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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

RAINA THOMAS SCURRAH et al., Objectors and Appellants, v. DAVID DUBOIS ELDER et al., Petitioners and Appellants.	B268995 (Los Angeles County Super. Ct. No. BP074332)

APPEAL from an order of the Superior Court of Los Angeles County. David J. Cowan, Judge. Affirmed, as modified.

Poindexter & Doutré, Jeffrey A. Kent for Objectors and Appellants.

Freeman, Freeman & Smiley, Stephen M. Lowe and Thomas C. Aikin for Petitioners and Appellants.

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A wealthy woman died, placing one of her assets in a trust that named her then-husband as the income beneficiary and her children from prior marriages as the residual beneficiaries. She named two of those children as the trustees responsible for administering the trust. This has led to nearly 15 years of litigation. In this appeal and cross-appeal, the successors to the income beneficiary and the trustees (collectively, the parties) present three substantive issues: (1) did the trustees properly allocate the trust's receipt of $304,000 to the trust's principal rather than its income beneficiary; (2) did the trustees properly apply the terms of a 2005 settlement between the parties when calculating (and charging the income beneficiary) the expenses incurred in litigating an arbitration proceeding in New York; and (3) did the trustees properly hold in reserve the undistributed income held by the trust on the date the income beneficiary died? The trustees also claim that the first two claims are time barred, and both parties claim that the trial court incorrectly awarded or calculated prejudgment interest. Although we reach many of our conclusions by traveling a different path than the trial court, we conclude that the trial court correctly resolved all three substantive issues and correctly concluded that the first two claims are not time barred. However, we disagree with the trial court's calculation of prejudgment interest as to the arbitration proceeding expenses and as to the undistributed income; we accordingly modify those awards.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. General background

Betty Gross Thomas (Betty) died in February 1986. At that time, Betty was married to John Thomas, who was also known as

Piri Thomas (Piri). Betty also had three children from prior marriages—petitioner and appellant David DuBois Elder (David); petitioner and appellant Michael Olenick (Michael); and Laura Amy Olenick (Laura).[1]

Betty's will provided for the creation of a trust. The trust's sole asset was 32 shares of the Chelsea New York Hotel (the Chelsea); those shares represented 16 percent of the Chelsea's ownership. Betty named Piri as the trust's income beneficiary and named David, Michael, and Laura as the remaindermen. Betty named David and Michael as cotrustees (collectively, the trustees).

In 2000, Piri assigned his interest in the trust to the Thomas Revocable Trust.

B. Expenses from the New York Arbitration

In September 2002, the trustees sued other shareholders of the Chelsea. The matter proceeded to arbitration (the New York arbitration). In mid-February 2005, a panel of arbitrators issued an award granting the trust, among other things, damages of $950,000 and attorney's fees of $825,000.

Ten days later, Piri and the trustees entered into a Settlement Agreement and Mutual Release (2005 Settlement) to resolve a pending probate petition between them, which included how to split the costs of the New York arbitration. In the 2005 Settlement, the parties generally agreed to "allocate income and expenses to income and principal pursuant to the Uniform Principal and Income Act," Probate Code sections 16320-16375

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1 Because many of the named individuals share the same last name, we will use first names for the sake of clarity. We mean no disrespect.

(the Act).[2] The Act usually requires an even split of such expenses. However, because the expense of the New York arbitration had been funded out of the cash on hand (which came from the trust's income), the parties agreed to correct that imbalance by allocating more of the arbitration's expense to principal than to income. Specifically, they agreed that that "the amount of expense allocated to income . . . will be reduced by . . . $177,500[] and the amount of expense allocated to principal . . . will be increased by . . . $177,500[]." The parties knew the total arbitration expense was $1,111,180.33 as of October 31, 2004, but anticipated some additional expenses between October 2004 and the date of the 2005 Settlement. Consequently, they agreed to a formula by which they would further adjust the allocation of the arbitration's expense depending on the final amount of that expense: "If the total expense to the Trust of the . . . [a]rbitration is less than $1.2 million, 20% of the shortfall will be deducted from the $177,500 amount," but "[i]f the total expense to the Trust of the . . . [a]rbitration is greater than $1.2 million, any excess shall be allocated 30% to income and 70% to principal."

In March 2005, the parties signed and submitted a court order—which the trial court then signed—memorializing the 2005 Settlement. In pertinent part, the terms of the order are identical to the 2005 Settlement except that the paragraph mimicking how to make the final adjustment adds the following italicized words: "If the total expense to the Trust (*before reimbursement*) of the . . . [a]rbitration is less than $1.2 million,

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

then twenty percent (20%) of the shortfall will be deducted from the $177,500 amount."

The trustees subsequently allocated the expense of the New York arbitration in a manner that entirely or substantially eliminated the agreed-upon $177,500 reduction of those expenses chargeable to the income beneficiary. Indeed, over the years, the trustees offered three different calculations. Each of the trustees' calculations rested on the assumption that the term "total expense" in the 2005 Settlement did not include the $825,000 in attorney's fees the trust was to be (and was actually) paid under the arbitration award. Once the $825,000 was deducted, the "shortfall" between the remaining arbitration expense and $1.2 million was a large number, and the subtraction of 20 percent of that amount from $177,500 (as the 2005 Settlement requires) left little or no offset to reduce the expenses charged to Piri's income interest. The trustees calculated the offset as being reduced to $32,255,[3] reduced to $12,500,[4] and reduced to $0.[5]

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3 The trustees reached this calculation as follows: Total expenses of $1,298,777.04 less the $825,000 amount of attorney's fees, leaving expenses of $473,777.04. The "shortfall" between $473,777.04 and $1.2 million is $726,223. Twenty percent of $726,223 is $145,245. This means that the offset is $177,500 less $145,245, or $32,255.

4 The trustees reached this calculation as follows: Twenty percent of $825,000 is $165,000. This means the offset is $177,500 less $165,000, which is $12,500.

5 The trustees reached this calculation as follows: Total expenses of $1,012,596.71 (which is somehow calculated as "allowable legal fees" of $825,000 plus additional *incurred* legal fees of $187,593.71), less the $825,000 amount of attorney's fees,

C. Allocation of 2004 Chelsea Distribution of $304,000

On July 6, 2004, the Chelsea distributed $304,000 to the trust. Because the Chelsea is organized as a closely held Subchapter S corporation, Piri paid taxes of $6,696 on that distribution in 2004.

The trustees did not allocate any of the $304,000 in their initial accounting for 2004, which was issued in January 2006. However, the trustees and Piri entered into a Settlement Agreement in 2008 (2008 Settlement), and the trustees agreed to issue a "revised and/or supplement[al]" accounting for 2004. The trustees issued that revised accounting in September 2009, and in it allocated $297,304 of the amount to principal and $6,696 to income (to repay Piri for paying the taxes).

D. Undistributed income on hand when Piri dies

Piri died on October 17, 2011. At that time, there was $75,686 allocated to the income beneficiary, but not yet paid to him. The trustees declared that amount to be a "reserve" and proceeded to spend that money on legal and accounting fees paid after Piri's death. After these fees, $51 remained.

II. Procedural History

Piri's heirs are objectors, appellants, and cross-respondents Raina Thomas Scurrah and Renee Shank (collectively, objectors), who are Piri's daughters from a subsequent marriage. On September 21, 2012, they filed a Petition for Review of Trustees'

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leaving expenses of $187,596.71. The "shortfall" between $187,596.71 and $1.2 million is $1,012,403.29. Twenty percent of $1,012,403.29 is $202,480.66. This means that the offset is $177,500 less $202,480.66, which is negative $24,980.66, leaving no offset at all.

Revised Trust Accountings and Objections to Trustees' Revised Accountings. In the operative first amended petition, they allege that the trustees committed three errors: (1) in allocating $297,304 from the $304,000 distribution to principal; (2) in calculating and allocating the expense of the New York arbitration; and (3) in withholding the $75,686 on hand at the time of Piri's death. Objectors also sought prejudgment interest on any balance owed on the last two items.

Following pretrial briefing, a day-long trial, and posttrial briefing, the trial court issued a 28-page statement of decision.

The court first rejected the trustees' argument that the objectors' challenges to the allocation of the $297,304 distribution and the New York arbitration expense were time barred. The court then moved to the merits of those challenges. The court ruled that the trustees properly allocated $297,304 to principal because the statute in effect on the *date of allocation* dictated that the amount was principal. The court next concluded the expense of the New York arbitration charged to income should be reduced by $197,254.81.[6] The court reasoned that the total expense of the arbitration was $1,298,774.04; that this amount was more than $1.2 million; that 30 percent of the excess ($98,774.04) should be allocated to income; that, because the trustees had allocated 50 percent of all the expenses to income, the income interest was owed 20 percent of the excess ($19,754.81); and that the total amount owed was $19,754.81 plus $177,500 (which is $197,254.81). The court ruled that trustees had not proven their entitlement to keep the $75,686 as a reserve because they had not shown that the money had been used to pay

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6 The trial court miscalculated the amount as $197,074.81.

expenses incurred prior to Piri's death, which is the only purpose for which a reserve can be maintained. The court then awarded prejudgment interest of seven percent on (1) $159,886 (the amount Piri originally calculated to be chargeable as the expense of the New York arbitration) from January 18, 2006 (the date of the first accounting for 2004); and (2) $75,686 from November 17, 2011 (30 days after Piri's death).

After the trial court entered its order, the objectors filed a timely notice of appeal, and the trustees filed a timely notice of cross-appeal.

DISCUSSION

In their appeal, the objectors challenge (1) the trial court's ruling that the trustees properly allocated $297,304 to principal, and (2) the trial court's award of prejudgment interest at seven percent, rather than 10 percent. In their cross-appeal, the trustees challenge (1) the trial court's calculation and allocation of the New York arbitration expense credited to income, (2) the trial court's invalidation of their withholding of a "reserve," (3) the trial court's ruling that the objectors' claims for $297,304 and for the New York arbitration expense are timely, and (4) the award of *any* prejudgment interest. We still start with the threshold issue of the statute of limitations, then discuss the merits of the three substantive claims and cross-claims, and finally address the issue of prejudgment interest.

I. Statute of Limitations

The trustees argue that the objectors brought two of their claims—their challenge to the allocation of $297,304 and to the trustees' calculation and allocation of the New York arbitration expense—too late because their petition challenging those rulings was filed more than three years after the trustees disclosed their final accounting for those items. We review the trial court's factual findings for substantial evidence and any legal questions de novo. (*Hart v. Darwish* (2017) 12 Cal.App.5th 218, 223-224.) We review the trial court's ruling, not its reasoning. (*People v. Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 386.)

A. As to allocation of $297,304

A beneficiary under a trust has three years after the "receipt of [an] account or report" to challenge that accounting if it "adequately discloses the existence of a claim against the trustee." (§ 16460, subd. (a)(1); *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733; *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1123.) The statute specifies that the limitations clock begins to run once the accounting to be challenged is "received"—either by the beneficiary or, if the beneficiary "is not reasonably capable of understanding the account or report," his "legal representative." (§ 16460, subd. (b)(1)-(2).) However, individuals generally have the right to displace the form of notice required by statute with a form of notice they agree to by contract. (See *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1227 [builders may "elect[] to follow . . . contractual [notice] procedures in lieu of the statutory procedures"]; *Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 750 [so holding, as to unlawful detainer notice].) Ostensibly, this means that a beneficiary and a trustee can agree to define for themselves the type of notice that would trigger the three-year limitations period.

The trial court made several factual findings relevant to the statute of limitations question. The court found (1) that the trustees mailed the accounting for 2004 to Piri on September 1, 2009; (2) that Piri received it at some time prior to September 10, 2009; (3) that the trustees mailed the accounting to Piri's counsel on or after September 16, 2009; and (4) that Piri's counsel received the accounting on September 21, 2009. These findings are supported by substantial evidence.

In light of these findings, it is unclear whether the objectors' petition is timely under the statute. Although the objectors' September 21, 2012 petition was filed more than three years after Piri *himself* received the accounting, it was filed exactly three years after Piri's *counsel* received the account. As noted above, receipt *by counsel* is required when the beneficiary "is not reasonably capable of understanding the account or report." (§ 16460, subd. (b)(2).) Because Piri, in September 2009, was nearly 80, in "very poor" health, and had suffered "several strokes," it is possible that he was "not reasonably capable of understanding the account," that the trustees were obligated to serve his counsel, and that the September 21, 2012 petition is timely because Piri's counsel did not receive the accounting until September 21, 2009.

In light of the trial court's factual findings, it is also unclear whether the objectors' petition is timely under the terms of the 2008 Settlement. That document provides that the trustees would file a "revised and/or supplement[al]" accounting for 2004. The trustees and Piri also agreed that "[a]ny notice of [*sic*] other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given for all purposes when," among other things, "deposited in the United States mail" and "directed to" both the party *and* its attorney. The language in the 2008 Settlement applies to the

2004 accounting, which is a "communication[]" "required . . . under this Agreement." More to the point, the 2008 Settlement seems to define notice as occurring when the trustees deposit a required document in the mail to *both* Piri and his counsel. In this case, we can infer from the fact that Piri's counsel *received* the accounting on September 21, 2009, that it was deposited in the mail at least one day earlier (on or before September 20, 2009), which would render the September 21, 2012 petition untimely by at least one day. However, the trustees at trial "acknowledge[d] that the relevant date is the receipt date, not the service date." If that is the case, then the September 21, 2012 petition *was* timely.

At bottom, the timeliness of the petition is uncertain. We must resolve this uncertainty in favor of the objectors because it is the trustees who bear the burden of establishing that the objectors' filing is outside the limitations period. (E.g., *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 ["Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant"].)[7]

B. As to the calculation and allocation of the New York arbitration expense

In selecting which statute of limitations to apply, a court must "identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22.) "[T]he nature of the right sued upon and not the form of action nor the relief demanded" is what matters. (*Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 733.)

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7 In light of this conclusion, we have no occasion to reach objectors' alternative arguments as to why their claim for re-allocation of the $297,304 is timely.

As discussed more fully below, the objectors' claim for proper calculation and allocation of the expenses arising from the New York arbitration requires us to interpret and enforce the terms of the 2005 Settlement. The gravamen of the claim is for breach of that contract. Because a party suing for breach of contract has four years to sue after that breach (Code Civ. Proc., § 337, subd. 1; *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 738-739), the September 21, 2012 filing in this case was timely because the trustees did not breach the 2005 Settlement until they calculated and allocated expenses in the revised 2004 accounting that they sent to Piri in September 2009. Because of the four-year limitations period, the objectors had until at least September 1, 2013 to file their claim; the September 2012 petition was timely.

II. Allocation of $297,304 Distribution to Principal

Section 16350, subdivision (b), sets out the rule that a trustee is generally to "allocate to income money received [by the trust] from an entity." However, the trustee must instead "allocate to principal" "[m]oney received in total liquidation of the entity or in *partial liquidation* of the entity." (§ 16350, subd. (c)(3), italics added.) Because the trust received $304,000 from the Chelsea, the pertinent question in this case becomes: Does this amount constitute a "partial liquidation" of the Chelsea?

The answer to this question depends on *which version* of section 16350 we apply. Prior to July 18, 2005, section 16350 defined "partial liquidation" of an entity as occurring when "the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's yearend [*sic*] financial statements immediately preceding the initial receipt."

(Former § 16350, added by Stats. 1999, ch. 145, § 5.) In *Estate of Thomas* (2004) 124 Cal.App.4th 711 (*Thomas I*), this Court interpreted "the total amount of money . . . received in a distribution" to require focus on "the total amount of money *received by the trust*, *not the total amount of an entity's distribution*." (*Id.* at p. 720, italics added; see generally *id.* at pp. 720-726.) Believing this interpretation to be "wrong" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 296 (2005-2006 Reg. Sess.) as amended Apr. 26, 2005, p. 4), our Legislature thereafter enacted an urgency measure that changed the definition of "partial liquidation" to focus on the "the total amount of money and property received *by all owners, collectively*" (Stats. 2005, ch. 51, § 1, italics added).[8]

The Chelsea's $304,000 distribution would be allocated to income under the pre-July 2005 version of section 16350, but would be allocated to principal under the July 2005 version. If we apply the pre-July 2005 version of the statute as construed by *Thomas I*, we must compare the amount received *by the trust* (here, $304,000), and ask whether that amount is more than 20 percent of the Chelsea's gross assets from the year before (which was $8,999,766). That comes to 3.38 percent, which means it is *not* a "partial liquidation" and must therefore be allocated to income under the general rule. If we apply the July 2005 version of the statute, we must compare the amount distributed by the Chelsea to *all* of its shareholders (which is $1.9 million, because

8 Our Legislature has made further changes to the definition of "partial liquidation" in 2013 and 2014 (see Stats. 2014, ch. 867, § 1; Stats. 2013, ch. 105, § 1), but those definitions took effect long after all of the pertinent events in this case and are accordingly not relevant.

16 percent of that number is $304,000) to the $8,999,766 gross asset value. That comes to 21.1 percent, which means it *is* a "partial liquidation" and must therefore be allocated to principal.

We review questions of a statute's retroactivity de novo. (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 183.)

We conclude that the trustees correctly used the July 2005 version of section 16350, and thus correctly allocated the $304,000 distribution (minus the amount Piri paid in taxes) to principal. Section 3 sets the default rule for how statutory changes to the Probate Code are to be applied. (§ 3; *Rice v. Clark* (2002) 28 Cal.4th 89, 99 [so noting].) There is no question that the July 2005 amendment to section 16350, by overruling *Thomas I*'s interpretation of the prior language, changed the law. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473-474 (*McClung*) ["although the Legislature may amend a statute to overrule a judicial decision, doing so *changes* the law"].) However, an "act that makes a change in [the Probate] [C]ode . . . applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, . . . [the] taking of an action." (§ 3, subds. (a) & (c); accord, Cal. Law Revision Com. com., 52 West's Ann. Prob. Code, (2002 ed.) foll. § 3, pp. 10-11 ["The general rule . . . is that a new law applies immediately on its operative date to all matters, including pending proceedings"].)

The "action" the objectors are challenging is the trustees' allocation of the $304,000 distribution. That action was not taken until September 2009, when the trustees issued the final accounting for that year. Because September 2009 was long after the July 18, 2005 operative date of the July 2005 version of section 16350, we apply that version, which, as noted above, dictates that the distribution is to be allocated to principal.

The objectors raise five challenges to this conclusion.

First, they argue they are challenging the trust's *receipt* of money from the Chelsea, not the trustees' subsequent *allocation* of those funds to principal. Thus, they assert, the action to look at is the date of receipt. Accordingly, they conclude, we should look to the pre-July 2005 version of section 16350 in effect on the July 2004 date that the trust received the $304,000 from the Chelsea. The objectors make three arguments in support of their contention that the date of receipt is the pertinent date. They point to section 16350's many references to "money *received* from an entity" and "[m]oney *received* in total . . . or in partial liquidation of the entity." (§ 16350, subds. (b) & (c)(3), italics added.) They also point to our prior decision in *Thomas I*, where we noted that "the Legislature's use of the term 'received' is significant." (*Thomas I*, *supra*, 124 Cal.App.4th at p. 720.) And they finally point to section 16346, which directs a trustee to "allocate an income receipt or disbursement" according to its "due date," which for non-periodic payments like the Chelsea distribution in this case is defined as "the date the payer is required to make a payment." (§ 16346, subds. (a) & (c).)

None of the sources cited by the objectors call into question our conclusion that the pertinent date is the date of allocation when it is the allocation that is being challenged. Section 16350's focus on receipt of money from an entity has no special weight because such receipt of money is a necessary prerequisite to its allocation (*Thomas I*, *supra*, 124 Cal.App.4th at p. 721 ["money 'received in a distribution' necessarily refers only to money that the trustee has the power to allocate"]), and the objectors are challenging how the trustees allocated the money. *Thomas I* placed significance on the word received, but did so in the course of deciding whether section 16350 looked to the amount of money received by the trust or instead the amount of money distributed by the entity. This appeal, by contrast, calls upon us to decide whether section 16350 looks to the date of receipt or the date of allocation; this is an entirely different question on which we took no position in *Thomas I.* (E.g., *People v. Seumanu* (2015) 61 Cal.4th 1293, 1366 ["'cases are not authority for propositions not considered'"].) And section 16346, subdivision (a) defines to whom "an income receipt or disbursement" is to be allocated "before an income interest begins in the case of a trust or successive income interest." In other words, it deals with *which* income interest is to receive funds. But it *assumes* that the funds have already been allocated to the income interest (§ 16346, subd. (a) ["A trustee shall allocate an income receipt or disbursement *other than one to which [section 16340, subdivision (a)] applies to principal*"], italics added), and thus does not speak to the question of whether the date of allocation or receipt controls when making that initial allocation of funds as between a trust's income and principal interests.

Our decision to treat the pertinent date as the date of allocation makes sense for two additional reasons. To begin, this conclusion better accords with our Legislature's intent, which is the critical inquiry for determining the applicability of a new statute. (Accord, *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1137 [looking to the Legislature's intent].) When our Legislature amended section 16350 in July 2005, it also conferred immunity from civil suit on trustees who "allocated" "receipts" under *Thomas I*'s rule. (§ 16350, subd. (d)(1).) This immunity provision only makes sense if our Legislature viewed the date of allocation as the pertinent date. Moreover, because the statute of limitations is keyed to the "gravamen of [the] plaintiff's action" (*People v. Union Oil Co.* (1957) 48 Cal.2d 476, 483), a rule that looked to the date of *receipt* of funds by the trust would start the limitations period running months (or, as it was in this case, years) before the challenged allocation. This could lead either to a limitations period expiring before the action to be challenged occurs or, if the time is tolled until allocation, an open-ended limitations period. Either result is absurd, and thus to be avoided. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 190 [courts must "avoid[] an interpretation that would lead to absurd results"].)

Second, the objectors contend that Piri obtained a vested right to have the $304,000 distribution allocated to him under the pre-July 2005 version of section 16350 in effect at the time of the trust's receipt of that distribution, and that applying the July 2005 version would impermissibly deprive him of that right. Such deprivation, they continue, runs afoul of one of the exceptions to the default rule in the Probate Code and of due process in general. To be sure, section 3 grants courts the discretion to "apply either the new law or the old law" if the "application of . . . the new law would substantially interfere with the . . . rights of the parties . . . in connection with an event that occurred . . . before the operative date" of the new law "to the extent reasonably necessary to mitigate the substantial interference." (§ 3, subd. (h); *Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1137-1138 & fn. 20.) Along similar lines, the "retroactive application of a new measure may conflict with constitutional principles 'if it deprives a person of a vested right without due process of law.'" (*Strauss v. Horton* (2009) 46 Cal.4th 364, 473.)

However, this authority does not aid the objectors because Piri had no right—vested or unvested—to have the $304,000 distribution allocated to his income interest until the time of *allocation*. Further, even if we ignored that allocation is the pertinent event and looked instead to the trust's receipt of that distribution, the objectors still had no vested right to have the $304,000 received by the trust allocated to income at some point in the future because the language in the pre-July 2005 version of section 16350 is itself ambiguous (it just refers to "the total amount of money and property received"), and because *Thomas I* did not construe that language to mean the "total amount of money and property received *by the trust*" until December 2004, five months *after* the July 2004 distribution. Further, *Thomas I*'s interpretation was superseded seven months later, in July 2005. Piri could not have had a vested right to have the money received by the trust allocated to income at some point in the future based upon a judicial construction of an otherwise ambiguous statute when that construction only existed for seven months and was not handed down until several months *after* the date on which he claims his right vested and long before the allocation occurred.[9]

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9 Consequently, we have no occasion to examine the out-of-state decisions the objectors cite regarding whether changes to allocation rules impact vested rights (e.g., *In re Reznor's Estate* (Pa. 1965) 213 A.2d 791, 797-798; *Manufacturers Hanover Trust Co. v. Bartram* (Conn. 1969) 255 A.2d 828, 834; *Keith v. Adams* (Del. Ch. 1985) 1985 Del.Ch. Lexis 500, *43-44), and whether those decisions were abandoned long ago (Bogert, The Law of Trusts and Trustees (rev. 2d ed. 1981) § 847, pp. 591-592).

Third, the objectors assert that the July 2005 amendment to section 16350 effectively overturned *Thomas I* after it had become final, and that our Legislature is not allowed to retroactively overturn final decisions. Although a new law cannot retroactively overrule a final decision (*McClung*, *supra*, 34 Cal.4th at pp. 473-474), applying the July 2005 amendment to the $304,000 distribution does not overturn *Thomas I*. Although *Thomas I* involved the same parties and same trust as this case, our decision in *Thomas I* dealt solely with how to allocate a 2001 distribution (of $1.2 million) from the Chelsea to the trust; it had nothing to do with the subsequent $304,000 distribution. (*Thomas I*, *supra*, 124 Cal.App.4th at p. 716.) Consequently, the July 2005 amendment did not retroactively overrule *Thomas I*.

Fourth, the objectors argue that the trustees did not inform Piri that they were intending to allocate the $304,000 distribution to principal until September 2009, that their silence constitutes proof that they intended to allocate the funds to interest, and that they should now be bound by their contemporaneous conduct. (See *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 ["In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent"].) We reject this argument because the trustees' silence in no sense implied a position that the $304,000 would be allocated to income; until September 2009, they expressly deferred taking any position at all on how to allocate it.

Lastly, the objectors argue that that 2005 Settlement obligates the trustees to apply the pre-July 2005 version of section 16350 because, in that agreement, the trustees agreed to "allocate income and expenses to income pursuant to the Uniform Principal and Income Act." We disagree because the parties' agreement to apply the Act begs the question of *which version* of the Act to apply; the agreement does not answer that question.

III. Adjustment of $197,254.81 to Expenses Charged to Income for the New York Arbitration

The trial's court calculation of the adjustment to the expenses charged to Piri's income interest for the New York arbitration is based on (1) its construction of the formula for doing so set forth in the 2005 Settlement, and (2) the undisputed fact that the aggregate expense of the arbitration was $1,298,774.04. As we would with any other contract, we review the trial court's construction of the 2005 Settlement de novo, focusing on "the objective intent of [the] contracting parties," which is most readily ascertained from the contract's language. (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 461; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; see also Civ. Code, §§ 1638 & 1639.)

We agree with the trial court's construction of the 2005 Settlement. The starting point is that "the amount of expense allocated to income . . . will be reduced by . . . $177,500[]." The next step is to ascertain whether "the total expense [of the New York arbitration] to the Trust" is more or less than $1.2 million. In traditional contractual parlance, "total" means "the whole amount received" "'before deductions.'" (See *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 759 & fn. 7; *County of Sacramento v. Pacific Gas & Elec. Co.* (1987) 193 Cal.App.3d 300, 309 ["gross means 'an overall total exclusive of deductions'"].) Nothing in the 2005 Settlement itself indicates an intent to use a different definition. To the contrary, the March 2005 court order signed by both parties parallels the language set forth in the 2005 Settlement exactly except to make express that "total expense" means "before reimbursement." Thus, we reject the trustees' view that it is appropriate to deduct the $825,000 in attorney's fees received from the arbitration proceeding; subtracting that amount from the arbitration expense would yield the "*net* expense"—not the "*total* expense" specified in the 2005 Settlement. Because the total expense of the arbitration was $1,298,774.04, the excess expense over $1.2 million—that is, $98,774.04—is to be "allocated 30% to income and 70% to principal." Because the trustees had allocated 50 percent of those expenses to income, the income beneficiary is entitled to a 20 percent refund (the 50 percent less the 30 percent owed), and 20 percent of $98,774.04 is $19,754.81. The total amount to be offset is accordingly the sum of $19,754.81 and $177,500, which is $197,254.81.

The trustees raise two objections to this analysis. First, they argue that the trust did not incur the "expense" of the $825,000 in attorney's fees because it did not ultimately have to pay those fees. The gist of this argument is that "total expense" means "net expense." For the reasons discussed above, that is not the ordinary use of those terms and nothing in the 2005 Settlement sets out different definitions.

Second, the trustees argue that the trial court's calculation leads to an absurd allocation of the arbitration's expenses. The trustees note that the initial reallocation of $177,500 in expenses between income and principal—which was based on the assumption that the arbitration's expenses would be $1.2 million—leads to income paying roughly 35 percent of the expenses and principal paying roughly 65 percent.[10] The trustees then argue that if the $825,000 in attorney's fees is deducted from the expenses, then the breakdown is approximately 43 percent to income and 57 percent to principal;[11] however, if the $825,000 is included in the "total expense," they contend, the breakdown is 8 percent to income and 92 percent to principal.[12]

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10 The trustees calculate those figures as follows: The general 50/50 split presumes that income and principal would each cover half of the $1.2 million expense—or, $600,000 each. By subtracting $177,500 from income's $600,000 default expense, the adjusted expense charged to income is $422,500, which is 35.2 percent of $1.2 million. By adding $177,500 to principal's $600,000 default expense, the adjusted expense charged to principal is $777,500, which is 64.6 percent of $1.2 million.

11 The trustees calculate this figure as follows: Subtracting $825,000 from the actual expense of $1,298,777.04 yields a "total expense" of $473,777.04. Because that number is less than $1.2 million, there is a shortfall of $726,222.96 ($1,200,000 minus $473,777.04) and 20 percent of that shortfall is $145,245. That number is to be deducted from the $177,500 offset, which yields a much smaller offset of $32,255. By subtracting $32,255 from half of the "total expense" of $473,777.04 (which is $236,888), the adjusted expense charged to income is $204,633, which is 43 percent of the "total expense" of $473,777.04. By adding $32,255 to half of the "total expense" of $473,777.04, the adjusted expense charged to principal is $269,143, which is approximately 57 percent of $473,777.04.

12 The trustees calculate this figure as follows: Subtracting $825,000 from the expense of $1,298,777.04 yields a "total expense" of $473,777.04. If the trial court's offset of $197,074.81 is subtracted from half of the "total expense" of $473,777.04 (which is $236,888), the adjusted expense charged to income is

Even if we assume that mathematical disparities might be a cause for alarm, the 8/92 percent disparity cited by the trustees is a product of comparing apples and oranges and is therefore inaccurate and misleading for two separate reasons. To begin, the 8/92 percent figure is calculated using the trial court's allocation of expenses (which includes the $825,000 expense) in the numerator, but using the trustee's allocation of expenses (which excludes the $825,000 expense) in the denominator. Using the trustee's allocation as the denominator necessarily (and dramatically) skews the calculation. However, if the trial court's allocation (including the $825,000 expense) is used in both the numerator and denominator, the breakdown is 35/65 percent, which is *precisely* the allocation the parties sought.[13]

The 8/92 percentage figure is also misleading if we use the parties' anticipated total expense (rather than the actual total expense) as the yardstick. If the same denominator used to calculate the estimated 35/65 percentage breakdown (that is, $1.2 million) is also used as the denominator while using the actual expenses as the numerator, the breakdown is 47/53 percent if the

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$39,813, which is approximately 8 percent of the "total expense" of $473,777.04. By adding $197,074.81 to half of the "total expense" of $473,777.04, the adjusted expense charged to principal is $433,963, which is approximately 92 percent of $473,777.04.

13 We calculate this figure as follows: The amount actually allocated to income expense ($197,254.81) would be subtracted from one half of the total actual expense of $1,298,777.04 ($649,388.52), which yields an allocation to income expense of $254,133.71. This is 34.8 percent of the total actual expense, leaving 65.2 percent allocation of expense to principal.

$825,000 is not included in the "total expense" and 34/66 percent if the $825,000 is included.[14] Neither of these numbers is a large departure from the 35/65 percent breakdown contemplated by the parties when estimating $1.2 million in expenses; neither warrants ignoring the 2005 Settlement's plain language. More the point, it is the *inclusion* of the $825,000 in the "total expense" that leads to the breakdown (34/66 percent) that is most consistent with the parties' estimation (35/65 percent).

IV. Undistributed Income on Hand When Piri Died

An income interest in a trust "ends on the day before an income beneficiary dies" (§ 16345, subd. (d)), and on that date, as is pertinent here, "the trustee shall pay . . . to the estate of [the] deceased mandatory income beneficiary . . . the beneficiary's share of the undistributed income that is not disposed of under the trust" (§ 16347, subd. (b)). For these purposes, "undistributed income" means "net income received before the date on which [the] income interest ends" (§ 16347, subd. (a)), and "net income" refers to "the total receipts allocated to income during an

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14 If we accept the trustee's argument that proffered income adjustment should be $32,255 (see *ante*, fn. 11) and subtract that amount from half of $1.2 million ($600,000), the adjusted expense charged to income is $567,745, which is 47.3 percent of the "total expense" of $1.2 million. This makes principal responsible for 52.7 percent.

If we use the trial court's calculation that the proffered income adjustment should be $197,254.81, and subtract that amount from half of $1.2 million ($600,000), the adjusted expense charged to income is $402,745.19, which is 33.6 percent of the "total expense" of $1.2 million. This makes principal responsible for 66.4 percent.

accounting period minus the disbursements made from income during the accounting period" (§ 16328).

In assessing whether the trustees in this case properly withheld the $75,686 in undistributed income as a reserve, we could resolve the question in one of two ways: (1) by determining, as a matter of statutory construction, whether a reserve is *ever* allowed, or (2) by determining, as a factual matter, whether the reserve—if allowed under statute—was proper. The first question is a question of statutory construction that we would review de novo; the second is a factual question we would review for substantial evidence. (*Hart*, *supra*, 12 Cal.App.5th at pp. 223-224.)

We need not resolve the question of statutory construction[15] because, even if we assume that a trustee may validly "[m]aintain a reserve for reasonably anticipated expenses, including, but not limited to, taxes, debts, trustee and accounting fees, and costs and expenses of administration" (§ 16004.5, subd. (b)(1)), the only such expenses that could be reasonably charged against Piri's income interest are those incurred *while that interest still existed* (that is, while he was still alive), and does not include expenses incurred *after* the income beneficiary's death. (Accord, § 16347, subd. (a) ["undistributed income" to be issued to income beneficiary's next of kin "does not include an item of income or expense that is due or accrued"], § 16328 ["net income" reaches only "disbursements made from income *during the accounting period*"], italics added.) In this case, the trustees

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15 As a result, we need not address the trustees' argument that sections 16371 and 16373 always authorize a reserve, or the objectors' argument that section 16004.5, subdivision (a) always prohibits one.

documented the various accounting and legal fees they paid *after* Piri's death and did not produce evidence that those fees were incurred for services performed *before* his death. Without such evidence, those fees were not chargeable to Piri's income interest, and a reserve to pay them off was invalid.

The trustees point to language in the 2008 Settlement allowing the trustees to maintain a $150,000 "Cash Reserve." But that the "Cash Reserve" was to be maintained at all times, and does not on its face empower the trustees to take as reserve *additional* undistributed income at the time of Piri's death.

V. Prejudgment Interest

A trial court may generally award prejudgment interest under two provisions. First, a court may award prejudgment interest on a "damages" award, from date on which those damages "vest[]," if those damages are "certain, or capable of being made certain by calculation." (Civ. Code, § 3287, subd. (a).) "'Damages are deemed certain or capable of being made certain . . . where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.'" (*Leff v. Gunter* (1983) 33 Cal.3d 508, 519.) Put differently, prejudgment interest is owing as long as the "'*defendant* actually know[s] the amount owed'" or "'could . . . have computed that amount'" "'from reasonably available information.'" (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1789.) Second, a trial court may award prejudgment interest on a breach of contract at whatever rate is specified in the contract or, if the contract is silent, 10 percent. (Civ. Code, § 3289; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1131.) We review a trial court's statutory authority to award prejudgment interest de novo, but review any award itself for an abuse of discretion. (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 198.)

A. Prejudgment interest on $197,254.81 income adjustment from New York arbitration

As we described above, the objectors' entitlement to this income adjustment derives wholly from the terms of the 2005 Settlement. And as we concluded above, the trustees' failure to properly apply those terms is a breach of that contract, and this is true even though that breach was effected in an accounting. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811 ["A settlement agreement is a contract"].) Because the 2005 Settlement is silent on the prejudgment interest rate applied in the event of a breach, the applicable rate of prejudgment interest is 10 percent. (Civ. Code, § 3289, subd. (b).) The trustees breached the 2005 Settlement on September 1, 2009, the date on which they first allocated less than the proper amount due. Prejudgment interest should run at a rate of 10 percent interest from that date until the date of the trial court's final order.

Under Civil Code section 3289, the certainty of the damages is irrelevant. Thus, we reject the trustees' argument that the damages were not sufficiently certain until the trial court interpreted the 2005 Settlement's language in its final ruling in this case. We also reject the trial court's award of prejudgment interest on the amount it found to be calculable as of January 18, 2006 (the date the accounting for 2004 was first released) because (1) that first accounting took no position on the adjustment from the New York arbitration, and (2) limiting the amount on which prejudgment interest is to accrue to the amount calculable (and hence "certain") is, as we note, irrelevant under Civil Code section 3289.

B. Prejudgment interest on undistributed income of $75,686

The objectors are entitled to prejudgment interest on the undistributed income, but in a different amount, from a different date, and on a different ground than the trial court found. In addition to the general provisions noted above allowing for prejudgment interest on "certain" "damages" awards and on contracts, section 12005 specifically provides that a "devise for maintenance is entitled to interest on the amount of any unpaid accumulations of the payments held by the personal representative on each anniversary of the testator's death, computed from the date of the anniversary." (§ 12005; see also former § 666, subd. (c), added by Stats. 1983, ch. 842, § 40 [making similar provision].) Because a devise for maintenance includes a life income beneficiary (*In re Estate of Lair* (1940) 38 Cal.App.2d 737, 740; *In re Estate of Mackay* (1895) 107 Cal. 303, 307-308), Piri—and hence the objectors—are entitled to interest on the amount of the unpaid accumulations starting on February 8, 2012 onward, the first anniversary of Betty's death on which there was an unpaid accumulation. The rate of interest is "three percentage points less than the legal rate [of interest] on judgments in effect one year after the date of the testator's death" (§ 12001), which in this case is seven percent because the "legal rate" in effect one year after Betty's death was 10 percent (Code Civ. Proc., § 685.010). Thus, the objectors are entitled to interest on the undistributed income at a rate of seven percent from February 8, 2012 until the date of judgment.

The grounds for awarding prejudgment interest cited by the trial court or the parties do not support an award in this case.

The trial court invoked Civil Code section 3287 to award prejudgment interest, but *Estate of Kampen* (2011) 201 Cal.App.4th 971, 990 has held that an order requiring a trustee to distribute undistributed assets to a beneficiary does not constitute "damages" under that section. The objectors urge us to award prejudgment interest from the date of nonpayment at the full legal interest rate, citing sections 16440 and 16441. However, those sections are premised upon a finding of a "breach of trust" (§§ 16440 & 16441; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 922), and the objectors acknowledged to the trial court that they were not pursuing—and, by extension, never awarded—damages for a breach of trust.

It is of no consequence that we are relying on a different basis than the trial court; our job is to review the trial court's rulings, not its reasoning. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.)

DISPOSITION

The trial court's award of prejudgment interest for the income adjustment for the New York arbitration agreement is modified to require the payment of interest at a rate of 10 percent on the amount of $197,254.81 from the date of September 1, 2009 forward. The court's award of prejudgment interest on the undistributed income is modified to require the payment of interest at a rate of seven percent on the amount of $75,686 from the date of February 8, 2012. As modified, the order requiring the trustees to pay the objectors an additional $197,254.81 in expenses from the New York arbitration and to refund the $75,686 income interest balance wrongly withheld as a reserve is affirmed. Each party to bear its own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

______________________, J.
HOFFSTADT

We concur:

_________________________, Acting P. J.
ASHMANN-GERST

_________________________, J.
CHAVEZ