Filed 6/27/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LIONEL B. SANDERS, as Conservator, etc., et al., Plaintiffs and Respondents, v. CHERYL LAWSON, Defendant and Appellant.	B185999 (Los Angeles County Super. Ct. No. SC081896)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul G. Flynn, Judge,** and Joseph S. Biderman, Judge. Reversed.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marshal Oldman and Justin B. Gold for Defendant and Appellant.

Ronald J. Seeley and David A. Seeley for Plaintiffs and Respondents.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication with the exception of parts 1.a., 1.b., 2., 3.a., and 3.c.

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

INTRODUCTION

In this appeal, we are asked to determine whether the attorney's fees provision of the Elder Abuse Act (Welf. & Inst. Code, § 15657.5)[1] authorizes the award of trustee fees as costs. We hold that it does not.

Lawrence I. Schwartz as trustee of the Lawson Family Trust (the Trust), and Lionel B. Sanders as conservator of the estates of Louis and Sylvia Lawson brought an action under the Elder Abuse Act (§ 15600 et seq.) against Cheryl Lawson, a beneficiary.[2] The lawsuit stemmed from the manner in which Cheryl had obtained her elderly parents' signatures on a quitclaim deed that transferred an undivided one-half interest in a residence in Santa Barbara to her. Cheryl appeals from the judgment entered against her and from the subsequent award of costs and fees to the trustee and plaintiffs' attorneys. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are essentially undisputed. Cheryl is one of three children of Louis W. and Sylvia Lawson, now deceased.[3] Sanders was the court-appointed conservator of the estates of both Louis and Sylvia. Schwartz was the successor trustee of the Trust dated November 10, 1995, and amended and restated in January 2003.[4]

---

[1] We refer to various Lawsons by their first names for clarity and intend no disrespect thereby. (See *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 459.)

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

[3] Cheryl's brother Craig Lawson and sister Michelle Lawson-Dornfest are not parties to this action or appeal.

[4] After the judgment was entered, the trustee was suspended by order of the probate court. That order was the subject of a companion appeal in this court (B191484).

The Lawsons acquired the Santa Barbara residence (the Santa Barbara property) in 1990. Cheryl on the one hand, and her parents on the other, each held an undivided one-half interest in that property. Title to the senior Lawsons' one-half interest was held by the Trust as of October 2002.

In May 2003, Louis and Sylvia conveyed their interest in the Santa Barbara property to Cheryl by quitclaim deed. Cheryl then filed a quiet title action in Santa Barbara naming as a defendant, the trustee.

While the quiet title action was pending, in June 2004, plaintiffs filed the instant action in Los Angeles County against Cheryl seeking damages for elder abuse and breach of fiduciary duty arising out of the events leading to Louis and Sylvia's transfer of their interest in the Santa Barbara property to Cheryl. The gravamen of the complaint was that Cheryl acquired the property through undue influence and elder abuse in that she pressured, forced, and coerced Sylvia and Louis, during unwelcome telephone calls and visits, to sign the quitclaim deed.

At the close of the bench trial, the court found in favor of plaintiffs and adopted their 37-page statement of decision. The court awarded damages as follows: (1) $583,769.83 to the trustee for Cheryl's financial abuse (comprised of $512,500, which was the senior Lawsons' one-half interest in the property, plus $65,000 in rental income from the Santa Barbara property, plus interest); and (2) $100,000 to the conservator for Cheryl's elder abuse (comprised of $50,000 each for Sylvia and Louis). It also ordered Cheryl to pay attorney's fees, and trustee and conservator fees as costs, but left the amount to later determination. After the trial court denied Cheryl's motion for new trial, Cheryl filed her notice of appeal.

Plaintiffs then filed their motion for fees and costs. After referring the matter to a referee, the trial court accepted the dollar amounts only from the referee's recommendations and awarded the conservator $11,896.50; the trustee $517,869.93; and the attorneys $1,077,579.08. Additional facts will be delineated below.

DISCUSSION

[[End published portion]]

1. *The Trial Court Erred in Denying Cheryl's Motion for Continuance*.

a. *The relevant facts*

Cheryl asserts that plaintiffs did not serve the elder abuse complaint on her for 88 days after filing it, notwithstanding she was present with her attorney and plaintiffs' counsel at eight days of deposition in the quiet title action. The first amended complaint was filed on June 10, 2004. Plaintiffs served the summons and complaint on Cheryl on September 8, 2004, at the close of the seventh day of her deposition.

Just two weeks later, in September 2004, the trial court held an initial status conference in the elder abuse action. Cheryl's attorney did not attend because of illness. At that conference, the court scheduled trial for January 10, 2005, with the discovery cutoff date of December 10, 2004. Shortly thereafter, the parties stipulated that discovery taken in the quiet title action could also be used in the elder abuse action.

Cheryl demurred to the complaint in October 2004, and then filed her answer on November 5, 2004. On November 18, 2004, Cheryl noticed the deposition of one of the senior Lawsons' caretakers. Cheryl also requested a production of documents.

On November 30, 2004, Cheryl moved to continue the trial and reopen discovery for four months. In what was Cheryl's first continuance request, she argued that the trial date had been set in her attorney's absence because of illness. She intended to take the depositions of the trustee, the conservator, her brother and sister, three doctors, and at least one of the caregivers who attended to the senior Lawsons at the time the deed was executed. Cheryl argued she did not have a reasonable opportunity to complete discovery that would not be duplicative of the quiet title action because plaintiffs intentionally delayed service of the complaint and trial was set so soon thereafter.

Plaintiffs opposed the four month continuance arguing that Cheryl had taken no discovery in the three months since having been served with the complaint and had taken no discovery in the quiet title action. Plaintiffs noted that Cheryl had prolonged her own deposition by refusing to appear on some days. Plaintiffs also asserted that Cheryl had obstructed discovery and "refused to make a complete document production." Plaintiffs argued that Louis and Sylvia were elderly and ill, and delay of trial because of Cheryl's dilatory conduct would deplete the resources of the estate and delay their ability to use the equity in the Santa Barbara property for the senior Lawsons' care. It appears that the court did not grant the continuance motion.

On January 6, 2005, Cheryl's attorney filed a letter explaining that he was seriously ill with a pulmonary problem and would not be able to commence trial as scheduled on January 10, 2005. Upon court order, Cheryl filed the declaration of her counsel's physician confirming the illness. Cheryl filed a substitution of attorney.

The new attorney made what was Cheryl's second request for a continuance. Plaintiffs opposed the request and cited a stipulation entered in Santa Barbara that the trustee would not be required to produce any documents in the quiet title action until Cheryl's deposition was complete. The trial court expressed "concern [that] people," especially Cheryl and her former counsel, "have been dodging discovery." The court found that Cheryl's first attorney had not "been responsive to the discovery request and I don't think Ms. Lawson has been either. Somebody has to pay . . . ." Still, because the court had the physician's declaration and could not "in good conscience endanger some lawyer's life[,]" it postponed the trial from January 14, 2005 to March 14, 2005, but refused to reopen discovery. Thereafter, Cheryl moved to reopen discovery for the "limited purpose" only of deposing affiants in connection with a motion for preliminary injunction. On appeal, Cheryl contends that the trial court abused its discretion in denying her a continuance of the trial to allow discovery.

b. *The law and conclusion*

The decisions to reopen discovery and to continue the trial are committed to the sound discretion of the trial court (Code Civ. Proc., § 2024.050, subd. (b); *Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1249), which cannot be disturbed on appeal without a clear showing of abuse. (*Lazarus, supra,* citing from *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448.) " ' " 'The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [¶] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' . . ." [Citations.] "The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." [Citations.]' [Citation.]" (*Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246 (*Hernandez*).)

Requests to reopen discovery and to continue the trial present the trial court with competing mandates. On the one hand the court is under statutory "obligations to enforce discovery cutoff dates and to set firm trial dates. [Citations.] Strict adherence to these delay reduction standards has dramatically reduced trial court backlogs and increased the likelihood that matters will be disposed of efficiently, to the benefit of every litigant. [Citation.]" (*Hernandez, supra*, 115 Cal.App.4th at p. 1246.) On the other hand, a goal of delay reduction and calendar management is "to promote the just resolution of cases on their merits. [Citations.]" (*Hernandez, supra,* 115 Cal.App.4th at p. 1246, citing *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085.) Thus, "decisions about whether to grant a continuance or extend discovery 'must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency.' [Citation.]" (*Hernandez, supra*, at p. 1246.)

In short, as aptly explained by Justice Yegan in *Hernandez,* "*What is required is balance*. 'While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is no good cause for granting one, it is equally true that, absent [a lack of diligence or other abusive] circumstances . . . a request for a continuance supported by a showing of good cause usually ought to be granted.' [Citation.]" (*Hernandez, supra*, 115 Cal.App.4th at pp. 1246-1247, italics added; see also, Cal. Rules of Court, rule 3.1332(a), (b) & (c).)[5]

The requisite balance was missing here. (*Hernandez, supra,* 115 Cal.App.4th at p. 1247.) Cheryl established good cause for her first continuance request in November 2004. Cheryl's attorney was ill at the time of the September 2004 status conference when the trial court set trial only four months later. It is unfair to force parties, who are not chargeable with the health of their attorneys, to go to trial without adequately prepared counsel because of illness. (See, *id.* at p. 1244.) The court here gave Cheryl's counsel no consideration for that fact. "The death or serious illness of a trial attorney or a party 'should, under normal circumstances, be considered good cause for granting the continuance of a trial date[.]' (Cal. Stds. Jud. Admin., § 9.) The same circumstances should generally constitute good cause to reopen discovery after a trial date has been continued. [Citation.]" (*Hernandez, supra*, at pp. 1247-1248; see also Code Civ. Proc., § 2024.050.) While, admittedly, Cheryl's counsel's illness was nowhere as severe as the terminal illness of Hernandez's attorney, the trial court here had no reason to think Cheryl's attorney was *not* ill, the two situations lead to precisely the same legal result: The absolute inability of a party, particularly the defendant here, to

---

[5] Among the circumstances that may indicate good cause for a continuance are, "(3) The unavailability of trial counsel because of death, illness, or other excusable circumstances; [¶] (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice." (Cal. Rules of Court, rule 3.1332(c)(3) & (c)(4).)

proceed at trial with the necessary tools in violation of the preference for trial on the merits. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364; see also, *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1398.)

Compounding the problems arising from Cheryl's counsel's illness, was the fact, as Cheryl argued in her continuance motion, that plaintiffs had performed, in the vernacular, a "squeeze play" by delaying service of the complaint on Cheryl. The elder abuse complaint was first filed in June 2004. Despite the fact that plaintiffs and Cheryl were in the same room together for eight days of her deposition during the summer of 2004, plaintiffs withheld service of the summons and complaint on her until the *seventh day* of that deposition, in September 2004. Defendants then obtained a trial date four months later, in her attorney's absence, thereby severely curtailing the time available for discovery. In fact, the trial was scheduled before Cheryl had even filed her answer. This record suggests that plaintiffs calculatedly delayed service of the elder abuse complaint on Cheryl so as to put her in a scheduling bind and force her to go to trial having conducted virtually no discovery.

Nonetheless, Cheryl moved diligently in spite of this scheduling bind, plaintiffs' assertion to the contrary notwithstanding. The record shows that Cheryl was active between September -- when she first learned of the complaint and the trial date was set -- and November -- when she moved to continue the trial date and reopen discovery -- even in the face of her counsel's illness and her late entry into the lawsuit. She demurred to the complaint in October, the hearing on which was set for after the discovery cut-off date. Then, she answered the complaint in early November 2004, requested production of documents and served a deposition notice. That same month, Cheryl expeditiously made her first continuance motion, which was unsuccessful. Although on the eve of trial the court granted Cheryl's request to substitute counsel and continue trial, it specifically *declined to reopen discovery*. (See fn. 6.) Understandably, it would have been futile at that point, given the court's declaration, for Cheryl's new counsel to seek to reopen

discovery. Under the circumstances, Cheryl acted as diligently as could be expected.

To dispute Cheryl's diligence, plaintiffs argued to the trial court that she had been dodging their discovery. Although the court found that Cheryl and her attorney had been ducking discovery, it failed to consider that the discovery conduct plaintiffs cited *occurred in the quiet title action, not in the elder abuse suit*. The court also failed to consider that Cheryl had been suffering under stipulation in the quiet title action that no discovery would occur until Cheryl's deposition was complete.[6] The evidence shows that Cheryl had been attempting to mount a defense and to conduct discovery once she was served with the elder abuse complaint and her deposition was complete. Furthermore, the court should have considered that some issues in an elder abuse action could be qualitatively different than those raised by a quiet title action, necessitating different and additional discovery. The effect of the court's ruling denying Cheryl her continuance request in November 2004 was to prevent Cheryl outright from defending the elder abuse allegations against her on the merits.

Balanced against this was plaintiffs' argument that they would be prejudiced by any continuance because the senior Lawsons were elderly and ill and needed to sell the Santa Barbara property to pay for their expenses. This urgency is questionable where plaintiffs waited three months from June 2004 to September 2004 to serve the summons and complaint on Cheryl; they made no suggestion they could not have served her during first six days of the deposition. Nor is there any evidence in this record that plaintiffs moved for trial preference

---

[6] Plaintiffs noted for the trial court that the parties had stipulated in *Santa Barbara* that plaintiffs would not have to produce anything in the quiet title action until Cheryl's deposition was complete. While such a stipulation was unwise from Cheryl's standpoint, her deposition was complete in September 2004, and still plaintiffs fought Cheryl's very attempts to conduct discovery in the little time remaining available to her.

under Code of Civil Procedure section 36,[7] a fact that further undermines plaintiffs' asserted prejudice based on urgency.

Meanwhile, Cheryl was manifestly prejudiced by the denial of her continuance motion because she was compelled to defend against the elder abuse allegations only four months after learning of it, without the benefit of any discovery. Forcing Cheryl to go to trial four months after service of the complaint, during which time she had an ill attorney and no opportunity for discovery, constituted a denial of her right to due process and a manifest abuse of discretion.

Although this result compels the reversal of the entire judgment, for the guidance of the trial court on remand (Code Civ. Proc., § 43), we also address Cheryl's challenges to the trustee and attorney's fees and the damages.

2. *The trial court erred in declining to factor in the mortgage on the Santa Barbara property when fixing the property's value*.

"The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.] All presumptions favor the trial court's ruling, which is entitled to great deference because the trial judge, having been present at trial, necessarily is more familiar with the evidence and is bound by the more demanding test of

---

[7] Code of Civil Procedure section 36 reads:

"(a) A party to a civil action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court makes all of the following findings:

"(1) The party has a substantial interest in the action as a whole.

"(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

". . .

"(f) Upon the granting of such a motion for preference, the clerk shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Such a continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party."

weighing conflicting evidence rather than our standard of review under the substantial evidence rule. [Citations.] [¶] We must uphold an award of damages whenever possible [citation] and 'can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citations.] [¶] In assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor. [Citation.]" (*Westphal v. Wal-Mart Stores, Inc*. (1998) 68 Cal.App.4th 1071, 1078.)

In her new trial motion, Cheryl contended that the trial court ordered excessive damages because it valued the Santa Barbara property without reference to the amount of the mortgage. She argued that the court awarded damages against her in the amount of one-half of the value of the Santa Barbara property based on the courts' valuation of the property at the time of trial at $1,025,000. She contends on appeal that the court neglected to take into account the mortgage on the property, which mortgage reduced the equity in the property by the amount of that encumbrance.

Equity or interest in real property is valued by subtracting the amount of encumbrances from the fair market value. (See, e.g., Code Civ. Proc., § 680.190 [" 'Equity' means the fair market value of the interest of the judgment debtor in property, . . . over and above all liens and encumbrances on the interest superior to the judgment creditor's lien."].)

Here, we have been provided with no authority for valuing the senior Lawsons' interest in the Santa Barbara property in any fashion other than by first reducing the $1,025,000 fair market value by the amount of the mortgage lien, and only then dividing the result in half. Plaintiffs simply argued that where the mortgage was in Cheryl's name alone, any amount by which the mortgage may

reduce the value of the equity in the property should only affect Cheryl's interest. Yet, the bank or mortgagee is the holder of the interest in the encumbrance, not the Trust or Cheryl. That encumbrance reduced the equity value of the entire property and so a calculation of the trust's interest in the property that divides the fair market value in half *before* factoring in the encumbrance provides the Trust with a windfall. The damages must be reversed to afford the trial court the opportunity to properly calculate the property's value.

3. *The Fee Award was Erroneous.*

a. *Cheryl's challenge to the fee award is cognizable.*

Cheryl raises several challenges to the fee award. Preliminarily, we address plaintiffs' contention that Cheryl did not preserve her appeal from the fee award. Cheryl's notice of appeal, filed September 12, 2005, was taken from the judgment entered on July 13, 2005. The judgment awarded attorney's fees, conservator fees, and trustee fees to plaintiffs, but did not include the amounts of such fees. The amounts were not fixed until June 2007. Cheryl did not file a separate appeal from that ruling. Plaintiffs assert that the time within which Cheryl should have filed a notice of appeal from that ruling has long since passed.

However, the notice of appeal from the judgment awarding costs and fees to the prevailing party subsumes a later order fixing the amounts of the award. (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997-998.) Recognizing that the fee "order is an appealable order . . . [citations]" (*id*. at p. 996), the *Grant* court reasoned that "*requiring* a separate appeal from such an order when the judgment expressly makes an award of costs and/or fees serves no apparent purpose. The notice of appeal itself challenges the appropriateness of awarding fees and costs to respondents. Thus, appellate jurisdiction exists and respondents are on notice that appellants are seeking review of the award. Respondents have not been misled. [Citation.]" (*Id*. at p. 997.) *Grant* explained further that the issue was not a collateral matter unrelated to the judgment's validity because the judgment expressly provided for an award of fees and costs. "Determination of the amount

in essence defines the scope of the judgment itself. Long before we were called upon to consider any issues raised on appeal, the award amounts became a part of the judgment. If we were to follow respondents' restrictive approach, we could review only part of the judgment from which the appeal was taken and in essence rule upon a judgment containing *blanks.* We see no policy reason favoring that approach and respondents have not cited any authority requiring us to follow it." (*Ibid.*)

We agree with *Grant*.[8] First, the judgment here awarded fees and costs but did not specify the amount, leaving the resolution of that question for later. Cheryl timely appealed from the judgment and the award amounts became part of that judgment before her appeal was ready for our consideration. Second, the subsequent order for fees merely fixed the amount of the judgment, and so the issue is not a collateral matter unrelated to the judgment's validity and finality. Third, Cheryl's challenge to the award fixing the amount of fees could be considered an attack on the judgment itself where the statement of decision awarded costs, "including attorneys' fees, and the fees of . . . the Trustee." Pursuant to *Grant*, Cheryl's appeal from the attorney's fees award is subsumed in her notice of appeal dated September 12, 2005, and so is timely and cognizable.

[[Begin published portion.]]

b. *The Trial Court's Award of Trustee Fees was Unauthorized*.

Cheryl contends that the attorney's fees provision in the Elder Abuse Act, section 15657.5, does not authorize the award of compensation to a trustee and so

---

[8] Plaintiffs cite cases that decline to follow *Grant*. Each is distinguishable from *Grant*. (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1172 [no attorney fee award contained in judgment appealed]; *Gouskos v. Aptos Village Garage, Inc*. (2001) 94 Cal.App.4th 754, 763 [same]; *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43-44 [same]; *Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073 [appellant not aggrieved by decision in judgment to award attorney fees to appellant and so appeal from judgment could not challenge fees]; *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147-148 [appellants challenge award of discretionary fees, not costs as a matter of right].)

the $517,869.93 awarded to the trustee here was legal error. The relevant sentence in section 15657.5, subdivision (a) reads: "*The term 'costs' includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.*" (Italics added.) The referee concluded that that sentence was expansive enough to include the services of a trustee as well. We disagree with the referee.

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.]" (*Carver v. Chevron U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 142.)

In California a prevailing party in a civil proceeding is entitled to the recovery of costs. (Code Civ. Proc., § 1032, subd. (b).) "Code of Civil Procedure '[s]ection 1032 is the fundamental authority for awarding costs in civil actions. It establishes the general rule that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." ' [Citations.]" (*Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 724.) The " ' "items . . . allowable as costs under Section 1032" ' " are enumerated in Code of Civil Procedure section 1033.5. (*Duale, supra*, at p. 724.)

Here, the Elder Abuse Act's section 15657.5 is the relevant attorney's fees statute that invokes application of Code of Civil Procedure section 1032 costs, and by reference, the cost list in Code of Civil Procedure section 1033.5. (Code Civ. Proc., § 1033.5, subd. (c)(5); see *Duale v. Mercedes-Benz USA, LLC, supra*, 148 Cal.App.4th at p. 724.) As noted, section 15657.5 reads, in relevant part, "(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff

reasonable attorney's fees and costs. *The term 'costs' includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article*." (Italics added.)

Section 15657.5 makes no mention of trustees. Instead, it defines the term "costs" to include reasonable fees for the services of a *conservator*.

In support of the award of fees to the trustee, plaintiffs point to the important purpose of the Elder Abuse Act, namely, to encourage private enforcement of laws to protect a particularly vulnerable sector of the population from abuse and custodial neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) They contend that this purpose necessitates an expansive reading of the Elder Abuse Act's cost provision. They argue thus that the phrase "includes, but is not limited to," in section 15657.5 "is broad enough to encompass the fees of the Trustee as well as those of the Conservator." We decline plaintiffs' invitation to expand the scope of statutorily available costs.

First, the clause in section 15657.5, "*includes, but is not limited to,*" does not expand the list of items that could be considered costs to trustee fees. It has long been the law in California that "[c]osts recoverable are only those recoverable by statute or rule of court even though the item may be a reasonable one. [Citations.]" (*Muller v. Reagh* (1959) 170 Cal.App.2d 151, 153; accord, *Duale v. Mercedes-Benz USA, LLC, supra,* 148 Cal.App.4th at p. 724 [" ' "the right to recover costs exists solely by virtue of statute." [Citations.]' "].) Code of Civil Procedure section 1033.5 delineates the items allowable as costs in civil actions where costs are authorized by statute. (Code Civ. Proc., § 1033.5, subd. (c)(5).) That comprehensive list does not include trustee fees. Because the services of a trustee are entirely absent from this list of available costs, there was no authority for the award of fees to the trustee as costs.

Second, knowing full well what trustees and conservators are, the Legislature did not include fees for trustees' services when it enacted section 15657.5; it chose only to include fees for conservators' services. That is, when

adding to the Code of Civil Procedure section 1033.5 list of available costs, the Legislature chose not to include trustee fees in section 15657.5. "We presume the Legislature meant what it said in the [Welfare and Institutions Code], and that it is aware of the circumstances set forth in the Code of Civil Procedure under which attorneys fees may be recovered. [Citations.] Where the words of a statute are clear, we may not add to or alter the statute to accomplish a purpose which does not appear on its face. [Citation.]" (*Department of Forestry & Fire Protection v. LeBrock* (2002) 96 Cal.App.4th 1137, 1139.) Had the Legislature intended to include as costs in section 15657.5 the reasonable fees for the services of a trustee, it could have said so, given it was aware of the itemized list of costs in Code of Civil Procedure section 1033.5 and the absence therein of a reference to trustees. We decline to expand the list of statutory costs to include those of the trustee where the Legislature has conspicuously failed to do so. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88.).

Third, to endorse the interpretation suggested by plaintiffs "would substantially expand the range of recoverable costs, particularly under these facts" (See *Golf West of Kentucky, Inc. v. Life Investors, Inc*. (1986) 178 Cal.App.3d 313, 317, superseded by statute as stated in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294), where plaintiffs' attorneys already had the benefit of a conservator protecting the interests of the persons and estates of Louis and Sylvia, and where the ratio of trustee fees to conservator fees *was nearly 50 to 1*. "Modification of costs recoverable on appeal is best left to the Legislature with its fact finding capabilities through hearings at which all interested parties may have input." (*Ibid.*)[9]

---

[9] Plaintiffs argue that Cheryl "virtually stipulated to the award of Conservator's fees below by raising no objection to that award." But, Cheryl's challenge here is to the award of fees to the *trustee*. She challenged those fees in her opposition to the attorney fee motion before the referee and so she preserved her contention on appeal. Cheryl's acknowledgment that section 15657.5 provides for reasonable fees to the conservator, does not mean that she acquiesced to an

Where fees of a trustee are not authorized by section 15657.5 and Code of Civil Procedure section 1033.5, the trial court acted improperly in awarding the trustee fees for his services here in connection the claims brought under the Elder Abuse Act.

[[**End published portion.**]]

c. *Cheryl's other challenges to the attorney's fees award have merit.*

Cheryl also argues that the amount of fees awarded to plaintiffs' attorneys was grossly excessive.

Section 15657.1 directs the trial court to consider in awarding attorney's fees, among other things, (1) "the factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California,"[10] (2) "[t]he value of the abuse-related litigation in terms of the quality of life of the elder . . . and the

---

award to the *trustee* that is not only unauthorized by the statute but would result in double recovery by plaintiffs.

[10] Rule 4-200—of the Rules of Professional Conduct of the State Bar of California (Rule 4-200) reads: "(A) A member shall not enter into an agreement for charge, or collect an illegal or unconscionable fee. [¶] (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: [¶] (1) The amount of the fee in proportion to the value of the services performed. [¶] (2) The relative sophistication of the member and the client. [¶] (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. [¶] (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. [¶] (5) The amount involved and the results obtained. [¶] (6) The time limitations imposed by the client or by the circumstances. [¶] (7) The nature and length of the professional relationship with the client. [¶] (8) The experience, reputation, and ability of the member or members performing the services. [¶] (9) Whether the fee is fixed or contingent. [¶] (10) The time and labor required. [¶] (11) The informed consent of the client to the fee."

results obtained," and (3) "[w]hether the defendant took reasonable and timely steps to determine the likelihood and extent of liability."[11]

We conclude that on its face the $1,077,579.08 as an attorney's fees award is excessive. Plaintiffs cannot deny they entered into this lawsuit fully aware that the chance for recovery of this sum from Cheryl was extremely low. Plaintiffs spent nearly $1.3 million in attorney's fees to obtain a total judgment of $683,000 excluding interest from a defendant with only one asset. We have taken judicial notice of the Summary of Account from May 24, 2003 through July 31, 2005 filed in the Los Angeles Superior Court case number BP093891, by Schwartz as trustee of the Trust. It shows that the trustee authorized disbursements of over $3 million -- much of which was litigation-related -- out of an estate valued at less than that amount (not including the money the trustee anticipated being returned to the Trust as the result of this lawsuit). The amount involved was far out of proportion to the results obtained. (Rule 4-200(B)(1) & (5).) The fees here have raised the shameful specter of the horrendous case of *Jarndyce v. Jarndyce* in Charles Dickens's *Bleak House*, where because of protracted delays -- albeit not at issue here -- the corpus of the estates were depleted by court costs and legal fees. (*Bleak House*, Charles Dickens, 1853, ch. LXV; see *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1187.)

A review of some of the other factors in section 15657.1 and Rule 4-200 reveals that this attorney's fees award is an abuse of discretion. As Cheryl observes, because she was not served with the complaint until September 2004,

---

[11] Section 15657.1 reads, "The award of attorney's fees pursuant to subdivision (a) of Section 15657 shall be based on all factors relevant to the value of the services rendered, including, but not limited to, the factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California, and all of the following: [¶] (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained. [¶] (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability. [¶] (c) The reasonableness and timeliness of any written offer in compromise made by a party to the action."

and the case was tried in March 2005, she had no time to evaluate the likelihood and extent of liability. (§ 15657.1, subd. (b).) Indeed, the virtual lack of discovery (Rule 4-200(B)(6)), the absence of a jury, the fact that the issues in this case were not complex or novel (Rule 4-200(B)(3) & (B)(10)), and that the fee was not contingent and so counsel were never at risk of not recovering fees (Rule 4-200(B)(9)), suggest that the fees here were avaricious. In fact, the referee found that the requests for attorney and trustee fees were "excessive given the amount of the ultimate judgment, among other things," including that "many" hours billed did not appear necessary to the results achieved by plaintiffs. Accordingly, the referee reduced the fees requested by 20 percent. While the referee made positive statements about the conduct of the attorneys, the referee also recognized the excessive nature of the fees.

We are fully aware that the review of the amount an attorney's fees award after trial is deferential and that we look to see whether the trial court abused its discretion. (*Carver v. Chevron U.S.A., Inc*., *supra*, 97 Cal.App.4th at p. 142.) We are also aware that " 'trial courts have a duty to determine whether a cost is reasonable in need and amount.' " (*Acosta v. SI Corp*. (2005) 129 Cal.App.4th 1370, 1380.) Given that the award of any fees to the trustee was unauthorized as a

matter of law, and given the attorney fees awarded are patently excessive, the entire fee award must be reversed.[12]

DISPOSITION

The judgment is reversed. Cheryl Lawson to recover costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.

---

[12] As the result of our holding, we need not address Cheryl's further contention that the award to the trustee was unauthorized because the Trust is neither an elder nor a dependent adult.