178 of 193 DOCUMENTS

Estate of OSCAR O. OTIS, Deceased. JANE F. DEMPSEY, Appellant, v. JOHN J. DEE, et al., Respondents.

B163785

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

2004 Cal. App. Unpub. LEXIS 4598

May 11, 2004, Filed

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PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest George Williams, Judge. Los Angeles County Super. Ct. No. BP014792.

DISPOSITION: Affirmed.

COUNSEL: Oldman, Cooley, Leighton & Sallus, Marshal A. Oldman and Susan R. Izenstark for Appellant.

Sullivan, Workman & Dee, Henry K. Workman and Henry G. Bodkin, Jr. for Respondent John J. Dee.

Poindexter & Doutre, Inc. and William M. Poindexter for Respondents Poindexter & Doutre, Inc.

JUDGES: WOODS, J. We concur: PERLUSS, P.J. ZELON, J.

OPINIONBY: WOODS

OPINION: INTRODUCTION

Appellant, Jane F. Dempsey ("Dempsey"), a 50 percent residuary legatee in the estate of Oscar O. Otis, aka Oscar Otis, aka Oscar Orting Otis ("Decedent/or Otis"), appeals from the judgment of the Los Angeles County Superior Court dismissing her objections to the petition filed by attorney and executor John J. Dee, ("Executor/or **[*2]** Dee") n1 of two wills of the decedent for extraordinary fees and costs for legal services on behalf of the decedent's estate, and her objection to the petition of respondent, Poindexter & Doutre, Inc. ("P & D"), for extraordinary fees and costs for legal services rendered to Dee.

n1 John J. Dee died on December 19, 2003, while this appeal was pending. We granted the request to substitute Henry K. Workman to succeed John J. Dee as executor of the estate of Otis and as respondent in this appeal.

Protracted litigation resulted in two appeals to this court resulting in filed opinions. The trial court declared the opinions to be "law of the case" n2 which required that the objections of Dempsey to the Executor's petitions be dismissed with prejudice. Following entry of the order of dismissal with prejudice, Dempsey filed a timely amended notice of appeal. For reasons hereafter given, we affirm the judgment of the trial court.

n2 As will be more fully developed herein, a sharp dichotomy exists between the colloquy of the court at oral argument declaring the case to be governed by "law of the case" and the ultimate written judgment which declares

the issues before the trial court to be "moot," without ever mentioning "law of the case."

[*3]

FACTUAL AND PROCEDURAL SYNOPSIS

Preliminary Statement.

In reading the briefs of counsel on appeal, several things are apparent from the beginning. Initially, all counsel are in essential agreement that the trial court exhibited confusion in applying the doctrine of "law of the case" to resolve the issues in the pending motions before the court, and based thereon coming to the conclusion that the action must be dismissed. Ironically, the eventual written judgment of the court differs from the reasons stated in the reporter's transcript purporting to dismiss the action based on the doctrine of "law of the case." Equally ironic is that none of the moving papers filed by counsel prior to the hearing on the motions contained any reference to the applicability of the doctrine of "law of the case" to the pending motions. The written judgment concludes that the petitions before the court are "moot" in view of the fact that the depleted estate is not asset sufficient to allow *any* recovery by Dempsey as a result of her objections. For the reasons hereafter stated, this court agrees that the dismissal was proper because Dempsey's objection to the petitions were in effect **[*4]** "moot."

Because counsel spent an inordinate amount of time on the confusion of the trial court in applying the doctrine of "law of the case," as amply demonstrated in the reporter's transcript, we deem it prudent to accentuate and focus on the motions that were before the trial court for resolution and Dempsey's opposition thereto.

Pending before the trial court was the executor's petition for fees for services rendered over a period approximating 10 years, including two will contests (inclusive of appeals), protracted litigation involving a living trust between the trustors (decedent and his wife) and the Otis estate, the petition of the law firm of Poindexter & Doutre, Inc. for extraordinary fees and costs for legal services rendered to Dee, the claim of special administrator Howard Klein for services rendered to the estate, and the claim of Dempsey for counsel fees for successes in contesting the 1987 will of the decedent.

We likewise alert the reader that a considerable historical explanation is deemed necessary by this court in view of the protracted litigation involved which eventually gave rise to the current appeal.

Historical context.

Revocable Trust and Pour **[*5]** Over Wills. Dee met Otis in October 1977 while handling a litigation matter. During the course of the litigation, Otis and his wife, Ticky, requested estate planning work. Dee referred the estate work to his partner, Henry Workman ("Workman"), who drafted the Otis Family Revocable Trust ("Family Trust") and prepared pour over wills. The documents were executed in December of 1977. Following the death of Otis's wife in 1979, Otis drew the income he was entitled to from the Family Trust, purportedly less than his full entitlement. Dee and one Sandy Buffaloe ("Buffaloe"), a family friend, became trustees of the Family Trust. n3

n3 Purportedly, Otis made a decision in late May of 1985 to claim all of the income he was entitled to under the Family Trust, which came to $6,000 per month. Coupled with this request, Otis made a claim for all accumulated income which was determined to be $370,000. Purportedly, Otis made the request to Dee and asked Dee, Buffaloe and his own accountant to determine the correct figures. In late 1986 and 1987 the requested transfers were made to Otis but not all distributions were in cash.

[*6]

Subsequent Wills. A July 1984 will was drafted by Workman for Otis, leaving his estate in trust to Helen Ewing for the benefit of Otis's live–in housekeeper, one Ramona Gutierrez, and providing that upon the housekeeper's demise, the estate would pass to Helen Ewing.

A will executed by Otis in July 1985 made changes in the contingent beneficiary. The contingent beneficiary was changed from the daughter of Ramona Gutierrez to Helen Ewing's daughter in the event of the demise of Helen Ewing.

Burial instructions were included in a similar will executed by Otis in December 1985.

Workman prepared a substantially different will for Otis in April 1986. Ewing was excluded; Dee was given a bequest

of $100,000; Dee was referenced by Otis as a close friend and a person that Otis hoped would serve in the capacity as co–trustee for the rest of his life; Dee was given the additional responsibility of serving as trustee of a testamentary trust with Ramona Gutierrez as beneficiary; monthly income was to be generated for the beneficiary by funding the trust with 60 California general obligation bonds each in the amount of $1,000; and remaining corpus and residue was to be divided equally **[*7]** between Dempsey and Dee upon the demise of Ramona Gutierrez. n4

n4 A telephone conversation, purportedly initiated by Otis, gave Dee the details of the April 1986 will. Dee's purported response was to inform Otis that Dee did not want any money from the will and suggested that Otis should follow his wishes in the trust and give the money to charity upon the demise of the Buffloes. Otis's purported reaction to Dee's statement was to inform Dee that Otis could do what he wanted to with his own money.

Workman prepared another will which Otis executed on December 8, 1986, making the same bequests as the April 1986 will, but providing that Dee was to receive the corpus of the testamentary trust upon the demise of Ramona Gutierrez, with the residue of the estate still being divided between Dee and Dempsey.

The *last* will of Otis was executed on September 10, 1987. Workman prepared the will which was executed by Workman and attorney Richard Llewellyn. The last will provided for a testamentary trust; Ramona Gutierrez **[*8]** was given Otis's house rent free for her life span and bonds sufficient to provide an income of $200 per week; upon the demise of Ramona Gutierrez, Dee was to receive the trust corpus; and Dee was left the residue of the estate in the will.

Partial Revocation of *last* (1987) Will.

On May 6, 1992, the 1987 will of Otis was admitted to probate. Dempsey and the sisters of Otis's predeceased spouse, Middy Shutt and Ruth Agnello ("Sisters"), filed separate petitions to revoke probate of the will. Dempsey sought to set aside the entire will. Sisters attacked only that portion of the will leaving the residue to Dee. Upon entry of judgment by the trial court revoking the entire will, Dee timely appealed to this court, which resulted in this court's opinion filed July 15, 1997, invalidating the bequests to Dee but affirming for probate proceedings those portions of the will leaving bequests to Ramona Gutierrez.

Family Trust Litigation Against The Estate.

Buffaloe, in her capacity as co–trustee and as income beneficiary under the Family Trust, filed a petition to have title determined to certain assets. The petition was filed pursuant to *Probate Code section 9860* **[*9]** on or about May 11, 1995, seeking to have assets transferred to Otis by Dee while acting in the capacity as co–trustee of the Family Trust invalidated by reason of Dee's undue influence over Otis in violation of Dee's fiduciary duties to Otis. The gravamen of Buffaloe's action theorized that Dee concocted the transfer of the assets to Otis so that Dee could eventually take those assets under the subsequent will of Otis. As an alternative ground for relief Buffaloe resorted to trust law to compel redress for breach of trust by Dee, seeking return of wrongfully distributed assets. Dee opposed both petitions filed by Buffaloe, contending the assets transferred to Otis were proper as accumulated income belonging to Otis; invasion of principal was permitted under the liberal provisions of the Family Trust; and Buffloe was a co–trustee under the Family Trust and willingly and knowingly participated in the transfers.

Five years after the commencement of Buffaloe's action the matter was settled and approved by the court in January 2001.

Settled also was a dispute between Dempsey and Dee. The dispute had its genesis in the belief of Dempsey that a summary judgment motion should have been **[*10]** made by Dee as executor to gain confirmation that the transfer of assets from the Family Trust to Otis was proper. Dee refused; upon motion by Dempsey, one Howard Klein was appointed as special administrator to represent the estate in the trust litigation; Klein made the motion for summary judgment as suggested by Dempsey and lost; Klein arrived at a settlement with counsel for Dee and Buffaloe which was approved by the trial court over Dempsey's objections.

At the time of the aforementioned settlements the estate was valued at approximately $670,000. The settlement provided that the estate would return to the trust assets valued at $225,000, $50,000 in cash and a trust deed note secured by Otis's condominium, for a total settlement valued at $300,000.

Admission Of 1986 Will To Probate.

Following partial revocation of the 1987 will, Dee filed Otis's 1986 will for probate which was contested prior to admission by the heirs at law, the sisters of Otis's predeceased spouse, previously referred to herein as Sisters. The pre–probate contest was resolved as follows: the 1986 will was admitted to probate; Dee was appointed executor; and following a timely appeal by Sisters, this **[*11]** court affirmed the judgment by written opinion filed on February 26, 2002. The 1986 will provided: a specific bequest to Dee of $100,000; upon the demise of Ramona Gutierrez, Dee was to receive the corpus set up for Gutierrez; and Dee and Dempsey would be equal residuary legatees.

Dee's History As Executor

Dee's history of service as executor of the estate of Otis is as follows: appointed executor of 1987 will on May 15, 1992; powers suspended on May 11, 1999, when Klein was appointed special administrator; reappointed executor of 1987 will on April 3, 2002, following settlement of the Buffaloe litigation and resignation by Klein as special administrator; and appointed executor of 1986 will on June 16, 2000, which is continuing.

Summary of Petitions For Fees.

By Dee.

In the petition filed by Dee in his capacity as executor, Dee claimed entitlement to $540,205.25 for extraordinary services rendered over a 10–year period by the law firm of Sullivan, Workman and Dee ("SWD") allegedly involving over 2,000 hours of service, and reimbursement for costs advanced by SWD in the amount of $16,702.89. The total amount claimed was $556,908.14, itemized as follows: **[*12]**

Estate and income tax matters – $7,901.25

Will contest of 1987 will – $12,577.50

Appeal of 1987 contest – $52,595.00

Will contest of 1986 will – $163,372.50

Appeal of 1986 contest–$ 55,290.00

Trust litigation – $248,469.00

Costs advanced – $16,702.89

By P&D.

P&D filed a petition for attorneys' fees pertaining to will contests and related matters totaling $118,850.

By Special Administrator, Howard Klein.

Howard Klein, in his capacity as special administrator, filed a petition in which he requested a sum approximating $87,000.

By Dempsey.

Dempsey filed a petition for $125,513 for services rendered by her attorneys in connection with the successful contest of the 1987 will.

Summary Of Dempsey's Objections To Fee Requests.

Written objections to Dee's petition for attorneys' fees are summarized as follows: P & D represented the executor in contest of the 1987 will and not SWD; in a separate petition, Dempsey contended that P & D is likewise not entitled to an award of fees; appeal of the decision revoking probate of the entire 1987 will was not authorized in advance by the probate court coupled with the **[*13]** fact that Dempsey never challenged the gifts to Ramona Gutierrez; it was Dee's wrongful conduct as trustee of the Family Trust which led to Buffaloe's litigation to recover assets transferred to Otis for the benefit of the Family Trust and eventual settlement; Dee should have paid the settlement amount and not the estate because SWD's efforts were in truth for the benefit of Dee; through most of the trust litigation the special administrator, Howard Klein,

represented the estate and not SWD; any fees claimed by SWD for defending the 1986 will contest should be subject to a set off for amounts paid out in settlement of the trust litigation by reason of Dee's wrongful conduct; recognizing that some fees might be legitimately awarded to SWD, the fees should be drastically reduced by reason of Dee's wrongful conduct and discounted by the amount of estate assets paid out to the trust in settlement of the trust litigation.

In points and authorities filed in opposition to the fee requests being considered by the trial court, Dempsey opined that Dee was entitled to fees and costs in the approximate amount of $190,000, reasoning as follows:

> Trust litigation – $160,469 – claim of $248,469 **[*14]** should be reduced by $88,000;
>
> Will contest of 1986 will – $16,205 – claim of $163,372.50 should be reduced by $147,167.50;
>
> Administrative costs – $5,567.27 – claim of $16,702.89 should be reduced by $11,135,62; and
>
> Tax work fees – being claimed in the amount of $7,901.25 were not contested.

The Judgment.

At the outset of the trial on September 23, 2002, the trial judge declared it felt bound by the appellate opinion of this court involving the second will contest pertaining to the 1986 will which would constitute "law of the case." The court asked counsel to take a short recess and review "Witkin" on the subject and ". . . tell me where we can go in view of the opinion involving Judge Shatford."

After the recess counsel for Dee moved to dismiss Dempsey's objections as moot because Dempsey would get nothing even if Dempsey prevailed in her objections, given the size of the estate, the uncontested fees and costs and the specific bequest to Dee under the December 1986 will. Counsel for Dempsey argued at length that the "law of the case" doctrine had no application to the pending matters before the court. Counsel for Dee continued to return to the "mootness" **[*15]** argument. Following an extensive dialogue with counsel, the court concluded: "As far as I'm concerned, I am bound by the decision of Mr. ― Judge Shatford. I'm bound by the appellate decision and the second opinion, and based upon the findings submitted at the time of the joint pretrial statement that the balance due here was insufficient to pay Mr. Dee his $100,000.00, the contest is dismissed." Counsel did not request a statement of decision.

The judgment of dismissal, entered October 15, 2002, stated in relevant part:

> "The oral motion of Dee, in which P&D joined, to dismiss as moot the Objections of Dempsey to the said petitions of Dee and P&D was entertained by the court. The court considered the Trial Memoranda, Trial Briefs and Points and Authorities submitted by the parties, the appellate decisions in contests of two of decedent's Wills, and oral argument, and good cause having been shown,
>
> "IT IS ORDERED that the Objections of Dempsey to the said Petitions of Dee and P&D be, and they hereby are, overruled and dismissed with prejudice."

The judgment goes on to apportion fees between the special administrator, Klein, P&D, and SWD, according to their stipulation as follows: **[*16]**

> "1. To Howard S. Klein, the sum of $45,000 cash;
>
> "2. To Poindexter & Doutre, the sum of $45,000 cash; and
>
> "3. To Sullivan, Workman & Dee, the balance of the estate, which will consist of cash immediately available in the approximate amount of $70,000, the balance, if any, remaining upon the death of Ramona Gutierrez[n5] in a contingency reserve of approximately $11,000 to cover unanticipated expenses during her lifetime, the proceeds of sale of the condominium after Ramona's death, and any accumulated net receipts."
>
> n5 Ramona Gutierrez died on August 8, 2003.

The judgment was approved as conforming to the court's order by Dempsey's attorney. A timely notice of appeal was filed by Dempsey on December 15, 2002, followed by a "corrected notice of appeal" filed the next day.

DISCUSSION

The Core Issue Is Whether The Judgment Of The Trial Court Was Correct In Law But Given For The Wrong Reason As Reflected in the Reporter's Transcript.

Dempsey belabors the fact that the decision **[*17]** of the trial court was based on a misapplication of the "law of the case" doctrine. Dee concedes that the court was confused by two prior appeals and application of the law of the case doctrine to the matters pending before the trial court. Both counsel agree, as does this court, that the "law of the case" doctrine has no application in this instance. This court need go no further than to observe that the parties to the two appeals to this court were *different*. Dempsey was not a party in the 1986 will contest appeal, but was a party in the 1987 will contest appeal. We fail to see how "law of the case" is applicable when the parties to the appeals are different, the facts and circumstances involved in the two appeals are different in that two different wills executed on different dates are at issue. In our opinion filed on February 26, 2002, pertaining to the 1986 will contest, we went to considerable length to point out that "law of the case" was not applicable as a result of our opinion filed on July 15, 1997, pertaining to the contest of the 1987 will. The trial court was indeed confused.

But further reading of this opinion should be undertaken before jumping to a premature **[*18]** conclusion that the matter requires a reversal and remand for further proceedings.

As previously indicated, the judgment makes it abundantly clear that the decision was based on "mootness" and not on law of the case. California law is clear that *judicial action and not judicial reasoning* is being reviewed on appeal. To state it in a slightly different manner, an appellate court is without authority to reverse a trial court decision if the disposition of the matter is correct but for the wrong reason. In *Davey v. Southern Pac. Co.(1897) 116 Cal. 325,* the California Supreme Court stated at page 327: "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will be disturbed on appeal 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." See also an expression of the same rule recently expressed in *Whyte v. Schlage Lock Co. (2002) 101 Cal.App.4th 1443 at page 1451* **[*19]** as follows: "Because we review the correctness of the order and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered." (See also *Wilshire Ins. Co. v. Tuff Boy Holding Inc. (2001) 86 Cal.App.4th 627, 638* whether the dismissal for mootness was within the trial court's discretionary power not whether the court erroneously applied the law of the case doctrine.)

Breach Of Discretion Is Our Standard Of Review.

The trial court found that good cause existed for overruling and dismissing Dempsey's objections to the fee petitions. Good cause findings are within the discretion of the trial court and a reversal will be forthcoming only if an abuse of discretion is patent on the record. (See *Laraway v. Sutro & Co. (2002) 96 Cal.App.4th 266, 273.)* In other words we search the entire record to determine if the court below exceeds the bounds of reason when all the circumstances before it are considered. The complaining party has the burden to establish an abuse of discretion and unless a clear case of abuse of discretion is shown and unless a miscarriage of justice is demonstrated, **[*20]** a reviewing court will not substitute its opinion and divest the trial court of its discretionary power. (See *Denham v. Superior Court (1970) 2 Cal.3d 557, 564, 86 Cal. Rptr. 65.)*

For the reasons hereafter stated, we find no demonstrated abuse of discretion by the trial court in dismissing Dempsey's objections with prejudice.

The Question Of Mootness Requires A Three Step Analysis In This Instance:

1. How much is left in the estate after agreed upon amounts are distributed;

2. How much is left in the estate for proper distributions yet to be made;

3. Is there a sufficient amount left in the estate to pay Dempsey anything on her claim after the analysis is completed under steps 1 and 2?

Step 1 analysis.

The analysis under step 1 brings with it the conclusion that the sum of $370,000 would be left in the estate. Although Dempsey vigorously objected to a proposed compromise claim endorsed by the special administrator and other parties to

the litigation, under the proposed compromise of claim the sum left in the estate, i.e. $370,000, was derived as follows:

$670,000 – Value of the estate as calculated by the special administrator.

$300,000 **[*21]** – Payments to Otis Family Trust pursuant to Compromise of Claim.

$370,000 – Left in the estate.

Step 2 analysis.

In her objections to compromise of the trust litigation, Dempsey estimated that $280,000 in attorney and administrative fees would have to be paid before any distribution was made. That leaves $90,000 in the estate for distributions calculated in the following manner:

$370,000 – Left in the estate per step 1 analysis

– $280,000 – Administration and Attorneys Fees

$90,000 – Left in the estate for proper distributions yet to be made.

Step 3 analysis.

In her opposition to the compromise agreement, Dempsey noted that Dee is entitled to $100,000 off the top plus sixty (60) State of California general bonds. It is obvious that after payment of $100,000 to Dee the estate would be reduced to a minus value of $10,000 ($ 90,000 left in the estate minus bequest to Dee of $100,000 = negative value of $10,000). Dempsey would therefore obtain nothing from the estate and the mootness of the controversy is readily apparent.

Dempsey's Claim Of Surcharge Against Dee.

Dempsey contends in her opening brief that "The **[*22]** vast majority of the attorneys' fees incurred by Dee's attorneys, SWD and P&D, were the result of Dee's own unscrupulous actions, the result of a **conflict of interest** between Dee and Oscar, his client, and **only benefitted Dee personally.** The fee should have been denied or surcharged against Dee. In addition, Dee should have been surcharged for the attorneys' fees incurred by Dempsey, a beneficiary of one–half of the residue of Oscar's estate under the 1986 Will, eventually probated; and, for the fees incurred by Klein as special administrator, hired to defend the estate against Dee's persistent unlawful and unethical actions." (Bold emphasis in the original text.)

Dempsey summarizes her case against Dee for surcharge as flowing from ten years of litigation, in which Dee wore a number of hats, all related to furthering his unethical scheme to obtain Oscar's money as follows: "Dee was Oscar's attorney since early 1977, spanning the last 15 years of Oscar's life; Dee's law partner, Workman of SWD, drafted Oscar's Trust; Dee was a trustee of Oscar's Family Trust which provided income to Oscar; Dee was nominated as Oscar's conservator; Dee was an alternate holder of Oscar's **[*23]** Power of Attorney for Health Care; Dee was nominated as trustee of Oscar's Testamentary Trust; Dee was the named executor of Oscar's estate; Dee offered Oscar's wills for probate; Dee hatched a plan to circumvent the terms of Oscar's Trust by causing the Trust to transfer its assets to Oscar for the eventual benefit of Dee as the principal beneficiary of Oscar's estate; Dee was the defendant in litigation surrounding Oscar's Trust which resulted in a settlement because Klein believed any court would look negatively on Dee's unethical conduct as an attorney; Dee's law firm drafted five wills for Oscar from 1985 to 1987, including the 1986 Will and the 1987 Will; In the first Will, Dee was not a beneficiary; With each succeeding will, Dee was given more and more of Oscar's estate as well as more power over the estate; For example, the 1986 Will named Dee as executor and left over half of Oscar's estate to Dee; The 1987 Will also named Dee as executor and named Dee as residuary legatee, succeeding to all of Oscar's estate (except for Ramona's life estate and small allowance), valued at over half a million dollars; It was this 1987 Will which both the trial and appellate courts found was **[*24]** the result of Dee's **undue influence** over Oscar; and the 1986 Will and the 1987 Will also created testamentary trusts in which Dee was the sole trustee." (Bold emphasis in original; record and exhibit references omitted.)

While acknowledging that a court cannot dismiss an action as moot if a substantial issue remains, citing *3 Witkin, California Procedure (4th ed. 1996) Actions, section 83*, page 148, Dee "contends that Dempsey's surcharge claim is not justiciable, and therefore does not dilute the mootness of Dempsey's objections."

In contending that Dempsey's claims to surcharge are not justiciable and that the denial of Dempsey's objections

without an opportunity to present evidence do not violate Dempsey's rights to due process, Dee makes the following arguments: 1) In Dempsey's objections to Dee's petition for fees filed June 20, 2002, Dempsey conceded that some fees might be awarded these attorneys but maintained that: "... fees requested by Dee should be drastically reduced and that even those that the court decides are due and owing should be set off by the amount of estate assets paid out to the trust in settlement of the trust litigation. **[*25]** " 2) Dempsey filed Points & Authorities in support of her objections to these fees on July 9, 2002, without mentioning surcharges or set offs and concluded that SWD was entitled to approximately $190,000 in fees and costs of litigation. n6 3) The Mandatory Joint Trial statement filed August 2, 2002, and signed by counsel for all parties tracked Dempsey's contentions in her Points & Authorities that SWD was entitled to more than $190,000 in fees and costs. n7 Dempsey stated that she had no opposition to Klein's fee as special administrator. Dempsey repeated her contention that any award of fees to SWD should be offset by the amount of the estate assets paid to the trust in settlement of the litigation. 4) Dee emphasizes that Dempsey's first reference to a surcharge (other than an offset of the settlement paid to the trust) came shortly after July 10, 2002, the date the probate court issued its summary judgment denying Dempsey's claim for fees but stating that the ruling was without prejudice to claims under *Probate Code section 11003*, subdivision (b) n8 or any other claim for surcharge against the personal representative. Dee points out that *Probate Code section 11003* **[*26]** refers to contests to settlement of the personal representative's account. *Probate Code 11003*, subdivision (b) permits the court to award a contestant to an account costs of litigation if the court determines that the representative opposed the contest in bad faith and without reasonable cause. The amount awarded is a charge against the representative's compensation. Dee maintains that this section has no apparent application to will contests or objections to settlements or representative's opposition thereto. Dee contends it is to be noted that Dempsey did not challenge Dee's accounts only his claims for legal fees. 5) After that Dempsey's claims for surcharge expanded. In a trial brief filed August 21, 2002, Dempsey claimed that the "vast majority" of the attorneys fees incurred by Dee's counsel should be denied or surcharged against Dee and, in addition, that Dee should be surcharged for the attorneys fees incurred by Dempsey and for the fees incurred by the special administrator. In a document filed with the court on September 12, 2002, entitled "Points and Authorities Re: Denial of Fees with a Conflict of Interest [*sic*]; Response to Trial Briefs **[*27]** of Dee and Poindexter" Dempsey stated that Dee's mootness claim ignored Dempsey's request that Dee be surcharged. 6) Rule 10.22(b) n9 of the Los Angeles County Probate Rules requires a Joint Trial Statement in each contested case set for trial in the probate department. It shall include a concise statement of each contested issue and a comprehensive discussion of each contested issue. The statement is clearly tantamount to a stipulation. A stipulation is an agreement between opposing counsel respecting business before the court. It is binding on the parties and, unless contrary to law, court rule or policy, is binding law in the court. A stipulation may include or limit the issues to be tried. (See *County of Sacramento v. Workers' Comp. Appeals Board (2000) 77 Cal.App.4th 1114, 1119; Bemer v. Bemer (1957) 152 Cal. App. 2d 766, 771;* see also *1 Witkin, Cal. Proc. (4th ed. 1996) Attorneys, §§ 289, 298* pp. 360, 369.) Dee maintains that Rule 10.22 is clearly intended to expedite presentation of a case by, among other things, requiring a comprehensive discussion of the parties contentions **[*28]** as to contested issues. (Rule 10.22(c)(7).) n10 Dee maintains that he and the trial court had the right to rely on Dempsey's contentions as being limited to those set forth in the Mandatory Joint Trial Statement. Dee further submits that Dempsey cannot expand her surcharge claims beyond that described in the Joint Trial Statement, i.e., that "any award of fees to SWD should be offset by the amount of the estate assets paid out to the trusts in settlement of the Buffaloe litigation."

n6 See Conclusion to Points & Authorities filed July 9, 2002, which reads as follows: "SULLIVAN and DEE have disregarded all rules relating to recovery of extraordinary fees and costs as promulgated by statute and case law. Based upon the rules and precedent set forth herein, SULLIVAN is, at most, entitled to $7,901.25 for Tax Matters, $16,205.00 for the 1986 Will Contest incurred before May 11, 1999, and $160,339.00 for the Trust Litigation incurred before May 11, 1999, for a total of $184,445.25, as opposed to the sum of $540,195.23 requested by SULLIVAN and DEE, and for costs of administration only in the amount of $5,567.27, and not $16,702.89, as sought."

[*29]

n7 The Mandatory Joint Trial statement filed August 2, 2002, states at paragraphs 5 and 6 the following: "The fees claimed by Klein are not contested. It is uncontested that the amounts sought in the pending fee petitions well exceed the value of the remaining estate. [P] The amount of fees which should be awarded to SWD and P&D is contested." We note that "surcharge" is not mentioned as a contested issue. Only the amount of fees to be awarded is contested.

n8 *Probate Code section 11003*, subdivision (b) states:

"If the court determines that the opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the compensation or other interest of the personal representative in the estate and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied."

n9 Rule 10.22(b) of the Los Angeles County Probate Rules reads as follows:

"**Joint Trial Statement**. The following procedures shall be followed in preparing the Joint Trial Statement:

"(1) *Meet and Confer.* No later than thirty (30) days before the day set for trial, the attorneys and parties appearing *in propria persona* shall meet and confer in good faith to prepare a Joint Trial Statement. The fact that attorneys and/or parties appearing *in propria persona* are unable to agree upon language to be included in a Joint Trial Statement as required under this Rule shall not excuse a failure to file a Joint Trial Statement. Any such disagreements should be reflected in the Joint Trial Statement by first setting forth as much as the parties can agree upon concerning a particular subject and then setting forth each party's version of that which cannot be agreed upon concerning that subject.

"(2) *Filing Joint Statement.* The Joint Trial Statement shall be filed directly with the trial courtroom clerk and served on all parties no later than ten (10) days before the day set for trial. Filing Separate Statement. If the parties are unable to agree on a Joint Trial Statement, each party shall file directly with the trial courtroom clerk and serve on all other parties a Separate Trial Statement in accordance with these instructions no later than ten (10) days before the day set for trial. However, the filing of a Separate Trial Statement shall not excuse a failure to timely file a Joint Trial Statement. A copy of the Joint Trial Statement or separate Statement shall be lodged at that same time directly in the trial courtroom.

"(3) *Extension of Time.* The time for filing a Joint Trial Statement or a Separate Trial Statement may be extended only by order of court."

[*30]

n10 Rule 10.22(c)(7) reads as follows:

"(c) Contents of Joint Trial Statements. All Joint Trial Statements and Separate Trial Statements shall contain the following: . . .

"(7) *Discussion of Contested Issues.* A comprehensive discussion of each contested issue shall be provided, which shall include the following:

"(i) Any factors relevant to that issue.

"(ii) Documents, schedules, summaries and expert reports (if applicable).

"(1) A list of all documents, schedules or summaries to be offered at the time of trial regarding the issue.

"(2) A summary of the document contents and purpose.

"(3) Copies of any appraisals and reports of experts to be offered at the time of trial.

"(4) Note: Failure to comply with this provision may result in an order excluding the document, schedule, summary, report, appraisal or testimony of the expert at trial.

"(iii) Witnesses.

"(1) The name and business address of any percipient or expert witness whom a party intends to call at the time of trial.

"(2) A brief statement setting forth the substance of the witnesses' testimony.

"(3) The provisions of (iii) (1) and (2) will not apply to any witness anticipated, in good faith, to be called solely for the purpose of impeachment.

"(iv) All points and authorities or legal argument relevant to that particular issue on which a party intends to rely."

[*31]

Dee further maintains that no surcharge is applicable in this case since a surcharge is a sum assessed against an executor for failure to use ordinary care and diligence in managing and controlling a decedent's estate resulting in losses thereto. (*Estate of Gerber (1977) 73 Cal. App. 3d 96, 109, 140 Cal. Rptr. 577.)* Dee points out it is not a charge arising out of actions by potential representatives before probate administration commenced. Dee's pre–probate conduct in transferring trust assets to Otis did not cause a loss or injury to the estate. If those actions caused a loss, it was a loss to the trust, not the estate. Dempsey appears to be contending that Dee should replenish the loss of assets that didn't belong to the estate in the first place. This argument is tantamount to seeking a windfall. Dempsey would have the estate keep the allegedly ill gotten gains for her benefit and have Dee personally reimburse the trust.

We note that Dempsey did not appeal the order granting the petitions to approve settlement of trust litigation filed January 12, 2001, therefore the order is final and by such order the special administrator, and Dee, as executor of the 1987 **[*32]** will, and successor to the special administrator Klein, as well as executor of the 1986 will, were released from all liability from any act directly authorized by the order, including the transfer of assets from the estate to the trust under the compromise. (*Prob. Code, § 7250*, subd. (a).) n11

n11 *Probate Code section 7250*, subdivision (a) reads as follows:
"

(a) When a judgment or order made pursuant to the provisions of this code concerning the administration of the decedent's estate becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, 'order' includes an order settling an account of the personal representative, whether an interim or final account."

Further, *Probate Code section 9651*, subdivisions **[*33]** (a) and (b) n12 protect a personal representative from liability for a "good faith" mistake in taking possession of non–estate property. As Dempsey argued in an ill–fated Motion for Summary Judgment and in opposition to the settlement of the trust litigation, Dee did nothing wrong in the transfer of trust assets to Otis, because it was appropriate under the broad invasion clause in the trust. Dee's good faith in taking possession of the former trust property under the mistaken impression that it belonged to the estate, and transferring it back to the trust in settlement of the trust litigation can be implied from the court's approval. *Probate Code section 9651*, subdivision (c) n13 requires a personal representative to deliver assets later determined not to be part of the estate to the person legally entitled to them. The settlement of the trust litigation accomplished this precise thing. Under this section the personal representative also has the discretionary right to seek court approval for such return of assets and this is just what Dee did in supporting Klein's and Buffaloe's petitions for approval of the settlement.

n12 *Probate Code section 9651*, subdivisions (a) and (b) read as follows:

"(a) A personal representative who in good faith takes into possession real or personal property, and reasonably believes that the property is part of the estate of the decedent, is not:

"(1) Criminally liable for so doing.

"(2) Civilly liable to any person for so doing.

"(b) The personal representative shall make reasonable efforts to determine the true nature of, and title to, the property so taken into possession."

[*34]

n13 *Probate Code section 9651*, subdivision (c) reads as follows:

"(c) During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the property is later determined not to be part of the estate of the decedent, the personal representative shall deliver the property, or cause it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received by the personal representative, less any expenses incurred in protecting and maintaining the property and in collecting rents, issues, and profits. The personal representative may request court approval before delivering the property pursuant to this subdivision."

We further note that a party can be denied an opportunity to present evidence for good cause. A dismissal for mootness is based on the judicial policy that courts should not squander judicial resources and time in hearing evidence in cases where any decision would be purely academic. (See *Campbell v. Superior Court (1932) 126 Cal.App. 652, 653–654.)* **[*35]** There is no right to present evidence on moot or abstract questions. Thus, there can be no denial of due process in dismissing this case as moot.

Having reached the conclusion that the points raised by Dee have merit, we find the trial court properly dismissed the objections of Dempsey on the basis of "mootness."

DISPOSTION

The judgment is affirmed. Each side to bear their own costs of appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.