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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

RUSSEL S. LEVENTHAL, et al., Plaintiffs and Appellants, v. MICHELLE MONTELIONE, et al., Defendants and Respondents.	B230239 (Los Angeles County Super. Ct. No. LP014436)

APPEAL from judgments of the Superior Court for Los Angeles County, James A. Steele, Judge. Affirmed.

Law Offices of John M. Balian, John M. Balian, Emma M. Kurdian; Klapach & Klapach and Joseph S. Klapach for Plaintiff and Appellant Gianfranco Montelione, by and through his Guardian Ad Litem, Marisol R. Colon.

Law Offices of John M. Balian, John M. Balian and Emma M. Kurdian for Plaintiff and Appellant Russel Leventhal.

Law Offices of Mark H. Rademacher, Mark H. Rademacher; Seyfarth Shaw, Patricia N. Chock and Alan T. Yoshitake for Defendants and Respondents Michelle Montelione and Gaetano T. Montelione, Trustee.

Law Offices of Mary P. Kulvinskas and Mary P. Kulvinskas for Defendant and Respondent Shaun Wakashige.

This consolidated appeal, from judgments arising from two separate petitions, involves an irrevocable life insurance trust that utilized a lawful tax-avoidance device known as *Crummey* powers, named after *Crummey v. C. I. R.* (9th Cir. 1968) 397 F.2d 82. In the first petition, Russel S. Leventhal (Leventhal), the original trustee of the Frank Montelione, Jr. Irrevocable Trust dated May 17, 1996 (the Trust), challenged the authority of the then-current trustee -- Gaetano Montelione (Gaetano)[1] -- to act as trustee and asked the trial court to declare that Leventhal is the lawful trustee of the Trust. The court found that Leventhal, who had resigned as trustee almost eight years before he filed the petition, lacked standing to bring the petition. The second petition was brought by Gianfranco Montelione (Gianfranco), through his guardian ad litem Marisol R. Colon, seeking (among other things) an order finding him a beneficiary of the Trust. The court found that Gianfranco was a lifetime (or *Crummey*) beneficiary of the Trust, but his status as a lifetime beneficiary did not entitle him to any share of the trust assets upon the death of the settlor. We affirm both judgments.

BACKGROUND

A. *Preliminary Matters*

Before proceeding with the factual background of this case, a brief explanation of irrevocable life insurance trusts and *Crummey* powers is in order.

"An irrevocable life insurance trust is a non-amendable trust that is both the owner and beneficiary of one or more life insurance policies. Upon the insured's death, the trustee invests the insurance proceeds and administers the trust for one or more beneficiaries." (Gallo, "The Use of Life Insurance in Estate Planning: A Guide to Planning and Drafting - Part I" (1998-1999) 33 Real Prop. Prob. & Tr. J.

[1] We use the first names of members of the Montelione family for ease of reference.

685, 729.) Typically, the premiums on the life insurance policies are funded by annual gifts from the trustor/insured. (*Id.* at p. 740.) Those gifts are treated as gifts to the beneficiaries of the trust, and can qualify as tax-free annual exclusion gifts through the use of *Crummey* powers. (*Id.* at pp. 740-741.) *Crummey* powers give a beneficiary the right, usually for a limited period of time, to withdraw all or a portion of an annual contribution made to the trust. By having this right to withdraw, the beneficiary has a present interest in the contribution that qualifies for the annual gift tax exclusion. This is true even if the beneficiary has no present interest in the trust other than the withdrawal right (e.g., the beneficiary will not share in any distribution of trust assets or is a contingent remainder beneficiary). If the beneficiary does not exercise his or her right to withdraw within the allowable time, the power to withdraw lapses. (*Id.* at pp. 741-745.)

B. *Creation of the Trust*

The Trust in this case was created in 1996 by the trustor, Frank Montelione (Frank) as an irrevocable life insurance trust, with Leventhal as the initial trustee. It was established to keep the death benefit from a life insurance policy on Frank's life outside of Frank's estate for estate tax purposes, and was designed so that the annual premiums Frank paid would qualify for the annual gift tax exclusion. At the time of its creation, Frank had a daughter, Michelle Montelione (Michelle), who was nine years old, and a stepson, Shaun Wakashige (Shaun), who was 13 years old. Shaun was the son of Frank's then-wife, Teresa McOwen.

The Trust is set forth in 13 Articles. The first two Articles describe the creation and funding of the Trust. Articles 3 and 4 describe how the Trust is to be administered during Frank's lifetime, and Articles 5 through 9 describe how it is to be administered after his death. Articles 10 and 11 govern the resignation, replacement, and succession of the trustees and other matters regarding the

trusteeship, and the final two Articles set forth general and administrative provisions. Our primary focus for purposes of this appeal is on Articles 3, 7, and 10, as well as certain provisions of Articles 12 and 13.

1. *Administration of the Trust During Frank's Lifetime*

Article 3, section 2 provides that all contributions to the Trust during Frank's lifetime "shall be divided into equal shares for each of my beneficiaries who is living at the time of a contribution," and that each share shall be held in a lifetime separate trust for that beneficiary. Section 1 of Article 3 names as beneficiaries of those lifetime separate trusts ("lifetime beneficiaries") Michelle, Shaun, and "any children subsequently born to me, or legally adopted by me."

Despite the mandatory language used in Article 3, section 2, however, Article 12, section 3c states that, "[f]or purpose of convenience with regard to the administration and investment of the trust property, my Trustee may hold the several trusts created under this agreement as a common fund [and] may make joint investments with respect to the funds comprising the trust property." Article 4 gives the trustee the power to purchase and hold as trust property a policy or policies of insurance on Frank's life.

Sections 4 through 10 of Article 3 set forth the *Crummey* powers. Those sections provide that each lifetime beneficiary has a right to withdraw his or her share of any property contributed to the Trust (including payments of premiums made directly to an insurance company by any party [section 9]), up to a certain limit (section 4), and that the withdrawal right vests upon the date of the transfer to the Trust and lapses 30 days after notice by the trustee of the transfer (section 5). Under section 10, any amount subject to a withdrawal right that is not withdrawn by a lifetime beneficiary is retained as part of that beneficiary's lifetime separate trust.

The notice provisions regarding the *Crummey* powers, which are found in sections 6 and 7 of Article 3, are at issue in this appeal. Section 6 provides that within 15 days following the transfer of property to the Trust (or indirect transfers such as insurance premiums paid directly to an insurance company), the trustee "shall provide written notice to each beneficiary then entitled to a right to withdraw that property has been transferred to the trust" and that the beneficiary has a right to withdraw. Section 7, however, provides that "[i]f a beneficiary entitled to make a withdrawal is a minor or is under any other form of legal disability during all or part of any withdrawal period, the beneficiary's legal or natural guardian, conservator, or personal representative shall be informed of, and may exercise, the withdrawal right on behalf of the beneficiary." Finally, Article 13, section 8c provides that "[a]ll notices required to be given in this agreement shall be made in writing by either" personal delivery with a written receipt or certified mail, return receipt requested.

2. *Administration of the Trust After Frank's Death*

Section 12 of Article 3 addresses the administration of the lifetime separate trusts at Frank's death. Section 12a provides that the trustee "shall maintain the lifetime separate trust for a beneficiary who is living at [Frank's] death" and that the income and principal of that lifetime separate trust shall be administered and distributed in the same manner as set forth in Article 7. Section 12c, however, states that "[t]he death benefit under any life insurance policy owned by the trust shall not be included in the value of a separate trust." Nevertheless, section 12c allows the trustee to use the death benefit "to fund, in whole or in part, the value of any separate trust which is not fully funded at the time of [Frank's] death." (We note that, as discussed in section B.2., *post*, the meaning of this last sentence is in dispute.)

Article 5 provides that, upon Frank's death, "[t]he balance of the trust property not disposed of under the prior provisions of this trust agreement shall be administered as provided in the Articles that follow." Article 6 makes clear that Frank did not intend to create a common trust for the benefit of his children, and instead directed that all trust property not distributed under prior provisions "be divided, administered, and distributed under the provisions of the Articles that follow." Article 7 provides that "[a]ll trust property not previously distributed under the terms of [the] trust agreement shall be divided as follows: [Michelle receives an 80 percent share, and Shaun receives a 20 percent share]." That Article also directs that separate trusts be set up for Michelle and Shaun and provides directions for how the property in those trusts is to be administered and distributed. Articles 8 and 9 set forth instructions for distributing trust property if there is no person, corporation, or other entity entitled to receive trust property or if any beneficiary is a minor or disabled.

3. *Trustee and Successor Trustees*

Article 10 provides that any trustee may resign by giving written notice, and that any trustee may be removed, with or without cause, by a majority of the beneficiaries then eligible to receive mandatory or discretionary distributions of net income from the Trust. Section 3 of Article 10 names Richard J. Shapiro (Shapiro) as successor trustee, and section 4 provides that if no named trustee is available, a majority of the beneficiaries "shall forthwith name a corporate fiduciary," or if they cannot agree, any beneficiary may petition the court to designate a corporate fiduciary as trustee.

B. *Operation of the Trust*

The Trust was created on May 17, 1996. At that time, Leventhal, as trustee, obtained a $4 million life insurance policy on Frank's life (which became the sole asset of the Trust), and entered into a split-dollar agreement with Allstate Communications (ACI) -- a corporation co-owned by Frank and Leventhal -- whereby ACI would pay the premiums on the policy during Frank's life and would be paid back the amount of those premiums upon Frank's death.[2]

On September 18, 2001, Leventhal gave written notice of his resignation as trustee of the Trust. Shapiro, the named successor trustee, accepted the position of trustee on that same day. A month later, on October 26, 2001, Shapiro gave written notice of his resignation as trustee. On October 29, 2001, Frank, as parent and natural guardian of Michelle and as guardian of Shaun, signed an appointment of successor trustee. The document stated that the beneficiaries were unable to name a corporate fiduciary to act as trustee, because the corporate fiduciaries they contacted through counsel had declined to serve. Therefore, they appointed Frank's brother Gaetano as successor trustee. Gaetano accepted the position as successor trustee on November 16, 2001.

On June 3, 2003, Frank, who was no longer married to Michelle's and Shaun's mother, had another child, Gianfranco, with his wife Janice.[3] Before that date, Frank, as Michelle's father and Shaun's stepfather (and, once he reached the age of majority, Shaun), had signed annual statements acknowledging gifts made to the Trust and each beneficiary's right to withdraw one-half of the gifts, and

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[2] At some point, Frank (or Frank and his wife Janice) began paying the premiums instead of ACI.

[3] Gianfranco was born prematurely and suffers from numerous birth defects. In 2004, Frank created an irrevocable investment trust for Gianfranco. He also created an irrevocable insurance trust for Janice and Gianfranco in 2006.

electing not to withdraw. After June 3, 2003, Frank, as Michelle's father, and Shaun signed similar statements, except those statements reflected that each beneficiary had a right to withdraw one-third of the gifts.

Frank died unexpectedly on May 14, 2007, at the age of 47. Gaetano submitted a claim to the insurance company for the death benefit. Once the insurer approved the claim, the proceeds -- approximately $4.3 million -- were paid to the Trust. After consulting with Michelle and Shaun to assess their needs, Gaetano began making $5,000 monthly distributions to each of them from the net income of the Trust.

C. *Litigation*

On May 4, 2009, Leventhal, as initial trustee of the Trust, filed a petition for instructions challenging Gaetano's appointment as successor trustee in 2001 and requesting a determination that he, Leventhal, is the lawful trustee. Apparently, the petition was not served on Gaetano until July 21, 2009, and it was not set for hearing until August 20, 2009. Before that hearing, Leventhal made an ex parte application for an order to establish a blocked account and appoint a temporary trustee, and requested that no notice be provided to Gaetano or the beneficiaries of the Trust. The trial court granted the application in part and suspended Gaetano's powers as trustee, based upon Leventhal's allegations that Gaetano had improperly and unlawfully dissipated Trust funds.[4]

On October 5, 2009, Gianfranco, through his guardian ad litem and represented by the same attorneys as Leventhal, brought a petition for instructions requesting confirmation that Gianfranco is a present beneficiary of the Trust or, in

[4] None of the papers (or reporter's transcript) related to the ex parte application are included in the record. Our summary is based upon Gaetano's verified objections and response to Leventhal's petition and the trial court's judgment.

the alternative, that he is an omitted child under Probate Code[5] section 21620 et seq. Gianfranco's petition also asked for confirmation that Gaetano is not the lawful trustee and requested appointment of an interim trustee if necessary.

Both petitions were aggressively litigated, with many new issues and/or theories raised up to and during the trial. After several continuances, the matter was set for a bench trial on June 22, 2010. On June 17, the trial court issued an order determining the issues to be tried and the order in which they would be tried: (1) validity of the Trust; (2) Gianfranco's status as an omitted heir or a post-death or other beneficiary of the Trust (assuming the Trust is found to be valid); and (3) the identity or selection of an appropriate trustee.[6]

The first issue is not at issue in this appeal, and therefore we need not discuss it. Suffice to say that the trial court found that Leventhal was judicially estopped to assert the invalidity of the Trust and that sufficient evidence was presented to establish that the Trust was valid.

Most of the trial addressed the second issue. Leventhal and Gianfranco (collectively, Petitioners) asserted that Gianfranco was an omitted heir or a post-death or other beneficiary because (1) Frank exercised such dominion and control over the assets of the Trust and over Gaetano as purported trustee that the Trust document amounted to a testamentary instrument within the meaning of the omitted heir statute; (2) as Frank's child, Gianfranco is a beneficiary of a lifetime separate trust under Article 3, and he is entitled to a constructive trust on the fruits of the funds that should have been set aside for him (i.e., one-third of the life insurance proceeds) because (a) he never received written notice of his *Crummey*

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[5] Further undesignated statutory references are to the Probate Code.

[6] The third issue was bifurcated, to be tried after the court ruled on the first two issues.

powers, (b) a lifetime separate trust was never established for him, and (c) his share of gifts to the Trust were invested for the benefit of others.[7]

The primary witnesses on the issue of Gianfranco's entitlement to a share of the death benefit were Carol Peskoe Schaner, the attorney who drafted the Trust (as well as several other trusts Frank created for other members of his family), and Jon Gallo, a certified specialist in estate planning, probate, and trust law, who testified as an expert witness on behalf of Gaetano, Michelle, and Shaun (collectively, Respondents). In addition, under a stipulation by the parties, Gaetano provided written testimony, responding to questions posed by Petitioners and Respondents.

1. *Testimony of Carol Schaner*

Schaner testified that she met with Frank to discuss his plans for the Trust, its purpose, and how it would operate. She explained that the Trust "was intended to be a single purpose trust to acquire life insurance on Frank Montelione. There were two primary purposes of the Trust. One was to exclude the proceeds of the life insurance policy from Frank's estate. The second purpose of the Trust was to qualify all of the gifts [to] the Trust for the gift tax annual exclusion amount." She said that Frank made it very clear that he wanted the death benefit of the life insurance to be paid 80 percent to Michelle and 20 percent to Shaun. She prepared several drafts of the Trust, reviewing each draft with Frank and making changes as a result of those reviews. She explained the terms and purpose of the Trust to Frank, and believed that Frank understood those terms and purpose.

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[7] Although the trial court granted Michelle's motion in limine to preclude Petitioners from presenting evidence to support their constructive trust theory because they did not raise that issue until after trial had begun, the court stated that the issue may be determined as a matter of law based upon the interpretation of the Trust.

When asked about the purpose of Article 3 of the Trust, Schaner testified that it "is an Article that stands alone for gift tax purposes, and it basically is a mechanism by which gifts can be made to the Trust." She said that beneficiaries such as those under Article 3 -- referred to as "lifetime beneficiaries" -- are not intended to share in the death benefit, but are instead included so that the gifts to the lifetime beneficiaries will cover the cost of the life insurance premium. She explained that the gift tax exclusion amount in 1996 was $10,000, but the premiums for the life insurance held in these kinds of trusts often exceed $10,000 per year, so Article 3 is designed to have multiple beneficiaries, each of whom can receive an annual "gift" of $10,000.

Schaner explained that the purpose section 2 of Article 3, which requires the trustee to set up separate shares and sub-trusts for each lifetime beneficiary, is to set aside any funds after the lifetime beneficiaries' *Crummey* power to withdraw lapses and make them available to pay the life insurance premiums. Schaner noted that in an insurance trust where the gifts to the trust are equal to the amount of the insurance premium, trustees usually do not set up separate shares or trusts because there is nothing left after the premiums are paid. Instead the requirement to set up separate shares or trusts described in section 2 is "really just kind of an accounting mechanism so that the gifts can be tracked." Nevertheless, she stated that the separate lifetime trusts are true property rights of the lifetime beneficiaries, and that upon the death of the grantor and the collection of life insurance proceeds by the trustee, "[t]he amount of the gift into each separate share is honored." Thus, section 12c of Article 3 allows the trustee to use a portion of the death benefit to transfer the necessary amounts to the separate lifetime trusts. In other words, if a lifetime beneficiary received an annual gift of $10,000 for four years and never exercised his or her *Crummey* power, when the death benefit is paid, $40,000

would be distributed to the separate lifetime trust for the benefit of the lifetime beneficiary.

With regard to giving notice to the lifetime beneficiaries of gifts to the Trust, Schaner testified that written notice is not required under Article 3, section 7 when the beneficiary is a minor. Instead, all that is required is actual knowledge of the gift by the minor beneficiary's parent or natural guardian; when the settlor who is making the gift is the minor's parent or natural guardian, he or she has actual knowledge. When asked whether the settlor/parent would have a conflict of interest when declining to exercise the *Crummey* power, Schaner responded that he or she would not, because he or she would be acting as a parent or natural guardian rather than as a settlor. She also explained that the settlor/parent generally would not exercise the power to withdraw, even if the child would not share in the death benefit, because "withdrawal of funds would defeat the family's overarching estate plan, which generally consists of multiple trusts, not just one. And if the *Crummey* power holder exercises his or her demand right, the trustee wouldn't have enough money to keep the policy in force. It would defeat the overarching design of the family's overall planning."

Finally, she testified about Article 7, governing the distribution of the death benefit of the life insurance policy. She stated that Gianfranco is not a beneficiary under that Article (although she confirmed that he is a lifetime beneficiary under Article 3), and that Frank understood and intended that any children born after the creation of the Trust would not be after-death beneficiaries. She noted that, had Frank wanted his after-born children to be after-death beneficiaries, she could have drafted the Trust to accomplish that.

2. *Testimony of Jon Gallo*

Gallo offered three opinions as an expert witness: (1) that Michelle and Shaun are the beneficiaries of the Trust entitled to the death benefit proceeds; (2) that Gianfranco is not a beneficiary under Article 7; and (3) that Gianfranco is not entitled as a lifetime beneficiary to reimbursement of any *Crummey* gifts used to pay the premiums on the life insurance policy held by the Trust.

As to his first opinion, Gallo explained it was based upon section 12c of Article 3, which states that the death benefit under any life insurance policies owned by the Trust will not be included in the value of a separate share. He stated that, since those proceeds are not disposed of by Article 3, they would be deemed to be a part of the Article 7 residue of the Trust estate.

Gallo's second and third opinions were interrelated and also based upon Article 3, but he said that his third opinion "was a little bit wishy-washy." He explained that the purpose of Article 3 is simply "to expand the total number of annual exclusions that were available to the decedent insured so that he could make gifts to the Trust and not have them be taxable gifts." He said it was clear that Article 3 was intended to make Gianfranco a *Crummey* beneficiary, that *Crummey* beneficiaries do not necessarily have any interest in a trust other than the *Crummey* demand right, and that Article 3, section 12c makes clear that the death benefit is not part of the lifetime trust.

But Gallo said there is a possible interpretation of the second sentence of section 12c, which allows (but does not require) the trustee to use the death benefit to fund the value of any separate trust that is not fully funded at the time of the settlor's death. He observed that this provision could be interpreted to mean that a portion of the death benefit might be used to restore to the separate lifetime trusts the entire amounts that had been given to the Trust. Under that interpretation, Gallo noted that Gianfranco could be entitled to reimbursement of his share of the

amounts of the gifts made to the Trust during his lifetime. He did not believe, however, that this would be a correct interpretation. He explained that he had "never heard of anybody doing it that way before. It's completely contrary to the concept that *Crummey* beneficiaries are there to multiply annual exclusions. They are not there to really get benefits from the trust." Instead, he said that the real purpose of that last sentence of section 12c was to address a situation that could occur if the insured died while a *Crummey* demand right had not yet lapsed. Under section 12c, the trustee would be allowed to use the death benefits to fund the unlapsed *Crummey* demand right, i.e., the right to withdraw the $10,000 annual gift. He stated that such a provision has to be included in the Trust to ensure that the withdrawal power is not illusory.

3. *Written Testimony of Gaetano*

Among other things, Gaetano testified that he did not provide written notice to Gianfranco regarding gifts made to the Trust or his right to withdraw because Frank was Gianfranco's father and natural guardian. Gaetano stated Frank made or closely monitored the gifts made to the Trust and that, based upon Gaetano's conversations with Frank, he knew that Frank was well aware of Gianfranco's withdrawal rights. Therefore, Gaetano believed that sending written notices was not required under the Trust. Gaetano also testified that based upon his conversations and interactions with Frank, he understood that Frank intended that all gifts made to the Trust were to be used to pay the premium on the life insurance policy held by the Trust, that the death benefits were to be for the benefit of Michelle and Shaun, and that after-born children were not entitled to death benefits under the Trust. Gaetano also understood that no portion of the death benefits was to be distributed to Gianfranco.

4. *The Trial Court's Ruling*

On November 12, 2010, the trial court issued a detailed decision after trial and judgment thereon. In addition to rejecting Petitioners' assertion that the Trust was invalid (as noted above), the court found that Gianfranco could not be deemed an omitted heir under section 21620 et seq. because those statutes apply only to "testamentary instruments" and do not apply to irrevocable trusts.

The court also rejected Gianfranco's argument that he was entitled to recover a portion of the death benefits under a constructive trust theory because he was not given written notice of his *Crummey* powers and because there was no separate lifetime trust established for him. The court found that, because Gianfranco was a minor, under section 7 of Article 3, the only requirement was that his natural guardian be "informed" of those powers. Since Frank, Gianfranco's father, was his natural guardian and had actual knowledge of the gifts and the *Crummey* powers, the requirements of the Trust were satisfied. The court also found there was no breach of the Trust by the failure to establish a separate lifetime trust. The court credited the testimony of Schaner and Gallo that, where a trust is designed merely to fund payment of life insurance premiums, the trustee is not required to establish separate trusts for lifetime beneficiaries such as Gianfranco because the purpose of those beneficiaries is simply to permit greater contributions to the Trust free of certain taxes. The court also found that Gianfranco was not entitled to "reimbursement" of his share of the gifts made to the Trust. The court acknowledged that Schaner's and Gallo's testimony differed to some degree with regard to the meaning of the last sentence of Article 3, section 12c, but concluded based upon the terms of the Trust (including Article 6, which provided there was to be no common fund for distribution to all of his children) and other evidence, including Gaetano's written testimony, that it was Frank's

intent that Gianfranco was only a lifetime beneficiary "whose presence was intended merely to multiply the available annual gift tax exclusions."

Finally, the court found that since Gianfranco's status was limited to that of a lifetime beneficiary for contribution purposes only, he lacks standing to participate in any future decision-making or litigation with regard to the identity of and/or selection of the trustee of the Trust.

After the court issued its decision and judgment, Petitioners filed a request for a statement of decision in which they noted, among other things, that the decision did not resolve the issues raised in Leventhal's petition. Michelle subsequently filed an ex parte application for an order appointing Gaetano and Fiduciary Trust International of California as interim trustees. Leventhal objected to Michelle's application and requested a ruling on his May 2009 petition. The court granted Michelle's application, and denied Leventhal's petition. In denying Leventhal's petition, the court found that Leventhal lacks standing because he is neither a beneficiary nor a trustee of the Trust, and under section 17200, only a beneficiary or a trustee may petition the court for relief.

Petitioners filed notices of appeal from the decision and judgment on Gianfranco's petition and the order denying Leventhal's petition.

DISCUSSION

On appeal, Leventhal contends he has standing to bring his petition as the lawful trustee because "trustee" is defined under the Probate Code to include "an original, additional, or successor trustee" (§ 84), and he was the original trustee of the Trust. Gianfranco contends he is entitled to a pro rata share of the death benefit received by the Trust because (1) the trustee failed to provide written notice of his *Crummey* powers, so his withdrawal rights did not lapse and therefore the trustee misappropriated his share of the contributions made to the Trust; (2) in the

alternative, even if Frank's knowledge of the contributions to the Trust and *Crummey* powers constituted sufficient notice, Frank could not waive Gianfranco's right to withdraw because he had a conflict of interest; and (3) even if Gianfranco's withdrawal rights were waived, the trustee misappropriated his share of the contributions because he did not maintain the funds in a separate trust for Gianfranco's benefit but instead invested them in a life insurance policy for the benefit of others. Gianfranco also contends that he has standing as a beneficiary of the Trust to seek the removal of the trustee.

A. *Leventhal Lacks Standing*

Leventhal contends he has standing to bring his petition because section 17200, subdivision (a) authorizes "a trustee or beneficiary of a trust" to "petition the court . . . concerning the internal affairs of the trust," and section 84 defines "trustee" to include "an original, additional, or successor trustee." He argues that since he was the original trustee of the Trust, he is entitled to assert his rights as the "lawful" trustee and challenge Gaetano's right to serve as trustee. We disagree.

Leventhal's reliance on the definition of "trustee" is misplaced. Section 20 provides that, "[u]nless the provision or context otherwise requires, the definitions in this part govern the construction of this code." Here, the context requires that the literal definition of "trustee" not apply.

Although Leventhal was the original trustee of the Trust, he resigned eight years before he brought his petition. In the interim, the named successor trustee was appointed and then resigned, and Gaetano was appointed and managed the Trust for the next seven and a half years, including for two years following Frank's death. Under these circumstances, section 17200 cannot be construed to authorize the resigned original trustee to petition the court concerning the internal affairs of the trust, because the resigned trustee no longer has any real interest in those

affairs. (*Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1111 [“‘“As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury”’”] (*Shapell*).)

Leventhal’s assertion that the trial court was required to determine standing based upon the allegations of the petition (including his allegation that if he executed resignation documents, he did so under mistaken premises), which the court must accept as true, has no merit. While the issue of standing is often decided by reference to the allegations in the complaint or petition (see *Shapell*, *supra*, 132 Cal.App.4th at p. 1111), that is not necessarily so, since the issue may be decided at any stage of the proceedings, after facts showing a lack of standing have come to light. (See, e.g., *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000 [“Lack of standing may be raised at any time in the proceeding, including at trial or in an appeal”].) And in this case, the trial court had before it Leventhal’s written notice of his resignation as trustee, Shapiro’s subsequent acceptance as successor trustee, Shapiro’s later notice of resignation, and Gaetano’s appointment and acceptance as trustee. Thus, the trial court properly rejected Leventhal’s disingenuous allegation that he and Shapiro “may have” executed resignation documents, but if they did so it was under mistaken premises. And having concluded that Leventhal no longer had any interest in the Trust because he had resigned as trustee, the trial court correctly found that Leventhal lacked standing to bring his petition.[8]

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[8] Leventhal’s concern that the trial court’s (and our) interpretation of section 17200 would preclude an action by an improperly-removed trustee challenging that removal is unfounded. We simply hold that a trustee who resigned as trustee more than eight years before bringing a petition no longer has any interest in the trust and therefore lacks standing to petition the court concerning the internal affairs of the trust.

B. *Gianfranco's Contention That He Is Entitled to a Share of the Death Benefit Is Not Supported by the Terms of the Trust*

Gianfranco's contention that he is entitled to a pro rata share of the death benefit received by the Trust is premised upon his interpretation of provisions of the Trust governing notice of *Crummey* powers and maintenance of separate trusts for lifetime beneficiaries. He contends that (1) the Trust required that he be given written notice of his *Crummey* powers, but no written notice was given to him, so his power to withdraw contributions to the Trust never lapsed; and (2) the Trust required that the trustee maintain a separate trust for his benefit, but the trustee failed to do so and instead invested all contributions in a life insurance policy, so he is entitled to share in the death benefit from that policy. The trial court found that the Trust did not require written notice to Gianfranco, nor did it require that the trustee maintain a separate trust for the benefit of Gianfranco. We agree with the trial court's interpretation of the Trust.

"'"In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker." [Citations.]' [Citation.] 'Section 21102 provides, "[T]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."' [Citations.] '"In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it." [Citations.]' [Citation.]" (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.) Where there is ambiguity in the language used, or where there is a latent ambiguity, courts may look to extrinsic evidence to determine the trustor's intent.

(*Estate of Russell* (1968) 69 Cal.2d 200, 206.) We review the trial court's interpretation of a trust instrument de novo, unless that interpretation turns on the credibility of extrinsic evidence or requires resolution of a conflict in that evidence, in which case the trial court's determination must prevail if it is reasonable and supported by substantial evidence. (*Estate of Dodge* (1971) 6 Cal.3d 311, 318.)

1. *Notice Provisions and Waiver of Withdrawal Rights*

With regard to Gianfranco's first premise -- that the Trust required the trustee to give him (or his parent or natural guardian) written notice of contributions made to the Trust and his *Crummey* powers -- Gianfranco relies upon section 6 of Article 3, which provides that the trustee "shall provide written notice to each beneficiary" within 15 days following the transfer of property to the trust, informing the beneficiary of the transfer and the beneficiary's right to withdraw. But the section immediately following that section -- Article 3, section 7 -- which specifically applies when a beneficiary is a minor or disabled, provides that the minor/disabled beneficiary's legal or natural guardian simply must be *informed* of the withdrawal right on behalf of the beneficiary. Schaner, the attorney who drafted the Trust instrument in consultation with Frank, testified that section 7 controlled when the beneficiary (such as Gianfranco) was a minor, and therefore no written notice was required; all that was required was actual knowledge by the beneficiary's legal or natural guardian. She observed that written notice clearly is not required when, as in this case, the settlor who made the gift is the minor beneficiary's parent or natural guardian, because the settlor/parent has actual knowledge of the gift and the minor beneficiary's withdrawal right.[9]

[9] As noted, Gaetano testified that Frank made or closely monitored the gifts to the Trust and that, based upon his conversations with Frank, he knew that Frank was aware of Gianfranco's withdrawal rights.

The trial court apparently credited Schaner's testimony in concluding that, under Article 3, section 7, written notice to Gianfranco (or his parent or guardian) was not required because Gianfranco was a minor and Frank, his father, had actual knowledge of the gift and the withdrawal right. The trial court's interpretation is reasonable. It makes little sense to require the trustee to provide written notice of a contribution to the Trust and the minor's right to withdraw his share to the person who made the contribution and who established the Trust with full knowledge of the beneficiaries' *Crummey* power. Therefore, we affirm the trial court's finding that Gianfranco's withdrawal powers had lapsed, and thus the trustee did not misappropriate funds subject to a withdrawal right.

To the extent Gianfranco argues that even if written notice was not required, his withdrawal rights could not be deemed waived based solely upon Frank's knowledge of the gifts because Frank had a conflict of interest, we disagree. Section 7 of Article 3 authorizes a minor beneficiary's legal or natural guardian to exercise or waive the withdrawal rights. Since the only lifetime beneficiaries under the Trust are Frank's children, the Trust necessarily contemplates that Frank, as a natural or legal guardian to his children, would have the power to waive his children's withdrawal rights. If, as Gianfranco asserts, Frank had a conflict of interest in waiving Gianfranco's rights (an issue we need not decide), his claim is against Frank (or his estate) rather than against the Trust.

2. *Separate Trust Provisions*

In asserting that the trustee misappropriated gifts made to Gianfranco to pay the premiums on the life insurance policy for the benefit of Michelle and Shaun, Gianfranco relies upon sections 2 and 10 of Article 3. Gianfranco is correct that section 2 provides that contributions to the Trust must be divided into equal shares and held in separate trusts for each lifetime beneficiary, and section 10 provides

that any contributions that were subject to a withdrawal right but not withdrawn by the lifetime beneficiary must be retained as part of that lifetime beneficiary's separate trust. But Article 12, section 3c expressly relieves the trustee from the obligation to establish and maintain separate trusts, by authorizing the trustee to hold the separate trusts as a common fund and make common investments with those funds.

Read in isolation, sections 2 and 10 of Article 3 might be interpreted, as Gianfranco urges, to require that each lifetime beneficiary's share of contributions to the Trust be maintained and used solely for the benefit of that lifetime beneficiary, and under that interpretation Article 12, section 3c could be seen as allowing the trustee to pool the resources to invest for the equal benefit of all the lifetime beneficiaries. But the intent of the trustor "'"must be ascertained from the whole of the trust instrument, not just separate parts of it."'" (*Estate of Cairns, supra*, 188 Cal.App.4th at p. 944.) As Schaner testified, the Trust "is designed to be a single purpose irrevocable life insurance trust" (as evidenced by Article 4), where lifetime beneficiaries are included solely for gift tax purposes to cover the cost of the insurance premiums, and Frank intended (and Article 3, section 12c and Article 7 make clear) that the only people who would benefit from the life insurance policy held by the Trust were Michelle and Shaun. Therefore, we conclude the trial court's finding that Gianfranco was not intended to benefit from the life insurance policy held by the Trust is supported by the terms of the Trust.

We note that there is an interpretation of the Trust instrument that might entitle Gianfranco to a small portion of the insurance proceeds. Schaner testified that Article 3, section 12c allows the trustee to use a portion of the proceeds to restore to each lifetime beneficiary's separate trust his or her share of contributions made during the beneficiary's life that were used to pay the life insurance premiums. The trial court rejected this interpretation based upon other terms of the

Trust and evidence presented at trial (including Article 6, which declared that Frank did not intend to create a common trust for the benefit of his children, and the testimony of Respondents' expert witness that *Crummey* beneficiaries are included solely to multiply the available gift tax exclusions). Even if the trial court's interpretation of this provision was erroneous, it does not follow that Gianfranco is entitled to one-third of the death benefit due to the trustee's failure to maintain a separate trust for his benefit. At best, Gianfranco would be entitled to his share of the contributions made to the Trust, which amounted to just over $53,000, less allowable expenses. But he has not made any such argument in his opening or reply briefs on appeal and therefore has forfeited the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].) Thus, we affirm the trial court's judgment denying Gianfranco's petition seeking to share in the death benefit from the life insurance policy held by the Trust.

C. *Gianfranco Lacks Standing to Seek Removal of the Trustee*

Gianfranco contends the trial court erred in finding he lacked standing to seek removal of the trustee. He argues he has standing because Article 3, section 12a requires the trustee to maintain a lifetime separate trust for any beneficiary who was living at the time of Frank's death, and thus he has a continuing interest in the Trust. We disagree.

As noted with regard to Leventhal's standing, section 17200, subdivision (a) authorizes "a trustee or beneficiary of a trust" to "petition the court . . . concerning the internal affairs of the trust." Section 24, subdivision (c) defines a beneficiary of a trust as "a person to whom a donative transfer of property is made . . . who has any present or future interest, vested or contingent." In the present case,

Gianfranco had at one time a present interest in a share of a donative transfer, but that interest lapsed when he (through his father, Frank) waived his *Crummey* power to withdraw. Under the terms of the Trust, Gianfranco had no interest in the corpus of the Trust once Frank died, because the sole asset of the Trust was the life insurance policy and he was not entitled to share in the death benefit. As Respondents' expert witness testified, in an irrevocable life insurance trust, where the only corpus is a life insurance policy, the lifetime beneficiaries have separate share trusts (consisting of an interest in the policy) subject to defeasance through a condition subsequent -- in other words, when the insured dies, the separate trust becomes unfunded because the policy turns into insurance proceeds in which the lifetime beneficiaries have no interest.

Because Gianfranco no longer has any interest in the Trust, the trial court properly found he lacks standing to participate in any future decision-making or litigation with regard to the identity and/or selection of the trustee of the Trust.

DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.