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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

LUCINDA GARCIA et al., Petitioners, Appellants and Cross-Respondents, v. DOUGLAS R. KELLOGG, Respondent and Cross-Appellant.	B266039 (Los Angeles County Super. Ct. No. BP151087)

APPEAL from an order of the Superior Court of Los Angeles County, David S. Cunningham, III, Judge. Affirmed in part, reversed in part and remanded.

Gifford, Dearing & Abernathy, Riley B. Holzman and Anne Gifford Ewing for Petitioners, Appellants and Cross-Respondents.

Law Offices of Robert Forgnone and Robert Forgnone for Respondent and Cross-Appellant.

Beneficiaries of an inter vivos trust claimed the trustee mismanaged assets, and charged excessive fees as trustee and as property manager of the trust's major asset, a 14-unit apartment building. They sought removal of the trustee and denial of further compensation, imposition of a surcharge for alleged breaches of the trustee's duties, and payment of their attorney fees and costs. The trial court found no grounds to remove the trustee. The court also found that, except for some overlapping duties performed as both trustee and property manager which resulted in an overpayment for which it imposed a surcharge, no breach was committed. The court also found no party had prevailed in this action, and required each side personally to bear its own attorney fees and expenses.

The beneficiaries appealed, arguing that the trial court erred in refusing to remove the trustee who: (1) conceded he had failed to adhere to terms of the trust, and with whom a dysfunctional and hostile relationship had developed that impaired trust administration; (2) filed accountings that did not satisfy Probate Code requirements; (3) failed to diversify trust assets in violation of the Uniform Prudent Investor Act, Probate Code section 16045, et seq. (PIA); and (4) received excessive compensation as trustee and was improperly paid as a property manager because he lacked a real estate broker's license. They also contend they were entitled to recover their attorney fees and costs because the trustee opposed this action without reasonable cause and in bad faith, and intentionally breached his duties as trustee. None of these contentions has merit.

The trustee filed a cross-appeal. He contends the trial court erred in that: (1) it assessed a surcharge against him even though the evidence shows his fees as property manager were reasonable, and (2) it failed to find that the beneficiaries' claims that accrued before April 2011 were barred by the three-year statute of limitations of Probate Code section 16460, because the annual profit and loss statements and other written reports he sent to the beneficiaries provided ample factual information as a matter of law to trigger the limitations period before the instant action was filed in April 2014. We find the latter contention has merit, and partially reverse the judgment to the extent it assessed a surcharge based on breaches that occurred before April 2011.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, respondent and cross-appellant Douglas Kellogg (Kellogg, or trustee) began serving as the property manager of a 14-unit apartment building in the City of Whittier (apartment building) owned by Marjorie Davis. Kellogg, who had considerable professional experience managing apartment buildings, was paid a fee of six percent of the monthly rental income received from the apartments.

On July 10, 2000, Ms. Davis (Davis or settlor) executed the Marjorie C. Davis Family Revocable Trust (Trust), which she later amended several times.[1] Davis appointed Kellogg her successor trustee, and he assumed that position upon her death in December 2004. The beneficiaries of the Trust—petitioners, appellants and cross-respondents here—are Davis's daughter, Lucinda Garcia (Garcia) and grandsons, Jonathan and David Larsen and Christian Garcia.

At the time of Davis's death, the value of the Trust was approximately $2.5 million, composed of two principal assets: (1) the apartment building,

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1 None of the amendments is at issue.

which was unencumbered and had a fair market value of $1,815,000, and (2) a family residence in Escondido, worth approximately $706,000, with a mortgage loan of $345,614 (Escondido property). When Davis died, the Trust had very limited cash reserves and significant expenses, including a bank demand for full repayment of the loan on the Escondido property, estate taxes of about $345,000, and expenses of about $46,000. Kellogg negotiated a $750,000 mortgage loan secured by the apartment building and used the funds to pay off the Trust taxes and debts.

The Trust provides that, upon Davis's death, "the entire undistributed principal and income of the trust estate shall be divided into equal shares [of 22.2 percent], one for each then-living" grandson of the settlor, and gives Garcia a life estate in the Escondido property.[2]

The Trust does not specify the amount of the trustee's compensation.[3] Kellogg is paid a trustee fee based on a rounded one percent of the annual fair market value of the Trust's assets, a fee he and Davis agreed upon and which he claims is an industry standard. The Trust provides that "*Kellogg in*

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[2] The Trust further provides that the trustee "shall pay to or for the benefit of a beneficiary so much or all of the income and principal of his or her share as the Trustee deems necessary or advisable from time to time for his or her health, maintenance and reasonable comforts, education (including post graduate) in best interest adding to principal any income not so paid. However, the amount paid to each beneficiary [grandsons], shall not exceed (33-1/3%). The remaining 33-1/3% shall be paid to [Garcia] in accordance with the foregoing. The payments shall be made quarterly . . . ."

[3] Probate Code section 15681 provides that, where a trust instrument fails to specify a trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances. (Further undesignated statutory references are to the Probate Code.)

addition to being a Trustee of this Trust shall act as property manager of all real estate which is a part of this Trust, including but not limited to, collecting all rents and paying the insurance and property taxes." (Italics added.) The Trust pays property taxes, insurance and homeowners fees for the Escondido property.

From December 2004 to December 31, 2014, Kellogg was paid $287,500 in compensation as trustee,[4] and approximately $108,513 as property manager, or approximately $396,000 in total compensation. Over that 10-year period, the trustee allocated or distributed $235,956 to the beneficiaries. Distributions, made only to Garcia, totaled $100,047, and the trustee allocated–but did not distribute–$47,000, $45,500 and $44,409 to designated accounts (subtrusts) for Jonathan, David and Christian, respectively.

There is no dispute that the Trust is poorly drafted and plagued with ambiguities. As the trial court observed in its thoughtful statement of decision,[5] among other failings, the Trust fails to specify the remainder interests in Trust assets or to provide clear direction for the allocation and distribution of cash flow between ordinary income and principal appreciation. From the time he assumed the position of trustee, Kellogg realized that material terms of the Trust regarding the allocation of income and principal, and distribution among the beneficiaries were ambiguous. He never sought

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4 Rather than regularly re-compute his one percent fee, Kellogg elected an annual trustee fee of $24,000 ($2,000 per month) for 2005 and 2006, and $30,000 ($2,500 per month) ever since.

5 Our discussion and resolution of this appeal is greatly assisted by the court's well-reasoned analysis.

judicial assistance to clarify his responsibilities as trustee, but endeavored to interpret and administer the Trust himself.

Kellogg retained a bookkeeper to prepare annual "profit and loss statements" for the Trust which were mailed to the adult beneficiaries, together with rent rolls, beginning in December 2006. The profit and loss statements summarized the Trust's "income and expenses," including Kellogg's fees as trustee and property manager. Beginning in November 2005, Kellogg also mailed the beneficiaries monthly statements reflecting the fees he received as property manager. These statements and reports did not conform to the requirements for trust accounting under the Probate Code. (See §§ 16062, 16063.)

On April 10, 2014, the beneficiaries filed the instant Petition seeking, among other things, to compel Kellogg to provide accountings for the Trust and for the grandsons' subtrusts in compliance with statutory requirements. The beneficiaries also requested that Kellogg be removed and replaced as trustee based on his failure to file code-compliant accountings, his alleged breaches of fiduciary duties, his unreasonably high compensation as trustee (particularly as those duties overlapped with his duties as property manager), and his failure to maintain the Escondido property. The beneficiaries sought imposition of a surcharge against Kellogg for his alleged breaches. Kellogg was ordered to file code-compliant accountings for the Trust and subtrusts by September 22, 2014. Kellogg complied, although the accountings prepared by Rodney Hill, the CPA retained on behalf of the Trust, contained numerous deficiencies and were not approved before the evidentiary hearing.

An evidentiary hearing on the Petition took place over 12 court sessions from March 4–April 20, 2015. At issue was: (1) whether the court should approve the accountings filed by the trustee in September 2014; (2) whether Kellogg should be removed, suspended or replaced as trustee; (3) whether Kellogg should be denied further compensation; (4) whether Kellogg breached his duties as trustee and, if so, whether a surcharge was in order for such breaches; (5) whether past compensation had properly been paid to Kellogg as property manager and/or trustee in light of his alleged breaches; and (6) whether the court should approve payment of attorney fees for the beneficiaries or Kellogg.

We discuss additional facts relevant to these issues as necessary below. Suffice it to say that, at the conclusion of the lengthy evidentiary hearing, the court concluded that the trustee's accountings, while imperfect, substantially complied with pertinent statutory provisions. The court found that, with one minor exception, the beneficiaries had failed to show that Kellogg breached his duties as trustee, and there was no basis to justify his removal as trustee or to deny him past or continued compensation. However, the court did find that overlap in duties Kellogg performed as trustee and property manager had resulted in his receipt of excessive compensation warranting a two percent reduction in his compensation as property manager. The court imposed an interest-free surcharge of $36,169.01 against Kellogg.[6] The court also converted the Trust to a court-supervised Trust, and required that all future accountings be submitted for its review and approval. The parties

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6 That amount represented one-third of the six percent fee Kellogg received as property manager through April 2015, i.e., reducing his compensation to four percent of the apartment revenue going forward, to be repaid interest-free in monthly or annual installments over about three years.

were ordered to bear their own costs, expenses and attorney fees. The beneficiaries appealed, followed by Kellogg's cross-appeal.

DISCUSSION

The Beneficiaries' Appeal

I. *Removal and Replacement of the Trustee*

The beneficiaries contend that the trial court erred in refusing to remove Kellogg as trustee, because he had failed to adhere to the terms of the Trust, and his historically problematic relationship with the beneficiaries had become increasingly dysfunctional and hostile to the point that his removal was necessary. We disagree.

A. *Controlling Legal Principles and the Standard of Review*

A beneficiary may file a petition seeking removal of a trustee if a trustee has committed a breach of trust, has received excessive compensation under the circumstances, or for other good cause. (See §§ 17200, subds. (a), (b)(10), 15642, subds. (a), (b)(1), (4) & (5).) "Hostility between the trustee and the beneficiary may also be a sufficient ground for removal. [Citations.]" (13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 51, p. 622.) The determination whether to remove a trustee is vested in the trial court's discretion. Where, as here, an appeal challenges a court's exercise of that discretion, we review the ruling to determine if it exceeds the bounds of reason. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449.) "A ' . . . showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. [We are] neither authorized nor warranted in substituting [our] judgment for the judgment of the trial judge.

To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . . .' [Citation.]" (*Ibid*.)

A trial court may remove a trustee where necessary to preserve the trust and protect beneficiaries. Historically, however, courts have been reluctant to displace a trustee who was appointed by the settlor. "When the settlor of a trust has named a trustee, fully aware of possible conflicts inherent in his appointment, only rarely will the court remove that trustee, and it will never remove him for potential conflict of interest but only for demonstrated abuse of power detrimental to the trust. [Citations.]" (*Estate of Gilliland* (1977) 73 Cal.App.3d 515, 528 (*Gilliland*).)

The trial court's refusal to remove Kellogg as trustee was premised largely on the rule articulated in *Gilliland, supra,* 73 Cal.App.3d 515. *Gilliland* involved conflicts of interest not directly at issue here. (*Id*. at p. 528.) But the case is instructive regarding the principle that a judicial determination whether to remove a trustee—particularly one chosen and appointed by the trustor—is a matter not to be undertaken lightly. Moreover, in light of the fact that Amendments to the Trust deprived Garcia of a role she believed she deserved in the administration of the Trust, Davis was likely aware at the time she appointed Kellogg the sole trustee that Garcia would resent her decision and that personal conflicts would arise once Garcia learned her mother had placed her confidence in Kellogg.[7]

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[7] Indeed, a letter Garcia wrote to Kellogg in October 2006 indicates she was wounded by her mother's decision in precisely that way. The letter begins with Garcia's request to Kellogg for "a more accurate accounting—

At issue is whether reversal is required, and Kellogg's removal necessary, because he admittedly failed to adhere to the terms of the Trust (irrespective of whether any harm flowed from that breach), and the level of hostility between him and the beneficiaries impairs Trust administration. (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633 (*Gilmaker*).)

In *Gilmaker,* the petitioner was a life beneficiary under his father's testamentary trust, as to which a bank was the trustee. (*Gilmaker, supra,* 57 Cal.2d at p. 629.) Much of the trust's property was undivided half interests in parcels of real property, the other half of which were owned by petitioner. (*Ibid.*) Petitioner (who had actively managed the real properties before his father's death), also was appointed "Consultant" to the trust, which prohibited the bank/trustee from taking action regarding any property without first notifying petitioner of its intent to act, and receiving his written consent approval. (*Ibid.*) The trustee ignored this term, and others, including the term requiring petitioner's active involvement in all investment decisions. (*Id.* at pp. 632–633.) Under the circumstances, the court found that proper trust administration required a close working relationship between the trustee and petitioner, and it was critical that there be no hostility between them. (*Ibid.*) However, significant disagreements had developed between them over, among other things, investments of surplus cash and rent collection. (*Id.* at p. 633.) That hostility was exacerbated by the fact that the trustee's decisions were made by an internal bank committee that actively excluded the petitioner in a way unlikely to improve

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itemized statements—and the new rent roles [*sic*] from each year." Garcia goes on: "*My mom's wishes really insulted my intelligence. . . . When I found out you were the executor [sic], it was a devastating blow*." (Italics added.)

the parties' working relationship. (*Ibid.*) Over time, the hostility that developed between them was so "constant and intense" that it directly affected trust administration to the point of necessitating the trustee's removal. (*Id.* at p. 632.) The parties properly agreed in their joint trial statement that *Gilmaker, supra,* 78 Cal.2d at page 632 controls the resolution of this matter.

Among the grounds for removal asserted below, two remain at issue: the beneficiaries contend the trial court erred in refusing to remove the trustee because he failed to adhere to the terms of the Trust regarding distributions to beneficiaries, and because an historically difficult relationship had become increasingly dysfunctional to the point that the trustee's removal was required. Neither assertion has merit.

B. *The Court Did Not Err in Refusing to Remove the Trustee Based on His Failure to Adhere to Trust Terms or a Hostile Relationship with the Beneficiaries*

1. *Failure to Adhere to the Terms of the Trust*

The beneficiaries contend the court should have removed the trustee who, "by his own admission chose not to follow [the] trust instructions" directing him to deposit funds into designated bank accounts for the grandsons. The Trust provides that distributions of income to the grandsons are to be deposited in specified accounts: payments to Jonathan and David Larsen are to be paid into specified accounts established in their names at California Bank & Trust Company (California Bank), and payments to Christian are to go into a specified Wells Fargo account. Kellogg concedes that he ignored these instructions. Instead, he deposited the grandsons' funds in dedicated interest-bearing money market accounts he established in the grandsons' names at the same bank used by the Trust, accounts he controlled as trustee. The court found that Kellogg did so based on his belief that Davis "did not trust the security investments the bank holding the trust accounts would ostensibly make,"[8] and that, at least as to the Wells Fargo account, the beneficiaries failed to present evidence the account existed or, if it did, whether it was "simply interest bearing . . . or investment accounts."

The trial court agreed that Kellogg breached his duty to administer the Trust strictly according to its terms (a violation of section 16000[9]), but nevertheless "allow[ed]" the trustee's "choice," because it "resulted in [no] . . . ascertainable harm." The court also found that the trustee's decision would cause no future harm by ordering Kellogg to convert the grandsons' accounts to blocked accounts, and placed them and the entire Trust under court supervision.

2. *Hostility Between the Parties*

The beneficiaries also contend that, by the time the Petition was filed, their historically negative, hostile relationship with Kellogg had degenerated to the point that it impaired his ability properly to administer the Trust. In

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8 Some support for this conclusion may be found in a notarized letter Davis sent to Kellogg in June 2004, in which she instructs him to send a grandson's income from the apartment building directly to the grandson rather than to the Trust because she "[c]an not depend on stocks any more."

9 Section 16000 provides that a "trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise . . . ." (See e.g., *Estate of Bothwell* (1944) 65 Cal.App.2d 598, 604 [where terms of trust are specific, "trustee cannot substitute his own plan because he thinks it is a better one, . . . even if it has operated to general advantage of the estate"].)

Garcia's view, that hostility peaked in March 2013, when she received a late-night phone call from Kellogg who (sounded drunk and) yelled at her, and which Garcia perceived as threatening. The call scared Garcia and she was no longer comfortable requesting disbursements from or contacting Kellogg. Her phone records reflected receipt of a call at 11:00 p.m. on the evening in question from a "blocked" number. Christian (the only other beneficiary to testify) said that his mother's relationship with Kellogg began well, but became "hostile over time." Kellogg did not view his relationship with the beneficiaries as hostile or dysfunctional. He denied making a late night call to Garcia, let alone one during which he was drunk or threatening, and claimed he had never had a blocked number.

The court did not resolve this issue; it was unable to determine whether Kellogg or Garcia testified truthfully about the call. The court did find that the relationship between the trustee and beneficiaries had been "historically negative," and that it had become "increasingly dysfunctional" and "problematic." However, it also found that the relationship was not irrevocably damaged, ordered the parties to work to repair it and refused to remove the trustee on this ground.

3. *Analysis*

This case bears a superficial resemblance to *Gilmaker*: there is no question that Kellogg ignored the terms of the Trust that require him to deliver the grandsons' distributions to specified California Bank and Wells

Fargo accounts.[10] Beyond that, however, the cases part ways. Unlike *Gilmaker*, none of the beneficiaries is a designated "consultant," and no one's approval is required for Kellogg to act. Although at one point Davis had designated a role for Garcia in the Trust administration, by the time of her death Davis had amended the Trust to state unequivocally that Kellogg was the sole trustee with responsibility to make decisions regarding Trust assets. In short, while a more cooperative relationship will certainly ease Trust administration, unlike *Gilmaker*, it is not critical that Kellogg and any beneficiary maintain a close working relationship. *Gilmaker* requires that the level of hostility between trustee and beneficiary be such that it impairs administration of the trust. (*Gilmaker, supra,* 57 Cal.2d at p. 632.) That showing was not made here.

Kellogg testified there was no hostility between himself and Garcia, and believes he has always had, a "very good relationship" with her. The beneficiaries claim to have had a "negative and hostile relationship" with the trustee that has "degenerated to the point of obstructing the proper administration of the Trust." The court found the reality fell somewhere between the two extremes: there was evidence of an "historically negative and increasingly dysfunctional relationship," which was "problematic," but not one that was so irrevocably damaged that it impaired the administration of the Trust. The court urged the parties to work together to mend it.

We find no error. "Hostility between the beneficiary and the trustee is a ground for removal of the trustee [only if] the hostility *impairs the proper*

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10 The fact that Kellogg did so because he believed it was better for the grandsons if he held onto the cash rather than investing their funds (because he does not believe in investing in marketable securities) is of no import.

administration of the trust." (*Gilmaker, supra,* 57 Cal.2d at p. 632, italics added.) "The removal . . . of a trustee is largely within the discretion of the trial court." (*Id*. at p. 633.) Here, the court did not find that hostility between the parties impaired proper administration of the Trust, necessitating Kellogg's removal. The beneficiaries are correct that *Gilmaker* controls our resolution, but mistaken that it requires reversal.

II. *Approval of Accountings*

Beginning in December 2006, Kellogg sent the beneficiaries an annual written "'Profit and Loss' statement" prepared by a bookkeeper he retained on behalf of the Trust. Those statements did not comply with trust accounting requirements under the Probate Code. (See e.g., §§ 16062, 16063.) The beneficiaries received the profit and loss statements, and did not seek code-compliant accountings until the instant Petition was filed in April 2014.

In June 2014, the court ordered the trustee "to account as directed by the Probate Code for the Trust and Subtrusts from the death of [Davis] on 12/14/2004 to 3/31/14." Kellogg retained CPA Hill to prepare code-compliant accountings, which were filed in September 2014. Those accountings were not approved before the evidentiary hearing because deficiencies identified in the probate notes were not cleared. Accordingly, the court left the issue whether the accountings should be approved to be resolved at the hearing.

Following the hearing, the court found that Hill's accountings did not fully comply with Probate Code requirements. However, after reviewing the accountings and receiving evidence regarding them, the court found that they "substantially complied" with the Probate Code, except as to certain provisions that did not apply to the Trust.

On appeal, the beneficiaries contend the court erred in two respects in approving the accountings: First, the trustee never filed the court-ordered accountings for the grandsons' accounts/subtrusts, so there was nothing for the court to approve, and (2) the accountings he did file failed accurately to distinguish between income and principal.

A. *Accountings for the Subtrusts*

Kellogg maintains he did not comply with the court's order "to account as directed by the Probate Code for the . . . Subtrusts . . . ," because no subtrusts existed, as such. Rather, the only accounts were money-market accounts he established in the grandsons' names in lieu of placing their distributions in the California Bank and Wells Fargo accounts, and those funds were all accounted for. The beneficiaries insist those money market accounts are in fact the subtrusts from which Kellogg may or may not have made distributions, and as to which he had a duty to account. However, the trustee's "accountings" should not have been approved as such because it is impossible to ascertain anything beyond the outstanding balance in the grandsons' accounts from information Kellogg provided.

The court did not specifically address Kellogg's failure to file code-complaint accountings for the grandsons' accounts. It did find, however, that the trustee's decision to deposit the grandsons' distributions in interest-bearing money-market accounts instead of the accounts designated in the Trust (at least one of which may not have existed) resulted in no ascertainable harm. At the time of the hearing, no distributions had been made to any grandson. Because all the grandsons' funds were accounted for, the trustee's failure to file accountings for their accounts was not material in light of the fact that the court had divested him of the ability to access or authority to control the grandsons' now-blocked, court-supervised accounts. The beneficiaries have not shown that they suffered ascertainable harm due to the trustee's actions, and no future harm can occur because Kellogg lacks access to the grandsons 'accounts.

B. *The Accountings Fail to Distinguish Between Income and Principal*

Section 1063 requires that, if a trust is to "be distributed to an income beneficiary," the accounting filed with the court must include "a schedule showing an allocation of receipts and disbursements between principal and income." (§§ 1063, subd. (c), 1060.)

The accountings prepared by Hill on behalf of the trustee and filed with the trial court allocate income and principal. However, because of the Trust's ambiguities regarding the beneficiaries' interests in principal and income, Hill testified that he found it "'very difficult, if not impossible based on . . . the accountings' to determine whether the cash Kellogg transferred to the Trust's 'reserve account,'[11] to the grandchildren's accounts and to [Garcia] as monthly distributions, constituted income or principal, or some mix of both." Accordingly, in an effort to satisfy the court's order to prepare and file a decade's worth of accountings, he deemed it necessary to "code" principal and income entries to comport as nearly as possible with his and Kellogg's understanding of the Trust's terms. Hill conceded that the Trust's

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[11] Kellogg maintains a reserve account to cover necessary maintenance and unexpected exigencies for the apartment building. At the time of the hearing that account contained $100,000, as Kellogg anticipates incurring hefty expenses for roof and other major repairs. The court found "maintenance of such a reserve account [to be] prudent and necessary for the preservation of the Trust's solvency and operation."

ambiguous terms left him unable to tell with any degree of precision whether the cash allocations were actually income or principal.

The beneficiaries maintain the accountings are meaningless—and the court erred in approving them—because Hill conceded the distinction drawn between principal from income was retroactively "coded" and no real allocation occurred. Thus, Hill acknowledged it is virtually impossible for an income or principal beneficiary to understand his or her financial position based on the accountings he prepared. The court agreed that the coding had caused "some unknown inequity between the principal and income beneficiaries." However, it found that such inequities were "a matter of internal accounting among the beneficiaries" to be settled among them, and approved the accountings. The beneficiaries request that we order that the coding system be undone and that proper accountings be prepared at trustee expense. We decline the invitation.

Perhaps the only salient point upon which everyone agrees is that the Trust was poorly drafted and its material terms are, at best, ambiguous. In retrospect, Kellogg would have been wise to seek judicial guidance at the outset to clarify facially ambiguous terms of the Trust before proceeding to administer it. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453 [In interpreting trust, it is proper for a trial court in the first instance to consider the peculiar circumstances under which the document was made and be placed in the position of trustor whose language it is interpreting, in order to determine meaning of terms of document].) Kellogg chose not to follow this route. Instead, he did "his best to administer the Trust, based on his reading of [it] and his . . . conversations with [Davis] regarding her wishes . . . ." The court found that the choices Kellogg made as to how best to administer the Trust were both necessary and reasonable.

Trustees are under a continuing duty to accurately account for dealings with trust property, and to render accountings to beneficiaries on demand. (*Estate of De Laveaga* (1958) 50 Cal.2d 480, 487.) All matters relating to an accounting (interim or final) may be "contested for cause shown . . . ." (§ 11001.) Where, as here, there has been a failure to keep code-compliant accounts, the trustee must prove the items by satisfactory, sufficiently specific evidence. (*Estate of McCabe* (1950) 98 Cal.App.2d 503, 505.)

If a trustee's conduct is challenged, the court is charged with a duty to scrutinize the trustee's accounts and determine all incidental issues raised by the contesting petition to rectify a trustee's abuse of power. (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427-428.) In such circumstances, the court has an obligation to conduct a hearing addressing whatever the circumstances require in order to settle the account and determine underlying issues raised by the objections including whether the Trust has been mismanaged. (Cf., *McLellan v. McLellan* (1941) 17 Cal.2d 552, 554 [will contest]; § 11002, subds. (a), (c) [vesting court with discretion to make whatever order, incidental or otherwise, it deems necessary to settle an account].)

That duty was fulfilled here, and no abuse of discretion occurred. As the beneficiaries acknowledge, the Trust's terms are so ambiguous that no trustee could adhere to them as written. By necessary implication, without judicial intervention, it was virtually impossible for Kellogg to adhere to the Trust's instructions and properly distinguish between beneficiaries' interests in principal and income. Kellogg conceded that he found the instructions ambiguous from the outset. The "coding" was performed in a good faith effort to comport as closely as possible with Trust's terms, as understood by Kellogg and Hill in their effort to construct 10 years of accountings. Under the unique circumstances here, their treatment of income and principal was acceptable and was not undertaken in breach of Kellogg's duties to treat the beneficiaries impartially and not to commingle or convert Trust property (§ 16009). To the extent inequities arose from his reasonable choices, the court reasonably concluded they were matters for the beneficiaries to resolve among themselves.

III. *Trustee's Failure to Diversify Assets*

A trustee must administer a trust "with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." (§ 16040, subd. (a).) "This general standard applies to such functions as 'determining whether to make discretionary distributions, communicating with beneficiaries, and relations with creditors.' [Citations.]" (13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 75, p. 645.) Trustees' general investment and management duties of care are codified in the Uniform Prudent Investor Act, (PIA), sections 16045, et seq. The PIA requires a trustee to diversify trust investments unless, under the circumstances, it is prudent not to do so. (§ 16048; see *Estate of Collins* (1977) 72 Cal.App.3d 663, 669 [PIA typically requires a trustee to distribute the risk of loss by reasonable diversification].) Compliance with the PIA is determined not in hindsight, but in light of circumstances known at the time of the trustee's decision. (§ 16051.) If the trial court finds the PIA was violated, a trustee may be charged with the loss, lost profit or any unjust enrichment resulting from the breach. (§ 16440, subd. (a).)

The beneficiaries argue that Kellogg violated the PIA. They contend the court erred in refusing to surcharge him for not diversifying the Trust's investments, and for maintaining the grandsons' assets in money market accounts because of his personal mistrust in securities. They argue that a surcharge is in order because, when Kellogg took over as trustee in 2004, no circumstances existed under which it was prudent not to diversify the Trust's investments and Kellogg's personal aversion to the stock market does not excuse his failure to do so. We disagree.

Since becoming successor trustee, Kellogg has maintained a reasonable mix of Trust assets in the real property and interest-bearing savings accounts. Under Kellogg's administration, the Trust debts have been discharged and its operations have been profitable. The market value of Trust assets has increased from $2,521,000 in December 2004, to $3,383,502 in December 2014, an increase of 34 percent. As the court observed, this increase occurred notwithstanding a significant depression in the real estate and stock markets between 2007 and 2010. The trial court credited Kellogg's testimony that, if he were ever to sell the apartment building, he would replace it in the Trust with a parcel of income-producing real property and would not consider selling the real property or using the grandsons' funds to invest in stock because he mistrusts investments in the stock market, and he is confident that Davis shared this belief and carried out her wishes.

The court found the beneficiaries failed to present sufficient evidence of economic loss, and refused to impose a surcharge for violation of the PIA. The beneficiaries claim their inability to prove financial loss is a result of Kellogg's failure to provide accurate data, without which they cannot identify with precision the amount of their damages. In effect, they assert that the court refused to surcharge Kellogg for failing to diversify Trust assets because of his further failure to provide enough information to enable the court to calculate the surcharge. They also reject the court's reasoning that, by placing the grandsons' funds in money market accounts instead of securities, "Kellogg unwittingly protected [them] from exposure to the stock market's downturn in 2008." They observe that compliance with the PIA is not determined in hindsight (§ 16051), and assert that when Kellogg became trustee in 2004 no circumstances at that time justified his failure to diversify Trust investments. But the beneficiaries present no evidence as to what funds were available to the grandsons in 2004, or what likely investments have been forgone.

The beneficiaries request that we remand the action for further hearing to provide them an opportunity to present this evidence of economic loss to support their claim that Kellogg breached the PIA and should be surcharged. We decline to do so. The very hearing from which this appeal was brought presented the opportunity they seek. After that weeks-long hearing, the court concluded the beneficiaries presented no evidence that the grandsons suffered economic loss.

IV. *Payment of Kellogg's Fees as Both Trustee and Property Manager*

For the majority of the 10 years preceding the hearing Kellogg received an annual trustee's fee of $30,000, roughly one percent of the value of the Trust property. As property manager, Kellogg is compensated at a rate of six percent of the rental income. The beneficiaries argue that, in his capacity as trustee, Kellogg has an obligation to employ the full extent of his unique skills. (§ 16014.) Because Kellogg has long held himself out as a skilled and professional property manager, he has a duty to employ those skills as trustee. (See §§ 16006, 16007 & 16060, et seq.) By paying himself the trustee's fee, the beneficiaries argue that Kellogg is compensated for most, if not all, of the services he performs as property manager. Thus, he is not entitled to outsource his duties as property manager—which encompass an obligation to perform bookkeeping and accounting services—to himself or others, at Trust expense.

There is no rule against "double compensation" of a representative who renders "extraordinary" professional or specialized services to an estate (e.g., accounting), so long as the services he provides are not among those he is obligated to perform as part of his "ordinary services." (See § 10801, comment; *Estate of Billings* (1991) 228 Cal.App.3d 426, 431-432.) Here, the trial court specifically found that Kellogg's retention and oversight of the specialized services of the bookkeeper, attorneys or a CPA was acceptable. (See §§ 16012, 16401.) We agree with the beneficiaries to the extent the beneficiaries argue Kellogg's fees are excessive because the tasks he performs as property manager duplicate services he performs in his capacity as trustee. This issue is discussed at Section I of the trustee's cross-appeal below, in connection with our discussion of the surcharge imposed against Kellogg.

We reject, however, the assertion that Kellogg was improperly paid as property manager because he was not a licensed real estate broker. It is undisputed that as trustee Kellogg acts as de facto owner of the apartment building. As such, he has the power and ability to let units and there is no requirement that he have a real estate license, or that he retain a licensed broker in order to do so. (§§ 16226, 16231; see *Winnett v. Roberts* (1986) 179 Cal.App.3d 909, 919 [observing "universally accepted rule that a person dealing with his or her own property is not acting as a broker"]; *Garcia v. Wetzel* (1984) 159 Cal.App.3d 1093, 1097 [same].) This principle was rightfully acknowledged by the beneficiaries' own expert witness who testified on the beneficiaries' behalf.

V. *Attorney Fees and Costs*

The court ruled that there was no prevailing party, and ordered each side to "bear its own costs and expenses and attorney's fees personally." The beneficiaries claim they are entitled to reimbursement for their attorney fees and costs. They maintain that Kellogg opposed the Petition without reasonable cause and in bad faith, intentionally breached his duties to comply with the terms of the Trust, failed or refused accurately to account for Trust income and principal, and defied a court order to provide code-compliant accountings.

We review a ruling on attorney fees for abuse of discretion. (*Estate of Moore* (2015) 240 Cal.App.4th 1101, 1105.) The probate court has broad discretion to decide whether attorney fees should be awarded. (*Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99.) We find no abuse.

Generally, in the case of surcharge litigation, beneficiaries must "pay their own attorney fees in challenging the trustee's conduct, even when they are successful. [Citation.]" (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1595 (*Leader*).)

An exception exists in cases where the court finds that the trustee's opposition lacked reasonable cause and was made in bad faith. (*Leader, supra,* 182 Cal.App.4th at pp. 1595–1596; § 17211, subd. (b); see *Estate of Fain* (1999) 75 Cal.App.4th 973, 993–994.) Neither finding was made here. On the contrary, the court found that Kellogg's efforts at interpreting and administering the Trust were imperfect but not unreasonable and resulted in no ascertainable harm to the Trust or beneficiaries. Kellogg conducted his activities in good faith, loyally and in an effort to advance what he believed were Davis's "goals and desires." There is no basis to find that the court abused its considerable discretion by requiring the parties to bear their own fees and expenses.

The Trustee's Cross-Appeal

I. *The Court Did Not Err by Imposing a Surcharge*

Kellogg notes that expert witnesses who testified on behalf of each side agreed his fee of six percent of the rental income was within an acceptable range. His own expert, experienced in property and apartment management in Whittier, said she would charge a five percent rate to manage the same building, but that six percent was not unreasonable. The beneficiaries' expert testified that a professional manager would charge four–to–seven percent for a similarly sized building, and his firm's services would be charged at six percent. On this evidence, Kellogg insists the trial court erred in reducing his compensation as property manager to four percent and assessing a two percent surcharge for 10 years, as there is no evidence his fee was excessive or that his management of the property caused financial harm to the Trust.

Kellogg misunderstands the court's order. The surcharge was not assessed because his six percent fee, in and of itself, is excessive. The surcharge was assessed because, once Kellogg assumed duties as trustee, *in addition to those responsibilities he was already performing as property manager* (and for which he continued to be separately compensated), the evidence showed that his primary ongoing responsibility as trustee involved management of the apartment building.

We review a surcharge order for abuse of discretion. (Cf., *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268–269 [applying rule to attorney fees and expenses].) As trustee, Kellogg is charged with the responsibility to incur fees that are reasonable in amount and appropriate to the purposes of the trust. (*Id.* at p. 268.) As trustee, Kellogg bears the burden to show he subjectively believes the fees are appropriate to carry out the Trust's purposes, and that his belief is objectively reasonable. (*Ibid.*) Kellogg's regular duties, once he discharged the Trust's debts and took care of the taxes, involved such matters as handling rental deposits by tenants, negotiating the amount for repair services for upkeep of the apartments, paying bills, and similar matters. No doubt Kellogg's responsibilities increased once he became trustee. Nevertheless, on this record, it is clear that several duties he performed in that capacity could reasonably be expected to be performed by a professional apartment property manager, particularly one who had earned over $100,000 from one 14-unit building because of his expertise and management skills.

Moreover, contrary to Kellogg's representation, the court did not find merely that "there was likely some overlap" in the employment of his unique skills in both his professional capacities. The court expressly found that it was because of the overlap, that the six percent "fee[] paid to Kellogg for management of the [apartment building was] excessive." Although Kellogg failed to present time records segregating tasks he performed as trustee from those performed as property manager, evidence from both sides' experts reflected that a property management fee of four–to–five percent was reasonable for an apartment building like the one owned by the Trust. Thus, the court acted reasonably and well within its discretion to reduce Kellogg's duplicative compensation on a going forward basis, and to impose an interest-free surcharge for past overpayments. (§ 16420, subd. (a)(7) [empowering court to reduce or deny compensation of trustee who commits a breach of trust].)

II. *Statute of Limitations*

A. *Amendment of the Trustee's Objection and Controlling Law*

The Petition sought to compel Kellogg to file code-compliant accountings for each year he had served as trustee. The beneficiaries alleged that the annual "profit and loss" statements Kellogg mailed since becoming trustee were inadequate to apprise them of the value of the Trust's assets, the extent of its liabilities or their right to income distributions.

Just before the evidentiary hearing began on March 4, 2015, the trial court granted the trustee's "motion in limine to amend objection" to assert a statute of limitations defense under section 16460, subdivision (a)(1) to the beneficiaries' claims for failure to provide accurate accountings and damages of breach of Trust.[12] That statute provides:

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12 Our review is hampered by the parties' failure to designate either the Trustee's initial or Amended Answer/Objection to the Petition for inclusion in the appellate record. Indeed, it is not clear the latter document was ever filed.

The transcript of the March 4, 2015, hearing during which the court granted the leave to amend indicates the trustee's counsel was prepared immediately to file and serve a "first amended answer." The court noted it was fair to give the beneficiaries' attorney a few days to review the amended pleading, to verify that no unauthorized alterations were made. However, the court then indicated that, "for the record, [trustee's] counsel [had] just handed [the court] a copy of the proposed amendment . . . . [¶] [t]o be filed." The civil register does not reflect that an amended answer or objection was filed. Nevertheless, the beneficiaries concede that the trial court granted

> "(a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise:
> "(1) If a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. An account or report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim."[13]

Noggle v. Bank of America (1999) 70 Cal.App.4th 853 (*Noggle*) is instructive. In *Noggle*, residuary beneficiaries of testamentary trusts successfully sued a bank acting as the trustee for breach of fiduciary duty. (*Id*. at pp. 855–857.) The bank appealed, arguing that specified claims which arose between 1980 (the date the probate court relinquished supervision over the trustee) and a date three years before May 1990 (when the petition was filed) were barred by the statute of limitations of section 16460. (*Id*. at p. 857.) The appellate court agreed. (*Ibid*.)

Noggle clarified that section 16460, enacted in 1986 and amended in pertinent part in 1996, effected two changes in California trust law significant here. First, before 1986, actions against trustees of express trusts were governed by the four-year statute for general breaches of fiduciary.

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leave for the trustee to assert a statute of limitations defense. Accordingly, we deem the affirmative defense at issue.

[13] Adult beneficiaries capable of understanding a written account or report, are deemed to have received the writings if they are personally received; minors are deemed to have received such reports if their parent received them. (§ 16460, subds. (b)(1) & (3).) The account or report need not satisfy Probate Code accounting requirements. (§ 16460, subd. (c).)

(Code Civ. Proc., § 343.) Second, the limitations period did not begin to run until a beneficiary had "'actual knowledge of some unequivocal act in violation of duties of the trustee or in repudiation of the trust.' [Citation.]" (*Noggle, supra,* 70 Cal.App.4th at p. 857.) Section 16460 shortened the limitations period to three years, and provides that the claim accrues once a beneficiary receives enough information to reasonably permit him or her to inquire about or discover the existence of a claim. (*Id*. at p. 858.) If this requirement is satisfied, the limitations period is triggered regardless of whether the writing received by the beneficiary satisfies formal Probate Code accounting requirements. (*Id*. at p. 859.) In short, section 16460 codified a beneficiary's duty to mitigate damages, and obligates him or her to act within three years of receipt of information sufficient to permit discovery of a claim. (*Id*. at p. 860.)

In *Noggle*, the court found the beneficiaries received annual accountings for a sufficient number of years to permit them to make pertinent comparisons and observe an absence of growth. Also, some beneficiaries had written to and received correspondence from the trustee regarding matters such as the method of calculation of market value of trust assets and accusations of mismanagement, as far back as 1982. (*Noggle, supra,* 70 Cal.App.4th at p. 861.) Based on the plain language of section 16040, the court found the beneficiaries had sufficient information to trigger the statute of limitations long before May 1990, and any claim based on a breach of trust occurring more than three years before that was time-barred. (*Ibid*.; see *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111 [it is the discovery of facts essential to a claim, not their legal significance, that triggers limitations period]; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398, 410, fn. 8 [expressly disapproving notion that plaintiff need do "more than suspect a factual basis for the elements of a cause of action"].) *Noggle* and section 16460, subdivision (a)(1) bar imposition of the 10-year surcharge assessed here.

B. *No Surcharge for Claims that Accrued Before April 11, 2011*

Beginning in 2006, Kellogg mailed to the adult beneficiaries written profit and loss statements, rent rolls and monthly statements. Those documents do not satisfy Probate Code accounting requirements, but do clearly reflect Kellogg's compensation as trustee and property manager. Garcia, the only adult beneficiary who testified at the hearing, admitted that she received the profit and loss statements beginning in 2006. She conceded that she was "fully aware" of the amount of compensation Kellogg was paid during this time, and never complained to anyone about the amount of fees he was paid for his services, either as trustee or as property manager.

The record contains evidence that, at least as early as October 2006, Garcia expressed concern to her mother's attorney regarding Kellogg's administration of the Trust. Garcia's concerns did not abate. There is regular and repeated correspondence up to the time the Petition was filed reflecting her issues with the trustee's conduct and accounting methods. That correspondence began in January 2007, when Garcia wrote to Kellogg shortly after receiving his first (2006) profit and loss statement. In that letter she expressed concern about information missing from his written report (the amount and treatment of security deposits and laundry funds). Kellogg wrote back, attempting to explain. Prior to retention of the attorneys who have represented the beneficiaries throughout this action, Garcia hired at least two other attorneys due to her concerns about the Trust administration. The first of these attorneys contacted Kellogg in January

2009 to, among other things, express Garcia's concerns with Kellogg's administration of the Trust, obtain further accountings and to determine the trustee's "faithfulness in carrying out [his] instructions as trustee and the rights of [Garcia] and the other beneficiaries."

Kellogg's written annual profit and loss statements reflect his trustee fees, and the monthly statements reflecting his compensation as property manager constitute "interim or final account(s) or other written report(s)" detailing his aggregate compensation. These documents gave the beneficiaries regular and cumulative evidence of the amount he was paid in each capacity. If the beneficiaries had reason to suspect that Kellogg's compensation was excessive or otherwise unacceptable, they had plenty of information beginning in December 2006 and for several years thereafter to seek judicial recourse to have the fees reduced. It was incumbent on them to do so. Instead, they did nothing until April 2014.

The court permitted Kellogg to assert a statute of limitations defense under section 16040, then failed to consider its application. As a matter of law, we conclude that the profit and loss statements and monthly reports provided by Kellogg beginning in 2006, constitute sufficient accountings or written reports to trigger commencement of the statute of limitations under section 16460, subdivision (a)(1). Accordingly, no surcharge may be imposed for claims that accrued before April 11, 2011. The matter will be remanded to permit the trial court to recalculate an appropriate surcharge and enter a new and different order.

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DISPOSITION

The matter is remanded to the superior court with directions to recalculate the surcharge imposed against Kellogg at Paragraph 26 of the trial court's June 11, 2015 order (see also Paragraph 22), and to enter a new and different order. In all other respects, the order is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.