimbursed to the Trusts.

stating, “The petition is essentially asking for instructions on a question of law, whether the trustee can, without fear of future litigation, withhold trust distributions to pay for future attorney fees and costs. This is an inappropriate use of a petition for instructions. (*Estate of Schneider* (1944) 62 Cal.App.2d 463, 465).” Klein’s timely appeal ensued.

### **CONTENTION**

Klein contends that the probate court erred in declining to rule on his section 17200 petition for instructions.

### **DISCUSSION**

Section 17200 is the general method for initiating proceedings in the probate court “ ‘concerning the internal affairs of the trust.’ ” (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427, citing §§ 17201 & 17200, subd. (a).) Probate court proceedings under section 17200 embrace, among other things, instructing the trustee (§ 17200, subds. (a) & (b)(6)), and “[s]ettling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.” (*Id.*, subd. (b)(5)). They are the “well-established method of resolving controversies that may arise between trustee and beneficiary.” (*Bellows v. Bellows* (2011) 196 Cal.App.4th 505, 511, citing § 17200, subds. (a) & (b)(5).) As Klein correctly observes, the probate court does resolve questions of law under section 17200, for example, when it interprets a trust instrument or permits actions not authorized by a trust instrument.



Turning to Klein’s section 17200 petition, it acknowledges the required distribution of principal, but asks for court permission to withhold Trust assets to pay taxes, accounting fees, and “the *Trustee’s future costs for attorneys*, accountants and other professionals advising and assisting him in this litigation.” (Italics added.)

The Probate Code entitles Klein as trustee to the reimbursement from trust property for which he seeks permission. “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.” (Prob. Code, § 15684, italics added; *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97.) “[A]mong the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for said purposes.’ [Citation.] . . . ‘If the trustee acts in *good faith*, he 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.’ [Citation.]” (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226–1227, italics added (*Whittlesey*), quoting from *Evans v. Superior Court* (1939) 14 Cal.2d 563, 574.)

In addition to the Probate Code, the Menlo Trust instruments, which set forth the trustee's powers and duties (§ 16000), empower Klein as trustee, to distribute the principal and to retain professionals to administer the Trusts.<sup>7</sup> The Trust instruments also shield him from liability for any act or omission to act in "good faith." (Franklin Menlo Trust, art. 7.E.)<sup>8</sup> Klein is already entitled to be reimbursed from Trust property for acts in administering the Trusts if the costs are properly incurred (§ 15684) and to pay for legal and accounting assistance from the Trust assets as long as he acts in good faith and for the benefit of the beneficiaries. (*Whittlesey, supra*, 104 Cal.App.4th at pp. 1226–1227.)

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<sup>7</sup> According to articles 5.A and 5.A(15) of the Franklin Menlo Trust, the trustee, subject to "the discharge of the Trustee's fiduciary obligations," is "vested with and has all rights, powers and privileges" "[t]o hire, obtain, retain and utilize such employees, agents, contractors, professional assistants, and advisors, including, without limitation, accountants and attorneys, and pay them compensation, as may be reasonable under the circumstances."

<sup>8</sup> Article 7.E, entitled "Limitation of Liability of Individual Trustee" reads, "No . . . Trustee shall be liable for loss or damages to any Trust or the assets thereof or to any beneficiary of any Trust *for any action or failure to act which is in good faith*; and each individual so serving is hereby indemnified, out of Trust assets, against any such loss or damages, including without limitations, expenses and reasonable attorney fees." (Underscoring omitted, italics added.)

The real focus of Klein’s section 17200 petition, as he represented to the probate court at the hearing, is on the expenses he anticipates incurring for his legal defense: He stated that the “balance” of the Menlo Trusts’ funds that he sought to withhold from distribution were “to cover attorneys’ fees.”

“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 service to the trust.’” (*Whittlesey, supra*, 104 Cal.App.4th at p. 1230; *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1314; *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 534; *Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 213.) The “trustee may use trust funds to pay for legal advice regarding trust administration [citation] and may recover attorney fees and costs incurred in successfully defending against claims by beneficiaries. [Citations.] When the law gives the trustee a right to use trust funds, or to reimbursement, the funds do not in law belong to the beneficiaries.” (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213.) By contrast, “if the trustee’s expenditures turn out to have been unauthorized, the beneficiaries may ask the probate court to surcharge the trustee.” (*Ibid.*)

Klein’s section 17200 petition seeks permission to withhold 50 percent of the Trusts’ principal specifically to pay “future costs for attorneys . . . assisting him in *this litigation*” “so that he is not subject to subsequent criticism or surcharge for the loss” of value to the Menlo Trusts. (*Italics added.*) As the probate court recognized, Klein wants court approval so he can retain half of the estate without fear of liability. But, to authorize advance payment of attorney fees out of Trusts’ assets to protect Klein

from “subsequent . . . surcharge,” the probate court would have to determine now that that Klein’s use of those funds is incurred “in good faith” (Franklin Menlo Trust, art. 7.E) and is a benefit and service to the Menlo Trusts rather than for Klein’s personal benefit. (*Whittlesey, supra*, 104 Cal.App.4th at p. 1230.) Stated otherwise, Klein is seeking a prophylactic judicial declaration that withholding such funds from the distribution of the Trusts’ principal would be in good faith and for the benefit of the Trusts so that Klein could not later be held liable for a surcharge.

Accordingly, any order the court makes with respect to this petition for instructions would be advisory and courts do not render advisory opinions. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 119–120; *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622; *Gonzalez v. Santa Clara County Dept. of Social Services* (2017) 9 Cal.App.5th 162, 168; *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1344; *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1157.) The proscription against issuing advisory opinions is particularly pertinent in the context of the bitter consolidated proceeding where the court’s determination here would become law of the case.

The probate court’s rulings on petitions for instructions are reviewed for abuse of discretion. (§ 17206; *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 528–529.) Also, the court’s decision denying Klein’s request for fees payable from the Trusts’ assets is reviewed for abuse of discretion. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268; *Estate of Vokal* (1953) 121 Cal.App.2d

252, 260.)<sup>9</sup> The probate court did not abuse its discretion in denying Klein’s petition for instructions.<sup>10</sup>

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<sup>9</sup> We disagree with Klein’s argument that because the probate court “essentially interpreted” section 17200 as prohibiting court instruction on matters that involve issues of law, its ruling must be reviewed de novo. A review of the court’s ruling shows that it read Klein’s petition as seeking instructions that the retention of 50 percent of the Trusts’ assets for his attorneys would, *as a matter of law*, be in good faith and benefit the Trusts.

<sup>10</sup> Klein argues that the probate court erroneously relied on *Estate of Schneider* because that case long predates enactment of section 17200. Under the longstanding rule of decision, we will not disturb a correct ruling merely because given for a wrong reason. “‘If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.’” (*D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

**DISPOSITION**

The order is affirmed.

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KALRA, J.\*

We concur:

EDMON, P. J.

EGERTON, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.