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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FIRST REPUBLIC TRUST COMPANY, Plaintiff and Respondent, v. BRADFORD D. LUND, Appellant.	B258224 consolidated with Case No. B258380 (Los Angeles County Super. Ct. Nos. BP119205, BP129814, BP129815)
BRADFORD D. LUND, Plaintiff and Appellant, v. FIRST REPUBLIC TRUST COMPANY, et al., Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Bohm Wildish, James G. Bohm and Joanne P. Freeman for Appellant.

Mitchell Silberberg & Knupp, Allan B. Cutrow, Peter B. Gelblum, Karl deCosta and Andrew C. Spitser for Plaintiff and Respondents.

INTRODUCTION

Bradford Lund,[1] the grandson of Walt and Lillian Disney, appeals from rulings by the trial court following a bench trial that centered on opposing claims by Brad and the trustees of three trusts of which he is the primary beneficiary. With respect to one of the trusts, Brad asserts that the trustees improperly exercised their discretion in refusing to make principal trust distributions due to him on his 35th and 40th birthdays. Thus, he argues that the trial court erred in refusing to compel these distributions. He also contends the trial court erred in denying his request to remove the trustees based on alleged breaches of their fiduciary duties and in limiting the scope of related discovery. With respect to the other two trusts, the trial court found Brad adequately exercised his right under the trust instruments to remove and replace the trustee. However, the court also concluded that the trustee acted in good faith in seeking instructions from the court before effectuating that removal. Brad contends the latter finding was error.

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[1] We refer to members of the Lund family by first name for clarity because they share a surname; no disrespect is intended. Consistent with the convention adopted by both parties throughout the case, we refer to Bradford as "Brad."

We conclude all of the challenged rulings were supported by substantial evidence and fell well within the bounds of the trial court's discretion. We therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Lund family*

This case is one of many in a long-running legal battle over several multi-million dollar trusts established for the benefit of Brad and his siblings. Sharon Disney Lund, who was Walt Disney's daughter, had three children: her oldest daughter, Victoria Lund, and twins, Brad and Michelle Lund, born in 1970. Brad and Michelle's father, William Lund, was married to Sharon from 1969 until they divorced in 1977. Sharon died in 1993. Before her death, she established multiple trusts for the benefit of each of her three children. Victoria died in 2002 without children.

William subsequently remarried; throughout the course of this litigation he was married to Sherry Lund, his fifth wife. Both Sherry and William have adult children from other relationships.

In approximately 2003, Brad moved from California to Arizona to live near William, Sherry, and Sherry's daughter Rachel Schemitsch.

B. *Trusts at issue*

This appeal concerns three trusts that name Brad as the primary beneficiary.

1. *Residuary trust*

Sharon established the Lund Family Trust in 1989; she subsequently executed two amendments in 1991 and 1992. Upon Sharon's death in 1993, pursuant to the terms of the trust, three separate trusts were created from the residuary trust estate, one

for each of Sharon's children, each to be held and administered as a separate trust (the Brad residuary trust, the Michelle residuary trust, and the Victoria residuary trust). Since their inception upon Sharon's death, each of the three residuary trusts has had three individual trustees and one corporate trustee. Sharon selected William, her ex-husband, as one of the original co-trustees. Successor co-trustees over the years were selected by the remaining co-trustees. As of 2007, the four trustees were William, respondents First Republic Trust Company (FRTC), Robert Wilson, and L. Andrew Gifford. In November 2010, William resigned as a co-trustee pursuant to a settlement agreement (discussed further below) and the remaining co-trustees appointed respondent Douglas Strode in his place.

The terms of the residuary trusts provide the beneficiaries with a testamentary power of appointment to select how the balance of the trust shall be distributed or held upon that beneficiary's death. If no such selection is validly made and the beneficiary has no living children, upon the beneficiary's death the balance of the trust will be added to the principal of the remaining residuary trusts. Victoria made no selection and had no children. Thus, when Victoria died in 2002, the remainder of her residuary trust was added to the residuary trusts for Brad and Michelle. As of December 2012, the combined assets of the Brad residuary trust were in excess of $100 million. As of the time of trial in 2013, neither Michelle nor Brad were married or had any children.

Under the Brad residuary trust, the trustees are required to pay Brad a yearly "income payment." In addition, the trustees have the discretion to distribute principal from the trust to Brad for certain enumerated purposes, including the purchase of a

primary residence, business investments, and payment of travel and medical expenses. The trust also provides for distributions of 20 percent of the then-remaining principal balance when Brad reaches ages 35, 40, and 45 (the birthday distributions). However, the trust further provides: "Notwithstanding the foregoing, the Trustees shall have the power to withhold any such distribution in the event that the Trustees, in their discretion, determine that the child has not theretofore demonstrated the maturity and financial ability to manage and utilize such funds in a prudent and responsible manner" (the discretionary withholding power). In the event of such a withholding, the trustees "may subsequently make such distribution, or a portion thereof, if the Trustees later determine that the child has met the required standard."

In June 2005, at the time of Brad's 35th birthday, the trustees unanimously exercised the discretionary withholding power to withhold Brad's birthday distribution. William was one of the trustees at the time of this determination. At the same time, the trustees made the birthday distribution to Michelle under her residuary trust, in an amount (according to Brad) of approximately $35 million. As memorialized in a memorandum signed in 2007 by the trustees, they "determined that it was in Brad's best interest" to withhold the birthday distribution under the residuary trust. Brad reached age 40 in June 2010. At trustees' meetings held from June 2010 to March 2011, the trustees voted to defer acting on Brad's 40th birthday distribution or revisiting Brad's 35th birthday distribution. Ultimately, at a meeting in June 2011, the trustees decided to withhold all of Brad's 35th and 40th birthday distributions. As explained further below, William was no longer a trustee at the

time of this decision. As of trial, Brad had not received any part of these distributions.[2]

2. *1986 trust*

In 1991, Sharon executed the Sharon Disney Lund 1986 Irrevocable Trust (the 1986 trust). Upon execution, the trust was divided into three equal subtrusts for the benefit of Victoria, Brad, and Michelle. Upon Sharon's death, the entire net income of each subtrust was to be "paid to or applied for the benefit of" each child, not less often than quarterly. If that income was insufficient, "in the discretion of the Trustee, to provide for the health, support, maintenance and education of the Beneficiary, the Trustee shall pay to the Beneficiary or apply for the Beneficiary's benefit, so much of the principal . . . up to the whole thereof, as shall be necessary in the Trustee's discretion for such purposes," taking into consideration other available resources. Similar to the residuary trusts, the 1986 trust provides a testamentary power of appointment upon the beneficiary's death; otherwise, the trust balance augments the shares of the remaining beneficiaries. As of 2011, the corpus of Brad's subtrust totaled over $7 million in bonds and cash.

The 1986 trust has a sole corporate trustee. Between 2009 and the time of trial, FRTC was the acting trustee. Under the terms of the 1986 trust, Brad has the power to remove the acting trustee from his subtrust and replace it with "a corporate

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[2]The parties stipulated to the basic facts regarding the birthday distributions in a joint trial statement submitted prior to trial. We discuss in further detail below the evidence regarding the trustees' decisions to exercise the discretionary withholding power.

institution qualified to act as Trustee" (the trustee removal power).

3. *1992 trust*

The 1992 Bradford D. Lund Irrevocable Trust was executed by Brad as trustor and Sharon as trustee in 1992 (the 1992 trust). The 1992 trust was funded by Brad with his Walt Disney Company stock. Sharon acted as the sole trustee until her death, succeeded by a designated corporate trustee. Under the terms of the trust, the entire net income of the trust is to be distributed to Brad in "convenient installments, but not less often than quarterly," plus additional payments as needed to provide for his "health, support, maintenance, and education," at the discretion of the trustee. The entire remaining balance of the trust principal is to be distributed to Brad in specified percentages at ages 35, 40, and 45, subject to the discretionary withholding power.[3] As of 2011, the corpus of the 1992 trust totaled over $10 million in stock and cash.

Between 2009 and the time of trial, FRTC was the acting trustee of the 1992 trust. The 1992 trust also provides Brad with the trustee removal power, and allows him to replace the removed trustee with "a bank or trust company . . ., or one or more individuals or any combination thereof."

C. *2009 litigation*

Michelle suffered a ruptured brain aneurysm in September 2009, from which she eventually recovered. This event preceded a flurry of litigation in late 2009 in California and Arizona related to Brad, Michelle, and their trusts. We relate the

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[3] The status of the birthday distributions under the 1992 trust were not raised in the petitions below and are not at issue in this appeal.

background of these proceedings to the extent they are relevant to the instant matter.

1. *Prior California litigation and settlement*

On October 20, 2009, FRTC, Gifford, and Wilson, as three of the four trustees for the Brad and Michelle residuary trusts, filed petitions for redress for breach of trust, seeking to remove William as the fourth trustee. The petitions alleged that William breached his fiduciary duties to the trusts, and as a result received millions of dollars in "kickbacks" related to certain real estate purchases. The petition on the Brad residuary trust also sought appointment of a guardian ad litem for Brad, alleging that Brad "apparently experienced oxygen deprivation" during birth, resulting in brain damage. The petition alleged that Brad had previously lived independently in California, "held a job, and traveled on his own." However, after William "moved Brad" to Arizona to live next door to William in approximately 2003, Brad "has become isolated from his family and friends, outside of [William], [William's] current wife [Sherry], and her children."

Brad and William filed responses to the petition, alleging that the money William received was compensation for trust-related work and both Brad and Michelle had consented to the transactions. Both also filed affirmative petitions, asserting various breaches of trust by the other three co-trustees and requesting their removal. In his petition, Brad alleged his "concern" over whether the other trustees were acting for his benefit and noted an emerging conflict causing the relationship between Brad and the trustees to "irretrievably [break] down." Among other things, he alleged that the trustees filed their petitions with little investigation and without consulting him, and that they were working with petitioners in an Arizona

guardianship proceeding to "remove William from Brad's life and to exert unwelcome control" over Brad.

The parties—Brad, Michelle, and the four trustees, individually and as co-trustees of the residuary trusts—entered into a settlement agreement in November 2010 (the settlement agreement). The court entered an order approving the settlement agreement on November 12, 2010. Under the settlement agreement, William agreed to resign as co-trustee from the Brad and Michelle residuary trusts and from all positions at any entity controlled by those trusts. The agreement further provided that, at Brad's request, the Brad residuary trust would pay William $500,000 per year for life, as "extraordinary fees for past services." The settlement agreement also contained denials of wrongdoing by any party and releases of all claims, with the express reservation of rights for actions by Brad related to his right to receive his birthday distributions.

Litigation on the Brad residuary trust resumed shortly after entry of the settlement agreement in November 2010. The parties filed various petitions related to payment of attorneys' fees, allegations of breach of agreement, and other claims stemming from the settlement agreement.

2. *Arizona litigation*

In October 2009, Diane Disney Miller (Brad's aunt and Sharon's sister) and two of Brad's half-sisters, Kristen Lund Olson and Karen Lund Page (William's daughters with a different mother) filed a petition for appointment of a guardian and conservator over Brad in Arizona Superior Court, Maricopa County (2009 Arizona petition). In support of the claim that Brad required such assistance, the petition cited a prior guardianship petition filed in Arizona by Brad in 2006, seeking

appointment of William, Sherry, Michelle, and Sherry's daughter, Rachel as his guardians (2006 Arizona petition). The 2006 petition was ultimately withdrawn. Also in 2006, Brad signed a durable power of attorney designating William as his agent. At the time of trial and judgment in this action, the 2009 Arizona petition was still pending.[4]

3. *Conservatorship over Michelle*

In November 2009, as a result of her injuries from her brain aneurysm, Michelle filed a petition in Orange County Superior Court, voluntarily seeking appointment of Gifford and Wilson as temporary co-conservators over her estate. Her petition was granted; the temporary conservatorship was terminated in July 2010.

D. *Petitions at issue*

The instant appeal arises from three petitions related to three trusts: (1) a petition filed by Brad regarding the Brad residuary trust, seeking to compel his 35th and 40th birthday distributions and to remove the current trustees; and (2) two petitions for instructions filed by FRTC as trustee of the 1986 and 1992 trusts, related to Brad's purported attempt to remove it and appoint a new trustee. Due to the overlapping issues and parties, the petitions were tried simultaneously.

1. *Residuary trust case*

Brad filed the first petition at issue here in December 2010 in his residuary trust case,"(1) to compel co-trustees to comply with trust provisions and cause trust to distribute funds to the beneficiary; (2) for redress for breach of trust; (3) for removal of co-trustees Gifford and Wilson; and (4) for a surcharge against co-

[4] We denied Brad's requests for judicial notice regarding the outcome of the 2009 Arizona proceeding.

trustees." Following several motions to strike filed by the trustees and several subsequent amended petitions by Brad, the parties stipulated to allow Brad to file a fourth amended petition. That petition was deemed filed on November 6, 2013 and served as the operative petition in the residuary trust case at the time of trial (Brad's residuary petition). In essence, Brad alleged that the trustees improperly denied his birthday distributions and engaged in acts in breach of their fiduciary duties to him, thereby warranting their removal as trustees.

2. *1986 and 1992 trust cases*

The petitions at issue in the 1986 and 1992 trust cases were precipitated by two letters received by FRTC, the sole trustee for those trusts. First, on June 10, 2011, Arizona attorney Douglas Wiley sent a letter to FRTC stating that he was advising Brad regarding Brad's personal estate and tax planning and that "Brad has decided" to remove FRTC from the 1986 and 1992 trusts (the first Wiley letter). As to the 1986 trust, Wiley stated Brad wanted to appoint "a local Arizona corporate Trustee." As to the 1992 trust, Wiley stated that Brad wanted to exercise his right "to appoint both Brad and myself as the two Co-Trustees," and that the trust would be "managed by a local investment advisor." The letter also purported to bear Brad's signature as "approved and accepted."

On July 14, 2011, Wiley sent a second letter to FRTC (the second Wiley letter). In this letter, Wiley repeated the prior statements regarding Brad's desire to remove and replace FRTC as trustee of the 1986 and 1992 trusts, and also included instructions to transfer the assets of the trusts to an investment firm in Arizona, whose principal "has known Brad and his family

for a number of years." This second Wiley letter was not signed by Brad.

In response, FRTC filed Petitions for Instructions (the PFIs) regarding its status as trustee of the 1986 and 1992 trusts on July 26, 2011. In the PFIs, FRTC related receipt of the two letters from Wiley purporting to exercise Brad's removal power. However, FRTC alleged that during a deposition on June 29, 2011 (after the first Wiley letter but before the second one), Brad testified he did not know what was being done with respect to his trusts and was unfamiliar with their details.[5] Thus, according to FRTC, in light of the contradictory information related by Brad and Wiley, and due to ongoing concerns regarding Brad's mental capacity and possibility of undue influence, FRTC believed it needed guidance from the court to determine whether Brad had validly exercised the removal power. FRTC also alleged that it filed the PFIs "in good faith, and upon being advised by counsel that doing so is necessary or advisable for the protection of the interests of the [1986 and 1992 trusts] and beneficiaries."

In response to the PFIs, Brad filed objections and several motions attempting to remove FRTC as trustee and appoint an interim successor trustee. In his objections to the PFIs, Brad sought an award of attorneys' fees and costs, which he claimed "should be a surcharge against [FRTC] and not charged to the Trust." Brad also filed motions for judgment on the pleadings and for summary judgment, all of which the court denied. The

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[5]For instance, Brad testified at his deposition that he had never read the 1986 or 1992 trusts, had not done anything to try to change the trustee, and did not know anything about the trustee removal provision.

court also denied Brad's requests to remove FRTC and appoint an interim successor while the matter was pending.

E. ***Trial and statement of decision***

The petitions on the Brad residuary trust, the 1986 trust, and the 1992 trust were tried simultaneously in a bench trial between December 5 and December 23, 2013. At the conclusion of the trial, the court issued a proposed statement of decision, and both parties filed objections. The court issued a final statement of decision on June 3, 2014. In its lengthy decision, the court addressed the contested issues identified by the parties as follows:

With respect to Brad's claims regarding the residuary trust, the court found that the trustees did not abuse their discretion in withholding Brad's 35th and 40th birthday distributions from that trust. The court noted that the trustees' exercise of the discretionary withholding power "must be reasonable," and not merely made in good faith. As we discuss further below, the court found the trustees introduced "substantial evidence . . . to support their position" that at the time of Brad's 40th birthday, he "did not have the maturity and financial ability to manage and utilize a substantial trust distribution." In particular, the court found it compelling that Brad himself contended he was significantly impaired when he sought appointment of William and Sherry as his guardians in Arizona in 2006, and that these limitations were echoed in a declaration by Brad's treating physician at the time. In addition, the court cited evidence of ongoing concerns over Brad's "worsening" condition, as noted by William and other family members in 2009. The court also noted that several trustees who had extensive experience with the Disney family testified that

Brad did not have the necessary maturity or financial ability to manage the trust distributions. Further, the court relied on the fact that William had agreed with the denial of Brad's 35th birthday distribution in his capacity as a trustee at the time.

In finding for the trustees on this issue, the court rejected Brad's argument that "a definite external standard exists by which one can judge the Trustees' conduct," namely, standards used to award birthday distributions to Victoria and/or Michelle. Rather, the court found that "the evidence suggests that the specific circumstances of each individual beneficiary were considered at the time the Trustees determined whether to exercise their Discretionary Withholding Power." The court also disagreed with Brad's assertion that the trustees acted with an improper motive in withholding his birthday distributions. Instead, the court found that "the Trustees have clearly demonstrated that they are legitimately concerned about Mr. Lund's ability to protect himself from those around him who may wish to take financial advantage of him." In light of these findings, the court refused Brad's request to compel the trustees to make any birthday distributions to Brad.

Next, the court concluded that the trustees of the residuary trust did not breach their fiduciary duties to Brad. The court held that the evidence at trial was "overwhelming that the Trustees' actions about which Mr. Lund complains have been motivated out of a desire to protect Mr. Lund from those whom they perceive as taking advantage of Mr. Lund. Their concerns are not unfounded." The court also found insufficient evidence to support Brad's claim that the trustees harbored hostility toward him to an extent requiring their removal. As such, the court denied Brad's request to remove the trustees of the residuary

trust. The court noted that the issue of any surcharge to the trustees was "beyond the scope of this hearing," but could be raised together with future trust accountings.

With respect to the 1986 and 1992 trusts, the court found that Brad had effectively exercised his power to remove FRTC as trustee. After discussing in detail various pieces of evidence, including the trial testimony of Brad and a psychiatric expert for the trustees, the court concluded that while Brad "is dependent upon those around him, the evidence is insufficient to establish that Mr. Lund is not acting of his own will and desire on this issue." Thus, the court directed FRTC to transfer the assets of both trusts to Mutual of Omaha, the corporate successor trustee selected by Brad. On the other hand, the court found that the trustees brought the PFIs in good faith, given the evidence of "significant issues concerning whether [Brad] was exercising the Trustee Removal Power and whether he was doing so in a knowing, voluntary and intelligent manner." The court ordered both FRTC and Mutual of Omaha to file accountings regarding the 1986 and 1992 trusts.

Brad timely appeals from the judgment following the court's statement of decision.

DISCUSSION

Brad challenges a number of aspects of the trial court's decision. We examine each in turn and find no error.

A. *Good faith filing of PFIs regarding 1986 and 1992 trusts*

Brad contends the trial court erred in finding that FRTC acted in good faith in bringing the PFIs on the 1986 and 1992 trusts. Specifically, Brad argues that a finding of good faith required evidence that FRTC received advice of counsel that the

proceeding was necessary before filing the PFIs. FRTC proffered no such evidence at trial; thus, Brad asserts the court's finding of good faith was erroneous as a matter of law.

1. *Background*

Brad filed a motion in limine before trial seeking to exclude evidence that FRTC "sought the legal advice of counsel before bringing its petition." Brad argued that FRTC had "deliberately injected" advice of counsel as a defense into the case, but nevertheless refused to provide any discovery on the details of such advice, asserting the attorney-client privilege. FRTC filed an opposition, stating that evidence regarding advice of counsel was relevant only to Brad's "request for affirmative relief in the form of a surcharge." Otherwise, FRTC contended the issue was not relevant to the trial or the issues in the petitions. FRTC also argued, to the extent the issue was relevant, Brad provided no evidence to support his claims of discovery misconduct and took no steps to obtain such discovery. In reply, Brad asserted—without citation to authority or evidence—that the advice-of-counsel issue was relevant to FRTC's claim that it acted in good faith in bringing the PFIs, but that FRTC's evidence should be excluded as a sanction for discovery misconduct.

At the hearing on the parties' motions in limine, the court granted Brad's motion, noting that "I think we have an agreement" that the advice-of-counsel issue was not relevant to the trial, but was "only relevant to the surcharge issue." Thus, "when, and if we get to a breach, and there are damages, and we need to determine what the surcharge is…we will deal with the advice of counsel defense, but I think we have an agreement that it is not relevant, and unless and until there is a liability determined or a breach of trust, there is no reason to get to

damages." Accordingly, the court bifurcated the advice-of-counsel issue. When asked if he wanted to be heard, Brad's counsel argued several other motions in limine, but made no further statements regarding advice of counsel.

Consistent with the bifurcation, the court's proposed statement of decision included no discussion of the advice-of-counsel issue when finding that FRTC acted in good faith in filing the PFIs. Instead, the court based its finding on the other evidence adduced by FRTC demonstrating its belief that Brad was subject to undue influence and was therefore not fully exercising his trustee removal power. In his objections to the proposed statement of decision, Brad argued that FRTC failed to prove good faith because it introduced no evidence regarding advice of counsel. He cited only the trust documents themselves in support of this argument and did not otherwise raise or object to the court's bifurcation order. The court's final statement of decision noted that at a hearing after the objections were filed, the parties indicated that neither intended to "appeal the court's orders with regard to the 1986 Trust or the 1992 Trust… Accordingly, the court's reasoning with regard to resolution of the issues" related to those trusts "remains unchanged." As such, the statement of decision did not include any discussion regarding advice of counsel.[6]

2. *Analysis*

Both parties appear to suggest that the trial court found, as a matter of contract interpretation, that the 1986 and 1992 trusts did not require FRTC to seek advice of counsel before filing the

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[6] The court did refer to the trust language as the "exoneration clause" in an unrelated section of its decision, but with no discussion of the issue.

PFIs. They further agree that this ruling is reviewable de novo. We do not reach the substance of Brad's contract argument, as the trial court made no such finding and Brad did not otherwise challenge the bifurcation of this issue.

Initially, Brad argues that the ruling was in error based on the relevant provisions of the trusts. He cites to article V of the 1986 trust, titled "General Provisions," which states, in pertinent part: "The trustee shall be fully protected in any action or nonaction taken, permitted or suffered in good faith and in case of legal proceedings involving the Trustee or the principal or income of the trust estate, the Trustee may defend such proceedings, or may, upon being advised by counsel that such action is necessary or advisable for the protection of the interests of the Trustee or of the beneficiaries, institute any legal proceedings." On the other hand, FRTC argues that this advice-of-counsel language speaks to whether a trustee may be exonerated from any liability, but does not impose a limitation on the trustee's powers to initiate a legal proceeding. FRTC points to the broader language defining the trustee's powers elsewhere in the trust documents, as well as within the Probate Code.

From our review of the record, it does not appear that the trial court ruled on whether the 1986 and 1992 trust language required FRTC to seek advice of counsel before filing the PFIs. Nor does either party cite to any such ruling. Rather, in the two paragraphs of hearing transcript devoted to this issue, the trial court bifurcated the advice-of-counsel question based on FRTC's statement that it was relevant only to its exoneration from any surcharge to be determined after a breach was found, as well as the court's belief that Brad agreed with that position. To the extent Brad disagreed, he failed to correct the trial court or object

to the proposed bifurcation. As such, he has forfeited his right to do so now. (See *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830; *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.) As a result of the bifurcation, it was not error for the trial court to omit any findings or analysis regarding the advice-of-counsel issue in its statement of decision.

Further, this court cannot review the correctness of a ruling that was never made. The parties' arguments regarding the correct interpretation of the trust language on the advice-of-counsel issue were never made during the motion in limine proceedings, and it does not appear they were ever considered or ruled upon by the trial court at any other time. We decline to do so in the first instance. Similarly, the trial court did not rule on Brad's claim that FRTC should be precluded from introducing evidence at trial on the advice of counsel because of FRTC's purported discovery misconduct. Brad has not suggested this was error, and we find none.

The second part of Brad's argument posits that the trial court could not have found FRTC acted in good faith in filing the PFIs without also finding that FRTC relied on the advice of counsel. But Brad provides no authority to support his contention that evidence of advice of counsel was part of FRTC's "prima facie case" to establish good faith. Instead, he simply refers to the language of the trust instruments themselves, again asserting, as a matter of contract interpretation, that the trust language required FRTC to seek advice of counsel before filing the PFIs. This is insufficient to meet Brad's burden to demonstrate error on appeal. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["When a point is asserted without argument and authority for the proposition, 'it is deemed to be

without foundation and requires no discussion by the reviewing court.' [Citations.]"]; *Sporn v. Home Depot USA, Inc*. (2005) 126 Cal.App.4th 1294, 1303.) Brad does not otherwise challenge the court's conclusion that FRTC acted in good faith. Thus, we find no error.

B. *Withholding birthday distributions from Brad residuary trust*

1. *Relevant Evidence*

Much of the evidence adduced at trial focused on the trustees' decisions to deny Brad his 35th birthday distribution in June 2005 and his 40th birthday distribution between June 2010 and June 2011, including the bases for those decisions and the information known to the trustees at the time. Key portions of this evidence included the following:

Quarterly trust meeting minutes

The trustees held quarterly meetings regarding the residuary trust, generally in Los Angeles, California. The trustees raised the subject of the 40th birthday distributions for Brad and Michelle at the meeting in June 2010, a few days before their 40th birthday. The meeting was attended by the four then-trustees--William, Gifford, Wilson, and Michael Harrington, FRTC's president, on behalf of FRTC. Michelle also attended in person and Brad attended by phone. According to the minutes of the meeting,[7] William asked Michelle about her health status following her aneurysm the year before. Michelle reported that her doctors told her she had recovered to 98 percent of her pre-

[7] Each set of trust meeting minutes was signed and verified by the attending trustees as accurate, although the trustees testified at trial that the minutes did not reflect the entirety of the discussions held.

aneurysm condition. The trustees then unanimously agreed to make the 40th birthday distribution to Michelle.

Turning to the issue of Brad's distribution, Gifford reminded the group that the trustees had denied Brad's prior distribution in 2005, finding that he did not meet the trust standard. Gifford then asked for comments about the current distribution. William reported that recent testing by Brad's physician, Dr. Duane, showed Brad's cognitive abilities had improved. Therefore, William proposed making the distribution to Brad and stated that William "will be setting up a Revocable Living Trust for Brad." Harrington recommended deferring the decision until the next meeting in September. Wilson noted he was "encouraged" by William's report but needed an independent, professional opinion on whether Brad was capable of managing his money. He cited a similar scenario with Victoria in the past. He further stated that he "wants to make an evaluation after a plan is presented." Gifford agreed to defer, not based on a specific medical diagnosis, "but whether Brad can manage his own money." Gifford also reminded the group that "less than 18 months ago [William] gave a pretty dire diagnosis of Brad, serious enough that he wanted control of Brad's accounts and . . . a Power of Attorney or Conservatorship for Brad." Gifford also noted he did not feel comfortable making the decision in light of the pending 2009 Arizona conservatorship proceeding. Apart from William, the three other trustees agreed to defer the decision on Brad's distribution "until the Arizona proceedings have some resolution."

At the following two meetings in September and December 2010, Gifford, Wilson, and Harrington again voted to defer the decision on Brad's distribution because the status of the 2009

Arizona conservatorship proceeding had not changed. Brad attended both meetings by phone. At the September meeting, William again stated he thought they should approve the distribution. After the decision to defer during the December meeting, Brad asked: "What are you trying to tell me?" Gifford stated that "the trustees need more information to make a decision and one piece that they need is what the court decides" in Arizona. Wilson also noted that the trustees had not seen Brad during the last two meetings, and asked whether he could attend the next meeting in person. Brad said he would try.

Brad attended the January 2011 meeting by phone. Prior to that meeting, William had been removed as a trustee pursuant to the parties' settlement agreement. Thus, at the January 2011 meeting, the remaining three trustees with approval from Brad and Michelle, agreed to appoint Strode as the new trustee in William's place. The trustees also voted to defer Brad's distribution and again requested that Brad attend the next meeting in person. At the next meeting in March 2011, which Brad attended by phone, the trustees again voted to defer the distribution decision and requested Brad attend in person. Wilson told Brad to "feel free" to call any one of the trustees if he had any questions and Brad responded that he would.

Brad did not attend the next meeting on June 1, 2011. During that meeting, the trustees made a final determination that Brad did not meet the trust standard and therefore agreed to withhold Brad's 40th birthday distribution. The trustees noted the prior decision made in 2005 as to the 35th birthday distribution, which was reaffirmed in 2007.[8] They agreed "that

[8] The decision in 2005 was not reported in the meeting minutes as to Brad, but it is undisputed that the trustees at the

there has not been a change in [Brad's] circumstances since the 2005/2007 decision of the trustees which would now warrant a distribution to him" under the trust standard. Brad was informed of this decision by letter dated June 24, 2011.

Testimony of the trustees

Wilson, Gifford, Strode, and Harrington all testified at trial. The trustees testified that the same trust standard—based on the language of the trust instrument—applied to Victoria, Michelle, and Brad, for distributions from their mirror residuary trusts. Because Brad alleged that the trustees treated him unfairly in denying his birthday distributions while granting those for Victoria and Michelle under their identical subtrusts, the parties presented evidence regarding the trustees' decisions as to all three beneficiaries.

Wilson, who worked for the Disney family for 45 years, was the only current trustee who also voted on the birthday distribution to Victoria in 2001. He testified that the trustees met with Victoria and her advisors regarding Victoria's plans for managing the distributions. He wanted to know that Victoria had the understanding and maturity to work with financial advisors. Ultimately, the trustees (including William) unanimously approved the distribution to Victoria. Wilson testified to his opinion that Brad was not as capable of handling financial affairs as Victoria or Michelle were. He thought Victoria had the maturity to work with advisors; by contrast, he had never observed the same with Brad.

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time voted unanimously to give Michelle her 35th birthday distribution and to deny Brad his. After FRTC became the corporate trustee in 2007, the trustees signed a memorandum confirming and documenting this decision.

With respect to Brad's 35th birthday distribution in 2005, Gifford testified that none of the trustees ever suggested that Brad should get the distribution. Instead, they unanimously felt Brad did not meet the standard, including William and Ron Gothner, an original trustee who had drafted the residuary trust for Sharon. In fact, William "led . . . off" the discussion, as the first among the trustees to suggest that Brad did not meet the standard. The trustees also voted unanimously at the time to give Michelle her 35th birthday distribution.

Each trustee testified at length regarding the factors that influenced his decision to deny Brad his 40th birthday distribution. Importantly, each trustee detailed personal interactions with Brad over the course of many years and the impressions each formed of Brad's capabilities based on those interactions. Harrington stated that his impression when he first met Brad in 2007 was that Brad had "significant cognitive impairments," and that impression had not changed between 2007 and 2011. Gifford, who voted against the prior distribution, testified it did not appear to him that Brad had improved between 2005 and 2011; thus he voted to deny distribution both times. Strode testified that his interactions with Brad from 1997 to 2011 influenced his decision to withhold the 40th birthday distribution, and that he did not notice any improvement of Brad's mental condition over the years. Wilson had known Brad since 1992, voted against the distribution in 2005, and had not seen any improvement in Brad between 2005 and 2010. He testified that his determination that Brad did not meet the trust standard was "not close."

Multiple trustees also pointed to Brad's lack of regular attendance at quarterly trustee meetings and his limited

engagement when he did attend. Harrington could not recall Brad attending any meetings in 2007 or 2008, including an important all-day meeting held in Arizona in late 2007. Moreover, at the meetings Brad did attend, Brad "sometimes follows, sometimes does not. Sometimes, actually goes to sleep. Is not engaged." Harrington explained that this was a factor in his decision on the distribution because Brad's "lack of engagement, involvement in strategic planning coupled with what I had observed [regarding Brad's cognitive impairments] just kind of reinforced what we had already been told, that he was not capable of managing his financial affairs under the trust." By contrast, several trustees noted Michelle's regular attendance at meetings and substantive participation, apart from the months following her aneurysm in 2009. Strode, who reviewed the trustee meeting minutes from approximately 1993 through 2012, testified that Brad attended 18 meetings in person, five by phone, and did not attend 80 meetings in that period.

The trustees also testified to their reliance on statements and conduct by the family prior to 2011 relating to Brad's inability to meet the trust standard. In particular, they noted the 2006 Arizona petition, which was filed by Brad seeking a determination that he was "incapacitated" under Arizona law. The petition was supported by a report from Dr. Duane, who had been treating Brad since 2003. Dr. Duane noted Brad's "chronic cognitive disabilities with recent two year progressive decline in behavior and no expectation of change." The trustees confirmed that this report was consistent with their observations of Brad and the reports they had received from William regarding Brad's condition. According to several of the trustees, William stated he and Brad had dismissed the 2006 guardianship petition because

a guardianship would have required court supervision and accounting. Wilson also noted that William's power of attorney over Brad was the broadest he had ever seen.

In addition, Gifford testified that when Brad moved to Arizona around 2003, William stated Brad was moving because he "couldn't live alone." Gifford also cited to a letter sent by Sherry to Michelle in 2004, stating that Brad was incompetent. Then, in 2007, William told Gifford not to send the quarterly meeting books to Brad, "that he couldn't understand them, and just to send them to him, and [William]would take care of discussing trust business with Brad." Strode also relayed statements made by William prior to 2009 regarding Brad's "declining medical condition, his problems behaviorally."

Similarly, both Harrington and Gifford testified that at a trust meeting in March 2009, William reported that Brad's condition "was worsening. He was acting out more. His understanding of some of his financial matters was diminishing." Gifford testified to learning from William at the time that "Brad's condition had deteriorated to the point that he could no longer manage his bank accounts, pay bills." Brad was also "starting to bang his head and hurting himself." Because of these issues, William claimed he "needed to be able to have access to Brad's accounts to write checks. . . ."

The trustees testified that their concerns regarding Brad's continued cognitive impairment were reinforced by Brad's testimony at his deposition in April 2011. Harrington noted that Brad was often confused during questioning and seemed to lack an understanding on many issues related to the trusts and his finances. Gifford testified that the deposition confirmed his impression that Brad's comprehension of trust matters was "at a

very rudimentary level," and that Brad had placed "almost absolutely total reliance" on William to handle his financial matters. Strode stated his overall impression from the deposition was that Brad "was either uninformed, misinformed or lacked even at best just a very basic level of comprehension with respect to those matters." When asked which one he believed applied to Brad, Strode replied, "I think it was all three." Strode also noted Brad's deposition testimony that William, but not Brad, reviewed Brad's bank statements and his impression that Brad relied on William "heavily, if not exclusively" for financial matters. Strode stated this deposition testimony was a "very critical factor" in his decision on the distribution, because having spent three days watching Brad answer questions regarding his trust and personal business interests, Brad's testimony showed "just a real lack of understanding with respect to those matters."

In addition to their perception of Brad's ability to manage his distributions, the trustees also testified about their concerns that Brad was being unduly influenced by William, Sherry, and Rachel. They each discussed a letter dated in 2003 produced by William in his defense during the prior litigation seeking to remove him as a trustee. The letter was purportedly signed by Brad and Michelle, indicating their agreement at the time to William's receipt of various funds that the trustees claimed he obtained improperly. However, the trustees testified that they relied on their handwriting expert's opinion that Michelle's signature was a forgery and Brad's signature could be a forgery as well. Further, the trustees noted that several details stated in the letter were not known until after it was purportedly written and signed, and that William was unable to explain this discrepancy during his deposition. As Gifford explained, he found

this concerning because it was apparent that "Brad relied almost exclusively on [William]for financial advice and financial assistance. And almost all of the information . . . Brad Lund got about the trustees and about the trust was coming from [William]."

Wilson also testified regarding Brad's increased isolation following his move to Arizona in approximately 2003. Wilson detailed the increasing difficulty in speaking to Brad by phone, because Brad's calls were screened at home and his cell phone was purportedly lost or broken. And Gifford also noted his concern with Brad's deposition testimony regarding hundreds of thousands of dollars going to William, which Brad claimed he did not know about or did not understand.

The trustees also indicated that the filing of the 2009 Arizona petition influenced their decision, based on the allegations in that petition by other relatives regarding Brad's cognitive impairments and vulnerability to undue influence. However, Harrington testified that although his desire to wait for a resolution of the 2009 Arizona conservatorship proceeding was one reason the trustees decided to defer the distribution decision, it was "not the only reason in my mind." The trustees testified that, while the 2009 Arizona conservatorship proceeding was a factor, their decision to deny the distribution would have been the same without it.

Although they agreed to defer the final decision, several of the trustees testified that they had essentially determined as of June 2010 that Brad did not meet the trust standard. Harrington testified at his 2010 deposition that "unless there's been a major change from all of the information I had in mid '09, [Brad] has very little chance" of getting the 40th birthday

distribution. According to Wilson, when they began the discussion in 2010, he felt that Brad had not demonstrated the maturity and financial ability to manage the distribution. Once the trustees realized in June of 2011 that the 2009 Arizona proceeding was not going to be resolved anytime soon, they made the final decision to deny Brad's distribution and discontinue placing the item on the following quarter's agenda.

Overall, the trustees agreed that, although Michelle might not be able to manage such sizable distributions alone, she was capable of handling her investment managers, understanding or discussing their advice, and making prudent decisions based on that advice. They did not feel Brad had that ability.

Testimony by Brad and Michelle[9]

Michelle testified regarding her concerns that Brad was subject to undue influence by William. She also denied signing the 2003 letter produced by William purportedly bearing her signature.

Brad testified that he agreed that he didn't meet the trust standard at age 35. He also agreed the only thing that had changed between 2005 and 2011 to enable him to meet the standard was that he now had a trust manager and trust accountant. He agreed with William's statements in 2009 that, as of that time, he was not able to sign checks, manage his accounts, or pay his bills. He also agreed that, as of 2011, his "ability to receive or evaluate information needed in making or communicating personal and financial decisions" was "markedly

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[9] Brad and Michelle both testified at length during the trial regarding their trusts, finances, and relationship with the trustees, among other things. We relate herein only a few relevant portions of that testimony.

limiting." However, he also felt his condition had improved since 2006, citing new glasses and a hearing aid, an improved memory after he stopped taking certain medication, and that he no longer became "flustered" as easily.

Brad stated that it was William's idea to file the Arizona guardianship petition in 2006 and then to complete a power of attorney. He followed William's advice in these matters because "I trusted him." Brad also confirmed that William handles all his financial and business affairs and he is completely dependent on William and Sherry for financial matters.

Brad also testified regarding the errata to his April 2011 deposition, comprised of multiple pages of changes to his testimony, including numerous changes from "yes" to "no" and vice versa. He testified that these changes were in William's handwriting, that William gave him the errata sheets, and he signed them before reading his deposition transcripts.

2. *Legal Standards*

The court reviews the trustees' exercise of the discretionary withholding power for an abuse of the trustees' discretion. The trustees are required to exercise their discretion reasonably. (Prob. Code § 16080.) "If discretion is conferred upon the trustee in the exercise of a power, 'the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.'" (*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1209, quoting Rest.2d Trusts (1957) § 187, com. e, p. 403.)

We review the trial court's findings of fact regarding whether the trustees reasonably exercised their withholding power for substantial evidence. (See *SFPP v. Burlington*

Northern & Santa Fe Ry. Co. (2004) 121 Cal.App.4th 452, 462.) "'Where findings of fact are challenged . . . we are bound by the "elementary . . . principle of law . . . that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.'" (*Id.* at p. 462.) """We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.]""" (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102; see also *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762 ["We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value. [Citations.]"].)

3. *Analysis*

"In determining whether the trustee is acting within the bounds of a reasonable judgment the following circumstances may be relevant: (1) the extent of discretion intended to be conferred upon the trustees by the terms of the trust; (2) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; [and] (5) the existence or nonexistence of an interest in the trustee conflicting with that of

the beneficiaries." (3 Scott on Trust, 3d Ed. (1967) § 187 p. 1501; see also Rest.2d Trusts (1957) § 187, com. d, p. 403.)

Here, the trial court considered these factors and concluded that the trustees reasonably exercised their discretion in denying Brad's distributions for his 35th and 40th birthdays. Brad asserts that the court's analysis of the second through fifth factors was in error. We consider each in turn, and find that substantial evidence supports the trial court's conclusions.

a. *External standard*

It is undisputed that the trustees' application of the discretionary withholding power was governed by the language of the trust itself—that any withholding must be based on a determination that the beneficiary "has not theretofore demonstrated the maturity and financial ability to manage and utilize such funds in a prudent and responsible manner." It is also undisputed that the residuary trusts for Victoria, Michelle, and Brad contained identical withholding provisions and that the trustees had a fiduciary duty to treat the three beneficiaries impartially. (See Prob. Code, §16003; *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1089; *Hearst v. Ganzi, supra,* 145 Cal.App.4th at p. 1208 ["Unless the trust instrument itself provides otherwise, the trustee's duty to each beneficiary precludes it from favoring one party over another. Thus, a trustee must act impartially with respect to all beneficiaries, doing his or her best for the entire trust as a whole."].)

Brad contends that the trustees established a procedural process or standard when they considered and ultimately agreed to make Victoria's 35th birthday distribution in 2001. He argues that the trustees were required to follow these "established procedures" when considering whether to withhold Brad's birthday distributions. As such, he argues the trustees created

an "identifiable external standard," which he defines as first determining whether the beneficiary had the necessary maturity, and then, if there was reason to doubt that the standard was met, meeting with the beneficiary and his or her financial advisors to determine the intended plans for the distribution.[10]

The trial court rejected this argument, concluding that "the evidence does not support" the finding that the trustees had put "established procedures" into place. We agree. The only evidence Brad cites is the fact that the trustees took these steps with respect to Victoria, Wilson's single reference to Victoria's situation in discussing Brad, and the trustees' recognition that the beneficiaries must be treated "the same." None of that evidence compels a finding that the trustees established a specific standard, apart from the language of the trust, to be applied to each beneficiary determination.

Moreover, substantial evidence supports the court's conclusion otherwise. The trustees aptly articulated the differences among the siblings that would account for their differing treatment, such as their determination that Brad lacked the ability to work with financial advisors or make decisions based on their advice, whereas Michelle and Victoria were able to do so. The record supports the trial court's conclusion that each beneficiary "posed different challenges for the Trustees and that the Trustees individually evaluated each beneficiary" under the parameters of the trust standard. Our review of the record also

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[10] Brad's argument that the trustees should have inquired about his intentions for his distribution is contrary to his next argument, that the trust standard was entirely "historical" and therefore "it was irrelevant what Brad planned to do with the distribution once it was provided to him."

supports the court's finding of "marked and sharp differences" between Michelle and Brad, which "strengthen the Trustees' position that they reasonably exercised their Discretionary Withholding Power in connection with [Brad's] birthday distributions." As such, we reject Brad's claim that the trustees failed to treat Brad impartially in determining that he did not meet the trust standard.

Additionally, William approved the distributions to Victoria and Michelle and the 2005 withholding from Brad, and Brad conceded that he did not meet the standard in 2005, all without any objection to the standards used. This undercuts Brad's current claim that the trustees failed to apply an established standard when deciding to withhold his distributions in 2010 and 2011.

b. *Circumstances surrounding determination*

Next, Brad contends the court erred by considering the wrong evidence to affirm the trustees' decision. He claims the trust document established a "historical standard of prudence and responsibility," which the trial court failed to properly apply. We are not persuaded.

As an initial matter, Brad's suggestion that we review this issue de novo is without merit. While he attempts to frame his argument as one that the court "incorrectly interpreted" the trust document, in fact, he has raised no issue with the court's interpretation of the trust standard. The court applied the express language of the discretionary withholding clause; Brad fails to articulate any differing interpretation. Instead, Brad's argument looks at the court's weighing of the facts under the

trust standard and contends certain facts should have been weighed more heavily and certain facts less so.[11]

We find substantial evidence amply supports the court's determination. The trial court discussed at great length a portion of the evidence establishing that the trustees reasonably exercised their discretion in withholding Brad's birthday distributions, including: the trustees' observations regarding Brad's limitations in maturity and financial understanding and his lack of improvement between 2005 and 2011; statements by Brad and William during that time period—both in person and through the 2006 Arizona guardianship petition—attesting to Brad's declining cognitive abilities, including a markedly limited understanding of his own finances; evidence from Brad's treating physician to the same effect; efforts by William to exert control over Brad's finances; statements by other family members expressing concern that Brad was vulnerable to undue influence by William, Sherry, and Rachel, coupled with increased isolation and decreased independence for Brad; and the trustees' deliberation about whether to withhold the distribution in 2010. The court also found that the trustees' "ability to articulate the factors they considered relevant in their decision-making process aptly demonstrates that they actively exercised their discretion."

Rather than suggesting that the above-referenced evidence is insufficient, Brad argues that the "historical" language of the

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[11] Indeed, several of the headings in this section of his opening brief specifically highlight evidentiary arguments, such as that the "evidence presented by Brad's counsel supported the historical trust standard. . . ." Similarly, in his reply, Brad reiterates his position that a de novo standard of review applies, but then proceeds to argue that the "evidence ***did*** support a finding that an objective procedure had been established. . . ."

trust requires consideration *only* of evidence such as Brad's past management of his personal finances, his general prudence, and lack of excessive expenditures. Further, he states, without explanation, that the other evidence considered by the court was "irrelevant." He cites no authority in support of this contention. We conclude, as the trial court did, that it could consider all of the evidence available to and considered by the trustees related to the trust standard, at the time they made their decisions under that standard. Brad fails to articulate why the trustees and the court could not consider evidence such as Brad and William's past statements regarding the severity of Brad's impairments as relevant to whether Brad possessed sufficient "maturity and financial ability to properly manage his substantial distributions."

In addition, there is no evidence in the record that the trustees or the court ignored evidence of Brad's past financial responsibility. Indeed, several trustees expressly acknowledged it, but testified as to all the reasons they nevertheless concluded that Brad was not capable of managing the birthday distributions. The fact that Brad believes the court should have weighed the evidence differently does not establish an abuse of discretion by the trustees, nor does it meet his burden to show error on appeal. (See *Hearst v. Ganzi, supra,* 145 Cal.App.4th at p. 1209 [""The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.' [Citation.]"].)

Brad also contends the court "disregarded" the evidence that he had established a revocable trust as of June 2010 and an irrevocable trust prior to the final distribution decision in June

2011, as well as evidence that the trustees had obtained his consent on various trust-related issues over the years. Contrary to Brad's representation, the meeting minutes from June 2010 reflect William's statement that he *would* be setting up a trust for Brad, not that he had done so. Although William testified at his deposition that he had already set up a revocable trust, this evidence was disputed. In addition, several trustees testified that the presence of an asset management plan would not have changed their determination that Brad did not meet the trust standard; they also acknowledged seeking Brad's consent to certain matters from time to time, such as for a change in the trustees' fee structure. The trial court found that those instances did not undercut the trustees' testimony regarding their perceptions of Brad's inability to manage a multi-million dollar trust distribution. We find no error in that conclusion.

c. *No finding of improper motive or conflict of interest*

We also conclude substantial evidence supports the trial court's finding that the trustees withheld Brad's distributions because "they sincerely believe that [Brad] does not have the maturity and financial ability to manage and utilize a substantial trust distribution." Brad argues that the trustees acted out of an improper motive to protect their ongoing trustee fees. He points to evidence that the trustees would have lost compensation had they given Brad his birthday distributions, thereby reducing their fees based on the amount held in trust, because Brad was unlikely to use them to manage other assets. The trial court acknowledged this issue, but made a credibility determination regarding the motivation of the trustees. We find no error in this

conclusion, particularly in light of the substantial amount of evidence supporting the trustees' exercise of their discretion.

Brad also asserts that the trustees' decision to withhold Brad's birthday distributions was at odds with Sharon's intentions when she established the residuary trust. He cites evidence that Sharon wanted Brad to be independent and suggests that she intended that Brad receive his birthday distributions to assist with that goal. While several witnesses did express Sharon's desire that Brad be independent, there was no evidence tying that desire to Sharon's intentions for the distributions under the trust. The language of the trust itself belies any intent by Sharon that Brad gain access to the bulk of the trust assets without a determination of his fitness to manage those assets. Indeed, Wilson testified that the provision granting the trustees discretion to withhold the distributions was added specifically to restrict Brad's distribution, without calling attention to Brad's differences from his sisters.[12] We also note that William, who testified as to Sharon's wish for Brad's independence, voted to withhold Brad's 35th birthday distribution and never suggested that decision was contrary to Sharon's intent. Further, Brad received hundreds of thousands of dollars per year from the residuary trust and several other family trusts and assets, including payments covering housing, medical expenses, and travel. Thus, a decision to withhold his

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[12] Wilson's testimony regarding statements made about Sharon's intent was admitted at trial, over Brad's hearsay objection, not for its truth, but as relevant to the trustees' state of mind when they decided to withhold Brad's birthday distributions. As such, we consider it as relevant to the trustees' state of mind regarding Sharon's intent, rather than as evidence of her intent.

birthday distribution would not necessarily restrict his independence. As such, we conclude that evidence of the settlor's intent here does not compel a finding that the trustees abused their discretion.

C. *No removal of trustees from Brad residuary trust*

Brad argues that the court erred in refusing to remove the trustees from the residuary trust. He claims the trustees breached their fiduciary duties in several ways and exhibited hostility toward Brad, all of which warranted their removal. While the trial court found Brad had properly exercised his power under the 1986 and 1992 trusts to remove FRTC as trustee, it rejected his request to also replace the trustees of the residuary trust based on their purported misconduct. We agree and affirm.

1. *Marana project investment*

The fiduciary duties of a trustee include the duty of loyalty (Prob. Code, § 16002); the duty to deal impartially with the beneficiaries (Prob. Code, § 16003); and the duty to avoid conflicts of interest (Prob. Code, § 16004). The violation by a trustee of any duty owed to the trust beneficiaries is a breach of trust. (Rest.2d Trusts, § 201.)

Brad first asserts the trustees breached their fiduciary duties related to their investments in a real estate venture called the Marana project, or TMR. William brought this potential investment to the trust in 2005. The trust, along with William, Gifford, Wilson, Strode, and other investors, made investments to form an entity for the purpose of acquiring certain real property in Marana, Arizona. According to a memorandum prepared by Strode in June 2005 discussing various aspects of the planned project, the individual trustees gave their proxies to the institutional trustee (ultimately FRTC) to "vote their interests in

the venture along with the Trust's interests in the venture," in order to "avoid any appearance of conflicts of interest, now or in the future" between their role as trustees and their individual investments.

In response to the 2009 petition seeking to remove William as a trustee of the residuary trust, Brad and William alleged that the Marana investments by individual trustees created a conflict of interest. The settlement agreement resolving that petition included a release of all parties from all claims "arising out of, grounded upon, or in any way connected with the subject matter" of that litigation. However, Brad's current petition regarding the residuary trust again alleged that the individual trustees breached their fiduciary duties related to their investments in the Marana project.

In the statement of decision, the trial court found that the settlement agreement expressly released Gifford and Wilson from complaints of conflicts of interest related to their Marana investments. In particular, the court noted that the settlement agreement did not require the trustees to divest themselves of their individual interests in the Marana project and their investments had not changed since the execution of the settlement agreement. Similarly, Strode was covered under the settlement agreement as an agent, because he was working for the trust at the time, and as a successor trustee. The court also rejected Brad's argument that the conflict of interest was implicated by calls for additional funding (at times termed "capital calls") for the Marana project following the settlement agreement. Because the Marana operating agreement did not require any investor to make capital contributions after the

initial investment, the court found that the occurrence of such voluntary capital calls was "inconsequential."

Brad does not challenge these findings. Instead, he argues that the individual trustees "continued to participate in the decision making process as to whether the Residuary Trust itself should respond to the 'voluntary' capital calls after September of 2010," and that conduct was a breach of their fiduciary duty to avoid conflicts of interest.[13] Specifically, he contends FRTC, through Harrington, "solicited the input and vote of the other trustees" at the trustee meeting in December 2012 regarding whether the trust should respond to a capital call, in violation of the agreement that only FRTC would vote to avoid the conflict of interest.

This contention is contradicted by the record. The trustees confirmed that only FRTC made the decisions on whether the trust would respond to a capital call for the Marana project; the individual trustees did not vote. Gifford specifically testified that the individual trustees did not vote on the decision for the trust to invest at the December 2012 meeting. According to the minutes of that meeting, Harrington provided a "recap on the

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[13] Brad suggests that our review of this issue should be de novo because "the trial court incorrectly interpreted the written instrument representing the Settlement Agreement." He does not, however, articulate any interpretation of the settlement agreement that he claims was in error. The crux of his argument is that the evidence at trial did not support the trial court's determination that there was no breach of fiduciary duty. We review that determination for substantial evidence. (See *Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603 [substantial evidence review applied to trial court's determination of whether trustee breached duties].)

trustee's position regarding the investment in TMR," then the "individual trustees concurred with making the funding request." Brad and Michelle also agreed during the meeting that the investment made sense to them. Gifford explained at trial the trustees' reasoning for stating their concurrence—they were not making their own investments because of the pending litigation, rather than "because they didn't think it was a good deal." Thus, they wanted to show that, even though they were not personally investing at the time, "we thought it was a good deal for the trust to make the investment." Brad cites no evidence that the other trustees voted; he merely queries, without more, "is concurring not a vote?" As such, he has failed to show that substantial evidence did not support the trial court's finding of no breach of fiduciary duty.

Brad also complains that Strode, rather than FRTC, was responsible for certain Marana-related matters, such as keeping the project's documents for the trust. And he suggests that, even though the capital calls were voluntary, if the residuary trust failed to respond, it could compromise the entire project and therefore the trustees' investments. But apart from his contention that the trustees were improperly voting for the trust, he does not tie these other issues to any breach of a fiduciary duty, much less one that was not released under the settlement agreement.

2. *Travel policy*

Brad also argues that the trustees breached their fiduciary duties in their application of the trust's travel reimbursement policy and that the trial court erred in finding to the contrary. We disagree.

a. *Factual background*

The residuary trust provides the trustees with the discretion to distribute funds to a beneficiary for enumerated purposes, including "to provide funds for travel expenses incurred by the child." In 1994, the then-trustees adopted a travel reimbursement policy to guide beneficiary travel reimbursements. The policy was amended in 1995 to include reimbursement for "natural traveling companions." The policy was again amended in 1996 "to permit reasonable travel by each beneficiary as well as to protect the confidentiality of, and encourage fiscal responsibility on the part of, the beneficiaries." Only the 1995 version of the policy contained specific language regarding reimbursement of traveling companions; the 1996 version changed the reimbursement process to one under which the beneficiary was entitled to a maximum set amount of reimbursement, without requirements regarding verification.

The parties appear to agree that no beneficiary submitted any reimbursement requests between 1998 and August 2011, and Brad had never submitted a request. In August 2011, Brad submitted his first request for reimbursement for his travel expenses for the past 13 years, totaling approximately $255,000. According to Strode, Brad's request contained mathematical errors, and the total amount requested was approximately $244,000. The request and accompanying documentation spanned over 100 pages. As evident from the names listed on some of the documentation, the request included reimbursement for travel with multiple individuals besides Brad.

The trustees sought advice from FRTC's Trust Advisory Committee (TAC) about how to handle Brad's reimbursement request. The TAC analyzed Brad's submission and recommended

limiting the reimbursement to the last seven years of expenses, and excluding expenses for all companions. The trustees initially decided to reimburse Brad for all 13 years of claimed expenses, but limited the payment to his expenses only, citing the trust language regarding expenses "incurred by the child." This reimbursement for approximately $87,000 was paid in October 2011. The trustees also cautioned Brad that they were allowing a "one-time exception" to permit reimbursement for expenses going back so many years.

Following the partial reimbursement, the trustees received a letter from Brad's counsel, objecting to the reimbursement restrictions and stating that Michelle had been receiving reimbursements for several years for herself and a companion. In addition, Wilson—the only current trustee who had also been present during the discussion and implementation of the prior travel policies in 1994-1996—recalled the past practice of including reimbursement for one "natural traveling companion."[14] In light of this information, the trustees reconsidered and agreed to reimburse Brad for the travel of one companion, in addition to himself, bringing the total reimbursement to approximately $114,000. They also noted various entries from Brad's submission where it was unclear whether the expense was reimbursable, and suggested that Brad could provide additional information to possibly increase his reimbursement amount.

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[14] The reimbursement process was largely handled by Strode and Stephanie Wheeler at FRTC. Although Wilson recalled some information regarding the prior policies, it appears his memory on this issue was limited.

In June 2012, Brad submitted another reimbursement request for expenses from 2011 and 2012. He also continued to dispute the prior reimbursement, arguing that the prior policy should apply to include all "natural traveling companions."

In October 2012, the trustees adopted a new travel reimbursement policy. In the background section of the policy, the trustees related some of the history behind travel reimbursements under the trust, pursuant to their examination of historical trust meeting minutes. The stated purpose behind the new policy was to "memorialize their decision making process, which guided them in reviewing Brad's reimbursement requests of August 2011 and June 2012 and which will guide them in reviewing future requests for reimbursement filed by a beneficiary, and to formally establish a Travel Reimbursement Policy."

Under the new 2012 policy, reimbursable expenses included the spouse and children of the beneficiary, as well as one "natural travelling [*sic*] companion." Reimbursement was restricted to the prior 12 months of travel; the beneficiary was also required to provide evidence that "he incurred the expenditure and it is for the beneficiary and an approved travelling [*sic*] companion." However, the policy expressly provided an exception to the documentation requirement for Brad's 2011 and 2012 submissions, noting that "full verification" might not be possible given the lapse in time. The policy also stated that, given her personal financial resources, Michelle would not be eligible for reimbursement absent a change in circumstances. The policy would be applied to "all reimbursement requests submitted and currently under review, including Brad's August 2011 and June 2012 submissions."

Brad argued at trial that the trustees abused their discretion in two ways in handling his reimbursement requests: (1) applying the 2012 policy to expenses he had incurred and submitted before that date; and (2) including a request under the new policy for identifying information of his traveling companions, in violation of his privacy.

The trial court found the trustees reasonably exercised their discretion in their determinations regarding Brad's travel reimbursement requests. The court rejected Brad's contention that the trustees acted based on an improper motive, noting that the "travel reimbursement issue had been dormant for 13 years," and that neither the trustees nor Brad were aware that the prior policies existed at the time of Brad's request. Thus, the trustees' decision to enact in 2012 a "clear and comprehensive policy by which to exercise their discretion in reimbursing travel" was appropriate.

b. *Analysis*

As he did below, Brad first argues that the trustees abused their discretion when they retroactively applied the 2012 policy to his 2011 and 2012 reimbursement requests.[15] We conclude that substantial evidence supports the trial court's determination that the trustees acted reasonably and impartially. While Brad urges that the trustees should have immediately applied the older travel policies, there is no evidence that any individuals involved were aware those policies existed, other than Wilson, who did not recall the specifics. Brad certainly did not rely on those policies at the time and the trustees had not applied them for over a

[15] Brad first asserts that our review should be de novo because the court "incorrectly interpreted" the written travel policies, but then argues that the trial court abused its discretion.

decade.[16] Despite the exceptionally large and belated nature of Brad's submission, resulting in a suggestion by the TAC to deny almost half of his request, the trustees agreed to reimburse Brad for all 13 years, but relied on the trust language to limit reimbursement to only him. Further, once the trustees obtained information from Wilson and Brad's counsel regarding the past policies and current practice of reimbursement of one travel companion, they agreed to extend the same practice to Brad.

While Brad makes much of the retroactive application of the 2012 policy to his past expenses, the new policy continued the same practice of reimbursement for one natural traveling companion, and included potential reimbursement for several other individuals (spouse and children of the beneficiary). Brad's suggestion that this was an unfair change from the prior policy is unpersuasive, particularly because he was not aware of those policies, the 1996 policy does not specify how many (if any) companions may be eligible for reimbursement, and he had delayed seeking any reimbursement for over a decade. And Brad's assertion that the trustees' application of the 2012 policy to his prior expenses was improper "as a matter of law" is unsupported by any authority.

Moreover, the record contains evidence explaining the trustees' bases for adopting a new policy in 2012 and applying it to the pending reimbursement requests. We also note several parts of the 2012 travel policy that, in contrast to Brad's claims, appear to inure to his benefit, including the waiver of the documentation requirement for his then-pending requests, and

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[16] Indeed, in litigation correspondence, Brad's attorneys repeatedly demanded payment under the 1995 policy, although the most recent policy was from 1996.

the decision to disallow all reimbursement to Michelle. Brad has not shown on this record that the trustees abused their discretion or breached their fiduciary duties.

Second, Brad argues that the trial court "erred in finding no breach of privacy" from the requests that he provide identifying information for his traveling companions. The trial court found that Brad's assertion of a duty of "privacy" in relation to trust administration issues was unsupported. It also noted that requesting information from Brad about the specifics of his travel was a reasonable part of the exercise of the trustees' discretion.

Brad provides no authority for his assertion that the trustees owed him a duty of "privacy" and breached that duty by their conduct. Instead, he cites to the stated desire in the 1996 policy to "protect the confidentiality of...the beneficiaries" and to testimony by the trustees at trial that they would not require the identity of a traveling companion to allow reimbursement. This evidence does not establish a fiduciary duty by the trustees to protect Brad's privacy, nor does it require the trustees to accept all reimbursement requests without any supporting documentation. Indeed, the evidence suggests that the trustees themselves acted in accordance with their statements that identification of companions was not required—the 2012 policy not does specify a requirement for such identification, and the trustees all testified they neither requested nor required it. The only request for identification of Brad's companions came from attorneys for the trustees in connection with meet and confer efforts relating to discovery in this litigation. It appears that Brad has never provided such information nor have there been

any other such requests. As such, the trial court did not abuse its discretion in finding no breach of trust.

3. *Strode's entry into common interest agreement*

Brad contends that Strode breached his fiduciary duties by entering into a common interest agreement with the petitioners in the 2009 Arizona proceeding, Brad's aunt and half-sisters, who were seeking a conservatorship over Brad. The other trustees also entered into the common interest agreement with the Arizona petitioners; however, they did so in 2009 and Brad concedes their conduct was released under the 2010 settlement agreement. Strode joined the common interest agreement after he became a trustee in 2011. Brad argues this was post-settlement conduct that was not released and breached Strode's fiduciary duty of loyalty to Brad.

We conclude that substantial evidence supports the trial court's determination that Strode did not breach his fiduciary duties because of the common interest agreement. Brad concedes that Strode is protected by the settlement agreement, but argues that his entry into the common interest agreement was new conduct post-settlement and was therefore not released. He does not explain or provide supporting authority for the proposition that by signing onto the existing common interest agreement as the successor trustee, Strode engaged in new conduct that was not released. As such, this argument is forfeited. (*Sporn v. Home Depot USA, Inc., supra,* 126 Cal.App.4th at p. 1303 ["Contentions on appeal are waived by a party who fails to support them with reasoned argument and citations to authority."]; *Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.)

Brad also contends that Strode failed to prevent the trustees' counsel from "assisting the Arizona litigants at Brad's expense," despite knowledge that counsel was doing so. However, the trial court expressly held that Strode was acting in good faith with regard to the common interest agreement, finding Strode credible when he testified he believed he was working in Brad's best interest. Brad contends that there "is no evidence in the record to support this finding" and then cites what he claims to be "Strode's only testimony regarding the common interest agreement." He fails, however, to cite the page of Strode's testimony on which Strode testifies that he believed he was working with the Arizona petitioners under the common interest agreement for Brad's welfare—the precise testimony cited by the court as credible. By doing so, Brad ignores a fundamental rule of appellate practice obligating him to completely and fairly summarize the evidence supporting the court's findings and judgment. (See, e.g., *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96–97; *Jhaveri v. Teitelbaum* (2009) 176 Cal.App.4th 740, 748–749.) Brad's failure to set forth the material evidence on this issue waives his claim of insufficiency of the evidence. (*Brockey v. Moore*, *supra*, 107 Cal.App.4th at pp. 96-97, citing *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

In addition, Brad provides no authority or analysis supporting his claim that by failing to "control his counsel," Strode breached a fiduciary duty to Brad. Brad cites reasoning contained in the trial court's proposed statement of decision, but omitted from the final ruling, which is improper. A tentative statement of decision is not binding on the trial court, can be modified or changed as the judge sees fit before entry of judgment, and cannot be relied on to impeach the judgment on

appeal. (Cal. Rules of Court, rule 3.1590(b); *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1284 [citations omitted].)

4. *Hostility*

Brad also challenges the court's conclusion that there was insufficient evidence to support his claim that the trustees exhibited hostility toward him. He cites his arguments regarding the travel reimbursement issue, the trustees' friendly relationship with Michelle and dislike of William, Sherry, and Rachel, and an incident where the trustees terminated the lease on a ranch used by both Brad and Michelle (as Michelle requested) rather than firing a ranch employee (as Brad requested). In essence, he claims the trustees improperly exercised their discretion in each instance, and that abuse of discretion demonstrated their hostility toward him.

To the contrary, the trial court found the trustees properly exercised their discretion in each instance: "The Trustees considered an issue, exercised their discretion, and made a decision." Moreover, the court concluded Brad had failed to establish that the trustees "acted dishonestly, with an improper motive or acted in a manner that exceeds the bounds of reasonable judgment." Instead, the court found the trustees credible in their assertions that they were concerned about Brad's vulnerability to undue influence and were motivated by an effort to protect him from financial abuse. In light of this record, Brad's suggestion that the court should have made different credibility findings or weighed certain evidence more heavily are insufficient to meet his burden on appeal. (See *Tribeca Companies, LLC v. First American Title Ins. Co., supra,* 239 Cal.App.4th at p. 1102 [""We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.]""].)

5. *Adverse service*

Brad also challenges the court's conclusion that the trustees did not breach their fiduciary duties by serving as trustees on the identical residuary subtrusts for Brad and Michelle. Brad cites to the fact that all four trustees serve on the residuary subtrusts for both Brad and Michelle, and that a denial of Brad's birthday distributions could benefit Michelle (and, by extension, the trustees) should Brad predecease her.

The trial court found any purported adversity was inherent in the structure of the trusts, as Sharon set up mirrored trusts and specifically named identical trustees for each subtrust. As such, substantial evidence supports the conclusion that the trustees did not violate Probate Code, section 16005, which requires trustees "not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust."

Brad responds that the adversity of the trusts extends beyond the structure of the trusts themselves, arguing that the trustees "are beholden to Michelle financially such that they would be inclined to side with Michelle over Brad." In support of this argument, he notes instances where Michelle paid certain legal fees of the individual trustees and her separate payments to the trustees for management of other entities and other trusts. However, as discussed above, the court rejected this argument in finding that the trustees acted out of a desire to protect Brad, rather than out of motivation to preserve their own fees. As such, we conclude that Brad has failed to establish any abuse of the trial court's discretion.

6. *No removal*

Even assuming the trustees had breached their fiduciary duties, Brad also must show that the trial court abused its discretion in concluding that any such breach would not warrant their removal. He has not.

The removal of a trustee is a matter entrusted to the sound discretion of the trial court. (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633.) A trustee may be removed on grounds that include breach of trust, failing or declining to act, and "[f]or other good cause." (Prob. Code, § 15642, subd. (b)(1), (3), (4) & (9).) Whether a trustee should be removed is "'dependent upon the circumstances of each particular case.' [Citation.]" (*Jones v. Stubbs* (1955) 136 Cal.App.2d 490, 502.)

On appeal, we review the trial court's decision for abuse of discretion. (*Jones v. Stubbs, supra, 1*36 Cal.App.2d at p. 500.) The appropriate test for abuse of discretion is whether the trial court's decision exceeded the bounds of reason under the circumstances. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

Here, the trial court denied Brad's request to remove the trustees from the residuary trust, finding "overwhelming" evidence that "the Trustees' actions about which [Brad] complains have been motivated out of a desire to protect [Brad] from those whom they perceive as taking advantage" of Brad. The court set forth a few examples of the "voluminous" evidence supporting the trustees' concerns, such as the testimony by the trustees' expert psychiatrist, who opined that Brad was "particularly susceptible to undue influence from people upon whom he is dependent" and was "vulnerable to others' manipulation." The court also cited to evidence of multiple instances of purported improprieties by William, his attempt to

gain access to Brad's bank accounts, the fact that Brad's April 2011 deposition transcript was corrected in over 100 places--with those corrections made with William's assistance-- and several transactions resulting in the payment of hundreds of thousands of dollars from Brad to William and to Sherry's family members. We also note Brad's testimony and other evidence supporting the conclusion that Brad was heavily, if not totally, reliant on William for financial matters.

Brad cites authority for the proposition that a trustee "may be removed where there is a conflict of interest between the trustee's interests and those of the trust." But he makes no showing how the trial court's determination in this case was an abuse of discretion, apart from suggesting that the court should have weighed more heavily the evidence showing the trustees' preference for Michelle and their disfavor toward Brad.

Similarly, the court concluded that Brad had not sufficiently shown how any alleged hostility by the trustees had impaired the administration of the trust, necessitating their removal. *IFS Industries, Inc. v. Stephens* (1984) 159 Cal.App.3d 740, 754 ["The rule is that hostility between the beneficiary and the trustee may be a ground for removal of the trustee *when the hostility threatens to impair the proper administration of the trust*. [Citations.]") Regardless of whether the purported evidence of hostility could have sufficiently supported the removal of the trustees, as Brad suggests, he has not demonstrated how the trial court's determination to the contrary was an abuse of discretion.

The statement of decision amply reflects the trial court's extensive familiarity with this case, its credibility determinations, and careful weighing of the evidence. As such,

we find no abuse of discretion in the court's determination that any breach of fiduciary duty or hostility by the trustees was not detrimental to the trust or sufficiently serious to warrant termination.[17]

D. *Objections to discovery rulings*

Finally, Brad asserts claims of error in two of the trial court's discovery rulings. He contends these rulings improperly restricted his ability to discover documents related to the purported common interest agreement between the trustees and the petitioners in the 2009 Arizona proceeding.

1. *Background*

The first ruling at issue concerned over 70 requests for production of documents served by Brad on each trustee. The requests included such broad categories as all communications between each trustee and the attorneys for the Arizona petitioners without limitation as to subject matter or time (request numbers 1 through 12); communications between each trustee and Brad (number 73) or Michelle (number 74); and communications with anyone else referring to Brad in any way (number 75). The remaining requests sought similar information, but with various limitations as to subject matter. Brad moved to compel further responses to all four sets in November 2011. The trustees argued, among other things, that the requests were overbroad and sought communications covered by the common interest privilege.

At the hearing on December 14, 2011, the court denied further responses to requests 1 through 12 and 73 through 75, on the basis that Brad failed to establish good cause for the

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[17] Brad's argument that "[t]here was substantial evidence to support a finding" of removal is beside the point.

discovery. The court noted that the requests were "incredibly expansive" and that Brad's "boilerplate statement that the information sought is relevant" failed to meet his burden to compel further responses. The court also noted that during meet and confer discussions, Brad and his counsel had agreed "to limit the discovery to post-settlement conduct." On March 19, 2012, the court issued a further written ruling granting the motion as to the remaining requests, finding that the common interest privilege did not apply, but limiting the scope of further production to communications occurring after September 14, 2010, the date the settlement agreement was executed.

After the trustees produced additional documents, Brad filed a motion for terminating sanctions, arguing that the trustees had violated the court's order and failed to produce all responsive documents. In support of their opposition to the sanctions motion, the trustees provided declarations stating that they had searched for responsive documents and had turned over everything in their possession. Gifford also stated that, if he ever had any additional documents, "I must have deleted them as part of my routine, good faith operation of my computer . . ." In Wilson's declaration, he stated that he had produced everything in his possession, but noted his computer crashed in August 2011 and earlier information could not be recovered. The court denied the motion in July 2012, finding no evidence that the trustees had withheld responsive documents.

However, in April 2012, Brad propounded seven additional sets of discovery, seeking information on every email account, telephone number, and internet service provider "used" by the trustees or anyone else on their behalf in the past two years, demanding inspection of all computers and cell phones,

demanding all phone records for the past two years, and notifying the trustees of third-party subpoenas served on their personal internet service providers seeking 32 categories of emails. The trustees objected. Brad then filed a second round of motions to compel related to this discovery, arguing that the email communications he sought were relevant to potentially show that the trustees "breached their fiduciary duties owed to Brad," including by disclosing his confidential information to the Arizona petitioners and by "using trust monies to fund the Arizona litigation." In addition, because the trustees claimed some emails were potentially deleted or lost, Brad asked the court to compel the trustees to execute consent to the production of documents stored by the internet service providers.

The court appointed a discovery referee in July 2012. The referee filed several reports in October 2012 recommending that the court deny Brad's motions to compel. Notably, the referee stated: "It is hard to imagine a more far ranging request that is ostensibly designed to obtain isolated email communications between certain individuals that may or may not be admissible evidence or lead to the discovery of admissible evidence." The referee concluded that Brad's discovery requests were "incredibly broad and sweeping demands for unfettered direct access into the computers, cell phones and phone records of the parties and unknown numbers of non-parties," and therefore recommended that the court deny the motions as overbroad and oppressive. The referee also concluded that the trustees properly filed objections to the third party subpoenas and that Brad's motions were a procedurally improper attempt to enforce the subpoenas.[18]

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[18] The referee also noted Brad's repeated failure to address an attorney-client privilege issue raised by the trustees. Several

Finally, the referee recommended the imposition of sanctions on Brad for bringing the motions "without engaging in any meaningful attempt to resolve the issues," and, regarding the motions seeking third-party document production, also for bringing the motions without substantial justification. In March 2013, the court adopted the recommendations and denied the motions. The court also adopted in part the referee's recommendations regarding sanctions, ordering $10,200 in sanctions in favor of the trustees.[19]

2. *Analysis*

With respect to his November 2011 motions to compel, Brad contends the trial court erred in limiting the scope of

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of the trustees were represented in a different matter by the same law firm representing the petitioners in the 2009 Arizona conservatorship proceeding. Thus, communications between the trustees and the law firm on the unrelated matter would be privileged and irrelevant, but included within the documents sought from the internet service providers. Brad's motions to compel continued to insist there was no privilege issue; however, during argument on the motions, Brad's counsel conceded that "we wouldn't be entitled" to documents on the unrelated matter.

[19] The court also denied a motion by Brad to terminate the discovery reference, a motion to suspend FRTC and appoint a temporary trustee while the case was pending, and a motion for contempt against the trustees. In the latter motion, Brad essentially reargued the same conduct regarding the trustees' purported failure to produce documents that the court had rejected in the motion for terminating sanctions. After holding the required contempt hearing, the court dismissed the order to show cause re: contempt, finding Brad had failed to meet his burden. The court also noted that Brad's decision to proceed with the contempt hearing was "completely misguided" and a "complete and total waste of time."

further responses to communications occurring after the settlement agreement. He argues that this limitation precluded "discovery of documents reflecting Brad's financial maturity prior to the date of the Settlement Agreement."

Brad fails to demonstrate error in several respects. As an initial matter, it appears from the record that when meeting and conferring over this discovery, Brad agreed to limit the trustees' responses to post-settlement agreement communications. To that extent, he is precluded from raising this argument on appeal. (See *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error."].) Further, his cursory suggestion that the documents sought would show "Brad's financial maturity," is insufficient to carry his burden to establish their relevance, particularly where he advanced different justifications below.

Moreover, even if he had established possible relevance, Brad does not even attempt to explain how the trial court abused its considerable discretion in limiting the scope of this discovery. (See *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186 ["'In reviewing an order of a superior court granting discovery, we recognize at the threshold that "the discovery statutes vest a wide discretion in the trial court in granting or denying discovery" and "such exercise [of discretion] may only be disturbed when it can be said that there has been an abuse of discretion.'" [Citation.]"].) For example, he does not address the trustees' objection, cited by the trial court, to pre-settlement communications as irrelevant to claims alleging post-settlement misconduct.

Brad's argument that the trial court erred in accepting the discovery referee's recommended rulings regarding his April 2012 discovery requests is similarly unsupported. Brad cites authority for the proposition that a court *may* compel a party to consent to disclosure of documents held by a third party and *may* order sanctions for discovery misconduct, including an adverse evidentiary inference. But he presents no analysis or authority demonstrating that the trial court here abused its discretion in refusing to do so. Brad also fails to address the significant substantive and procedural concerns articulated by the referee as to his requests. (*In re S.C.*, *supra*, 138 Cal.App.4th at p.408 ["To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]") As such, we find no error.

DISPOSITION

Judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.