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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ANNEMARIE DONKIN et al., Plaintiffs and Respondents, v. RODNEY E. DONKIN, JR., et al., as Trustees, etc., Defendants and Appellants.	B228704 (Los Angeles County Super. Ct. No. BP109463)

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed in part and reversed in part.

Rodney E. Donkin, Jr., in pro. per., for Defendants and Appellants.

Mark H. Boykin for Plaintiffs and Respondents.

Beneficiaries under a family trust filed a "safe harbor" petition to determine if their challenge to the successor trustees' administration of the trust would amount to a "contest" under the trust's "no contest" provisions. In response, the successor trustees filed a petition for instructions concerning the applicability of a new law which eliminated safe harbor petitions. The trial court found the beneficiaries' challenge would not constitute a contest and denied the successor trustees' petition for instructions. The successor trustees appealed and, ultimately, our Supreme Court affirmed the trial court's decision. (See *Donkin v. Donkin* (2013) 58 Cal.4th 412 (*Donkin*).)

On remand, in June 2015, the trial court took four actions: first, it took off calendar a 2010 petition by the successor trustees that had sought to forfeit the beneficiaries' interest in the trust's estate based on the trust's no contest provisions; second, it denied four motions to compel discovery brought by the successor trustees that were related to the 2010 petition; third, it denied a 2014 petition for instructions by the successor trustees that purportedly raised the "same issues" and sought the "same relief" as the 2010 petition; and fourth, it ordered the successor trustees to provide certain accountings. The trial court, in principal part, based its decisions on the holding and reasoning in *Donkin*, *supra*, 58 Cal.4th 412, finding that "[t]he day relating to the 'no contest' clause has come and gone and [has] been decided by the state's highest court." On appeal, the successor trustees contest all four actions by

the trial court, arguing in the main that the Supreme Court's decision in *Donkin* was not applicable to their 2010 and 2014 petitions or to their motions to compel discovery.

We hold that with regard to the trial court's decision to take the 2010 petition off calendar, to deny the motions to compel discovery and to grant the requested accounting, those are nonappealable orders. The denial of the 2014 petition is an appealable order, however, and it must be reversed. Although the successor trustees failed to object or otherwise challenge the proposed statement of decision as it applied to the 2014 petition, they did not waive their right to contest the court's decision on appeal. The doctrine of implied findings does not apply here because there was a legal error on the face of the statement of decision, an error requiring that the 2014 petition be remanded for further consideration.

BACKGROUND

I. The Trust and its "no contest" provisions

In August 1988, Rodney E. Donkin (Rodney Sr.[1]) and Mary E. Donkin (Mary), a married couple, executed a revocable trust (the Trust) as part of their estate planning, naming their children as equal primary beneficiaries after both parents had died.

The Trust contained the following no contest provision: "The Settlors [Rodney Sr. and Mary] desire that this Trust,

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[1] We refer to the Donkins and their children by their first names for the sake of clarity, intending no disrespect.

the Trust Estate and the Trust Administrators and beneficiaries shall not be involved in time consuming and costly litigation concerning the function of this Trust and disbursement of the assets. Furthermore, the Settlors have taken great care to designate, through the provisions of this Trust, how they want the Trust Estate distributed. Therefore, if a beneficiary, or a representative of a beneficiary, or one claiming a beneficial interest in the Trust Estate, should legally challenge this Trust, its provisions, or asset distributions, then all asset distributions to said challenging beneficiary shall be retained in Trust and distributed to the remaining beneficiaries herein named, as if said challenging beneficiary and his or her issue had predeceased the distribution of the Trust Estate."

In 2002, Rodney Sr. and Mary amended the Trust (the First Amendment). As amended, the primary beneficiaries of the Trust after the death of both settlors were their children: Rodney E. Donkin, Jr., (Rodney Jr.); Lisa B. Kim (Lisa); and Annemarie N. Donkin (Annemarie). The First Amendment also altered the arrangements for successor trustees. As originally drafted, the Trust named all of the Donkin children as successor trustees. Under the terms of the First Amendment, Rodney Jr. and his wife Vicki R. Donkin were named as "First" co-successor trustees, while Lisa and Annemarie were relegated to the position of "Second" co-successor trustees.

In 2004, after the death of Rodney Sr. and shortly before her own death, Mary executed a second amendment to

the Trust (the Second Amendment). The Second Amendment did two things. First, it substituted a new paragraph regarding the allocation of the trust assets after her death as the surviving spouse. Instead of directing an immediate allocation and division of the assets into separate shares for the beneficiaries, the new paragraph grants the successor trustees—which would initially be Rodney Jr. and Vicki—"complete discretion" after the death of Mary to retain the assets of the Family Trust intact and to continue to manage the property for the equal benefit of the primary beneficiaries. Among other things, the new paragraph granted the successor trustees "sole discretion" over distribution of income and principal from the Trust to the beneficiaries. Also, the Second Amendment added the following no contest clause: "If any beneficiary in any manner, directly or indirectly, contests or attacks this instrument or any of its provisions, any share or interest in the trust given to that contesting beneficiary under this instrument is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased the settlor."

II. Litigation over the Trust's no contest provisions

In 2008, Lisa and Annemarie (collectively, the beneficiaries) filed an application in the probate court under the safe harbor provision of former Probate Code[2] section 21320 to determine whether the petition they

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[2] All further statutory references are to the Probate Code unless otherwise indicated.

proposed to file would trigger the no contest clause in either the Trust or the Second Amendment. Their petition, inter alia, sought to remove Rodney Jr. and Vicki (collectively, the successor trustees) from office for misfeasance, and to compel the distribution of certain of the Trust's assets. (*Donkin*, *supra*, 58 Cal.4th at p. 419.) After a dispute arose over whether the beneficiaries were required to arbitrate their claims pursuant to an arbitration clause in Trust, the beneficiaries withdrew their safe harbor application. (*Id.* at pp. 419–420.)

In June 2009, the beneficiaries renewed their safe harbor petition for a determination of whether their proposed petition violated the no contest clauses of the Trust (the safe harbor petition). (See *Donkin*, *supra*, 58 Cal.4th at p. 420; see also *Donkin v. Donkin* (Mar. 23, 2012) B228704 [nonpub. opn.].)

On January 1, 2010, changes to the Probate Code eliminated the safe harbor provisions of section 21320, pursuant to which a party could obtain a declaration from the court prior to instituting an action that the proposed action would not violate the no contest clause of the instrument at issue. In February 2010, the successor trustees filed their response to the beneficiaries' safe harbor petition, acknowledging that the law had changed and eliminated the safe harbor process and arguing, inter alia, that the beneficiaries' safe harbor application was subject to demurrer. (*Donkin*, *supra*, 58 Cal.4th at p. 420; *Donkin v. Donkin*, *supra*, B228704.)

In March 2010, the successor trustees, pursuant to the trial court's authorization, filed a petition for instructions regarding the applicability of the new law to the beneficiaries' safe harbor application (the 2010 petition[3]). In the 2010 petition, the successor trustees argued, inter alia, that the beneficiaries' petition to compel arbitration of their claims itself violated the no contest clauses. At the same time, the successor trustees contended that the Trust obligated the beneficiaries to arbitrate any disputes that could be legally raised, and that, by filing the safe harbor application instead of arbitrating, the beneficiaries had triggered the no contest clauses. The successor trustees contended that once the no contest clauses were triggered, the beneficiaries were no longer beneficiaries and had no standing to contest the trustees' actions, and the safe harbor

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[3] Although the successor trustees requested permission to file a "petition for instructions," they ultimately styled the petition as follows: "Petition for: 1) Determination That Beneficiaries Annemarie Nancy Donkin and Lisa Barbara Donkin Kim Have Violated No Contest Clauses; 2) Determination That Former No Contest law Applies to Trust, Pending Probate Code Section 21320 Petition, and Petition to Compel Arbitration; and 3) Stay of Pending Probate Code Section 21320 Petition."

Compounding matters, the successor trustees variously refer to the 2010 petition in their appellate briefs as "Trustees' Petition to Determine Violation of Trust" or "Petition for Instructions" or "Petition for Instructions to Determine Violation of Trust."

petition should be dismissed with prejudice. (*Donkin*, *supra*, 58 Cal.4th at pp. 420–421.)

In July 2010, in support of the 2010 petition, the successor trustees served the beneficiaries with over 100 special interrogatories and requests for production. In March 2011, the successor trustees moved to compel responses to those discovery requests by filing four separate but substantively similar motions (the discovery motions).

In August 2010, the trial court heard the safe harbor petition and in September 2010 issued a written order that, without making a specific finding whether the former or the current no contest clause law applied, found that the matters raised in the beneficiaries' proposed petition did not constitute a contest under the terms of the no contest clauses of the Trust. (*Donkin*, *supra*, 58 Cal.4th at pp. 420–421; *Donkin v. Donkin*, *supra*, B228704.) The successor trustees appealed and this court affirmed in part and reversed in part. The beneficiaries petitioned for review, which the Supreme Court granted. (*Donkin v. Donkin*, review granted June 13, 2012, S202210.)

A. THE SUPREME COURT'S DECISION

Our Supreme Court held first that "nothing in the current law suggests that safe harbor applications pending when the current law became operative were subject to dismissal" and, therefore, "the trial court did not err as a procedural matter in ruling on the beneficiaries' pending safe harbor application after the operative date of the current law." (*Donkin*, *supra*, 58 Cal.4th at p. 427.) Our

Supreme Court further held that the Trust's "no contest clauses cannot be enforced to disinherit the beneficiaries under the current law because the claims alleged in the beneficiaries' proposed petition do not fall into any of the categories of contest set forth in section 21311, subdivision (a)." (*Id.* at p. 432.)

The Supreme Court also held that "the successor trustees cannot establish that under the former law the beneficiaries have already violated the no contest clauses by their filing of a request for an order of the probate court compelling arbitration of their claims or by their filing of the safe harbor application in lieu of proceeding to arbitration. If, as we conclude, the substantive claims raised by the beneficiaries do not as a matter of law violate the no contest clauses on grounds of public policy, as expressed in the former law, the beneficiaries are not disinherited by the assertion of those claims in court or in arbitration. Nor did the filing of the safe harbor application, prior to commencing arbitration, trigger the no contest clauses under the former law, as the successor trustees argued. A ruling under former section 21320, subdivision (a), determines neither the merits of the proposed claims nor the appropriate forum for assertion of those claims. [Citation.] It determines only whether pursuit of the claims will result in disinheritance under the terms of the no contest clauses and the law governing them. [Citation.] [¶] In summary, we conclude that if the former law were to be applied the beneficiaries could pursue their proposed claims without risk of being

disinherited. . . . [T]his is the same result that is reached by applying the current law." (*Donkin*, *supra*, 58 Cal.4th at p. 438, fn. omitted.)

B. PROCEEDINGS IN THE TRIAL COURT FOLLOWING REMAND

1. *The 2014 petition*

In August 2014, the successor trustees filed a petition for instructions (the 2014 petition). Although the 2014 petition discussed the Trust's various no contest clauses, it did not focus on whether any action by the beneficiaries triggered the application of those clauses. Instead, the 2014 petition raised two other issues.

The first issue concerned arbitration (the arbitration issue). Specifically, the successor trustees sought to clarify whether the parties had previously engaged in arbitration or only nonbinding mediation and whether any subsequent arbitration must be judicially compelled. The successor trustees urged the court to find that the parties' earlier effort at informal resolution was not an arbitration and, in any event, it terminated when they withdrew from the process and that, in order to have any issues resolved through binding arbitration, there must be an order from the court compelling arbitration.

The second issue raised by the 2014 petition concerned the proper interpretation of the allocation paragraph in the Trust as amended by the Second Amendment (the interpretation issue). In its opinion, the Supreme Court noted that the allocation paragraph as amended was

ambiguous and that the parties held very different interpretations of that language. (*Donkin*, *supra*, 58 Cal.4th at pp. 435–436.) However, the court did not decide which interpretation, if either, was correct. Instead, it held merely that the beneficiaries' argument/interpretation did not run afoul of the Trust's no contest clauses. (*Id.* at p. 438.) With regard to the merits of the parties' contending interpretations, the court expressly stated, "*It is up to the court or arbitrator to rule on the merits of the parties' conflicting interpretation of the trust instrument in the future, if the beneficiaries choose to pursue their claims*." (*Ibid.*, italics added.)

2. *The beneficiaries motion for judgment on the pleadings with regard to the 2010 petition*

In November 2014, the beneficiaries moved for judgment on the pleadings with respect to the 2010 petition only. The beneficiaries central argument was that *Donkin*, *supra*, 58 Cal.4th 412, "resolve[d] all of the issues" raised by the 2010 petition.

On March 11, 2015, the trial court heard oral argument on the beneficiaries' motion for judgment on the pleadings. Although the trial court denied the motion, it did so without prejudice. Moreover, based on the parties' willingness to waive further oral argument and an evidentiary hearing, the trial court allowed the parties to submit additional briefing on the 2010 and 2014 petitions and the discovery motions, and it set a date by which it would render a decision.

3. *Supplemental briefing on the 2010 and 2014 petitions*

On April 22, 2014, the successor trustees submitted their "final" brief on the submitted issues. The successor trustees focused their brief on the 2010 petition, devoting little more than one page of the more than 80 pages in their brief to the 2014 petition, noting principally that the Supreme Court had found the Trust's amended allocation provision to be ambiguous and in need of interpretation.

On May 11, 2015, the beneficiaries filed their supplemental brief, which they styled as a "reply" to the successor trustees' final brief. Therein, the beneficiaries argued primarily that the 2010 and the 2014 petitions were "nothing more than the same allegations" as those at issue in the safe harbor petition decided by the Supreme Court, but "packaged in slightly different forms" and, as a result, they should be denied.

4. *The trial court's decision*

On June 4, 2015, after reviewing the parties' supplemental briefing, the trial court announced its decision in court. The trial court found that although the Supreme Court did not directly rule on the 2010 petition, it expressly indicated that the beneficiaries' petition to compel arbitration would not violate the Trust's no contest provision. Accordingly, the trial court took the 2010 petition off calendar: "Therefore, there is nothing further for the court to do . . . . The court—the Supreme Court's already

made its decision. . . . [¶] . . . [¶] There's nothing further to do. It should go off calendar."

With regard to the discovery motions, since they all "relate to issues concerning the arbitration [and the no contest clauses]. That issue has come and gone. . . . [It] makes moot all four motions—those are all denied."

As to the 2014 petition, the trial court seemingly indicated that it agreed with the successor trustees on the issue of arbitration—that is, there had not been and could not be any arbitration in the absence of a court order compelling arbitration: "the court finds that the underlying matters should not be—are not to be decided through arbitration . . . . To the extent that they could have been, that opportunity has come and gone, and [the beneficiaries'] motion to compel [arbitration] was denied." However, at the hearing, the court did not address the other issue raised by the 2014 petition, namely the parties' conflicting interpretations of the Trust's allocation paragraph as amended by the Second Amendment.

At the hearing on June 4, the trial court also granted a petition by the beneficiaries (originally filed in 2010) to compel the successor trustees to provide certain accountings.[4]

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[4] The petition, which was based on certain informal accountings that allegedly showed inappropriate transactions by the successor trustees, sought a number of other, broader forms of relief besides the accountings, such as an order removing the successor trustees and an order

On June 29, 2015, counsel for the beneficiaries, as requested by the trial court, served a proposed statement of decision. The proposed statement of decision, consistent with the trial court's finding at the June 4 hearing, affirmed that the 2010 petition could not proceed due to the Supreme Court's statement that a petition to compel arbitration would not violate the Trust's no contest clauses. With regard to the discovery motions, the proposed statement of decision, also consistent with the trial court's oral comments at the June 4 hearing, indicated that "all of the discovery sought relates to the alleged violation of the no-contest clauses by the Beneficiaries claimed by the Trustees which the Supreme Court found not to exist; that discovery is not relevant to the remaining issues in this matter and cannot be the basis for a motion to compel."

On the 2014 petition, however, the proposed statement of decision provided virtually no discussion or analysis,

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compelling distribution of the Trust. The trial court did not address, let alone decide any of these other requests.

In October 2010, a different judge than the one who had made the rulings at issue in this appeal ordered the successor trustees to provide the requested accountings (but did not rule on any of the other requested relief) if the parties were not able to reach an agreement on the accounting issue through arbitration. Resolution of the accounting request was subsequently delayed by a number of intervening events, including the prior appeal in this matter and the successor trustees' subsequent petition to the United States Supreme Court for a writ of certiorari.

limiting itself to just the following sentence that reflected the beneficiaries' position on the petition as reflected in their supplemental briefing: "Th[e successor trustees'] PETITION FOR INSTRUCTIONS, seeking the same relief and raising the same issues [as the 2010 petition], likewise, cannot proceed."

Although the proposed statement of decision, to the extent it addressed the 2014 petition, was arguably at odds with the trial court's statements at the June 4 hearing regarding the arbitration issue, and did not address at all the interpretation issue, the record before us does not indicate that the successor trustees ever objected to the proposed statement of decision and/or requested that the trial court clarify any ambiguities or omissions therein.

On July 21, 2015, the trial court signed the proposed statement of decision and entered an accompanying order memorializing its decisions (the order). The successor trustees filed a timely notice of appeal regarding the order.

DISCUSSION

I. The 2010 petition

The successor trustees argue that the trial court erred by taking their 2010 petition off calendar because the Supreme Court did not determine the merits of the 2010 petition, only the merits of the beneficiaries' safe harbor petition. The successor trustees' argument is without merit for two reasons, one procedural, the other substantive. First, the trial court's order taking their 2010 petition off calendar is nonappealable. Second, even if the order was appealable,

under the law of the case doctrine, the 2010 petition had been rendered moot by the Supreme Court's decision in *Donkin*, *supra*, 58 Cal.4th 412.

A. THE ORDER TAKING THE 2010 PETITION OFF CALENDAR IS NONAPPEALABLE

As our Supreme Court has explained, "An off-calendar order is not equivalent to a dismissal and does not divest the court of the jurisdiction which it has acquired." (*Guardianship of Walters* (1951) 37 Cal.2d 239, 244.) In other words, because a trial court "has discretion in the control and regulation of its calendar or docket," it is "permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court's own motion. 'Off Calendar' is not synonymous with 'dismissal.' 'Off' merely means a postponement whereas a 'dismissal' in judicial procedure has reference to a cessation of consideration." (*Guardianship of Lyle* (1946) 77 Cal.App.2d 153, 155–156.) In short, as the court in *Estate of Berg* (1964) 225 Cal.App.2d 423, 428, explained, a trial court's order that a "petition be placed off calendar . . . [is] not equivalent to a dismissal of the petition."

In the absence of a final order on the 2010 petition, the successor trustees' appellate challenge regarding the merits of the 2010 petition is premature. Lacking an appealable order, we do not have jurisdiction to consider the successor trustees' argument regarding the 2010 petition. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

B. THE LAW OF THE CASE DOCTRINE RENDERS THE 2010 PETITION MOOT[5]

Even if the order taking the 2010 petition off calendar was appealable, the trial court had good cause to take the 2010 petition off calendar due to the law of the case.[6]

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[5] Although the law of the case doctrine implicitly guided proceedings on the 2010 petition following the Supreme Court's decision, neither the parties nor the trial court ever referred to the doctrine by name or expressly discussed the well-developed body of case law regarding the doctrine. On appeal, neither party addressed the law of the case doctrine in their initial submissions. Instead, they referred to somewhat related doctrines—res judicata by the successor trustees; and issue preclusion by the beneficiaries. Accordingly, we invited the parties to submit supplemental briefs on the doctrine and its potential application to the issues on appeal. In their supplemental briefing, however, neither party closely analyzed the text of the *Donkin* decision or analyzed how the law of the case doctrine would (or would not) apply to both the 2010 petition and the 2014 petition. Accordingly, we believe that a limited discussion of the doctrine and its application to this case would be of some benefit to the parties and the trial court upon remand.

[6] While the law of the case doctrine applies to the 2010 petition, it does not have any application to or any affect on the 2014 petition. The reason for this is simple—the issues raised and the relief sought by the 2014 petition, as discussed below, are not the same as those raised and sought by the 2010 petition or the safe harbor petition, both of which were determined by the Supreme Court in *Donkin*, *supra*, 58 Cal.4th 412.

As our Supreme Court has explained, where an appellate court states a rule of law necessary to its decision, such rule " 'must be adhered to' " in any " 'subsequent appeal' " in the same case, even where the former decision appears to be " 'erroneous' " (*People v. Shuey* (1975) 13 Cal.3d 835, 841.) Thus, the law-of-the-case doctrine "prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances." (*Id.* at p. 638.) The doctrine is one of procedure, not jurisdiction, and it will not be applied "where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 787.)

"Moreover, '[a] decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed. [Citations.]' [Citation.] Thus, application of the law-of-the-case doctrine is appropriate where an issue presented and decided in the prior appeal, even if not essential to the appellate disposition, 'was proper as a guide to the court below on a new trial.' " (*People v. Boyer* (2006) 38 Cal.4th 412, 442.)

"The primary purpose served by the law-of-the-case rule is one of judicial economy." (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435.) "The doctrine promotes finality by preventing relitigation of issues previously

decided." (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309.) In other words, under the doctrine of the law of the case "[l]itigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court." (*Id.* at p. 312.)

As our Supreme Court has recognized, "[t]he doctrine is . . . harsh." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.) Accordingly, California courts will decline to adhere to it "where its application would result in an unjust decision, e.g., where there has been a manifest misapplication of existing principles resulting in substantial injustice, or where the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations." (*Id.* at pp. 491–492.) However, "[t]he unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination." (*Id.* at p. 492.)

Here, although the 2010 petition was not directly at issue in the successor trustees' prior appeal, the Supreme Court was well aware of the 2010 petition. (See *Donkin*, *supra*, 58 Cal.4th at p. 420.) Not only was the court aware of the 2010 petition and its close connection to the issues raised by the beneficiaries' safe harbor petition, but, in its holding, the court expressly rendered the 2010 petition moot. The 2010 petition asserted two points: (1) the Trust obligated the beneficiaries to arbitrate any disputes that could be legally raised, and that by filing the safe harbor application instead of arbitrating, the beneficiaries had triggered the no

contest clauses; and (2) the beneficiaries' petition to compel arbitration of their claims itself violated the no contest clauses. As to the 2010 petition's first point, the Supreme Court expressly held that "nothing in the current law suggests that safe harbor applications pending when the current law became operative were subject to dismissal" and, therefore, "the trial court did not err as a procedural matter in ruling on the beneficiaries' pending safe harbor application after the operative date of the current law." (*Donkin*, *supra*, 58 Cal.4th at p. 427.) With regard to the 2010 petition's second point, "the successor trustees *cannot* establish that under the former law the beneficiaries have already violated the no contest clauses *by their filing of a request for an order of the probate court compelling arbitration of their claims or by their filing of the safe harbor application in lieu of proceeding to arbitration*. . . . Nor did the filing of the safe harbor application, prior to commencing arbitration, trigger the no contest clauses under the former law, as the successor trustees argued." (*Id.* at p. 438, italics added.) The court held that "the *same* result . . . is reached by applying the current law" as under the former law. (*Ibid.,* italics added.)

If there was any question about whether the court's holding would reach the issues raised by the 2010 petition, that question was answered by the court itself: "Although not expressly addressed by the probate court in its order, *the successor trustees raised such arguments in their response to the beneficiaries' safe harbor application, as well as in their*

[2010] petition for instructions. Therefore, the arguments may fairly be read as having been implicitly rejected by the probate court. Accordingly, *we reject the successor trustees' claim that the Court of Appeal lacked jurisdiction (and implicitly that we lack jurisdiction) to consider whether the beneficiaries triggered the no contest clauses by their actions or inaction regarding arbitration of their claims*." (*Donkin*, *supra*, 58 Cal.4th at p. 438, fn. 16, italics added.)[7]

II. The order denying the discovery motions is nonappealable

As alluded to above, "[t]he right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.) Therefore " ' "[n]o appeal can be taken except from an appealable order or judgment, as defined in the statutes and developed by the case law. . . ." ' "

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[7] On appeal, in an attempt to place the 2010 petition outside the purview of the Supreme Court's decision, the successor trustees argue that their final brief below on the petition contained a number of "relevant issues which were not included" in the safe harbor petition ruled on by the Supreme Court. However, it has long been recognized in California that a petition in a probate proceeding is akin to a complaint or other pleading in a civil action. (*Estate of Wooten* (1880) 56 Cal. 322, 325.) Under the rules of civil procedure, which, in large part, guide probate proceedings (see § 1000), a party cannot unilaterally amend a pleading by simply asserting arguments into a brief; rather, a party, in most circumstances, must first obtain leave from the court to amend a pleading. (See Code Civ. Proc., § 473.)

(*City of Gardena v. Rikuo Corp*. (2011) 192 Cal.App.4th 595, 601, italics omitted.) There is no statutory provision for appeal of an order denying or compelling discovery. (See *Doe v. United States Swimming, Inc*. (2011) 200 Cal.App.4th 1424, 1432 (*Doe*); Code Civ. Proc., § 904.1.) " 'An attempt to appeal from a non-appealable order does not give this court jurisdiction or authority to review it.' [Citation.] Consequently, it is the duty of the court to dismiss an appeal from an order that is not appealable." (*Doe*, at p. 1432 [declining to review order granting discovery].)

Because we have no jurisdiction to rule on that portion of the order denying the discovery motions, we decline to consider that portion of the order.

III. The denial of the 2014 petition was an abuse of discretion

The successor trustees argue that the trial court erred with respect to the 2014 petition, because the trial court "did not address the merits and summarily dismissed the petition." We agree that the trial court erred with regard to the 2014 petition, but not for the precise reasons advanced by the successor trustees. The trial court abused its discretion by making a legal error on the face of the statement of decision—as to the 2014 petition, it misinterpreted and/or misapplied the Supreme Court's decision in *Donkin*, *supra*, 58 Cal.4th 412.

A. STANDARD OF REVIEW

" 'In view of the varied nature of the matters which may be freely brought before the probate court by the use of

a petition for instructions, the action of the court with respect thereto should be upheld in the absence of an abuse of discretion.' " (*Estate of Denton* (1971) 17 Cal.App.3d 1070, 1075; see *Estate of Mabury* (1976) 54 Cal.App.3d 969, 984 [trial court abused discretion in responding to trustee's petition for instruction].) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, . . . unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

"Notwithstanding the applicability of the abuse of discretion standard of appellate review, when the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions of law are subject to de novo (i.e., independent) review on appeal. [Citation.] It is an abuse of discretion for a trial court to misinterpret or misapply the law." (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333–1334.)

B. DOCTRINE OF IMPLIED FINDINGS

"The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant

bears the burden of providing an adequate record affirmatively proving error." (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58 (*Fladeboe*).)

Appellate courts will invoke the doctrine of implied findings where the parties failed to bring alleged deficiencies in a proposed statement of decision to the trial court's attention in a timely manner. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133–1134.) As our Supreme Court has explained, "the party must state any objection to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. . . . [I]f omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. The clear implication . . . is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Id.* at pp. 1133–1134, fn. omitted.) The rationale for the doctrine is as follows: "it would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial. [Citations.] . . . It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal." (*Id.* at p. 1138.)

The doctrine of implied findings applies where the trial court rendered a statement of decision containing ambiguities or omissions unless the record shows that those ambiguities or omissions were timely brought to the trial court's attention. (See *SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462; *Fladeboe*, *supra*, 150 Cal.App.4th at p. 59.)

The doctrine of implied findings also applies where a statement of decision fails to resolve a "principal controverted issue" requested by a party. The deficiency is reversible error only if timely brought to the trial court's attention; otherwise, the defect is waived. (*Arceneaux*, *supra*, 51 Cal.3d at pp. 1133–1134.) *In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, is illustrative. In that case, the trial court's statement of decision "failed to make factual findings necessary to a resolution of disputed material issues" and "did not consider certain undisputed evidence." (*Id.* at p. 453.) As a result, the court of appeal found that that statement of decision was "inadequate as a matter of law" and requiring remand for further consideration, but only because the wife filed objections to the husband's proposed statement and filed an alternative proposed statement, which "adequately preserved" the issue for appeal. (*Id.* at p. 453 & fn. 4.)

However, there is no waiver if the statement of decision contains a legal error on its face. (See *United Services Auto. Assn. v. Dalrymple* (1991) 232 Cal.App.3d 182, 186; *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 677,

fn. 5.) In such cases, there is "no omission or ambiguity in the trial court's statement" if it "clearly" expresses a legal conclusion that is wrong; under such circumstances, "there are no 'findings' to be implied in favor of the prevailing party which could alter the analysis." (*United Services Auto. Assn.*, at p. 186.)

C. THE STATEMENT OF DECISION CONTAINS A LEGAL ERROR

Here, the successor trustees had multiple opportunities to object to and/or request clarification of the trial court's statement of decision. Immediately, after the court announced its decision on June 4th, the successor trustees could have made an oral objection or request for clarification, but did not. Similarly, the successor trustees could have objected to the proposed statement of decision submitted by the beneficiaries, but, once again, they were silent. In addition, they could have submitted to the trial court an alternative statement of decision; but they did not do so.

Normally, under such circumstances, the doctrine of implied findings would compel us to conclude that the successor trustees waived any argument on appeal about the denial of the 2014 petition. However, the statement of decision contains, on its face, a legal error. Specifically, the statement of decision's assertion that the 2014 petition could not proceed because it sought the same relief on the same issues as the 2010 petition, which was rendered moot by the Supreme Court's decision, is based on a patent misreading of

the petitions and the Supreme Court's decision in *Donkin*, *supra*, 58 Cal.4th 412.

The 2014 petition did not raise the same issues as the 2010 petition. While both petitions broadly concern arbitration, they are very different. The 2010 petition seeks to directly disinherit the beneficiaries by arguing that because they filed a motion to compel arbitration they violated the Trust's no contest provisions. In contrast, the 2014 petition seeks merely to prohibit any arbitration proceeding that has not been ordered by the trial court. Moreover, the 2014 petition does not seek to disinherit the beneficiaries directly. Instead, it seeks an interpretation of provisions in the Trust that the Supreme Court found to be ambiguous. While one possible outcome of the 2014 petition—assuming the trial court adopts the interpretation advanced by the successor trustees—might be the effective disinheritance of the beneficiaries by the successor trustees, that possibility is very different than the certainty of disinheritance raised by the 2010 petition and the Trust's no contest provisions. Critically, the Supreme Court's decision did not decide either issue raised by the 2014 petition—it simply held, as discussed above, that a motion to compel arbitration by the beneficiaries would not trigger the Trust's no contest provisions and that the parties' competing interpretations of the amended allocation paragraph was an issue for the trial court or an arbitrator to decide.

In sum, the statement of decision contains a legal error on its face because the trial court's stated reason for denying

the 2014 petition is based on a misreading of the law of the case; as a result, the trial court abused its discretion. Accordingly, we reverse that portion of the order regarding the 2014 petition and remand for further proceedings consistent with our holding herein.

IV. The accounting order is not appealable

The successor trustees argue that the trial court "completely disregarded" their objections and responses to the beneficiaries petition for an accounting.[8] The successor trustees' argument is beside the point as the accounting order is nonappealable.

An order granting or denying a petition to compel an accounting under the Probate Code is not appealable. Specifically, the section 1304, subdivision (a)(1) provides as follows: "With respect to a trust, the grant or denial of the following orders is appealable: (a) Any final order . . . except the following: [¶] (1) Compelling the trustee to submit an account or report acts as trustee." Therefore, typically "[u]ntil the accounting is made and the order sustaining objections or approving the accounting is entered, there is no

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[8] In their respondents' brief, the beneficiaries do not address the successor trustees' arguments regarding the accounting order. Under such circumstances, we "examine the record on the basis of appellant's brief and . . . reverse only if prejudicial error is found." (*Walker v. Porter* (1974) 44 Cal.App.3d 174, 177; *DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1412 [same].)

appealable order." (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 622 (*Evangelho*).) However, "[a]n order to account is appealable when it expressly or implicitly decides other issues that could be the subject of an appealable probate order." (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 522.)

Evangelho, *supra*, 67 Cal.App.4th 615, illustrates when an order granting an accounting may be appealable. In that case, trust beneficiaries petitioned for an accounting, alleging that the trustee had diverted trust funds to a joint tenancy bank account she controlled. The probate court ordered the trustee to account for trust funds and transactions involving the bank account. On the trustee's appeal, the trust beneficiaries argued that the order to account was not appealable. The Court of Appeal disagreed, because "the issue is broader than the order of a mere accounting"—"[the trustee]'s contention is that the court's order could not compel an accounting of the joint tenancy account because a joint tenancy account is an asset separate and distinct from the trust." (*Id.* at p. 622.) In other words, the order compelling the trustee to account was held to be appealable because it implicitly decided that the joint tenancy account was a trust asset, which could be the subject of an appealable order.

Here, in contrast to *Evangelho*, *supra*, 67 Cal.App.4th 615, the requested accounting would not, in and of itself, explicitly or implicitly, decide any other issues that could be the subject of an appealable probate order. Because we have

no jurisdiction, we decline to consider that portion of the order regarding the accountings.

DISPOSITION

The portion of the July 21, 2015 order denying the 2014 petition for instructions filed by the successor trustees is reversed due to legal error on the face of the statement of decision. In all other respects, the order is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.