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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EDWIN KURVINK, as Trustee, etc., Plaintiff and Appellant, v. ROBERTA KURVINK, Defendant and Respondent.	B236033 (Los Angeles County Super. Ct. Nos. BC364661, BP107032 & BP116923)

APPEAL from judgments of the Superior Court of Los Angeles County, Reva Goetz, Judge. Affirmed.

Horvitz & Levy LLP, David M. Axelrad and Kris Bahr; McNally & Associates and Gerald McNally, Jr., for Plaintiff and Appellant.

Morris Polich & Purdy LLP and Jens B. Koepke; Law Offices of Steven C. Sosa and Steven C. Sosa, for Defendant and Respondent.

I. INTRODUCTION

This appeal arises out of three actions concerning Edwin Kurvink's administration of two trusts created by his mother, Katharine Kurvink. The first trust is the Katharine Wian Kurvink Family 1992 Trust, which was created on February 18, 1992 ("the family trust"). The second trust is the Katharine W. Kurvink Insurance Trust ("the insurance trust"), which was created in December 2001. Mr. Kurvink challenges a $600,000 surcharge, plus interest of $294,000, imposed on him for taxes owed on a $1.2 million insurance policy on Ms. Kurvink's life. We affirm the judgments in all respects.

II. PROCEDURAL HISTORY

Ms. Kurvink died on April 16, 2003. A probate court trial resolved several lawsuits between Mr. Kurvink and his sibling, Roberta L. Kurvink, concerning the administration of the trusts. In addition to the two litigants, Ms. Kurvink was survived by a second son, Charles Kurvink,[1] who died while these matters were pending.

A. The Family Trust

As previously noted, the family trust was created by Ms. Kurvink in February 1992. Ms. Kurvink named her three children as successor co-trustees of the family trust. The family trust made bequests of various items of personal property to her children. It also provided that, upon Ms. Kurvink's death, Charles and Mr. Kurvink could continue to live in the family home in North Hollywood. If Ms. Kurvink's sons chose to live in the family home, Roberta was to receive an equalizing payment of 50 percent of its fair market value. In the event of a dispute as to value, the parties were to agree on an

[1] We refer to Charles and Roberta Kurvink by their first names because they share the same surname as other family members. No disrespect is intended.

appraiser. The remainder of the trust assets was to be divided equally among the children. The family trust directed that all estate taxes be paid by the trustee and charged to the trust estate or the beneficiaries.

B. The Insurance Trust

Mr. Kurvink had managed Ms. Kurvink's financial affairs since 1990. This included preparing her tax returns and managing her stock portfolio. By the time of Ms. Kurvink's death, her stock portfolio was valued at around $5 million. Sometime around December 2001, Mr. Kurvink realized that the tax liability on Ms. Kurvink's estate was increasing to about $1 million. Mr. Kurvink suggested to Ms. Kurvink that life insurance would exempt some of her assets from estate taxes and provide a fund to pay the taxes.

In accordance with Mr. Kurvink's suggestion, in December 2001, Ms. Kurvink created the insurance trust for the benefit of her three children. Ms. Kurvink retained an attorney, James R. Patterson, to assist her in creating the insurance trust. Kneave Riggal, a certified tax law specialist, explained the purpose of an irrevocable life insurance trust is to avoid estate taxation. This was accomplished by giving away life insurance or having the trust acquire it. A properly written life insurance trust will eliminate tax consequences. But, tax consequences can result from what is known as "claw back" provisions of the Internal Revenue Code. (26 U.S.C. §§ 2035, 2042). Under these provisions, if a decedent possesses any incidents of ownership of the life insurance within a three-year period, the *asset* is "clawed back" in the estate. In order to be exempt from this provision, the settlor must live three years after the policy is purchased. The best way to avoid the consequences is have periodic gifts to the trust by the settlor for the trustee to purchase the insurance policy. Gift tax returns for those amounts, paid to the trustee are then filed with the Internal Revenue Service.

Ms. Kurvink's insurance trust was executed on December 17, 2001. The insurance trust appointed Mr. Kurvink as the sole trustee. Also on December 17, 2001, Mr. Kurvink executed the insurance trust as the trustee. Paragraph 6.1(b) of the insurance trust authorized the trustee to acquire insurance policies and pay all expenses and taxes. The trustee's powers included: "Subject to any limitations contained elsewhere in this document, the Trustee is granted all powers necessary to carry out the terms of this document including . . . . [¶] . . . [] To pay all expenses . . . including payment of premiums for such insurance as the Trustee deems advisable to protect the trust estate from damage or loss and to protect the Trustee from liability." Paragraph 6.16(d) of the insurance trust limited the trustee's powers concerning inclusion of assets as follows, "The Trustee shall have no power and shall take no action which will result in the inclusion of the trust estate in the taxable estate of the Settlor for federal estate tax purposes and all provisions of this document shall be interpreted and limited accordingly."

Mr. Peterson, the attorney who prepared the trust, also attached a document giving express instructions to the trustee on an insurance policy acquisition. The instructions, which were in bold and capitalized, stated: "**NOTICE TO THE TRUSTEE AND SETTLOR [¶] IF THE TRUSTEE PURCHASES INSURANCE ON THE LIFE OF THE SETTLOR, PROPER PROCEDURES MUST BE FOLLOWED, INCLUDING THE FOLLOWING: [¶] 1. LIFE INSURANCE PREMIUMS SHOULD NOT BE PAID BY THE SETTLOR. INSTEAD, THE SETTLOR SHOULD MAKE PERIODIC GIFTS TO THE TRUSTEE, WHICH WILL BE USED TO PAY THE PREMIUMS. [¶] 2. AT THE TIME EACH GIFT IS MADE, A WRITTEN NOTICE MUST BE GIVEN TO THE TRUSTEE. IN TURN, THE TRUSTEE MUST GIVE WRITTEN NOTICE TO SOME OR ALL OF THE BENEFICIARIES. [¶] 3. GIFT TAX RETURNS MUST BE FILED IF GIFTS ARE MADE TO THE TRUST. [¶] 4. INCOME TAX RETURNS MAY ALSO BE NECESSARY FOR THIS TRUST. [¶] IF YOU HAVE ANY QUESTIONS**

CONCERNING THIS NOTICE, CONTACT YOUR ATTORNEY OR ACCOUNTANT." These instructions were included to avoid the federal "the claw back" rule in the Internal Revenue Code. (26 U.S.C. §§ 2035, 2042.)

In accordance with the instructions in the trust document, Mr. Kurvink applied for and purchased a $600,000 insurance policy (Prudential Financial Insurance Policy No. V3063714) on Ms. Kurvink's life in 2001. The policy was in the name of the trust. Mr. Kurvink filed amended United States Estate (and Generation-Skipping Transfer) Tax Returns form 706 concerning the $600,000 policy. There is no taxation issue between the parties concerning this insurance policy because it was not taxed to the estate. However, there are distribution issues concerning this policy.

A problem did arise from the circumstance surrounding a $1.2 million insurance policy on Ms. Kurvink's life. Shortly after the $600,000 policy was purchased, Mr. Kurvink suggested to Ms. Kurvink that an additional policy could be used to further reduce her taxable estate. The insurance proceeds could also be used to pay the tax. Sometime around December 2001 and January 2002, Ms. Kurvink acquired a $1.2 million insurance policy on her life. At the time, Ms. Kurvink was 81 years old. However, the $1.2 million policy was not acquired according to the instructions in the insurance trust documents. Ms. Kurvink opted not to give Mr. Kurvink money to pay the premiums. Rather, Ms. Kurvink exchanged an existing $900,000 policy (Prudential Insurance Policy No. 98979777) for a new $1.2 million policy (Prudential Insurance Policy No. V306084).

Ms. Kurvink received Internal Revenue Code section 1035 (26 U.S.C. § 1035) income benefits in exchanging the $900,000 and the $1.2 million policies. According to Mr. Riggal, the certified tax specialist, there are potential income tax consequences of gifting a life insurance policy. It occurs when a policy has excess value created by the difference between the premiums paid over a lifetime and the cash value. If there is a gain, the amount is taxable. An Internal Revenue Code section 1035 exchange allows a party to avoid the taxation by trading one policy for a "like kind" one. Any gain is not recognized. The exchange resulted in approximately $11,000 in income taxes savings for Ms. Kurvink. The transaction also resulted in a substantial commission for the Prudential insurance agent, Brian Clay.

On February 9, 2002, Ms. Kurvink transferred the $1.2 million policy to the insurance trust. Mr. Kurvink testified that he did nothing to comply with the steps outlined in the insurance trust notice when he took control of the $1.2 million policy. Mr. Kurvink acknowledged signing the insurance trust documents indicating he was the trustee on December 17, 2001. However, he testified that he did not know he was the trustee. This was because the insurance trust documents meant nothing to him. He never looked at the insurance trust nor the bold and highlighted notice instructing him on how to purchase insurance on Ms. Kurvink's life. This would include the instruction that the insurance had to be purchased through periodic gifts to the trustee. According to Mr. Kurvink, Mr. Peterson never explained the trust provisions. Mr. Kurvink did not look at either the family trust or the insurance trust documents until three or four months after his mother's death. Mr. Kurvink never filed a gift tax return on the new insurance policy. As previously noted, Ms. Kurvink died in April 2003, which was less than three years after the exchange. As a result, the policy became part of Ms. Kurvink's taxable estate, resulting in an increase of an additional $600,000 in federal taxes.

C. Ms. Kurvink's Death

The family trust named the three siblings as co-trustees. But Mr. Kurvink testified that he believed he was the sole trustee. Mr. Kurvink retained Mr. Patterson to help prepare estate tax returns after Ms. Kurvink's death. According to Mr. Kurvink, between September and December 2003, Roberta would only communicate through an attorney. Mr. Kurvink thought Roberta was not acting as a co-trustee. Mr. Kurvink reached this conclusion because Roberta only communicated through an attorney.

On May 23, 2003, Stewart Hoover, an attorney, wrote a letter to Mr. Kurvink on Roberta's behalf concerning the trust administration. The letter advised Mr. Kurvink of his responsibilities as a trustee including: communicating with beneficiaries; providing trust documents; and making certain notification in compliance with Probate Code[2] section 16060. Mr. Hoover's letter also requested a copy of the trust. Mr. Kurvink was requested to inform Roberta of the trust's assets and liabilities.

In June 2003, Mr. Peterson wrote a letter to Ms. Kurvink. The letter indicated all three siblings were co-trustees. The letter included copies of the two trusts and the will. It also indicated that the estate taxes would probably be paid from the insurance policies. In November 2003, Mr. Peterson resigned as Mr. Kurvink's attorney.

Mr. Kurvink then employed certified public accountants, Larry Weiss and Ken Zaccaria, to prepare United States Tax Return form 706 for the estate. The accountants charged $25,000 to prepare the estate taxes returns. Mr. Peterson, as a favor to Ms. Kurvink, would have charged $2,500. Mr. Kurvink ultimately filed a gift tax return for the $600,000 policy. Mr. Peterson sent forms to Mr. Kurvink regarding the $600,000 policy. But, no one told Mr. Kurvink to file a gift tax return for the $1.2 million policy. So, Mr. Kurvink never filed a gift tax return for the $1.2 million policy.

After retaining the accountants, Mr. Kurvink gave them the statements concerning the $1.2 million policy but not the policy itself. Mr. Weiss explained to Mr. Kurvink that there was a question about the taxable nature of the $1.2 million policy. Mr. Weiss stated he was checking with an attorney about the issue. According to Mr. Kurvink, the accountants initially told him that the $1.2 million policy was not taxable. However, after the accountants contacted the Internal Revenue Service, they explained that the $1.2 million policy was taxable. So, it was included in the estate's tax return. Mr. Kurvink testified he relied on the accountants. He never considered hiring an attorney to assist him in administering the trusts. He never made any more inquiries. He considered his trust duties to be complete after he paid the taxes. Mr. Weiss also stated

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

that he would send a letter to Roberta explaining the $1.2 million policy. Mr. Kurvink did not know that his duties as a trustee included providing information to all the beneficiaries about how the trust assets were spent. He relied on the accountants to provide Roberta with information about the trust. Mr. Kurvink subsequently retained an attorney to compel Roberta to pay her share of the taxes.

Mr. Kurvink explained how the proceeds of the $600,000 were used. Mr. Kurvink's share was $235,673. After making some deductions, his siblings each were entitled to $132,565.75 from the $600,000 policy. Mr. Kurvink charged Roberta and Charles $68,000. The $68,000 fee was for his services as an executor. Mr. Kurvink did not charge a portion of the executor fees against his interest. Mr. Kurvink deducted $37,000 each from Roberta and Charles. The $37,000 deduction was for what Mr. Kurvink called loans from their mother. Mr. Kurvink then gave Charles $57,000 for a house payment. Mr. Kurvink then took the two $37,000 deductions and gave one-half to Charles and retained the remaining one-half himself. Mr. Kurvink had no paperwork to support his belief the $37,000 had been a loan to Roberta from Ms. Kurvink. And, he admitted that his mother was generous with all her children. She gave each of them $10,000 checks at Christmas. Mr. Kurvink also lived with his mother all his life paying neither rent nor utilities.

Mr. Kurvink had the house appraised. The house was valued at $230,000 in October 2003. Mr. Kurvink credited Roberta with $115,000 as her share of the house. Mr. Kurvink used the $115,000 to pay her share of the taxes owed to the Internal Revenue Service. Mr. Kurvink assumed that an attorney would tell Roberta the payment was made for the federal taxes. Mr. Kurvink was evasive about why, contrary to his mother's wishes, various personal items were not distributed to Roberta. Mr. Kurvink admitted that he commingled his personal assets with the funds from the $600,000 policy.

Daren Sigrist, a certified public accountant, testified that Roberta initially consulted him in February 2004. Roberta had questions about a tax return indicating an estate tax of $1.5 million. Mr. Sigrist attempted to ascertain background information on the assets and final accounting of the tax such as what was reported as income and deductions. According to Mr. Sigrist the process was “difficult.” Mr. Sigrist began attempting to communicate with Mr. Kurvink around April 2004. Mr. Sigrist made about 25 calls to Mr. Kurvink attempting to obtain information. Mr. Sigrist had no idea what Roberta’s share of the tax was. Then, Mr. Sigrist requested information about the entire estate and a final accounting from Mr. Kurvink. Mr. Sigrist assumed that her portion was a third of the additional tax owed.

Mr. Sigrist knew that there was a $1.2 million insurance policy as well as some other trust assets, which could be used to pay the estate taxes. Mr. Sigrist testified that the $1.2 million policy created an additional $600,000 of tax liability. Mr. Sigrist knew that there was an earlier draft of the tax return that did not include the $1.2 million policy. Mr. Sigrist questioned Mr. Zaccaria, the aforementioned accountant hired by Mr. Kurvink, about why it was ultimately included in the tax return. Mr. Sigrist was told that an investigation revealed a transfer occurred within three years of Ms. Kurvink’s death. Mr. Sigrist needed more information about the policy which was not forthcoming.

In late May or June 2004, Mr. Sigrist received some information from Mr. Kurvink. But, Mr. Kurvink explained that the $523,085 was Roberta’s portion of the estate tax. In May 2004, Mr. Sigrist knew that the $600,000 life insurance policy had not been distributed. So, they deducted that from the net estate tax due with the understanding that Mr. Kurvink would use that to reduce the estate taxes. Mr. Sigrist sent a letter to Mr. Kurvink on May 7, 2004. The letter instructed him to hold the $600,000 to use it to pay the estate tax. In accordance with Mr. Sigrist’s suggestion, Roberta then paid a third of the remaining tax liability to Internal Revenue Service in June 2004. This payment was made to avoid further interest or penalties. However, in response to the trial court’s inquiry, Mr. Kurvink admitted not ever reading Mr. Sigrist’s May 7, 2004 letter. The letter instructed Mr. Kurvink to pay Roberta’s taxes with the $600,000 policy. Thus, in May 2004, Mr. Kurvink made a wire transfer to Roberta of approximately

$132,000. Mr. Sigrist assumed, but did not know, that it was her share of the $600,000 policy.

Also in June 2004, Mr. Kurvink provided some handwritten notes, which were supposed to be a final accounting. But, the notes were very incomplete as they did not specify the assets or distributions. Mr. Kurvink used figures and columns which were indecipherable. In addition, Mr. Kurvink only provided some hand scribbled notes about the $600,000 policy. Mr. Kurvink refused to provide information about distribution of cash accounts, the home or any other assets. Mr. Kurvink also refused to provide any information concerning why the $1.2 million policy had been included in the United States Tax Return, form 706. But, Mr. Kurvink indicated he had deducted $37,000 from Roberta's share. The $37,000 represented loans from Ms. Kurvink to Roberta.

Mr. Sigrist testified that the $25,000 accounting fee was exorbitant for an estate tax return. The typical fee charged by his firm averaged $5,000 to $7,500. For a very complicated case involving valuations, multiple multistate real estate properties, the fee range is $10,000 to $12,000. The assets in Ms. Kurvink's estate were straightforward.

Roberta testified that Mr. Kurvink never gave her any information. The first time she learned of Ms. Kurvink's trust was through a letter from Mr. Peterson. She was advised that she was a co-trustee of the family trust. But, Mr. Kurvink never included Roberta in the administration of the trust. Sometime in January 2004, she received copies of the estate tax returns. Mr. Kurvink indicated with a note that Roberta should sign the estate tax returns. Mr. Kurvink did not tell Roberta she owed $523,000 in estate taxes. In January 2004, Roberta had received over $500,000 from Mr. Kurvink. But, Roberta did not know the source of all the funds. This included: the $132,000 deposit to her account; a $411,000 deposit; and $92,000 from a certificate of deposit. Mr. Kurvink never told her he would be using a $115,000 home appraisal value to pay the estate taxes. Roberta knew that some of the personal items Mr. Kurvink denied having were still in the family home.

Roberta called Andrew M. Wallet to testify concerning a trustee's fiduciary duties. Mr. Wallet was asked to look at various documents to determine whether a breach of fiduciary duty had occurred. Mr. Wallet concluded a breach of fiduciary duty had occurred in two respects. First, Mr. Kurvink breached his fiduciary duties by transferring the $1.2 million policy to the insurance trust. Because the transfer occurred within three years of Ms. Kurvink's death, it was subject to estate taxes. Second, if there was uncertainty in Mr. Kurvink's mind, he should have consulted an attorney. The failure to do so was a breach of fiduciary duty owed to the trust.

Mr. Wallet testified as to the first area wherein Mr. Kurvink's breach of fiduciary duties occurred. "[I]t appeared that in early 2002 the Settlor wanted to basically exchange an existing life insurance policy which had a face amount of $900,000 and had cash value into a new policy and put it into her Irrevocable Life Insurance Trust. . . . And that transaction seemed to have some problems, meaning that, in looking at the Prudential documents, they correctly stated that the owner was supposed to be the [insurance trust] or the trustee of the [insurance trust], Mr. Kurvink, and they are going to put his new policy into the [insurance trust]; however, from correspondence I saw from the insurance agent, he and the insurance company appeared to not get the transaction right. [¶] And what I mean by that is she did an exchange of one policy into another and the correct way to have done it is she could have cashed out her existing policy and made a gift of that cash to the trustee of the [insurance trust]. He in turn then would buy a new policy that would have avoided the estate tax problem that they ran into."

Mr. Wallet continued: "Here, where I think the trustee made some mistakes and breached his duty in the Prudential documents, the documents were signed by the Settlor. There was also a provision to have the trustee of the [insurance trust] sign, and Mr. Kurvink signed that in his capacity as trustee. He was already acting as trustee of the [insurance trust]. There was already a policy in there for $600,000 which ultimately was not taxed for estate tax purposes. And my opinion is that, when he was already acting in the capacity as trustee of the [insurance trust] – and backing up, this wasn't a situation where the [insurance trust] was just being created and he hadn't been in office, accepted office, or started acting or assumed duties. He already was the trustee. He was already managing one policy. And so he signed these documents. He was certainly well aware of an attempt to put this new policy into the [insurance trust.]"

Mr. Wallet testified: "If he didn't understand the legal issues and the requirements to do so, to create a tax-free event, he should have and I believe he had a duty to engage counsel who could have guided him properly in the process and not just sit back and do nothing. He had a duty to make sure it was done properly and it was properly funded into the trust without exposing it to tax as the first policy or the existing policy for 600,000 was already in there. So he didn't do that is my understanding, and that, to me, was a breach of duty prior to death – to the settlor's death. And he should have been monitoring or had his counsel monitor the transaction to make sure it was done properly. [¶] So as a result, ultimately he paid tax on that $1.2 million. If I recall from the 706, it was $600,000 paid and I believe just needlessly because of a breach of his duty." Mr. Wallet continued, "[H]e signed the Prudential documents, he knew there was a transaction pending, he apparently didn't understand the legal ramifications of what should be done to make the transaction go smoothly without exposure of estate tax."

According to Mr. Wallet it was no defense that Mr. Kurvink was confused. During Mr. Wallet's testimony, the following occurred: "Q . . . Now it's the Trustee's contention in his trial brief that he wasn't really aware of what was going on. 'It was my mother who was the one who was procuring these policies. I wasn't really the one running the show; therefore, I should not be liable for how this policy was purchased.' [¶] Is that a credible defense to you? A [¶] No. [¶] Q Why not? [¶] A As I stated, this was not a situation where he hadn't been acting, where he wasn't actively involved. In looking at the Prudential documents, he signed as trustee of the [insurance trust]. The documents stated that the policy was supposed to go into the [insurance trust], and so there were flaws in the way the transaction was set up in terms of doing the exchange which obviously exposed the policy to the three-year rule being included in her estate and she in fact died within those three years. [¶] So it all could have been avoided if someone who was overseeing the transaction who knew that they were doing -- typically that would be legal counsel, and there's a duty to engage legal counsel when you're not an attorney yourself acting as a fiduciary and particularly if you don't know what you're doing."

As to the second aspect of Mr. Kurvink's breach of fiduciary duty, Mr. Wallet testified an effort should have been made to mitigate damages: "Then subsequent to the Settlor's death, there should have been some activity on his part to mitigate. Upon being told by, as I saw somewhere in the correspondence, there was inclusion of this policy for estate tax purposes. He should have been looking for a way to mitigate the damage. And one of those ways, looking at just when I reviewed the Prudential documents, it appeared that there was a number of errors made in how this was done. [¶] He should have had legal counsel try to get a tolling agreement from Prudential and/or the agent in terms of mitigating damage to see if their pockets could be looked to in terms of the mistakes that were made that I think were pretty obvious by virtue of how the transaction was handled. And what I mean by that specifically is that there never should have been an exchange of one policy into the other. I realize maybe there was an attempt to avoid income tax, but the income tax that may or may not have been incurred there would be very minimal compared to the exposure to the estate tax and of course it has turned out he paid 600,000 in estate tax, which I believe needlessly." In Mr. Wallet's view, Mr. Kurvink should have hired counsel to assert a claim against the insurer for negligence in connection with the policy purchase.

Mr. Wallet had dealt with multiple irrevocable life insurance trusts over the years. He would never advise an 81-year-old woman to purchase a policy and transfer it into such a trust due to the three-year rule. The best way to handle the transaction is to take cash and make a gift of it to the trustee. The trustee would then use the funds to purchase the insurance policy. in Mr. Wallet's opinion, certified public accountants could not be relied on to provide the correct legal advice. They prepared the tax forms to file a return. Their duty was to make decisions about what to include and not include in the return.

D. The Civil And Probate Actions

The case was tried in the probate court after a civil action and two probate matters were deemed related. Mr. Kurvink filed the civil action against Roberta on January 12, 2007. (*Kurvink v. Kurvink* (Super. Ct. L.A. County, 2011, No. 364661).) Mr. Kurvink alleged claims against Roberta. The three claims were for: trust breach by Roberta; fraud in representing to Mr. Kurvink she would pay her share of the taxes; and unjust enrichment. On September 19, 2007, the trial court ordered Mr. Kurvink to file a petition in the probate court because the basis for relief was section 16420.

On October 5, 2007, Mr. Kurvink filed a probate petition. (*Katharine Wian Kurvink Trust* (Super. Ct. L.A. County, 2007, No. BP107032).) The petition alleged that Roberta had failed to pay her full share of the federal and state taxes. Mr. Kurvink requested an order directing Roberta to pay $239,647.73 plus interest. On October 31, 2007, the civil action was ordered transferred to the probate department as a related matter. While the matters were pending, both parties filed petitions in the probate court for affirmative relief in case No. BP107032. Mr. Kurvink sought approval of accountings filed on January 28 and February 26, 2010. Roberta sought: Mr. Kurvink's removal as trustee; her appointment as successor trustee; a surcharge against Mr. Kurvink; imposition of a constructive trust over the trust assets; and attorney fees and costs.

In addition, on June 4, 2009, Roberta filed a separate petition in the probate court. (*Katharine W. Kurvink Trust* (Super. Ct. L.A. County, 2009, No. BP116923).) Among other things, the petition alleged Mr. Kurvink had refused to account to the beneficiaries concerning the administration of the $600,000 and $1.2 million policies. Roberta requested: an accounting; a surcharge against Mr. Kurvink; imposition of a constructive trust; and attorney fees and costs.

After an eight-day trial, the probate court issued a judgment in Roberta's favor in the civil and both probate matters.   With respect to the family trust (case No. BP 107032), the probate court found that Mr. Kurvink breached his trustee duties to: administer the trust in accordance with its terms (§ 16000); deal impartially with all beneficiaries (§ 16003); control and preserve trust property (§ 16006); communicate (§ 16060); and account (§ 16061 and Trust Article Fifth F).

The probate court ruled that within five weeks of Ms. Kurvink's death, Mr. Hoover reminded Mr. Kurvink of a trustee's duties. Despite Mr. Hoover's reminders and specific requests for information, Mr. Kurvink did not respond. Mr. Kurvink also shared no information with Roberta or Charles, who were co-trustees. The probate court found Mr. Kurvink's testimony concerning Ms. Kurvink's personal effects was not credible. The probate court ruled the $68,670 trustee fee Mr. Kurvink paid to himself exceeded the amount it would have found just and reasonable for the services he rendered. The probate court also ruled: Mr. Kurvink had never credited Roberta with the $115,000 home value; he had in fact sued her for that amount in the civil action; and in his trial brief, he continued to claim that amount plus additional amounts were owed by Roberta.

The probate court removed Mr. Kurvink as a trustee of the family trust. Roberta was appointed as successor trustee without bond. Mr. Kurvink was surcharged with: the taxes incurred on the $1.2 million policy in the amount of $600,000, plus interest in the amount of $294,000, for a total of $894,000; the amount of $115,000 for Roberta's interest in Ms. Kurvink's residence he paid to the Internal Revenue Service; plus interest of $56,350, for a total of $171,350.

Also, the probate court found Mr. Kurvink breached his duties as an insurance trustee to administer the trust in accordance with its terms (§ 16000) and control and preserve its property. (§ 16006.) The probate court ruled the insurance trust was irrevocable. The probate court found: Mr. Kurvink signed the Trustee Statement and Agreement on December 17, 2001, as trustee; Mr. Kurvink was already the trustee of the insurance trust; the statement reflected that the insurance trust owned the new $1.2 million policy; Mr. Kurvink admitted that he did not complete any of the steps outlined in the insurance trust regarding the $1.2 million policy; no gift tax return was ever filed; and there was no evidence that Mr. Kurvink considered the "claw back" consequences, including that his 81-year-old mother, Ms. Kurvink, might not survive three years. The probate court found: Mr. Kurvink's accounting was deficient because it did not comport with statutory requirements; Mr. Kurvink improperly deducted gifts in the amount of $37,258.26 made to Roberta by Ms. Kurvink; Mr. Kurvink did not make similar lifetime gift deductions made by Ms. Kurvink to either of the other children; there was no authority to make any such deduction; and he allocated his trustee fees half each to his siblings but none to his share of the trust.

In finding a breach of trustee duties under sections 16000 and 16006, the probate court relied on Mr. Wallet's testimony. This included the following: Mr. Kurvink was the trustee of the insurance trust at the time of Internal Revenue Code section 1035 exchange, which was improperly handled; the old policy should have been cashed out and gifted to the insurance trust; the estate tax could have been avoided by having the trustee purchase the new insurance policy; as a result of the improper handling of the transaction, a $600,000 tax exposure was created; and Mr. Kurvink was negligent in failing to follow the insurance trust's instructions on how to complete the transaction to avoid the taxes. Mr. Kurvink was also negligent in: regard to the new policies which erroneously name the heirs individually and not as beneficiaries; failing to retain counsel as to how to complete the transaction properly; and failing to take actions to mitigate the damages created by the additional tax exposure, including obtaining counsel. The probate court ruled Mr. Kurvink had two opportunities to address the problems during the exchange process and after Ms. Kurvink's death.

Among other relief, on the insurance trust petition (case No. BP116923), the probate court surcharged Mr. Kurvink with underpayments to Roberta in the amount of $36,287.18 plus interest of $17,781, for a total of $54,068.18. Mr. Kurvink was surcharged with the $68,670 for trustee fees he paid to himself. The probate court ruled Mr. Kurvink failed to act impartially and properly administer the trust. Roberta was awarded $121,949 in attorney fees pursuant to section 17211, subdivision (b). The probate court found that Mr. Kurvink's accounting was deficient. And, the probate court ruled the "aggressive defense he mounted in opposing Roberta's objections" was "without reasonable cause and in bad faith . . . ." Mr. Kurvink filed timely notices of appeal from the judgments.

III. DISCUSSION

A. Fiduciary Breaches And Surcharges

Mr. Kurvink asserts the judgment must be reversed as to the $894,000 surcharge as a matter of law. Mr. Kurvink argues his duties as trustee did not extend to Ms. Kurvink's Internal Revenue Code section 1035 exchange and transfer of the $1.2 million policy to the insurance trust. The existence of a duty in a breach of fiduciary cause of action is a question of law subject to de novo review. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599, 1606; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) However, whether the trustee has breached a fiduciary duty is a question of fact, which determination is reviewed for substantial evidence. (*David Welch Co. v. Erskine & Tulley*, *supra*, 203 Cal.App.3d at p. 890; *Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 272.)

Mr. Kurvink's theory is that he cannot be held liable for Ms. Kurvink's conduct in exchanging the policy as his duties did not begin until she deposited the property in the trust. This contention is inconsistent with the applicable law and the evidence. Section 16000 codifies a trustee's duties as follows, "On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division." The trustee has a duty to carry out the trust terms according to the settlor's expressed intent. (*Estate of Goulet* (1995) 10 Cal.4th 1074, 1080, fn. 4; *Union Bank and Trust Co. v. McColgan* (1948) 84 Cal.App.2d 208, 213.) And, section 16049 provides, "Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter."

In December 2001, at Mr. Kurvink's suggestion, his mother agreed to create an insurance trust. The purpose of the insurance trust was to acquire insurance policies to avoid or reduce the amount of estate taxes. Upon the creation of the insurance trust, Mr. Kurvink agreed to act its sole trustee. Mr. Kurvink executed the insurance trust on December 17, 2001. Included in the insurance trust documents was a bold and highlighted notice giving specific instructions on acquiring insurance in order to avoid the Internal Revenue Code "claw back" provisions. Consistent with those instructions, a $600,000 life insurance policy was purchased by Mr. Kurvink after his mother gifted funds to him as trustee. Gift tax returns were filed for the $600,000 policy. This transaction was handled correctly with no tax consequences. Thus, Mr. Kurvink's duties as a trustee began in December 2001 when he executed the insurance trust and performed duties thereunder. (§ 15600.)

Within a very short period after the trust was created, Mr. Kurvink again suggested to Ms. Kurvink that the insurance trust should be increased to avoid the estate tax. This time, however, Ms. Kurvink did not make a gift of funds to Mr. Kurvink as trustee to purchase the additional insurance. Rather, she exchanged a $900,000 policy for the $1.2 million policy. The failure to comply with the instructions led to a $600,000 tax exposure for the estate. This was contrary to the purpose of the insurance trust, which was to avoid estate taxes. Thereafter, on February 9, 2002, Mr. Kurvink accepted the $1.2 million policy into the insurance trust. Because he had been acting as the insurance trust trustee since December 2001, Mr. Kurvink had a duty to comply with the terms of the trust document. This included complying with specific instructions on how to accept insurance into the trust. The bolded and capitalized warning to Mr. Kurvink forewarned against directly accepting the policy into the insurance trust as opposed to utilizing funds to purchase one. But, Mr. Kurvink chose to do nothing with this information. Indeed, Mr. Kurvink admitted at the trial that he did not examine the insurance trust documents after he became the trustee of the trust in December 2001. Mr. Kurvink is incorrect that he cannot be held liable because his duties did not begin until Ms. Kurvink deposited the property into the trust. Mr. Kurvink's duties began in December 2001 when he executed the insurance trust and began acting under its instructions. Mr. Kurvink's failure to comply with the instructions led to a $600,000 tax liability for the estate.

Furthermore, contrary to Mr. Kurvink's arguments, there is substantial evidence he was not ignorant of the $1.2 million policy transaction. The undisputed evidence showed that Mr. Kurvink managed his mother's financial affairs since the early 1990's. He lived with his mother most of his life. Mr. Kurvink managed his mother's stock portfolio which was valued at approximately $5 million at the time of her death in April 2003. There is substantial evidence the insurance trust and both the $600,000 and $1.2 million insurance transactions resulted from suggestions made by Mr. Kurvink.

There is also no merit to the argument Mr. Kurvink's duties no longer existed because his mother gained $11,000 tax savings from exchanging the $900,000 policy for the $1.2 million policy. According to Mr. Kurvink, challenging $11,000 tax savings could have resulted in conflict with his mother. However, as a trustee fiduciary, Mr. Kurvink owed the trust beneficiaries his undivided loyalty. (§16002, subd. (a); *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 462-463.) And, our Supreme Court has explained the fiduciary nature of the trust relationship imposes on the trustee "an equitable obligation" to manage the property for the beneficiaries. (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1133-1134; *Estate of Shaw* (1926) 198 Cal. 352, 360.) Our Supreme Court further explained, "A trustee must always act *solely* in the beneficiaries' interests." (*Moeller v. Superior Court*, *supra*, 16 Cal.4th at p. 1134, citing § 16002, subd. (a).) It is of no consequence that Ms. Kurvink may have saved $11,000 in income taxes by choosing to exchange the policy rather than gifting premiums to the policy. Mr. Kurvink's sole duties rested with the insurance trust beneficiaries. His duties included accepting the policy into the insurance trust consistent with its express terms and under circumstances most favorable to the beneficiaries.

Mr. Kurvink makes a number of additional claims concerning the probate court's findings. Reversal is unwarranted because these findings were based on evidence establishing Mr. Kurvink's numerous derelictions of duty concerning the administration of the family and insurance trusts. The conclusive finding is that Mr. Kurvink had violated his duties as a trustee in failing to follow the specific instructions in both trust instruments. The probate court determined his fiduciary breaches led to a $600,000 estate tax because of the manner in which he accepted the $1.2 million policy into the insurance trust. Substantial evidence supports this determination of the breach and that Mr. Kurvink should be surcharged with the $600,000 tax. (*Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603; *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 472.)

B. Offset Against Roberta

Mr. Kurvink argues he is entitled to an offset of $202,641.20 in the amount he paid as a federal tax for Roberta out of his personal funds. First, this issue was not raised in the trial court. He cannot raise the excessive damages claim for the first time on appeal. (Code Civ. Proc., § 657, subd. (5); *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759; *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720.)

Second, there is no evidentiary basis for an offset of any kind. The probate court ruled the trust was charged $600,000 in unnecessary estate taxes because of Mr. Kurvink's failure to act competently. Mr. Kurvink was surcharged with that amount, plus $294,000 in interest. Thus, contrary, to Mr. Kurvink's claim, there is no clear basis to credit him with an offset of $202,641.20 based on payments for the federal taxes on Roberta's behalf. Moreover, the evidence showed that Roberta paid $308,000 in taxes from her own funds. Mr. Kurvink in turn contended he used his own personal funds to pay Roberta's taxes. But, the only evidence in the record is that Mr. Kurvink used a number of personal creative accounting methods to deal with the taxes. Notably, Mr. Kurvink admitted that he commingled the trust funds with his own funds. At the trial, he offered various explanations as to what sources were used to pay the taxes. Mr. Kurvink also did not deny that he made a number of mistakes in connection with Roberta's and his shares of the $600,000 insurance policy. This included an improper $37,000 deduction from Roberta's share. Mr. Kurvink improperly deducted $68,000 in fees from Roberta and Charles. Mr. Kurvink also claimed he used $115,000 to pay the federal taxes which were credited to Roberta as her half share of the family home. Without reason, Mr. Kurvink then sued Roberta for the $115,000 that he explained was her share of the family home. Any lack of clarity in the evidence directly results from Mr. Kurvink's persistent refusal to account for the assets of the family and insurance trusts. The probate court was in the best position to resolve the factual issues concerning the funds based on the evidence. (*Greenwich S.F., LLC v. Wong*, *supra*, 190 Cal.App.4th at p. 759; *Jamison v. Jamison*, *supra*, 164 Cal.App.4th at pp. 719-720.) This is not a matter of simple math in which an amount can be calculated or decided in the first instance of appeal. We can do nothing to disturb those findings which are supported by substantial evidence.

C. Offset Against Charles' Estate

Mr. Kurvink argues $298,000 of the surcharge attributable to Charles' share must be reversed. According to Mr. Kurvink, the probate court lacked jurisdiction to adjudicate the issue because Charles died before the trial of this matter. But, his estate did not file a separate surcharge petition.

In order to resolve the claimed jurisdictional error here, we grant Roberta's judicial notice request as to certain records and orders in the probate matter entitled *Estate of Charles Kurvink* (Super. Ct. L.A. County, 2010, No. BP125180). While the matter was pending, Charles was living in a skilled nursing facility in Colorado with a number of mental and physical health issues. The probate court appointed a guardian ad litem for Charles in both probate actions on September 8, 2009. (*Katharine Wian*

Kurvink Trust (Super. Ct. L.A. County, 2009, No. BP107032)) and on January 25, 2010 (*Katharine W. Kurvink Trust* (Super. Ct. L.A. County, 2010, No. BP116923)), respectively. The guardian ad litem subsequently joined in both of Roberta's petitions which asserted Mr. Kurvink had breached his fiduciary duties to the trusts. Charles died on August 15, 2010.

Judicially noticeable documents show that, on October 20, 2010, the probate court appointed Roberta as special administrator of Charles' estate. Roberta, as special administrator, was authorized to pursue this litigation. On November 8, 2010, Roberta was given letters of special administration, which expired on April 20, 2011.

On December 13, 2010, the first day of the trial, the parties raised the issue of Charles' death with the probate court. Roberta's counsel, Steven C. Sosa, advised the probate court there were some issues that Charles' estate might pursue separately from Roberta. This was because of Charles' mental and physical condition prior to his death as well as Mr. Kurvink's secretive actions in administering the trusts. The parties stipulated that overlapping issues could be tried by the probate court. The judgments in this matter were entered on July 20, 2011.

Code of Civil Procedure section 377.30 specifies that a cause of action can survive a death and be commenced by a decedent's personal representative or successor in interest. Code of Civil Procedure section 377.31 allows for the continuance of a pending action by or against a decedent that does not abate as follows: "On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest."

No doubt, the general rule it is improper to render a judgment for or against a decedent without first substituting in the party's personal representative. (Code Civ. Proc., §§ 377.30-377.43; *Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 957; *Pham v. Wagner Litho Machinery Co.* (1985) 172 Cal.App.3d 966, 972-973.) However, as the court in *Sacks* explained, "[T]his general proposition has not been applied blindly, but rather has acted to prevent prejudice to the parties because of lack of notice, lack of proper representation, or some other disadvantage." (*Id*. at p. 957.) In the absence of prejudice, such errors are at most technical. (*Sacks v. FSR Brokerage, Inc.*, *supra*, 7 Cal.App.4th at p. 959; *Kern v. Kern* (1968) 261 Cal.App.2d 325, 328.) Thus, the court is not automatically deprived of jurisdiction to proceed and enter judgment upon a decedent's death. (*Sacks v. FSR Brokerage*, *Inc.*, *supra*, 7 Cal.App.4th at p. 959; *Kaley v. Catalina Yachts* (1986) 187 Cal.App.3d 1187, 1194-1195.) Rather, the issue is whether there was prejudice to any party or to decedent's estate. (*Sacks v. FSR Brokerage, Inc.*, *supra*, 7 Cal.App.4th at p. 959; *Kaley v. Catalina Yachts*, *supra*, 187 Cal.App.3d at pp. 1194-1195.)

There is no prejudice in this case from the manner in which the judgment was entered as to either Charles' estate or Mr. Kurvink. There was no prejudice to Charles' estate because the probate court ruled in its favor. And, there is no prejudice to Mr. Kurvink based on the judgment. As Mr. Kurvink concedes, he orally stipulated that the probate court could litigate any claims of Charles' estates, which overlapped with Roberta's petitions. The issue litigated at trial was Mr. Kurvink's conduct in administering the trusts. Charles (and now his estate) was a beneficiary of those trusts. The probate court concluded Mr. Kurvink had violated his duties as trustee and should be surcharged for various amounts. Mr. Kurvink had eight court days to present any evidence to the probate court which would have refuted any of the beneficiaries' claim. Mr. Kurvink failed to do so. Moreover, as discussed above, Mr. Kurvink fervently refused to provide a proper accounting of his administration of the trusts. Thus, the record does not support the claim that Mr. Kurvink is entitled to an offset of any amount, much less $298,000.

IV. DISPOSITION

The judgments are affirmed. Defendant and respondent, Roberta Kurvink, is awarded her costs on appeal from plaintiff and appellant, Edwin Kurvink.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

KRIEGLER, J

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MOSK, J., Concurring

I concur.

The trustee had a fiduciary duty to the beneficiaries of the trust. By accepting the money in order to save the settlor some money but expose the beneficiaries to a large tax liability, especially when the trustee received legal advice on the way the transaction should be handled, justified the trial court in finding a breach of the fiduciary duty.

I am not so sure that the offset issue cannot be raised on appeal. In *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, the court said "we have no occasion to reconsider whether failure to move for a new trial necessarily bars a party from claiming on appeal that damages are excessive or inadequate in a case tried by the court without jury." (*Id.* at p. 919, fn. 8,) Later discussion by courts of appeal have assumed rule applies to court trials. (See, e.g., *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) The court also suggested that a new trial motion was not required to raise on appeal the issue that there was a lack of substantial evidence to support the damage award as contrasted with whether the damages are excessive or inadequate. (*Schroeder v. Auto Driveaway Co., supra,* 11 Cal.3d at p. 919.) "The failure to move for a new trial . . . does not preclude a party from urging legal errors in the trial of the damage issue . . . ." (*Glendale Fed. Sav. & Loans Assn. v. Marina View Heights, Dev. Co., supra,* 66 Cal.App.3d at p. 122; see also *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 721 ["The failure to move for a new trial does not preclude a party from urging legal errors in a trial on damages").] Whether an offset should have been considered for the taxes paid could be considered a legal issue that can be appealed by a new trial motion.

What occurred at trial is murky. Whether the offset proposition specifically was presented to the trial court is unclear. As noted by the majority, there was a lack of clarity in the evidence. The parties do not point us to a clear exposition that any monies Edwin paid for taxes were or were not taken into account. In Edwin's objections to the court's findings, there is no reference to an offset. Thus, I would not disturb the findings. As was noted in oral argument, the issues surrounding any offset presumably can be addressed upon distribution of the trust assets.

MOSK, J.