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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CAROLE A. GRAPPO,

Plaintiff and Appellant,

v.

McKEAN & McMILLS LP, as Trustee,  
etc.,

Defendant and Respondent.

A133699

(Alameda County  
Super. Ct. No. RP 05-248512)

This appeal has been taken by appellant Carole Grappo, a trust beneficiary, from an order that granted respondent, the appointed successor trustee of the trust, compensation based on “a ‘reasonableness’ standard,” rather than one percent of the value of the trust. We conclude that the trial court erred by denying appellant’s petition to restrict respondent’s compensation to one percent of the trust value, and reverse the judgment.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

The Michael A. Grappo 2003 Revocable Trust (the Trust) was created in September of 2003, by Michael A. Grappo, the settlor of the Trust. Designated

<sup>1</sup> We observe that respondent has not filed a brief or responded to appellant’s arguments in this appeal. This does not require reversal of the judgment below; the burden to show prejudicial error remains on the appellant. (See *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7; *Perfection Paint Products v. Johnson* (1958) 164 Cal.App.2d 739, 740.) Rule 8.220(a)(2) of the California Rules of Court provides, however, that if the respondent fails to file a brief, we may accept as true the statement of facts in the appellant’s opening brief, and “decide the appeal on the record, the opening brief, and any oral argument by the appellant.” (See also *Lane v. Valverde* (2012) 203 Cal.App.4th 71, 74, fn. 1; *Conness v. Satram* (2004) 122 Cal.App.4th 197, 200, fn. 3.) This we will do.

beneficiaries of the Trust were his children and grandchildren. During his lifetime the settlor of the Trust also acted as sole trustee. Article V, section 5.03(E)(1), of the Trust document, provided: “The Trustees shall be entitled to reasonable compensation for their services. For this purpose, a fee equal to one percent (1%) of the value of the trust estate, per year, shall be considered reasonable. The Trustees may, at trust expense, seek court approval of their fee.”

The settlor died in December of 2004, whereupon the Trust became irrevocable. By the terms of the Trust, Suzanne and Donald Grappo succeeded the settlor as trustees upon his death.

Thereafter, disputes among the trustees and beneficiaries ensued, including a petition for removal of Suzanne and Donald Grappo as trustees. In December of 2006, following mediation, the parties reached a resolution of the disputes and executed a formal “Settlement Agreement” that modified the Trust, and was approved by the trial court. According to the Settlement Agreement, Suzanne and Donald Grappo remained trustees of the Trust, subject to removal by majority vote of the remaining beneficiaries, under enumerated terms and conditions, one of which specified that they “shall split the 1% Trustee fee provided for in the Trust.” The Settlement Agreement explicitly provided that it was “binding upon each [of the] party’s” heirs, successors and assigns.

In February of 2009, the majority of the beneficiaries removed Suzanne and Donald Grappo as trustees. Pursuant to Article I, section 1.04(E) of the Trust, Suzanne and Donald Grappo appointed respondent McKean and McMills, LP, a California licensed Professional Fiduciary, to serve as successor trustee of the Trust. Respondent agreed to be bound by the terms of the Trust, as modified by the Settlement Agreement. Respondent’s appointment as successor trustee was approved by the court on April 28, 2009.

Without prior approval or concurrence of the beneficiaries, respondent began charging fees for services as trustee that exceeded one percent of the value of the Trust. In quarterly statements sent to the beneficiaries respondent asserted that the fees were for

“extraordinary” services and expenses, which were typically charged at a rate of \$150 per hour.

Appellant filed a petition for relief from breach of trust on March 15, 2011. She alleged that respondent breached the Trust provisions by charging excessive fees “in addition to paying itself one percent of the value of the trust estate per year,” in the amount of \$67,220 to December 31, 2010, and an additional unknown amount thereafter. Appellant sought repayment to the Trust of the unauthorized fees charged by respondent, and removal of respondent as trustee. In opposition, respondent claimed the Trust beneficiaries “accepted” the charged compensation by failing to object after notice was sent to counsel for the “former trustees” that as a condition of respondent’s acceptance of the role of trustee “extraordinary expenses” would be “billed at the hourly rate of \$150 plus out of pocket expenses.”<sup>2</sup>

Following a hearing, the trial court effectively bifurcated the proceedings, and did not reach the waiver issue raised by respondent. Rather, the court ruled in favor of respondent “solely on the ground that the Trust Instrument does not restrict the compensation of the successor trustee of the Trust to 1% of the value of the Trust as alleged in the Petition, but instead provides for compensation based on a ‘reasonableness’ standard.” This appeal followed.

## **DISCUSSION**

Our sole task is to review the trial court’s determination that Article V, section 5.03(E)(1) of the Trust does not limit annual trustee compensation to one percent of the value of the trust. The trial court so found despite the language of the trustee compensation provision that, “The Trustees shall be entitled to reasonable compensation for their services. For this purpose, a fee equal to one percent (1%) of the value of the trust estate, per year, shall be considered reasonable. The Trustees may, at trust expense, seek court approval of their fee.”

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<sup>2</sup> Respondent also filed a petition “for instructions to equalize cash distributions and to distribute the real property assets of the Trust in kind and to terminate the Trust,” which was pending before the trial court when the opposition in the present case was filed.

To discern the meaning of Article V, section 5.03(E)(1) we must engage in interpretation of the Trust language. “ ‘In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker.’ [Citations.]” (*Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888.) “Section 21102 provides, ‘the intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.’ ” (*Brown v. Labow* (2007) 157 Cal.App.4th 795, 812; see also *Aguilar v. Aguilar* (2008) 168 Cal.App.4th 35, 39.) “ ‘In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it.’ [Citations.]” (*McIndoe v. Olivos* (2005) 132 Cal.App.4th 483, 487.)

The parties presented no conflicting extrinsic evidence to the trial court to aid in the interpretation of the trust document, so we must “review the trust de novo, considering the circumstances under which the document was made in order to place ourselves in the position of the trustor to interpret the document.” (*McIndoe v. Olivos, supra*, 132 Cal.App.4th 483, 487.) “The interpretation of a trust instrument, like any written document, is a question of law. [Citations.] Under applicable rules of interpretation of written instruments, where there is no conflicting evidence, the reviewing court must independently interpret the document.” (*Brown v. Labow, supra*, 157 Cal.App.4th 795, 812; see also *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.)

We find nothing in Article V, section 5.03(E)(1) of the Trust that is the least bit ambiguous. The single clause granting a trustee “reasonable compensation” cannot be read in isolation. (See *Service Employees Internat. Union, Local 99 v. Options—A Child Care & Human Services Agency* (2011) 200 Cal.App.4th 869, 879.) The trustee’s entitlement to reasonable compensation must be read in conjunction with immediately following explicit clarification that “[f]or this purpose, a fee equal to one percent (1%) of the value of the trust estate, per year, shall be considered reasonable.” To ascertain and effectuate the trustor’s intent we must consider the document as a whole and give every expression some effect. (Prob. Code, § 21120; *Sarracino v. Superior Court* (1974) 13

Cal.3d 1, 13; *Colburn v. Northern Trust Co.* (2007) 151 Cal.App.4th 439, 449; *Estate of Mader* (1970) 11 Cal.App.3d 409, 417.) The language of the Trust document related to trustee compensation must also be read together and harmonized, with each provision helping to interpret the other. (Civ. Code, § 1641; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 799; *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 290.)

The additional provision in Article V, section 5.03(E)(1) that grants the trustee a recognized mechanism to obtain greater compensation by “court approval” substantiates the interpretation that the fee is otherwise set at the one percent figure. The court approval provision is in accord with statutory law that specifies, “if the trust instrument provides for the trustee’s compensation, the trustee is entitled to be compensated in accordance with the trust instrument,” unless upon proper showing the court “may fix or allow greater or lesser compensation than could be allowed under the terms of the trust,” where the duties of the trustee are “substantially different from those contemplated when the trust was created,” the “compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high,” or extraordinary circumstances call for “equitable relief.” (Prob. Code, § 15680, subs. (a), (b); see also *Estate of Taylor* (1970) 6 Cal.App.3d 16, 20; *Estate of Barton* (1950) 96 Cal.App.2d 234, 236; *Estate of Whitney* (1926) 78 Cal.App. 638, 649.)<sup>3</sup> Subdivision (c) adds: “An order fixing or allowing greater or lesser compensation under subdivision (b) applies only *prospectively* to actions

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<sup>3</sup> Probate Code section 15680 reads in full: “(a) Subject to subdivision (b), and except as provided in Section 15688, if the trust instrument provides for the trustee’s compensation, the trustee is entitled to be compensated in accordance with the trust instrument.

“(b) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:

“(1) Where the duties of the trustee are substantially different from those contemplated when the trust was created.

“(2) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high.

“(3) In extraordinary circumstances calling for equitable relief.

“(c) An order fixing or allowing greater or lesser compensation under subdivision (b) applies only *prospectively* to actions taken in administration of the trust after the order is made.”

taken in administration of the trust *after the order is made.*” (Italics added.) The plain meaning of the Trust language governs, and permits but one interpretation of Article V, section 5.03(E)(1): the trustee is entitled to compensation in the amount of one percent of the value of the trust estate per year, unless court approval of greater reasonable fee is first obtained.

Respondent was not entitled to unilaterally modify the Trust terms by sending notice of additional fees to an attorney for the former trustees. Respondent expressly agreed to be bound by the terms of the Trust and Settlement Agreement, which granted the right to additional expenses or compensation only after court approval.

We add only that the December 2006 Settlement Agreement did nothing to modify the trustee compensation provision. In fact, the Settlement Agreement reinforced the one percent compensation limitation by providing that Suzanne and Donald Grappo as trustees would continue to “split the 1% Trustee fee provided for in the Trust.” Therefore, the trial court erred by finding that respondent was authorized to charge in excess of the trustee fee specified in Article V, section 5.03(E)(1) of the Trust of one percent of the value of the trust estate.

Accordingly, the judgment is reversed and the case is remanded to the trial court for further proceedings in accordance with the views expressed herein. Costs on appeal are awarded to appellant.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.