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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

VALERIE HAGAN HARLAN et al.,

Petitioners and Appellants,

v.

BERNARD P. HAGAN et al.,

Defendants and Respondents.

A137780

(City & County of San Francisco  
Super. Ct.  
No. PTR-02-282957)

This case involves allegations of breach of trust levied by three adult children—Valerie Hagan Harlan (Valerie), Regina Hagan (Regina), and William Monroe (William) (collectively, petitioners)—against their father, Bernard P. Hagan (Hagan), and aunt, Roseanne Bertuccelli (Bertuccelli) (collectively, respondents), with respect to the management of the Hagan Family Trust.<sup>1</sup> After extensive hearings exploring petitioners’ numerous allegations of breach of fiduciary duty and trust mismanagement, the trial court issued a detailed decision settling the respective rights and obligations of all of the parties involved. Petitioners now raise a myriad of challenges to the trial court’s resolution of the case. Having conducted our own comprehensive review of the matter, however, we conclude that the petitioners have largely used this appeal to rehash factual issues which were determined against them below based on substantial evidence in the record.

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<sup>1</sup> A number of the individuals involved in this proceeding bear the same surname. Thus, to avoid confusion—and meaning no disrespect—after their introduction, we will refer to Hagan’s ex-wife, Bertuccelli’s husband, and Hagan’s children by first name.

Moreover, they have been unable to identify any meaningful way in which the trial court erred in its thoughtful handling of this sensitive family dispute. We therefore affirm.

## I. BACKGROUND

### A. *The Hagan Family Trust*

The Hagan Family Trust (Trust) was created by trust agreement dated March 31, 1970, for the benefit of Hagan's seven children from his marriage to Dolores Hagan (Dolores). Hagen and Dolores were married from 1955 until they separated in 1982 and ultimately divorced in 1988.<sup>2</sup> The children and original Trust beneficiaries include: Valerie, Regina, William, Paula Marie Hagan (Paula), Bernard Joseph Hagan (Bernard), Christopher Patrick Hagan (Christopher), and Michele Estelle Hagan (Michele).<sup>3</sup> After an extended bench trial, the court below concluded that the purpose of the Trust was "to minimize taxes, shelter funds in the trust from possible claims of Hagan's creditors in the real estate and construction business, and to provide for his children's education, health, housing and well-being."

Bertuccelli, Hagan's sister, acted as trustor for the Trust, and was a trustee from its inception. Although she remained a trustee throughout the life of the Trust, other trustees took the lead role for large periods of time, while Bertuccelli was raising her seven children. As Bertuccelli described it, she always had an obligation to the beneficiaries and the Trust and was aware overall what was going on, but "if there were other trustees appointed, they would do the daily, weekly, bill paying and balancing and all that." In this capacity, Hagan acted as a trustee from approximately 1990 to 1994. Bertuccelli's husband, Victor, was appointed trustee from 1987 to 1990. And, Paula was a trustee

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<sup>2</sup> Dolores passed away in 1993.

<sup>3</sup> Christopher died in an accident in 1978. Michele, an attorney, joined in the probate proceedings in propria persona, but reportedly did not appear at trial and is not a party to this appeal. According to petitioners, she stopped participating in the litigation after being sued by Hagan. It appears that Bernard also initially joined in his siblings' probate petition, but, according to petitioners, he subsequently withdrew in connection with the settlement of another matter between himself and his father. Paula, an attorney and former trustee of the Trust, has not been a party to this litigation.

from 1976 to 1987.<sup>4</sup> In addition, pursuant to the terms of the Trust, Bertuccelli selected Hagan to be Trust manager, a position he held throughout the operative years of the Trust.<sup>5</sup> Bertuccelli testified that she had absolute trust in Hagan's honesty and integrity and respected his intelligence as a businessman. Thus, she was unlikely to challenge his business recommendations. However, the two would disagree at times regarding what distributions should be made to the beneficiaries, with Bertuccelli determining to pay more expenses for the beneficiaries than Hagan thought prudent.

By its terms, the Trust, which includes a sub-trust for each named beneficiary, gives the trustee broad powers to manage Trust assets. As is particularly relevant here, paragraph 3 of the Trust authorizes the trustee to “retain in the trust *for such time as he may deem advisable* any property and/or rights thereto and/or interests therein received by him hereunder, whether or not of the character permitted by law for the investment of trust funds, and to continue and operate any business which he may receive hereunder *so long as in the absolute discretion of the Trustee it is deemed advisable to do so.*” (Italics added.) In addition, as a general matter, paragraph 4 of the Trust permits the trustee to “sell, convey, exchange, convert, improve, repair, manage and control” trust property “upon such terms and in such manner as he may deem advisable.” The trustee is also authorized to receive into the Trust any “property acceptable to him” and “to purchase and acquire by any method deemed advisable for the benefit of the beneficiaries . . . any real or personal property.” And, according to the Trust, determinations by the trustee “in all matters in which his discretion is exercised under the terms hereof shall be *final and binding upon all persons howsoever interested in this trust*” (italics added).

Moreover, the Trust provides the trustee with significant discretion in making distributions from the Trust to its beneficiaries. Specifically, Trust income may be

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<sup>4</sup> Neither Victor nor Paula have been sued regarding their involvement with the Trust.

<sup>5</sup> Specifically, paragraph 13 of the Trust provides that the trustee “shall have the right, power, and sole discretion to employ a manager for the management, protection, control, sale or other disposition of said trust estate and property and all the assets thereof, or for any parts thereof.”

applied, in the trustee's discretion, for the "support, care, maintenance, health, education or welfare of any one or more of [the beneficiaries]." In similar fashion, direct distributions of Trust income are not required to be made equally among the beneficiaries, but instead "shall be made in such proportion as the Trustee may at the time of each distribution in his discretion fix and determine." Moreover, the trustee has the power to invade principal "to provide for the reasonable care, support, maintenance, education and welfare of any named beneficiary" to the extent the trustee "in his sole and absolute discretion believes will be in the best interests and welfare of such named beneficiary."

Apparently, the trustee's ability to pick and choose the amount of Trust assets received by each sibling at any given time caused significant friction in the family. Valerie testified that, as children, "[o]ftentimes someone would complain that I had a horse and they wanted a minibike, that things weren't fair." Later, siblings were upset when some were provided with housing and others were not. Or "[s]omeone would complain that, you know, Bernie went to Stanford, and we went to Berkeley and that was, you know, unfair expense wise." According to Valerie, William "always thought he had been treated unfairly and that others received more distributions than he did."

It is undisputed that Hagan's activities on the Trust's behalf resulted in over \$3.5 million dollars in profits during its 30-year history. Moreover, during the lifetime of the Trust, the beneficiaries received over \$2.5 million to pay for everything from medical expenses, monthly allowances, housing, undergraduate and graduate education, trips, real estate, yacht club expenses, and horses. In July 2000, however, Bertuccelli informed the six beneficiaries of the Trust that the Trust's assets had been depleted and that there would thus be no more monthly allowances or payment of expenses for any of them. According to Bertuccelli, Hagan told her that he made the decision to stop funding the Trust because he felt that it was time for his children—the youngest of whom was then 30—to become self-sufficient. Nevertheless, Bertuccelli's letter did indicate that Hagan might be willing to come forward with financial assistance in an emergency situation.

**B. *Probate Court Proceedings***

On February 21, 2002, Valerie filed a petition for relief from breach of trust, for recovery of trust property, and for an accounting in San Francisco County Superior Court (Original Petition), challenging Hagan and Bertuccelli's management of the Trust. Regina and William subsequently joined in this Original Petition, which specifically alleged that Bertuccelli had abdicated control of the Trust to Hagan and that Hagan had failed to properly account and had used the Trust for his own financial advantage. In addition, both Hagan and Bertuccelli were accused of bad faith in their handling of Trust assets, and Hagan's conduct in managing the Trust was characterized as both malicious and fraudulent, warranting punitive damages. In fact, petitioners ultimately sought upwards of \$63 million in damages in this action due to alleged Trust mismanagement.

After mediation proved unsuccessful in resolving the dispute, petitioners filed a renewed petition on December 12, 2003, seeking to compel an accounting (Petition for Accounting). Michele, appearing in propria persona, joined in the Petition for Accounting. The probate court concluded that respondents had no previous duty to account pursuant to section 16062, subdivision (b), of the Probate Code,<sup>6</sup> but that an accounting was now warranted based on the request of a beneficiary in accordance with section 17200, subdivision (b)(7). By order dated January 30, 2004, it therefore granted petitioners' request, ordering Hagan and Bertuccelli to provide petitioners with an accounting of the Trust from March 31, 1970, through December 31, 2001, in a format that substantially comported with section 1060 et seq.

In June 2004, respondents submitted their First Account of Trust to the probate court. Apparently, respondents admitted that this account did not have the level of detail required by the court's January 2004 order. However, they argued that the accounting could be adequately explained through the questioning of Paul Erle (Erle), the Trust's long-term tax accountant, who also possessed detailed Trust documentation. Petitioners, predictably, objected. In fact, according to petitioners, it was becoming "increasingly

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<sup>6</sup> All statutory references are to the Probate Code unless otherwise specified.

clear” that respondents were unable to provide an accounting that complied with the Probate Code. They asked for a complete accounting and attorneys’ fees based on respondents’ “intentional flouting” of the probate court’s order. On October 25, 2004, the probate court reportedly again ordered respondents to file an accounting in compliance with the Probate Code. The court, however, denied Michele’s request to hold respondents in contempt.

Respondents submitted a First Amended Accounting of Trust to the probate court in January 2005. Petitioners again objected. This time, they asked that a proper accounting be provided by a third-party of their choice at respondents’ expense and also sought a finding of contempt and imposition of sanctions. In March 2005, the probate court instructed the parties to select an independent accountant to complete the Trust accounting. After the parties could not agree, the court, by order dated April 25, 2005, appointed the accounting firm of Daoro, Zydel & Holland (DZH) to complete the accounting. Hagan was subsequently ordered to pay the \$25,000 retainer required by DZH, which he did in May 2005.

At an August 2005 status hearing, however, the court learned that DZH had requested further funds to complete the accounting and that Hagan had refused to provide them, instead suing the firm for breach of contract. Given the conflict the lawsuit created, DZH refused to continue working on the accounting. In response, the probate court issued a September 1, 2005, order appointing Bruce Feder (Feder or Special Trustee) as special trustee for the limited purpose of retaining an accounting firm to replace DZH and complete the Trust accounting. Hagan was required to deposit \$50,000 with Feder for payment of fees related to the Special Trustee and new accountants. Respondents appealed the order appointing the Special Trustee, but Division Two of this court ultimately dismissed the appeal, finding that it had been taken from a nonappealable order. The appellate court, however, declined to impose the sanctions requested by petitioners because it concluded that the appeal had not been frivolous. (*Harlan v. Hagan* (Dec. 4, 2006, A111848) [nonpub. opn.].) After resolution of the appeal in December 2006, Hagan deposited the necessary funds with the Special Trustee so that the

accounting could continue. Thereafter, Feder retained the accounting firm of Burr, Pilger, and Mayer, LLP (BPM) to perform the accounting work.

In May 2008, Feder petitioned the probate court for additional monies from Hagan to finance the accounting. Funding of \$35,000 was authorized by the probate court in September 2008. Thereafter, in October 2009, Feder requested an additional \$100,000, stating: “The accountants have worked diligently to complete the project, although the task is not yet finished. They have spent countless hours compiling the data as well as attempting to put it together in a manner that will reflect an accurate portrayal of how the trust was administered and to allow the reader to easily comprehend the data and flow of funds during the life of the trust. I believe that the work is near completion.” Hagan objected, finding the request excessive and requesting a hearing on the reasonableness of the fees incurred. On December 17, 2009, the probate court authorized payment by Hagan of the requested \$100,000, “subject to any future allocation among the beneficiaries as the court shall determine.”

In the end, Feder filed his First and Final Accounting with respect to the Trust (First and Final Accounting) on April 10, 2010. In his petition seeking approval of this accounting, Feder noted that all funds held or generated by the Trust “were the result of either business and investment opportunities that [Hagan] brought to the trust, or loans, deposits, or advances that [Hagan] made to or for the benefit of the trust, or the repayment to the trust of loans that the trust made to [Hagan].” Feder then described the accounting process followed by BPM, stating: “The BPM staff has meticulously reviewed the contents of over 20 banker’s boxes containing over ten thousand pages of bank statements, tax records, cancelled checks, notes, correspondence, brokerage statements, spreadsheets, legal pleadings, and reports. [Feder] has spent many hours meeting with BPM, meeting with [Hagan] and his accountant [Erle], and reviewing the data item by item, all in an effort to reconstruct the trust activity as completely and as accurately as reasonably possible. There are complete records for trust activities from 1994 on, but prior to that time many of the transactions are not memorialized by any available primary documentation. [Feder] has included many transactions on the basis of

secondary documentation . . . . Unfortunately, due to the amount of time that has elapsed since the early years of the trust, original bank and brokerage records and cancelled checks prior to 1994 were not retained by the trustee and are no longer available from the financial institutions where trust assets were maintained.”

Feder stated in his petition for approval of the accounting that, in his opinion, “the work performed by BPM in this most time-consuming case has been excellent, and has produced the required accounting.” Feder further alleged in the petition “that the trust is chargeable for the sums and is entitled to the credits” set forth in the account. He also opined that there were no “unusual items” included in the accounting, although there were “a number of entries that cannot be fully described.” He thus sought an order “approving, allowing, and settling” the account as filed. In addition, Feder requested approximately \$81,000 in fees in connection with his work on the account and approximately \$63,000 as final payment to BPM.

Hagan objected to Feder’s petition, arguing that the additional fees requested for BPM were excessive and that the account did not accurately reflect the funds still owed to him by the Trust. Petitioners also objected at length, stating that the accounting was incomplete due to respondents’ failure to keep adequate records and revealed “compelling evidence of massive breaches of fiduciary duties and self-dealing” by respondents. Arguing that Feder had “no alternative” but to rely on misrepresentations of Hagan and Erle in creating the accounting, petitioners asked the probate court to: (1) strike Feder’s verification of the accounting; (2) deny Feder’s request that the accounting be approved; (3) set a hearing with respect to “all matters related to the accounting and the alleged breaches of fiduciary duties” of respondents; and (4) award petitioners reasonable attorneys’ fees and costs “for the expenses they have incurred in obtaining the accounting.”

Shortly thereafter, Valerie, Regina, and William filed a new Petition for Relief from Breach of Trust and for Recovery of Trust Property (Petition for Breach of Trust). The Petition for Breach of Trust expanded on the allegations set forth in the Original Petition with respect to Hagan and Bertuccelli’s alleged mismanagement of Trust assets.

Petitioners additionally alleged in the Petition for Breach of Trust that Hagan “used and abused” the Trust as “a means to manipulate and control his children.” Indeed, according to petitioners, Hagan “is and was an emotionally and physically abusive husband and parent, with a violent temper and abnormally controlling personality, who has employed emotional abuse, physical abuse, and financial abuse, emotional manipulation, litigation and financial manipulation of his former wife and children . . . in order to bully and control their lives, and force them to conform to his will.”

Both the Petition for Breach of Trust and Feder’s petition to approve the First and Final Accounting were set for hearing on September 20, 2010. After hearing, the probate court issued an order the next day with respect to the First and Final Accounting of the Special Trustee, stating it was ready to rule without conducting an evidentiary hearing. The court then ordered Hagan to pay the fees requested as final payment of BPM, subject to “the court’s allocation of liability among the parties at a future time.” It also approved the fees requested by Feder for his services as Special Trustee. Finally, and most importantly, the probate court’s order concluded as follows: “The Special Trustee’s First and Final Accounting is allowed, as filed, and Bruce A. Feder may petition for additional fees not to exceed \$5,000.00 and for discharge as Special Trustee.”<sup>7</sup> On the same day, the probate court by minute order referred the Petition for Breach of Trust to be set for trial.<sup>8</sup> No appeal was taken by any party from the probate court’s order with respect to the First and Final Accounting of the Special Trustee.

Thereafter—while proceedings were pending before the trial court with respect to the Petition for Breach of Trust—Feder filed an additional petition in the probate court seeking supplemental fees and costs for both BPM and himself with respect to time spent

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<sup>7</sup> This statement was written in the probate court’s own hand, after the following proposed language was crossed out: The Petition for Approval of the Special Trustee’s First and Final Accounting is referred to the Master Calendar, Department One, for trial setting and further proceedings.”

<sup>8</sup> Again, the probate court modified the form order—which initially stated that the “above-entitled matter” was referred for trial—by writing in its own hand that only the “Petition for Breach of Trust” was so referred.

responding to discovery by the parties to the litigation, appearing in depositions, and testifying at trial. Hagan objected to these additional fees, arguing that they were excessive and not appropriate charges against the Trust. Since it was petitioners who subpoenaed both Feder and BPM to testify at the breach of trust trial, Hagan argued, the services they provided were not for the benefit of the Trust. Hagan further requested that the fee petition be transferred to the trial court for resolution, as that court was better situated to resolve the matter having heard the testimony at issue. Feder, in contrast, argued that the fee matter was “in essence” a probate issue and should be heard by the probate court. The probate court agreed, and, on August 13, 2012, issued an order approving additional fees and costs for Feder and BPM in an amount approximating \$59,000. The probate court made clear, however, “[t]he allocation of liability for these fees among the litigants is subject to further order of Court.”

### **C. *Trial Court Proceedings***

With respect to the Petition for Breach of Trust, the trial court held numerous court sessions from November 2011 through February 2012 exploring petitioners’ breach of duty claims. Specifically, petitioners focused on alleged inadequacies in the accounting, including a lack of supportive primary documentation for the early years of the Trust; inadequate explanation of certain disbursements made to identified beneficiaries throughout the life of the Trust; and the dearth of documentation supporting respondents’ claim that many of the transfers made by Hagan to the Trust were loans rather than gifts to the Trust beneficiaries.

In addition, petitioners highlighted two business transactions brought by Hagan to the Trust. The first business deal at issue involved a low-income apartment building in South San Francisco called the Alida Apartments (Alida), which was built by Hagan and initially owned by him and Dolores. The Trust leased the entire complex from 1976 until 1980, with three options to renew for additional five-year periods. Pursuant to the terms of the lease, the Trust was entitled to the rents collected from apartment residents and, in return, paid rent to Hagan as well as most of the Alida’s operating expenses. From 1976 through 1990, the Alida rent was a primary source of income for the Trust. However,

Hagan made the decision not to exercise the Trust's option to continue the lease for the last five-year option period, from 1990 through 1995.<sup>9</sup>

The other business transaction at issue involved the development of low-income housing in a vacant building in the Tenderloin in San Francisco called the Herald Hotel. In the late 1970s, Hagan negotiated and acquired an option to purchase the Herald Hotel on behalf of the Trust. During the development process, a company in which Hagan was interested called Herald Hotel Associates LLP bought the option from the Trust for \$1.4 million. Ultimately, however, Hagan, acting as Trust manager, agreed to reduce the amount owed to the Trust in connection with the option sale by \$375,000. As justification for this decision, Hagan testified that, when the project approvals took longer than anticipated, all of the parties to the transaction found themselves in a situation where concessions had to be made to keep the deal together. And, indeed, it is undisputed that the Trust ultimately did obtain at least \$600,000 in profit from this transaction.

After hearing all of the evidence, reviewing extensive documentation, and considering various post-trial briefs and motions, the trial court issued its tentative decision in July 2012. Oral argument was allowed, along with the filing of objections and additional documents. The matter was finally submitted on September 28, 2012.

Thereafter, on October 2, 2012, the trial court issued a 50-page Statement of Decision after Court Trial (Statement of Decision) considering and resolving each of petitioners' claims. While the trial court rejected the vast majority of petitioners' contentions, it did find that Hagan had committed breaches of trust in connection with the nonrenewal of the Alida option and the reduction of the purchase price for the Herald Hotel option. Essentially the court determined that Hagan had interests adverse to the Trust in each of these transactions and thus it was his burden to prove that the decisions

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<sup>9</sup> According to Hagan, when the time came for the last option renewal, the Trust was in default under the terms of the Alida lease due to an Internal Revenue Service (IRS) audit requiring additional rent to be paid by the Trust to Hagan. As the Trust did not have the funds to pay the additional rent—and paying increased rent during the final option period would have significantly reduced any profit to the Trust—Hagan decided not to collect the rent owed to him and not to exercise the option to continue the lease.

he made operated for the benefit of the Trust. For both transactions, the court found Hagan unable to meet this burden and thus overcome the presumption that he violated his fiduciary duties. With respect to the Alida option, the court awarded damages of \$845,475. Additional damages of \$350,000, along with simple prejudgment interest at a rate of 10 percent, were ordered in connection with the Herald Hotel transaction. Finally, the trial court determined that Hagan had received repayments from the Trust in excess of amounts actually owed to him and therefore awarded an additional \$154,000 plus interest of \$89,798.50. A timely filed notice of appeal brought this matter before the appellate court for the second time.<sup>10</sup>

## II. DISCUSSION

### A. *Laches*

As a preliminary matter, the trial court in this case found that, because William failed to assert his rights in a timely fashion, all of his breach of trust claims against respondents were barred by the doctrine of laches. Laches is an equitable defense which requires proof of “ ‘unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from that delay.’ ” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68 (*Johnson*); *Estate of Kampen* (2011) 201 Cal.App.4th 971, 997 (*Kampen*)). As a general matter, the existence of laches is a question of fact which is determined by the trial court based on all of the applicable circumstances. (*Kampen, supra*, 201 Cal.App.4th at p. 997.) Thus, our review on appeal is for substantial evidence. (*Johnson, supra*, 24 Cal.4th at p. 67.)

In the present case, the trial court found that William was on notice regarding possible mishandling of the Trust by Hagan many years prior to the filing of the Original

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<sup>10</sup> Respondents initially filed a cross-appeal in the case, arguing that the two business decisions characterized by the trial court as breaches of fiduciary duty—the nonrenewal of the Alida option and the reduction in the purchase price for the Herald Hotel option—were subject to Hagan’s absolute discretion under the Trust terms and were therefore not actionable absent a finding of bad faith. However, on July 21, 2015, we granted respondents’ request for voluntary dismissal of their cross-appeal and will therefore not here determine the propriety of these two Trust transactions.

Petition in 2002. The court also determined that respondents experienced considerable prejudice due to William's delay in bringing his claims, and thus application of laches to bar his allegations was appropriate. We have no difficulty concluding that the trial court's decision in this regard was supported by substantial evidence. In fact, the court went to impressive lengths to lay out the evidence underlying both prongs of its laches determination.

With respect to unreasonable delay, the trial court referenced numerous letters written by William which belie his assertion that he was unfamiliar with "legal actions and litigation," a point on which the trial court expressly found him not credible. The letters also contradict William's claim that he was unaware of any potential problems with the management of the Trust, other than the historical inequity in the distributions made to its beneficiaries. Thus, for example, in 1987, William contacted Victor—who was then the acting trustee for the Trust—regarding a lawsuit involving the Trust which was filed in connection with his parents' divorce. Specifically, William threatened to sue his uncle if Victor settled the matter without the "full review and approval" of the beneficiaries. Later, in connection with the administration of his mother's estate in March 1993, William contacted Bertuccelli in her capacity as trustee of the Trust, asking that Dolores' will be honored and that certain funds be given directly to the children rather than "left back in the Hagan Family Trust." In particular, William declared: "As trustee of the Hagan Family Trust, you have the power to allow our mother's wishes to be carried out in accordance with her will *without us having to involve legal action*" (italics added). He further stated that "the Hagan Family Trust has always been a thorn in our sides and we would all like to settle this matter once and for all and get on with our lives."

In November 1993, William wrote a letter to a Hagan attorney regarding \$20,000 in excess premiums he believed he was entitled to under the I-trust, a life insurance policy on Hagan's life. According to William, as executor of his mother's estate, he needed the money to settle certain of her debts. He thus informed Hagan's attorney: "I have decided to meet with the Internal Revenue Service to discuss with them the

mishandling of the I-trust. I do not know what may result from my meeting, but I will not be responsible for what happens thereafter. *In addition, the IRS is interested to hear about the existence of the Hagan Family Trust and how it has been mishandled*” (italics added). William went on to state that he would not cancel the meeting unless he was given a check for \$20,000 by a certain deadline. Noting that “this is no joke,” he also declared: “Given my current financial condition, I have nothing to lose by meeting with the Internal Revenue Service. *The only ones to lose will be the I-Trust, the Hagan Family Trust and those that have been involved with its’ [sic] mishandling*” (italics added). At trial, William admitted that he had never contacted the IRS. Nor did he take any action with respect to the alleged mishandling of the Trust.

Some months later, in April 1995, William wrote an eight-page typewritten letter to his father, Hagan, discussing their estrangement. With respect to the Trust, William stated: “I basically have one fundamental problem that I see which stands in the way and will continue to be in the way of my future relationship or contact with you. As I look back, unfortunately, as I see it, you have chosen to make money more important to you than your family. . . . *[Y]ou have always played games with the Hagan Family Trust Fund and now the I-trust. Simply, tell us the truth. Placing your sister Roseanne as trustee I find so strange because everyone knows that you have always controlled the trust fund and will continue to even after you die. It is almost like you think we are stupid or something and you are pulling the wool over our eyes. . . . Why don’t you just admit that you are controlling and make yourself trustee and stop playing these games. I know that Roseanne does not know [the] first thing about trusts but you continue to use her for reasons of your own . . . .*” (Italics added.) The trial court read this letter as “in essence accusing Hagan and Bertuccelli of acting inappropriately in handling the trust, acting improperly as fiduciaries, and, in the case of Hagan, being motivated by money and greed.”

Finally, William sent a copy of this letter to his siblings in August 1997, noting that he had never received a response. He went on to inform them that he would be cutting off all contact with Hagan, exclaiming: “Talk about three words that completely

contradict one another and you are talking about the words ‘Hagan Family Trust.’ ” William elaborated as follows: “What is important to him in his life is his money. All we are, believe it or not, is just tax deductions, pawns, a way that he could shelter his income, keep it away from Mother and pay less taxes to the government. *The Hagan Family Trust is nothing but another bank account of his* a tool that he uses to control us. If he had no money, I believe that we would not acknowledge his existence. . . . He is a very evil man . . . .” (Italics added.) Although this statement indicates William’s belief that Hagan was manipulating the Trust for his own benefit, William again did nothing to bring a claim against respondents. Laches implies that a plaintiff should have done something earlier than he or she did, and, in this case, ample evidence supports the trial court’s conclusion that William had sufficient knowledge to act on his theories of Trust mismanagement many years before he actually did.

Moreover, the record clearly shows that respondents were prejudiced by this delay. As the trial court persuasively summarized: “[William’s] claims about expenditures made for or on his behalf go back to the 1970’s. Victor Bertuccelli is deceased. Hagan’s memory has faded, not surprisingly, on the intricacies of transactions that occurred in the 1970’s and 1980’s.<sup>1</sup> Bertuccelli does not have a specific memory of transactions. Cancelled checks are no longer maintained by the trust. The banks on which those checks are drawn no longer maintain copies of those cancelled checks. I find that the loss of documents, the death of witnesses, and the faded memories of the few surviving witnesses due to the passage of time all prejudice Respondents as to [William’s] claims.”

Despite the seeming appropriateness of the trial court’s laches decision, petitioners argue—citing *Berniker v. Berniker* (1947) 30 Cal.2d 439, 448 (*Berniker*)—that the doctrine of laches is “ ‘not applied strictly between near relatives.’ ” While this may be generally true, we agree with the trial court that this maxim has no application here, where the evidence shows that the relationship between William and Hagan was far from “near, dear, and confidential.” (See *Rottman v. Rottman* (1921) 55 Cal.App. 624, 632, cited with approval in *Berniker*; see also *Isakoolian v. Issacoulian* (1966) 246 Cal.App.2d

225, 229 [evidence of cordial and friendly relationship between brothers argues against application of laches].) Instead, this father-son relationship has unfortunately been characterized by dysfunction, lack of trust, and almost total estrangement, a situation unlikely to dissuade William from acting to protect his own self-interest in a timely fashion.

Further, we reject William's argument that, under the circumstances of this case, respondents should be estopped by unclean hands from relying on the equitable doctrine of laches. “ ‘ “The unclean hands doctrine ‘closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.’ ” ’ ” (*Quick v. Pearson* (2010) 186 Cal.App.4th 371, 380.) The trial court, however, expressly found in this matter that there was no evidence that Hagan or Bertuccelli did anything in an attempt to conceal facts from petitioners. (Cf. *ibid.* [allegation that trustee told other beneficiaries not to mention the existence of the trust to a potential additional beneficiary sufficient to bar application of laches under a theory of unclean hands].) Indeed, during the divorce proceedings between Hagan and Dolores, Hagan explicitly told William that he should talk to the trustee of the Trust if he had any questions, and the Trust had its own lawyers. Additionally, on at least one occasion, in 1987, the Trust sent journal entries covering several years of Trust activities to all of the beneficiaries. Moreover, although the trial court found Hagan technically at fault for certain business decisions in which he had a potential conflict of interest, there is no finding anywhere in the court's voluminous Statement of Decision that either respondent was guilty of bad faith in the management of the Trust. In particular, the trial court found no evidence that respondents intentionally destroyed documents; improperly commingled Trust and personal funds; embezzled or otherwise absconded with Trust monies; or used ledgers that were falsified or inaccurate in Trust management. The trial court also concluded that there was no evidence that Bertuccelli breached *any* fiduciary duties and that she did not “close her eyes” to any misconduct. Under such circumstances, there is simply no basis for application of the unclean hands doctrine.

Finally, William's contention that laches is inappropriate in this case because the respondents somehow induced him to delay in bringing this action against them is equally meritless. It is well settled that laches may not be used as a defense where the delay in commencing action was induced by the conduct of the defendant. (*Mashon v. Haddock* (1961) 190 Cal.App.2d 151, 174.) However, in the present case, as the trial court correctly noted, there is no evidence in the record that respondents ever did anything to induce petitioners to delay in filing this litigation. As stated above, respondents did nothing to conceal facts from petitioners. Moreover, the probate court concluded that respondents had no prior duty to account, and the Trust does not require written reports to the beneficiaries. Further, as the trial court found, William's relationship with Hagan was one of deep distrust and significant estrangement and therefore unlikely to operate as an inducement to forego litigation. Finally, William's argument that he was induced to delay any action by the continued receipt of his monthly allowance from the Trust is specious. We see no evidence of inducement.

In sum, our review discloses no reversible error in the trial court's decision to bar Williams' claims under a laches theory.

**B. Adequacy of Accounting**

Turning to petitioners' main contentions on appeal, we note that they spend a large portion of their briefing complaining about the sufficiency of the First and Final Accounting filed by the Special Trustee in this case and subsequently allowed by the probate court. They repeatedly assert that respondents failed to maintain adequate records of Trust activities, thereby precluding the rendering of an adequate accounting. Moreover, they argue that primary documentation disclosing transaction-by-transaction detail is necessary for a proper account and that respondents' should be liable for their failure to provide this level of documentation to the probate court.

In support of their position, petitioners cite *Purdy v. Johnson* (1917) 174 Cal. 521 (*Purdy*) and *Estate of McCabe* (1950) 98 Cal.App.2d 503 (*McCabe*). In *Purdy*, the plaintiff/beneficiary alleged trust mismanagement, including failures to account and comingling of trust and personal assets. (*Purdy, supra*, 174 Cal. at p. 524.) The trustees

in the case admitted to errors in the accounting and presented the court with a restated account created by an expert accountant. They did not testify on direct examination at trial, but were subject to cross-examination by the plaintiff. (*Id.* at pp. 526-527.) On review, the Supreme Court found this procedure “irregular,” stating: “The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed. Such is not the law.” (*Ibid.*) Moreover, although the trial court believed that “the trustees had acted throughout in good faith and without any intent to deceive or overreach,” our high court found this fact insufficient to insulate the trustees from liability. (*Id.* at p. 527.) Rather, as the *Purdy* court opined: “[C]onceding the good faith of the trustees, the fact remains that they had, by their own admission, failed to comply with the obligation which rests upon all trustees to keep full and accurate accounts of the trust funds coming into their hands, and to render an account thereof to their beneficiaries. ‘Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund [citations], and where there has been a *negligent failure to keep true accounts, or a refusal to account*, all presumptions will be against the trustee upon a settlement.’ ” (*Ibid.*, italics added.)

In addition, with respect to certain charges at issue in *Purdy*, the Supreme Court found that they had not been properly supported either by the documentation presented or by testimony. (*Purdy, supra*, 174 Cal. at p. 529.) Rather, they were included by the expert in the restated account solely on the basis of some inconclusive “memorandum checks or tags” that he found among the bank papers. (*Ibid.*) The *Purdy* Court concluded that, on remand, “the account should be stated in accordance with the rules to which we have adverted, i.e., that it is the duty of the trustees to support every item of their account, and that wherever they fail to support the correctness of a charge or a credit *by satisfactory evidence*, the item must be disallowed.” (*Id.* at p. 531, italics added.)

In *McCabe*, a mother was charged with the mismanagement of a trust set up for the care of her daughter. (*McCabe, supra*, 98 Cal.App.2d at pp. 503-505.) Filing an

account which purported to cover 15 years of the daughter's general living expenses, the mother listed the cost of board, clothes, laundry etc. as monthly amounts, without any itemization. (*Id.* at pp. 505-506.) Moreover, the mother's testimony contained "many contradictions" and "clearly" disclosed that she was relying on general estimates that she came up with after the fact, rather than any actual charges incurred. (*Id.* at p. 506.) In fact, she had no records of any kind to justify the expenses claimed. (*Ibid.*) Citing *Purdy*, the appellate court noted that trustees are "under the duty to prove every item of their account by 'satisfactory evidence'" and that "any doubt arising from their failure to keep proper records, or from the nature of the proof they produce, must be resolved against them." (*McCabe, supra*, 98 Cal.App.2d at p. 505.) Since the mother's testimony amounted to " 'a mere guess or conjecture,' " it was found to fall " 'far short of the degree of proof required.' " (*Id.* at p. 506.)

Thus, based on petitioners' own cases, the question here is not, as petitioners suggest, whether each transaction in the First and Final Accounting is individually itemized and supported by primary documentation. Instead, the issue presented for consideration is whether the respondents presented sufficient testimony and other evidence to support the transactions memorialized in that account. (Accord, *Ennes v. Ennes* (1957) 147 Cal.App.2d 574, 578-579 [distinguishing *Purdy* where respondent testified as to how he kept his accounts and that they were complete; the court held that the testimony along with other offered testimony "though certainly not very detailed, if believed, would substantiate the charges" at issue].) On appeal, the trial court's findings of fact in this regard are subject to review for substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021 (*James B.*))

Moreover, in resolving petitioners' claims, it is important to consider the procedural posture of this case. Here, the trial court determined that—in denying an evidentiary hearing, overruling objections that the accounting was not a proper accounting, and entering an order allowing the First and Final Accounting as filed—the probate court resolved the issue of the propriety of the accounting. We agree with the trial court that this is the clear implication of the probate court's various September 2010

orders. Although presented with the option to refer the entire matter for trial, the probate court declined to do so and specifically chose both to allow the accounting and to refer only the Petition for Breach of Trust to the trial court. Thus, general attacks on the adequacy of the accounting based on its compliance with the requirements of the Probate Code are no longer relevant. However, as respondents conceded below, an allowance of the charges and credits by the probate court is not the same thing as approving the “ ‘conduct that is manifested by the transactions reported in the accounting.’ ” On this basis, the trial court properly determined that it would “consider the various breaches of trust that are alleged by petitioners, and to what extent the evidence supports those breaches.”

In fact, on appeal, petitioners have only identified three instances in which they claim they were actually damaged by respondents’ alleged failures to account in an appropriate fashion: (1) by the failure of respondents to sufficiently document almost \$3 million in Trust expenses in connection with the Alida Apartments; (2) by the failure of respondents to sufficiently document that numerous transfers made by Hagan to the Trust were loans rather than gifts; and (3) by the failure of respondents to sufficiently document numerous alleged distributions for the benefit of the beneficiaries. But these are all issues that were extensively considered by the trial court and that we review here. Thus, petitioners’ concerns regarding the accounting are sufficiently addressed in the context of this appeal from the resolution of their Petition for Breach of Trust, without the need to revisit the adequacy of the First and Final Accounting.

### **C. *The Alida Expenses***

As their first example of claimed inadequate documentation, petitioners contend that the trial court erred by failing to charge respondents with \$2,968,081.66 in Alida expenses that were allowed in the First and Final Accounting but which, according to petitioners, are not supported by sufficient evidence. Specifically, petitioners claim that there is no detailed information from which to properly account for these expenses and that respondents have failed to meet their burden in this regard because no item-by-item accounting of the expenses was provided. They allege damages from this purported

breach of trust of \$11,012,904.16, the \$2,968,081.66 in unsupported expenses along with interest of \$8,044,822.49.

The trial court, however, rejected petitioners' claim that the evidence supporting these contested Alida expenses was insufficient. Although the entry in the accounting with respect to the expenses states "no details," the Special Trustee testified at trial that "what we meant by no detail was not that there wasn't some additional information that could have been brought to bear on these numbers, but there was no—not sufficient detail to list it item by item as we did the rest of these expenses. So our reference to no detail really refers to no detail sufficient for us to comply with the format that we're supposed to present." He further indicated that everything included in the account was included because "sufficiently reliable" evidence supported it; that is, that "it came from some record or some report that had previously been developed."

In fact, as stated above, in petitioning for approval of the First and Final Accounting, the Special Trustee opined that "the work performed by BPM in this most time-consuming case has been excellent, and has produced the required accounting." He believed "that the trust is chargeable for the sums and is entitled to the credits" set forth in the account. He also declared that there were no "unusual items" included in the accounting, although there were "a number of entries that cannot be fully described." At trial, he elaborated that "all [of] the transactions on their face were within the realm of what people usually do." That the Special Trustee believed the documentation describing the "no detail" Alida expenses was sufficiently reliable to permit inclusion of those expenses in the First and Final Accounting—and that the probate court subsequently allowed the accounting as filed—provides significant evidence as to the legitimacy of the alleged expenses.

In addition, the trial court found that there is "voluminous additional information" supporting the challenged Alida expenses. Although no primary documentation exists as the expenses were incurred in the 1970's and 1980's, there are spreadsheets kept at the time, financial statements, and related tax records. For instance, Erle, the Trust's tax accountant, provided examples of his work papers, which were admitted into evidence

and which the trial court found “establish that there were ample secondary details of expenses for the Alida apartments in the form of check register entries reflected in his ledger sheets.” Moreover, to prepare the Trust tax returns, Erle needed the monthly expenses for the Alida, and the tax returns which included the Alida operating expenses were available to BPM in preparation of the accounting. Further, the trial court expressly found “Erle’s testimony on how he maintained his work papers, and his method of recording primary records to create his accounting work papers credible insofar as it supports the Alida expenses.” The court also found no evidence to suggest that Erle’s documentation was false or that any funds had been improperly taken. Finally, as the trial court pointed out, there is evidence here that the Alida operated successfully as a business for many years, to the benefit of the beneficiaries. Necessarily, it would have had to have been maintained during that time period and expenses would have to have been incurred in that maintenance.

Given these circumstances, this case is easily distinguishable from both *Purdy* and *McCabe*, where the evidence supporting the challenged charges was either essentially nonexistent or much less extensive and reliable than the documentation and testimony presented here. We thus agree with the trial court’s conclusion that there was sufficient evidence presented to support the “no detail” Alida expenses against petitioners’ claim for breach of trust. (See *McCabe, supra*, 98 Cal.App.2d at pp. 505-506; *Purdy, supra*, 174 Cal. at pp. 529, 531.) Additionally, the trial court made no finding in this case that there was a negligent failure to keep true accounts or a refusal to account, and the evidence does not support such a finding.<sup>11</sup> Thus, this is not a situation where all presumptions must be made against the trustee upon a settlement. (See *McCabe, supra*, 98 Cal.App.2d at p. 505; *Purdy, supra*, 174 Cal. at pp. 527.) And, in fact, we would

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<sup>11</sup> To the contrary, the trial court stated: “I do *not* draw the inference, urged by Petitioners . . . that Respondents ‘did not believe they would ever be held accountable, and therefore didn’t place any importance in maintaining full and accurate records.’ [Citation.] The evidence, including my evaluation of the testimony of Hagan and [] Bertuccelli, does not support this inference.”

conclude that the evidence presented was sufficient to rebut any such presumption, even if it was applicable to these facts. We will therefore not disturb the trial court's determination with respect to the challenged Alida expenses.

**D. *Characterization of Transfers to Trust as Loans***

Next, it is undisputed in this case that Hagan made a significant number of advances to the Trust out of his own funds. Indeed, the BPM accounting filed by the Special Trustee indicates receipts from Hagan, over the life of the Trust, in the total amount of \$2,114,790.01. However, the parties disagree regarding how many of these transfers should be characterized, with petitioners claiming that they must be viewed as gifts and respondents asserting that they were always understood to be loans, subject to repayment by the Trust if surplus funds were available. With the exception of one promissory note from 1997 in the amount of \$700,000, there is no documentation supporting respondents' characterization of the transfers as loans. Petitioners argued below that, given this lack of evidentiary support, the Trust's "repayment" of the deposited funds to Hagan over the life of the Trust was improper and that, as a result, the beneficiaries were damaged in the amount of \$7,991,752.43 (surcharges of \$2,545,881.17 due to the erroneous distributions to Hagan, plus interest in the amount of \$5,445,871.26).

In its Statement of Decision, the trial court disagreed with petitioners' claim, concluding that the transfers at issue were loans. Specifically, the trial court noted that no evidence had been presented supporting petitioners' position that the transfers from Hagan were gifts, and no gift tax returns were ever filed.<sup>12</sup> In contrast, "Hagan testified unequivocally and persuasively that he did not intend to make gifts to the Trust," and the trial court expressly found this testimony to be credible. Further, Bertuccelli confirmed that "when the Trust required funds to meet the needs of the beneficiaries, Hagan made

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<sup>12</sup> In fact, there is evidence that one year Hagan did clearly make a \$6000 annual exclusion gift to each beneficiaries' trust, for a total of \$36,000. Although this transaction is not at issue here, it does show that Hagan did know how to designate a particular transfer as a gift if he wanted to.

loans and advances to the trust, which would be repaid when the trust had available funds.” Again, the trial court expressly found Bertuccelli’s testimony credible. Moreover, Erle also testified in support of the characterization of the transfers as loans, stating that he “maintained ‘due to/due from’ records with respect to advances made by Hagan to the Trust and payments from the Trust to Hagan,” which he updated annually. Finally, although, as stated above, one particularly large loan was memorialized with a promissory note, Hagan testified that, generally, he felt that “it wasn’t necessary to formalize loans in agreements because it was a family trust, and Erle kept records as to who owed what.”

Based on this evidence, the trial court determined the transfers at issue to be loans.<sup>13</sup> We review this factual determination for substantial evidence. (*James B.*, *supra*, 35 Cal.App.4th at p. 1021.) Largely ignoring this standard of review, however, petitioners argue on appeal that the trial court erred in characterizing the advances as loans because: (1) the lack of any available documentation memorializing them as loans creates a presumption that the transfers were gifts from parent to child; (2) respondents offered no reliable testimony on the issue; and (3) Hagan’s failure as a fiduciary to keep adequate records detailing the terms of the loans (with the one exception noted above) creates a presumption against his interpretation of events.

We are not persuaded. First and most importantly, petitioners completely ignore the fact that the trial court expressly found the testimony of Hagan and Bertuccelli on this issue to be credible. Although petitioners argue strenuously that the testimony was self-serving and unreliable, we will not here revisit the trial court’s credibility determination. (See *James B.*, *supra*, 35 Cal.App.4th at p. 1021 [on appeal we have no power “to consider the credibility of the witnesses”].) Indeed, Bertuccelli was particularly

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<sup>13</sup> Although the trial court found the transfers to be loans, it went on to conclude, as mentioned above, that the aggregate amount the Trust repaid to Hagan exceeded the aggregate amount advanced by Hagan to the Trust by \$154,000. It therefore ordered damages in the amount of \$243,798.50 (the \$154,000 overpayment plus interest of \$89,798.50).

consistent on this issue throughout her testimony. When asked about the money flowing back and forth between the Trust and Hagan, for instance, she elaborated: “Well, a large amount of money was going out of the Trust to the beneficiaries, and at some time it had to be replenished, and there would be discussion with the business manager about how to do that. Investments or something that would benefit the Trust and increase the balance for the beneficiaries. It was—[Hagan] would either go into a business deal or he would loan the Trust money.” She further testified: “It was always an underlying fact that the Trust did owe [Hagan] money, and when he wished to call it, you know, that was up to him. We were hoping during the years that we could invest and make more money to be allowed to pay him off.” Given the unequivocal and credible evidence presented by Bertuccelli and Hagan that the advances were loans, the powerful contemporaneous evidence presented by Erle that he tracked what was due to and from Hagan in connection with the Trust annually throughout the Trust’s life, and the lack of any evidence supporting characterization of the transfers as gifts, more than substantial evidence exists supporting the trial court’s finding in this regard.

Moreover, our conclusion is not altered by petitioners’ claim that various presumptions apply which operate in favor of treating the transfers as gifts. First, petitioners argue that “all presumptions are against the fiduciary unless the fiduciary has created and maintained documentation that transfers of assets were loans.” Although petitioners offer no citation to any authority for this proposition, they are apparently relying on *Purdy’s* holding that, where there is a negligent failure to keep true accounts, all presumptions must be made against the trustee upon a settlement. (*Purdy, supra*, 174 Cal. at pp. 527.) We doubt that *Purdy* would or should be read as extending to this situation. With respect to their other suggested presumption—that a transfer from parent to child is presumed to be a gift—petitioners cite *Lloyds Bank Cal. v. Wells Fargo Bank* (1986) 187 Cal.App.3d 1038, 1043 (*Lloyds*) (“where the grantee of property is the child or other natural object of the affections of the grantor, a presumption arises of a gift or advancement”). Again, however, it is far from clear that the *Lloyds* holding has any application outside of the context of real estate transfers in which it arose. The trial court

did not think so. Regardless, in the end, we need not determine the relevance to this case of either of these proffered presumptions because, at most, they are presumptions affecting the burden of proof. (See *Ceguerra v. Secretary of HHS* (9th Cir. 1991) 933 F.2d 735, 739-740 & fn. 4.) Where, as here, the evidence includes clear and credible statements from both respondents that no gifts were intended, along with contemporaneous evidence that the transfers were treated as loans, any such presumptions are soundly negated. (*Id.* at p. 740 [“the key element of a gift is the donor’s intent to make a gift”]; see also *id.* at p. 740, fn. 4 [even if *Lloyd’s* presumption “applies beyond transfers of real estate, it cannot apply to cases, like the present case, where there is affirmative evidence that the donor did not intend a gift”].) We see no error in the trial court’s characterization of the transfers from Hagan to the Trust as loans.

**E. Trust Distributions**

The First and Final Accounting of the Special Trustee contains six schedules—Schedules O through T—which detail distributions made to or for the benefit of each of the six Hagan children throughout the life of the Trust. For instance, Schedule T shows disbursements to William in the amount of \$192,635.89 and expenses paid of \$196,690.51, for a total of \$389,326.40. Schedule Q, in contrast, shows expenses paid on Paula’s behalf of \$142,019.71 and distributions of \$471,440.30, for a total of \$613,460.01. In their final claim based on theories of inadequate Trust documentation, petitioners argue that respondents failed to prove by sufficient evidence each and every transaction in these schedules. They further allege that certain disbursements reflected in the schedules were made for the benefit of Hagan rather than for the beneficiaries and thus should be disallowed as reflecting breaches of Hagan’s fiduciary duties. All told, petitioners claim damages and interest of \$4,763,300.73 with respect to these perceived deficiencies in the schedules.

At trial, both Valerie and William testified regarding their respective distribution schedules.<sup>14</sup> The process for both was similar. Before coming to testify, they were given a copy of their schedule and told to highlight those distributions that they believed were made to them or on their behalf. They then sought to charge respondents for the remainder on the theory that, if they could not remember a particular disbursement, it must not have occurred or must have been an improper expenditure. In its Statement of Decision, however, the trial court indicated that it did not find much of William's testimony credible, characterizing it instead as impressionistic and unpersuasive. The court thus gave it "very little weight" on the question of whether distributions were made for his benefit. With respect to Valerie, the trial court found her testimony to be similarly impressionistic and unpersuasive. Moreover, given Valerie's understandable inability to remember transactions from so long ago, her complete estrangement from Hagan, and her personal stake in the outcome of the case, the trial court likewise determined to give "little weight" to her testimony regarding her distribution schedule.

Nevertheless, petitioners argue on appeal that any inadequacies in Valerie and William's testimony (along with the complete failure of any of the other beneficiaries to testify at all) should not be deemed dispositive, because the burden was on respondents to prove each and every transaction in the account. However, as discussed above, the trial court appropriately found that the probate court had allowed the First and Final Accounting and thus the propriety of that accounting, as a general matter, was not before the trial court in this action. More importantly, as we have previously determined, the question here is not, as petitioners suggest, whether each transaction in the schedules is individually itemized and supported by primary documentation, but rather whether the respondents presented sufficient testimony and other evidence to support the transactions memorialized in the schedules. (See *McCabe, supra*, 98 Cal.App.2d at pp. 505-506;

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<sup>14</sup> Although a party, Regina did not appear or testify at trial, and no other beneficiaries were called to testify.

*Purdy, supra*, 174 Cal. at pp. 529, 531.) The trial court found that they had, and we see no error in this determination.

Indeed, as the trial court noted, the schedules are quite detailed. Specifically, “[e]ach item is described by type (*i.e.*, check), date, check number, payee, source of information (whether from a check register or a secondary source spreadsheet), bank/brokerage account number, and disbursement amount. The ‘source’ column identifies the document by unique number and location, so that the information on [the schedules] can be traced.” Moreover, the trial court specifically credited testimony offered by Erle and Hagan regarding the year-end distribution of amounts invested in accounts in the names of the beneficiaries in the early years of the trust, even though the corresponding records no longer exist. Finally, petitioners presented no credible evidence challenging the veracity of the thousands of transactions reflected in the schedules. We will thus not disturb the trial court’s conclusion that the schedules were supported by satisfactory evidence. (See *Purdy, supra*, 174 Cal. at p. 531.)

With respect to the alleged breaches of fiduciary duty reflected in the schedules, petitioners argue that the beneficiaries were inappropriately charged pro-rata shares of the rent for various family homes and of the dues for certain social clubs to which Hagan belonged. However, both Valerie and William testified that they benefitted by living or staying in the homes and by going to the clubs. The trial court found the club expenditures to be a “permissible use of trust funds to provide for a beneficiary’s well being.” Indeed, as the trial court noted, William did not challenge the Trust’s payments for his personal Olympic Club membership as an improper use of Trust fund monies. Similarly, with respect to the rental payments charged to the beneficiaries, Hagan testified that he maintained a large family home while his children were in college, and that these payments were a pro rata share of the rent. The trial court found that this was also a “permissible use of trust funds to provide for a beneficiary’s education, health, housing and well-being.” In fact, noting that housing of various kinds was a benefit provided to all beneficiaries at various points, the trial court found that “[t]he exercise of

discretion to pay these expenses is consistent with the purpose of the trust, in good faith, and reasonable.” We see no breach of duty in any of these expenditures.

Finally, petitioners assert that Bernard’s distribution schedule reflects a breach of fiduciary duty by Hagan in connection with the purchase of certain housing for Bernard. Specifically, they claim that Hagan improperly took \$80,000 of trust fund monies to purchase a house on Jackson Street in his own name, that he subsequently sold this house at a profit, and that he then used the money to purchase another Jackson street home which he still holds in his name. We find the trial court’s resolution of this matter dispositive and well supported by the evidence and thus simply report it here: “As he did for his other children, Hagan was involved, either personally or through the Trust, in helping his adult children buy houses. In 1999, the Trust gave [Bernard] \$80,000 for a down payment on a house on 2177 Jackson Street. Hagan’s name went on title, because [Bernard] could not qualify for the mortgage. [Bernard] was unemployed at the time. The lender required that title be in the name of the mortgagee. Hagan was the mortgagee. Subsequently, this house was sold for a profit, and the equity from this house was rolled into a second house on 1591 Jackson Street for [Bernard]. Title was again taken in Hagan’s name for the same reason, and Hagan was the mortgagee. [Bernard] and his girlfriend thereafter decided to buy a home in Napa. Hagan gave them \$340,000 to do so. This sum included the original \$80,000 that came from the Trust. Hagan continues to own 1591 Jackson Street. There had been a dispute between Hagan and [Bernard] over 1591 Jackson Street; it was resolved by Hagan’s \$340,000 payment to him. [Bernard] is not a petitioner in this case, nor was he called [as] a witness. Based on all of the evidence before me, including my assessment that Hagan’s testimony on this subject was credible, I do not find a breach of trust or damages to the Trust.”

**F. *Liability of Bertuccelli***

Petitioners also challenge the trial court’s conclusion that Bertuccelli did not breach any fiduciary duties. Specifically, they claim that Bertuccelli “completely abrogated her fiduciary duties . . . by delegating all her responsibilities to [Hagan], with no oversight and no effort to exercise her responsibilities as Trustee.” Without any

citations to the record, petitioners then proceed to list the “evidence” supporting their claim, stating, for example, that Bertuccelli signed blank checks for Hagan to complete “at his whim”; failed to monitor the exchanges of cash between Hagan and the Trust; failed to oversee Hagan’s self-dealing transactions with the Herald Hotel and the Alida Apartments; failed to require Hagan to account to her or the beneficiaries during the life of the Trust; and assisted Hagan in emptying the Trust in 1999.

The trial court, in contrast, relied on facts in the record to support its no-liability finding with respect to Bertuccelli. It described Bertuccelli’s actions as trustee as follows: When Bertuccelli was actively involved as trustee of the Trust, “she kept and maintained the trust records. She balanced the checkbook monthly and reconciled the checking account. She had worked in a bank and knew how to keep records. She recalled an occasion when Hagan absent-mindedly wrote personal checks against the trust account. When she discovered this, she required that he reimburse the trust and stop using the trust checkbook.” In addition, when Bertuccelli was not the acting trustee, she provided some guidance to Paula and Victor and consulted on a quarterly basis. As a matter of practice, she and Hagan would review business matters and recommendations. At times, Bertuccelli disagreed with Hagan about disbursement to beneficiaries, and, in those instances, acted against Hagan’s wishes. The trial court concluded that Bertuccelli implemented the intent of the trust and did not “close her eyes to misconduct.” In addition, in the court’s view, petitioners had failed to show any way in which Bertuccelli breached any fiduciary duty.

Further, with respect to the issue of pre-signed checks, the record contains Bertuccelli’s testimony that it was just a few checks for convenience at the beginning of the Trust’s life; that Hagan always told her what the checks were for; and that she would double-check the cancelled checks in the bank statements. Taken as a whole, there is substantial evidence in the record that Bertuccelli was properly absolved of any liability for breach of trust. (See also § 16440, subd. (b) [giving trial court discretion to excuse a trustee in whole or in part from liability for breach of trust where “the trustee has acted reasonably and in good faith under the circumstances as known to the trustee”].)

**G. *Failure to Award Interest on Damages with Respect to the Alida Option***

As discussed above, the trial court concluded in this case that Hagan had committed a breach of trust in connection with his failure to exercise the final option to renew the Trust’s lease for the Alida Apartments. It thus ordered payment of damages in the amount of \$845,475. The trial court, however, declined to award interest with respect to these damages, a decision which petitioners now contest on appeal.

The provision of interest in connection with damages for breach of trust is governed generally by section 16440, subdivision (a), which provides: “If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. [¶] (2) Any profit made by the trustee through the breach of trust, with interest. [¶] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.” The trial court reasoned that, while subdivision (a)(1) and (a)(2) of the statute expressly allow for interest, subdivision (a)(3)—under which the trustee is chargeable with “any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust”—does not. According to the court, since petitioners’ damage theory at trial was based on the loss of profit to the Trust as a result of Hagan’s decision not to exercise the Alida option, damages were awarded in this case under subdivision (a)(3) and therefore prejudgment interest was not warranted.<sup>15</sup>

On appeal, petitioners contend that they are entitled to interest with respect to the Alida option damages under either subdivision (a)(1) or subdivision (a)(2) of section 16440. In addition, they assert that, even if the only measure for damages in this case is

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<sup>15</sup> Because it concluded that interest was not available under subdivision (a)(3) of section 16440 in this case, the trial court never reached the issue of whether it should forgive all or any portion of an interest award in connection with the Alida lease option on the basis that Hagan acted reasonably and in good faith under the circumstances. (§ 16441, subd. (b) [“[i]f the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) [for interest] if it would be equitable to do so”].)

found in subdivision (a)(3) of that statute, interest should still be awarded on the Alida option damages in accordance with Civil Code section 3287. We are not persuaded by either argument.<sup>16</sup>

First, in response to petitioners' contention regarding the availability of interest under subdivision (a)(1) of section 16440, we note that there is no indication in the record that petitioners ever specifically argued that a damage award with respect to the Alida option was appropriate under that subdivision. Although petitioners' Opening Post-Trial Brief did contain a general explication of section 16440 in the context of their argument that Hagan was liable for damages and interest based on his failures to keep records and account, it did not argue how the statute applied in the context of the Alida option, merely asserting that a 10 percent interest rate was appropriate. Nor did they specifically argue that subdivision (a)(1) applied, either during oral argument or in their objections to the trial court's proposed statement of decision. Moreover, we see no damages calculation in the record based on the projected loss in value to the trust estate over the five-year option period as required by subdivision (a)(1). Under such circumstances, we conclude that petitioners have forfeited any claim of interest under subdivision (a)(1) of section 16440. (*Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 Cal.App.4th 1837, 1844 (*Cinnamon Square*).

As for interest under subdivision (a)(2) of section 16440, again, petitioners made no specific argument that damages were appropriate based on any profit made by Hagan due to the breach of trust, either in their post-trial brief, objections to the proposed statement of decision, or oral argument. Rather, in their last submission to the court, which was supposed to have been merely an arithmetic interest calculation with respect

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<sup>16</sup> Petitioners also make an argument in passing that if a breach of fiduciary duty causes damage under *any* subdivision of section 16440, interest should be allowed. We reject this claim as contrary to the plain language of the statute. (See also *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 921-922 [concluding that a 10 percent interest rate is appropriate under subdivisions (a)(1) or (a)(2) of section 16440, but that interest for damages under subdivision (a)(3) is only available pursuant to Civil Code section 3287, subdivision (a), at a rate of seven percent] (*Uzyel*).

to the Alida damages, petitioners argued for the first time (without any express reference to subdivision (a)(2)) that the trust's loss could be measured by what Hagan gained, which they characterized as not only the lost rents but also the investment value of those funds. Indeed, they claimed that this gain could be "reasonably inferred to be substantial" given Hagan's financial wizardry and investment expertise.

The trial court, however, expressly found that petitioners did not prove Hagan's profits at trial and thus were not entitled to an award of damages under section 16440, subdivision (a)(2). On appeal, petitioners do not point to any evidence undercutting the trial court's factual finding. Instead, they simply argue that proof of lost profits to the Trust under subdivision (a)(3) necessarily also proves the profits made by Hagan as a result of the breach under subdivision (a)(2) because, when Hagan cancelled the lease, any profits that would have been earned by the Trust instead went to Hagan as the owner of the property. While this argument may have some intuitive appeal, intuition is not a substitute for evidence. The record in this case reveals, as the trial court held, that the damage theory for the Alida option was based solely on the loss of profit to the Trust. No evidence attempting to monetize Hagan's profits during the option period was submitted or considered by the court in connection with the damage calculation. Indeed, at one point during the trial, petitioners referenced certain Hagan tax returns in support of their assertion that the Alida became more profitable after Hagan took it back over. Respondents argued that the profitability of the Alida to its owners was irrelevant in the case, and the trial court agreed. In fact, even petitioners, themselves, acknowledged several times that the information regarding Hagan's possible profits was not relevant to their damage claim. On this record, then, the trial court did not err in concluding that interest was not available to petitioners pursuant to subdivision (a)(2) of section 16440.

With respect to petitioners' other argument, Civil Code Section 3287, subdivision (a), provides that "a party is entitled to recover prejudgment interest on an amount awarded as damages from the date that the amount was both (1) due and owing and (2) certain or capable of being made certain by calculation." (*Uzyel, supra*, 188 Cal.App.4th at p. 919.) In *Uzyel*, the appellate court concluded that, although interest is not generally

available under subdivision (a)(3) of section 16440, that statute did not preclude an award of prejudgment interest under Civil Code section 3287, subdivision (a), for breach of trust where the requirements of the Civil Code provision were met. (*Uzyel, supra*, 188 Cal.App.4th at pp. 919-922.) In the present case, the trial court stated generally that petitioners did not establish the requirements necessary for an award of interest under Civil Code section 3287, and we agree that it seems highly unlikely that the damages for the Alida breach were “certain, or capable of being made certain by calculation.” (Civ. Code, § 3287, subd. (a).) Indeed, the trial court came to its damages calculation only after considering the conflicting numbers provided by the parties and determining various ancillary matters regarding additional rent potentially due to Hagan that would have impacted the profitability of the Alida lease going forward. (See *Uzyel, supra*, 188 Cal.App.4th at p. 919 [“damages that must be judicially determined based on conflicting evidence are not ascertainable”].) However, we need not reach the issue because, as the trial court correctly noted, petitioners did not seek prejudgment interest under Civil Code section 3287 below, a fact that they completely ignore in their briefing on appeal. In fact, in their objections to the trial court’s proposed statement of decision, petitioners expressly state that section 3287 is “inapplicable” to this case. We therefore deem the argument forfeited. (*Cinnamon Square, supra*, 24 Cal.App.4th at p. 1844.)

#### **H. *Attorney Fees Under Probate Code Section 17211***

Petitioners also attack on appeal the trial court’s conclusion that they were not entitled to recoup their attorney fees under subdivision (b) of section 17211 for the years of litigation required to obtain the accounting in this matter. Pursuant to section 17211, subdivision (b), “[i]f a beneficiary contests the trustee’s account and the court determines that the trustee’s opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney’s fees, incurred to contest the account.” In its Statement of Decision, the trial court concluded that this claim should have been brought in connection with the probate proceeding. Since the probate court did not award fees in its September 2010 order allowing the First and Final Accounting of the Special Trustee

and petitioners did not appeal from that order, their request for fees was both untimely and directed to the wrong forum.

We agree with the trial court’s handling of this fee claim. As discussed above, substantial evidence supports the trial court’s conclusion that all issues with respect to the accounting were resolved by the probate court, other than petitioners’ claims regarding respondents’ alleged breaches of fiduciary duty, which were preserved in the Petition for Breach of Trust that was referred for trial. The fact that the Petition for Breach of Trust contains a generic request for attorneys fees does not, as petitioners contend, establish beyond dispute that the probate court referred the issue of attorneys’ fees under section 17211 *in connection with the preparation of the accounting* to the trial court. Rather, in their August 2010 objection to the request for approval of the First and Final Accounting of the Special Trustee, petitioners expressly asked for an award of attorney fees and costs “for the expenses they have incurred in obtaining the accounting,” and the probate court declined to make the requested order.

Indeed, the probate court—which was far better suited to determine whether the trustee’s opposition to the accounting process was “without reasonable cause and in bad faith” under section 17211, subdivision (b)—repeatedly declined to impose fees or other sanctions on respondents throughout the extended accounting proceedings, despite multiple requests from petitioners. And Division Two of this court found that respondents’ appeal during the accounting process was not frivolous and therefore refused to impose sanctions. (*Harlan v. Hagan* (Dec. 4, 2006, A111848) [nonpub. opn.].) Under such circumstances, the trial court properly rejected petitioners’ attempt to re-raise the fee issue in the context of the Petition for Breach of Trust.

#### **I. *Damages Under Probate Code Section 859***

As a final matter, petitioners claim that the trial court erred by failing to grant them double damages as authorized by section 859. Pursuant to that statute, “[i]f a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a . . . trust, . . . or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult

financial abuse . . . , the person shall be liable for twice the value of the property recovered by an action under this part.” As is relevant here, section 850 provides that a trustee or interested person may bring an action for relief—including a request for double damages under section 859—if “the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another” or “the trustee has a claim to real or personal property, title to or possession of which is held by another.” (§ 850, subd.(a)(3)(A) & (B); see also *Estate of Kraus* (2010) 184 Cal.App.4th 103, 112 [“[t]he section 859 penalty is imposed when an interested party establishes both that the property in question is recoverable under section 850 and that there was a bad faith taking of the property”].)

In its Statement of Decision, however, the trial court declared that, in claiming double damages under sections 850 and 859, petitioners “do not offer any plausible explanation as to how these sections apply to this case to support this outsized damage award.” In particular, the court concluded that the requirements of section 850 were not shown to have been met, and thus the remedy set forth in section 859 was unavailable. Moreover, even if section 859 could be invoked on these facts, the trial court noted that a double damage award is only proper under that statute where the court finds that a person has “in bad faith wrongfully taken, concealed, or disposed of property belonging to a . . . trust” or has exercised “undue influence in bad faith or through the commission of elder or dependent adult financial abuse.” (§ 859.) According to the trial court, “[p]etitioners have not established *any* of these requirements in this case” (italics added).

We need not here determine whether respondents’ conduct in the management of the Trust could even arguably be deemed to satisfy the terms of section 850, because we find that the trial court’s conclusions regarding the inapplicability of section 859 are supported by substantial evidence. Indeed, petitioners’ only response on appeal to the trial court’s factual finding that the requirements of section 859 were not established is an argument that the court *must have* found bad faith because it found that Hagan had breached his fiduciary duties to the Trust with respect to the Alida and Herald Hotel options. This is, of course, not true. A breach of fiduciary duty may be found even in the

absence of bad faith. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 835 [“It does not matter that a trustee may have acted in good faith; self-dealing in violation of the duty of loyalty cannot be justified by the good faith of the trustee”]; see also *Estate of Pitzer* (1984) 155 Cal.App.3d 979, 992.) Moreover, petitioners’ claim is belied by the trial court’s own statement that petitioners did not establish *any* of the requirements of section 859.

Indeed, if the trial court had wanted to make a finding of bad faith in these proceedings, it could easily have done so. Instead, the court repeatedly refused to find any indicia of bad faith in respondents’ management of the Trust, and the record supports this determination. For instance, as described above, the court expressly found no evidence of purposeful destruction of documents; of commingling of Trust and personal funds; of embezzlement; or of falsification of ledgers. Further, as we have discussed, the trial court concluded that Bertuccelli did not breach any fiduciary duties and “did not close her eyes to misconduct.” And, the trial court refused to draw the inference suggested by petitioners that respondents “ ‘did not believe they would ever be held accountable, and therefore didn’t place any importance in maintaining full and accurate records.’ ” Under such circumstances, the court’s denial of double damages under section 859 was proper.

We are informed that Hagan, now in his late 80’s, has significant health problems and is in serious decline. Bertuccelli is in her late 70’s. We have exhaustively reviewed this matter in the fervent hope that, having discovered no error in the trial court’s thoughtful and well-reasoned decision, these issues can finally be laid to rest.

### **III. DISPOSITION**

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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REARDON, ACTING P. J.

We concur:

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RIVERA, J.

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STREETER, J.