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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KEVIN L. FRYE et al., Petitioners and Respondents, v. SHARON EILEEN COLLINS et al., Respondents and Appellants.	A143623 (Contra Costa County Super. Ct. No. MSP11-00677)

This appeal arises from a probate petition—filed by Kevin L. Frye, and his sons, Jesse E. Frye, Shane M. Frye, and Kyle L. Frye (collectively, respondents), against Kevin's sister, Sharon Eileen Collins, both in her individual capacity and as trustee of the Austin Leslie Frye and Joyce Eileen Alys Frye Living Trust, dated July 1, 2003; her son, Jacob Collins; and Jacob's wife, Amy Collins—alleging that Sharon[1] breached her fiduciary duties while acting as trustee for the trust established by Sharon and Kevin's parents. Following a probate court trial, the court found that Sharon had breached her trustee duties in various ways and awarded compensatory damages to the trust. It also awarded costs to respondents and attorney fees to Kevin.

On appeal, Sharon contends the court erred when it (1) enforced an illegal contract and ignored the plain terms of a purchase contract related to the transfer of trust real property to Jacob and Amy; (2) found that Sharon had breached her trustee duties in her

[1] Because many of the parties and other family members have the same last names, we shall refer to them in this opinion by their first names, to avoid confusion.

use of joint tenancy bank accounts, including certain credit card transactions and ATM and other cash withdrawals from the accounts; and (3) awarded Kevin attorney fees despite respondents' failure to prevail on their claims for elder abuse. We find the court improperly found that Sharon breached her trustee duties when she wrote a $60,000 check to Jacob because the evidence does not support the court's finding that she was a trustee when she performed that act, and shall therefore reverse the part of the judgment ordering Sharon to reimburse the trust this amount. We shall otherwise affirm the judgment and the attorney fees order.

FACTUAL AND PROCEDURAL BACKGROUND

Family Relationships and Trust Provisions

Austin Frye and Joyce Frye were the settlors of the trust. Joyce died on September 21, 2004, at the age of 76. Austin died on August 19, 2009, at the age of 82. Before they retired, Austin worked as a train engineer and Joyce worked as a real estate agent. Austin and Joyce had three children: Sharon, Kevin, and another son, Bruce Frye.[2] Sharon has three adult children: Amber Collins-Schmidt, Justin Collins, and Jacob; Jacob is married to Amy. Kevin has three sons: Jesse, Shane, and Kyle. Bruce has no children.

Austin and Joyce created the trust on July 21, 2003. Under the trust's terms, upon the death of the first settlor, the surviving settlor's interest in the community property of the trust, along with any separate property, was to fund a survivor's trust. The deceased settlor's property would ultimately fund a credit shelter trust, of which the surviving settlor would be the sole beneficiary. The trust provided that, upon the incapacity or death of Austin, Joyce would serve as sole trustee, but, in the event that Joyce was incapacitated or died before Austin, Sharon would become the successor trustee.

Upon the death of the remaining settlor, the trust directed the disposition of Joyce and Austin's real property as follows: their residence in San Ramon (Paddock Drive) to Sharon; their rental properties on Beverly Lane in Dublin (Beverly property) and on Valdivia Circle in San Ramon (Valdivia property) to Kevin; and their rental property on

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[2] Bruce is not a party to this action.

Ironwood Drive in Dublin (Ironwood property) to their six grandchildren, in equal shares. Upon the death of the remaining settlor, the trust further directed that the residual trust property be distributed as follows: 45 percent to Sharon, 45 percent to Kevin, and 10 percent to Bruce.[3]

The trust contained a provision regarding transfer of property to the trust, which provided in relevant part:

"**Section 1.03 Transferring Property to Our Trust**

"Any person or entity may transfer property of any kind, nature and description to our trust in any manner authorized by law.

"**(a) Initial Funding of Our Trust**

"By executing this agreement, we hereby transfer, convey and assign to our Trustee the property described in the attached schedule.

"**(b) Acceptance by Our Trustee**

"By execution of this agreement, our Trustee accepts and agrees to hold the trust property described in the attached Schedules. All property transferred to our trust after the date of this agreement must be acceptable to our Trustee. Our Trustee may refuse to accept any property. Our Trustee shall hold, administer and dispose of all trust property accepted by our Trustee for our benefit and the benefit of our beneficiaries in accordance with the terms of this agreement.

"**(c) Community Property**

"Any community property transferred to our trust including the income from such property and the proceeds from the sale of such property shall retain its character as community property during our lives to the same extent as if it had not been conveyed to our trust.

[3] The court noted in its statement of decision that the settlors' trust attorney, Amber Haskett, valued the trust assets in October 2005 at $2,415,915.

“**(d) Separate Property**

“Separate property transferred to our trust shall retain its character as separate property. . . .”

“Schedule A” attached to the trust listed the trust’s assets. Community property assets included the four residential properties: Paddock, Beverly, Valdivia, and Ironwood; two timeshares; two US Bank checking accounts; three US Bank savings accounts; an American Funds investment account; a Salomon Smith Barney investment account;[4] and miscellaneous tangible personal property. Community property assets held outside of the trust included Union Pacific Corporation stock held by Computershare Investment Services LLC; real property located in Buckhorn, California; two life insurance policies; and two American Funds IRAs. Separate property held outside of the trust included an account at Equiserve containing AT&T stock and another Equiserve account containing SBC stock, both held in joint tenancy with a third party.

Joyce and Austin’s 2004 Hospitalizations and Commencement of Sharon’s Trustee Duties

Joyce was hospitalized with flu-like symptoms on August 6, 2004. She remained hospitalized and on September 11, had a stroke from which she never recovered. She died on September 21. Austin was hospitalized from September 9 to September 10, for a catheterization procedure to determine whether he had any coronary blockages.[5]

Sharon testified that, after Joyce died, she became the successor trustee for both Austin’s survivor’s trust and Joyce’s credit shelter trust. She believed she was the sole trustee of both trusts.[6]

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[4] The Salomon Smith Barney account apparently later became the Morgan Stanley account, after the latter company acquired the former.

[5] Although medical records showed that both Joyce and Austin had been diagnosed with dementia, the court found that neither lacked mental capacity.

[6] In its statement of decision, the court found that Sharon began acting as trustee after Joyce had a stroke and/or upon Joyce’s subsequent death.

The Ironwood Property Transaction and $60,000 Payment to Jacob and Amy

Sharon testified that she was out of the country when Joyce was admitted to the hospital on August 6, 2004. However, after Sharon's return, while Joyce was still hospitalized but before her September 11 stroke, Joyce told Sharon that she had sold the Ironwood property to Jacob and Amy. Sharon was not present when any documents related to the sale were signed. After telling Sharon about the sale, Joyce said that when the proceeds from the sale came in, Sharon should write a $60,000 check to Jacob and Amy. According to Sharon, Joyce explained that Jacob and Amy "took out extra money. So when the check comes in, if I am not out of the hospital, write them a check for [$]60,000 because it's being attached to their mortgage." Sharon testified that Joyce said the extra $60,000 was "to fix up the house because it was literally falling apart." Sharon also testified that it was Joyce's practice to give a "rebate" when she helped family members buy homes.

Jacob (Joyce and Austin's grandson and Sharon's son) testified that he and his wife Amy originally rented the Ironwood property, starting in July 1998. In late 2003, he began to talk with Joyce about the possibility of buying the property. Joyce initially agreed to sell the property for $450,000, but Jacob and Amy were unable to obtain the necessary loan due to bad credit. After they were turned down for the loan, Jacob and Amy met with Joyce and Bonnie Halleran, a loan officer for First Horizon Home Loan Corporation (First Horizon). Jacob testified that at the meeting, Joyce asked Halleran "about gifting part of the property to us to help us be able to qualify for a loan." Then, in early 2004, Joyce met with her accountant, Wally Mayer, to discuss the tax implications of the sale, after which she arranged for Jacob and Amy's purchase of the property. The purchase price was $510,000, which included a gift of $300,000 from Joyce and Austin and a loan amount of $210,000. Jacob explained how they had arrived at the $210,000 figure: the original loan amount was going to be $150,000, which, with the $300,000 gift, would have totaled the original asking price of $450,000. But Jacob asked if he could "pull additional money out" for repairs on the house. The loan amount was therefore increased to $210,000 and the total sale price raised to $510,000, so that Jacob and Amy would receive $60,000 for house repairs.

When asked whether the $60,000 was meant to be a gift or a loan, Jacob responded, "This was part of the loan because the original loan was 150,000 instead of 210; so it was part of a loan." He did not believe he had to repay that money "because it came from the loan." Jacob further testified that the majority of the $60,000 was not used to make repairs to the Ironwood property, but was instead used for expenses related to Amy's hospitalization due to complications of pregnancy.

Documentary evidence shows that escrow on the Ironwood property opened with Fidelity National Title Company (Fidelity Title) on August 6, 2004, the same day that Joyce entered the hospital. An electronic document entitled "Notepad for Escrow 805521-TEC" and dated August 9, 2004, stated: "08/09/94 12:04 (TEC) Per Bonnie Hallers [*sic*], First Horizon will allow $310,000.00 showing as 'Paid Outside of Escrow[.]' Bonnie and I had a conference call with Accountant, he says that is ok. After close of escrow we will record a 2nd DT in favor of Grandma to Grandkids. Bonnie will provide us with terms. First Horizon is aware of $310,000.00[;] they don't want a 2nd showing on policy, ok to record afterwards, that is why [¶] we are showing Funds released prior to COE."

Tiffiny Crossley, a Fidelity Title escrow officer, testified at trial that she had no specific recollection of the conversation with Halleran described in the notepad document, but had no reason to doubt that the conversation took place or that the document was a true and correct copy of a note she entered into Fidelity Title's file at the time escrow was opened regarding the terms of the sale of the Ironwood property. Crossley confirmed that the letters "TEC" in the document are her initials, that "DT" was an acronym for deed of trust, and that "COE" was an acronym for close of escrow.

On September 10, 2004, while both Austin and Joyce were hospitalized and the day before Joyce suffered the stroke from which she did not recover, they signed a grant deed as trustees of the trust, transferring the Ironwood property to Jacob and Amy. Also on September 10, Joyce and Austin signed the "Seller's Estimated Closing Statement," which provided that $300,000 would be paid outside of escrow. Jennifer Glick, an escrow officer with Fidelity Title, testified at trial that "paid outside of escrow" "would mean paid outside, just as it states," and not a gift.[7] The "Buyer Estimated Closing Statement" also showed $300,000 "Paid Outside of Escrow." In an amended buyer's closing statement dated September 13, 2004, the $300,000 was described as "gift funds" for the first time in Fidelity documents. A handwritten note on that same date stated, "Figures on the way . . . Colleen needs us to fax her HUD showing $300k as gift not POE [paid outside of escrow]?"

Sherri Starr, Halleran's assistant at First Horizon, testified that there was no written contract for the sale as of August 10, 2004. She prepared a purchase contract after Crossley from Fidelity Title notified her that a written contract was required. Its terms were provided by Halleran and it was backdated to August 3. The contract provided: "The purchase price is to be $510,000, but this is not an arms-length transaction; the Buyer and Seller are related. A gift of equity is being given in the amount of $300,000 and a gift of cash in the amount of $10,000. A first mortgage in the amount of $210,000 is to be obtained at the prevailing interest rate." The court found that the contract must have been signed sometime between August 13 and September 7, 2004, and it is undisputed that it was signed after the August 3 date listed on the contract.

Jacob and Amy obtained a mortgage loan in the amount of $210,000 from First Horizon, which closed escrow on September 14, 2004, with a deed of trust recorded on that same date.

On September 15, 2004, an installment note and deed of trust were prepared on Fidelity Title forms, showing Jacob and Amy's additional debt of $310,000 to the trust, but the forms were not signed.

Kevin testified that on the evening of September 10, 2004, the date on which Joyce and Austin had signed the grant deed transferring the Ironwood property to Jacob

[7] The court noted that Wally Mayer, the family accountant, testified that the phrase, "paid outside of escrow," could describe a gift or loan.

and Amy, he visited her in the hospital. Joyce told him "I sold the house to Jacob and Amy, and I got to get money from them." She repeated that statement at least three times. In his trial testimony, Kevin acknowledged that at his deposition, he testified that Joyce had said Jacob owed her $210,000 as a down payment, but at the time of trial he did not remember the amount she said he owed. He also testified, however, that "I know what it wasn't. She did not say the number 300. I know that."[8] Kevin did not ask Joyce to provide details about the debt because she was very sick and he did not want to agitate her.

On September 17, 2004, the $210,000 in proceeds from the escrow were deposited into Joyce and Austin's checking account, which was listed on Schedule A of the trust. On the same date, Sharon signed a $60,000 check from that checking account, payable to Jacob.

Kevin testified that a month or two after Joyce's death, he told Sharon that Joyce had told him that she sold Jacob and Amy the Ironwood property. Sharon responded, " 'Yeah, I have to get a deed of trust for $300,000, against the house." She also told him that Jacob and Amy would be making interest only payments for 10 years, after which they would owe the trust $300,000. This was when Kevin first learned of the loan. He subsequently followed up with Sharon a few times to find out if she had received the paperwork from Jacob and Amy.

In April 2005, Jacob and Amy obtained a $75,000 home equity line of credit secured by the Ironwood property.

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[8] In its statement of decision, on the other hand the court stated that Kevin "first testified that he thought the number may have been '$200,000' but later stated it may have been '$300,000.' " In the first amended complaint, it was alleged that Joyce had told Kevin she was concerned about making sure "that she got the $210,000 that Jacob owed her as the down payment on the Ironwood Property . . . ." The complaint contained the additional allegation that Jacob and Amy were "supposed to have executed a promissory note in favor of the Trust to be secured by a deed of trust on the Ironwood Property in second position for a balance due to the Trust of $300,000.00." Regardless of these differing amounts, it is plain that, by the time of trial, Kevin did not recall the amount Joyce said Jacob owed her.

On May 3, 2005, Sharon, Austin, accountant Mayer, and attorney Haskett met at Haskett's office to discuss, inter alia, the loan issue. Haskett testified there was "the suggestion that we document the loan and get a promissory note and secure it. I recall the discussion that it was currently unsecured and Jacob and Amy could walk away from it." In a May 4 letter to Sharon discussing the May 3 meeting, Haskett stated: "We also discussed how to make the best of the situation with the promissory note of $300,000 held by the Trust. Your son, Jacob, has been making payments of $1,200 per month although there is no documentation of the loan. As Mr. Mayer suggested, the best way to proceed at this time is to document the loan by having your son sign a promissory note and a deed of trust. This will protect the trust in the event of default . . . ." Haskett also stated that "[t]he deed of trust will be a 'third priority' lien on the property after [Jacob's] first mortgage and home equity loan."

Jacob and Amy made eight interest only payments, totaling $9,126.60, to Austin between February and September 2005. On September 29, Jacob and Amy signed a $300,000 promissory note and deed of trust against the Ironwood property, retroactively "effective" November 1, 2004, which secured their obligation to the trust. The deed of trust was recorded in third position on December 5, 2005. The property was now encumbered in the amount of $585,000.

Sharon testified that she always believed the $300,000 was a gift of equity from Joyce and Austin to Jacob and Amy. She asked Jacob to make good faith payments on the $300,000 to "just keep some family peace" and so that she could tell Kevin that Jacob was "making some payments until we figure this whole thing out." She eventually obtained the promissory note and deed of trust for $300,000 after attorney Haskett told Sharon that she "need[ed] to protect the trust and write the note." Haskett testified that when a dispute arose regarding the status of the Ironwood property, she told Sharon "that [Sharon] had an obligation to act in the benefit of the beneficiaries. I explained to her that she cannot assume it was a gift; that she had to take a conservative approach if she didn't know and assume it was a loan."

Jacob testified that he and Amy always felt the $300,000 was a gift and they signed the promissory note only because Sharon was feeling pressure from Kevin and putting pressure on Jacob. He signed the note voluntarily, but "under protest" "to help keep family peace." He and Amy made the interest only payments on the $300,000 before executing the note because Sharon had asked them to do so "as a good gesture to show until we figured out what was going to happen with this situation . . . ."

On April 25, 2006, approximately seven months after Jacob and Amy signed the note and deed of trust against the Ironwood property, Sharon, as trustee, executed a deed of full reconveyance—which was recorded on May 2— releasing the security position of the $300,000 deed of trust. The deed stated that the secured indebtedness "has been fully paid and/or satisfied" even though Sharon had received no payment of principal from Jacob and Amy on the note. In fact, Jacob and Amy had not even made regular interest only payments. Sharon testified that despite this release, she and Jacob "did not realize that it was now an unsecured loan." A title company subsequently prepared a new note and deed of trust to be recorded, securing the trust for the $300,000, but those documents were never executed or recorded.

Around that same time, Jacob and Amy obtained a new mortgage secured by a first deed of trust on the Ironwood property for $472,500. This new deed of trust was also recorded on May 2, 2006, the same date the deed of full reconveyance of the $300,000 loan was recorded. None of the cash obtained in the refinance was used to make any principal payments on the $300,000.

Sharon believed she had been reasonable in not taking steps to foreclose on the Ironwood property once Jacob was in substantial default because Austin told her, "If Jacob can't make it right now, let's give him a chance. . . . Let's just wait. [¶] So on a respect factor for my father, yes, I think I did the right thing."

Sharon testified that, some years later, in April 2010, she told Kevin "that Jacob is going under water quickly. The [Ironwood] house has lost value, and he could not afford the 300,000, plus other expenses and was thinking about either, A, doing bankruptcy, or, B, just walking away from the house." Sharon therefore "asked Kevin if he would consider reducing the amount of the second to $100,000." At the time of this conversation, Sharon did not realize the loan was unsecured. Kevin initially agreed to the plan. On September 30, 2010, Sharon and Kevin signed a notarized document agreeing to the loan reduction.[9] In a November 10 letter to Sharon, Kevin advised her that, after consulting an attorney, he did not approve recording the loan reduction document. The document was never recorded.

Jacob and Amy filed for bankruptcy in March 2011.[10]

Sharon's Additional Conduct as Trustee and Use of Trust Property

Sharon testified that when she became trustee in 2004, she asked Haskett, the attorney for the trust, what steps she should take as trustee. She learned from Haskett that she had fiduciary duties to act for the benefit of all potential beneficiaries and to manage the trust properly, using at least ordinary business ability. She also understood that she was not to commingle trust assets with her own assets. Sharon further testified that she never provided Austin with a written accounting of the receipts, disbursements, and distributions that occurred or with a balance sheet of the trust property, although she showed him everything on the computer. Nor did she ever balance any US Bank checkbooks.[11]

Schedule A of the trust listed five joint tenancy bank accounts; three were held jointly by Joyce, Austin, and Sharon and two were held jointly by Joyce and Sharon only. Sharon testified that her mother had told her that the joint accounts in only her and Sharon's names would become Sharon's upon Joyce's death. Sharon also understood that half of the money in the accounts that were also in Austin's name would be hers after

[9] Bruce did not sign the document, and his original 10 percent share was not reduced.

[10] In their bankruptcy petition, Jacob and Amy listed the $300,000 note and deed of trust as obligations payable to the trust.

[11] The court found that Sharon never prepared or distributed any accountings to any beneficiary, although she testified that she informally discussed all financial matters with Austin. Nor did Sharon balance any trust accounts or even open any separate accounts in the name of the survivor or credit shelter trusts.

Joyce's death, and the other half would be Austin's during his life, becoming hers when he died. She testified that Haskett confirmed that the bank accounts were not part of the trust, that the accounts Sharon shared with Joyce were now hers, and that the accounts she shared with Austin were half hers and would become wholly hers upon his death. Haskett never told her that she could be exposed to risk by not treating those bank accounts as part of the trust.

In November 2004, shortly after Joyce's death, Sharon and Austin went to US Bank and took Joyce's name off of the accounts. Sharon acknowledged that Haskett prepared a document in October 2005, in which Haskett allocated the three US Bank accounts that had been in Sharon, Joyce, and Austin's names between the survivor's trust and credit shelter trust. Haskett also wrote a letter to Sharon summarizing a May 3, 2005 meeting, in which she described the plan to "split the promissory note, cash, and securities between the two trusts." Sharon never told Haskett that she (Haskett) had made a mistake in allocating the bank accounts to the trust.

Haskett testified that she had told Joyce and Austin that they needed to transfer the bank accounts to the trust for them to become trust assets. After Joyce's death, Haskett told Sharon that the bank accounts she held in joint tenancy with Joyce and Austin went to her and Austin, and the accounts she held in joint tenancy with Joyce were hers, as the surviving joint tenant.

Before Sharon and her husband, Gary, moved in with Austin at the Paddock property, Sharon and Austin agreed to add a sunroom to the residence. Sharon and Gary needed a room for their five cats and their new hot tub. Under the terms of the trust, Sharon was to receive the Paddock property upon Austin's death. Sharon agreed to pay for half of the addition, which she paid for with money from one of the US Bank accounts she had held jointly with Joyce.

Section 16.05 of the trust authorized "fair and reasonable compensation" for carrying out trust duties. Sharon paid herself $19,999.96 in trustee fees for the period of October 2, 2009 to April 22, 2011. In addition, after the present litigation began, Sharon used money from the Morgan Stanley investment account to retain a law firm to represent her and also to pay attorney fees to Haskett, for a total of $87,623.93.

The Present Action

On June 9, 2011, respondents filed a probate petition against Sharon, individually and as trustee of the trust for (1) determination of the applicability of Probate Code section 21133);[12] (2) redress for breaches of trust by trustee; (3) imposition of a constructive trust; (4) injunction enjoining trustee from committing further breaches of trust and using trust funds to defend the petition; (5) removal of trustee and a report of trust activities and full accounting; (7) appointing a successor trustee; (8) an order directing conveyance or transfer of property from third-party claimant to the trust (§ 850 et seq.); and (9) an order restricting receipt of property (§ 259). Respondents also filed an application for a temporary restraining order prohibiting Sharon from distributing trust assets to any beneficiaries or using those assets to pay for her legal defense.

On February 24, 2012, respondents filed a first amended petition, in which they added Sharon's son Jacob and daughter-in-law Amy as respondents. On February 29, 2012, the trial court ordered Sharon to file an accounting by March 8. On March 6, 2012, Sharon filed a cross-petition for approval of accounting, a surcharge for attorney fees, and imposition of a constructive trust.

On March 8, 2012, the probate court suspended Sharon as trustee due to (1) her failure to respond in good faith with a full accounting, (2) exposing trust funds to adverse income tax consequences as a result of liquidating stock, and (3) the court's concern about her ability to act objectively as trustee after Jacob was named as a respondent in the first amended petition. The trial court also appointed a professional trustee to serve on an interim basis.

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

Section 21133 provides that a "recipient of an at-death transfer of a specific gift has a right to the property specifically given, to the extent the property is owned by the transferor at the time the gift takes effect in possession or enjoyment" and if certain other requirements are satisfied.

On July 20, 2012, Jacob and Amy filed a cross-petition against Sharon and Kevin for rescission, restitution of funds paid to the trust, and damages.

The probate court trial commenced on August 6, 2012. On September 28, 2012, however, the court granted Sharon's request for disqualification (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(i) & (iii)), based on alleged bias in the court's prior expression of concern about the possible conflict of interest on the part of one of Sharon's attorneys, who was also the attorney for the trust and would be a witness at trial.

On February 19, 2013, Sharon filed a first amended cross-petition, in which she added a cause of action for enforcement of a no contest provision (§ 21300, et seq.).

On March 4, 2013, the probate court ordered, pursuant to the parties' stipulation, that the case would be tried before a retired superior court judge, the Honorable Bonnie Sabraw, acting as judge pro tempore (hereinafter, the court).

A court trial commenced on July 29, 2013, and continued intermittently over 17 days, through February 6, 2014. The court issued a proposed statement of decision on June 9, 2014, to which Sharon subsequently filed objections. A final statement of decision was filed on August 25, 2014, in which the court described the case as requiring it "to determine whether an adult child, who lovingly cared for aging parents, will be held liable for breach of financial Trustee duties placed upon her as a result of her parents' decision to make her the Trustee of their Living Trust. The court must answer that question in the affirmative."

The court found Sharon "liable for breach of trustee duties in three areas: (1) trust assets associated with Sharon's son Jacob; (2) trust assets not properly treated as trust assets (e.g., the bank accounts) or not properly accounted for (ATM withdrawals and credit card accounts); and (3) trust assets taken as trustee's fees or to reimburse for legal expenses."[13] The court found that Austin, "*was* susceptible to undue influence based on his reliance on Sharon and the trust he reposed in her for all things financial," but also

[13] On appeal, Sharon has not challenged the court's findings that she was liable for 50 percent of the trustee fees she paid herself or for the attorney fees she paid from trust assets to defend herself in the present litigation.

found that Sharon had not committed elder abuse. Finally, the court found that some leniency was appropriate with respect to imposition of prejudgment interest due to the lack of bad faith on Sharon's part[14] and respondents' inaction in investigating the competency of Austin during his lifetime.[15] Judgment was entered in favor of the trust on October 1, 2014, in the amount of $604,011.93 in compensatory damages plus prejudgment interest of $225,327.82, for a total sum of $829,339.75. Sharon was found liable for all damages, while Jacob and Amy were found jointly liable for only the $300,000 loan for the Ironwood property purchase. The court also awarded costs to respondents in the amount of $110,281.05 and attorney fees to Kevin, surcharged against the trust res prior to distribution, in the amount of $440,000.

On November 14, 2014, Sharon filed a notice of appeal.[16]

DISCUSSION

I. *Standard of Review and Other Preliminary Matters*

Sharon argues that nearly all of the issues raised on appeal require de novo review. Although she is correct that contentions that the court applied the wrong law or misinterpreted a statute require de novo review, most of the issues she raises involve the propriety of the court's factual findings. "In both jury and nonjury trials, factual findings made by the trier of fact are generally reviewed for substantial evidence. [Citations.] Factual issues may be reviewed de novo when the facts are uncontroverted and only one deduction or inference may reasonably be drawn. [Citations.]" (*Ermoian v. Desert*

[14] As the court explained: "No dispute exists that Sharon lovingly cared for her father and availed herself of legal advice and counsel in many key areas. The court desires to acknowledge and honor that reality even as it enforces the purposes and protections promulgated under the Probate Code."

[15] The court also found that several expenditures of trust funds by Sharon were *not* breaches of her fiduciary duties. These expenditures included payment of one year of college tuition for Sharon's daughter; proceeds from the sale of Austin's car; payment to Amy for care giving for Austin; and the purchase of a waterbed. The court also found that Austin's August 2005 designation of Sharon as the beneficiary of his IRA was not a result of undue influence, nor otherwise a breach of the trust.

[16] Jacob and Amy have not appealed from the court's judgment.

Hospital (2007) 152 Cal.App.4th 475, 500–501 (*Ermoian*).) Here, as in *Ermoian*, most "essential facts were controverted or permitted conflicting inferences." (*Id*. at p. 501.) Therefore, except where noted in the discussion, *post*, the issues raised on appeal will be reviewed for substantial evidence, which "applies to both express and implied findings of fact made by the court in its statement of decision." (*Ibid*.)

In addition, as a preliminary matter, respondents assert that the many objections Sharon made to the court's proposed statement of decision were ineffective because they did not specifically identify any omissions or ambiguities therein. (See Code Civ. Proc., § 634 ["When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment. . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue"]; see also *Ermoian, supra*, 152 Cal.App.4th at p. 498; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 896 (*Uzyel*).) We will address the propriety of Sharon's objections only to the extent they are relevant to a determination of the specific issues raised on appeal when we address those issues, *post*.

Respondents also assert that Sharon has waived her challenges on appeal because the statement of facts in her opening brief "rests entirely on her and her son's self-serving testimony that the trial court found unconvincing." (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 ["appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it ' "are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived" ' "].) While we agree that Sharon's summary of the evidence is slanted toward her version of events, we do not find it so lacking as to warrant a finding that she forfeited her claims on appeal. (See *ibid*.)

II. ***Trust Law: General Principles***

Trust law imposes certain basic obligations on a trustee. "On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division [section 1500 et seq.].” (§ 16000.) The violation by a trustee of any of the duties owed to the beneficiaries of a trust is a breach of trust. (§ 16400; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102 (*Pierce*), citing Rest.2d Trusts, § 201; accord, *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 462.) Those duties include, inter alia, the duty of loyalty (§ 16002), the duty to deal impartially with the beneficiaries (§ 16003), the duty to avoid conflicts of interest (§ 16004), the duty to control and preserve trust property (§ 16006), and the duty to report and account (§ 16060). The beneficiaries of a trust may sue a trustee to recover profits or recoup losses resulting from a trustee's breach of any of the foregoing duties. (*Pierce,* at p. 1103.)

With respect to conflicts of interest, "[t]he trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary." (§ 16004, subd. (a).) A presumption affecting the burden of proof on the issue of a trustee's breach of fiduciary duties exists where "[a] transaction between the trustee and a beneficiary . . . occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary . . . ." (§ 16004, subd. (c).)

Section 16463, which addresses a beneficiary's consent to a trustee's conduct, provides:

"(a) Except as provided in subdivisions (b) and (c), a beneficiary may not hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the act or omission.

"(b) The consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust in any of the following circumstances:

"(1) Where the beneficiary was under an incapacity at the time of the consent or of the act or omission.

"(2) Where the beneficiary at the time consent was given did not know of his or her rights and of the material facts (A) that the trustee knew or should have known and

"(B) that the trustee did not reasonably believe that the beneficiary knew.

"(3) Where the consent of the beneficiary was induced by improper conduct of the trustee.

"(c) Where the trustee has an interest in the transaction adverse to the interest of the beneficiary, the consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust under any of the circumstances described in subdivision (b) or where the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary."

Moreover, with respect to a trustee's liability for a breach of trust, section 16440 provides: "(a) 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.

"(b) If 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) if it would be equitable to do so."

III. ***The Ironwood Property Transaction And Subsequent Release of Security***

Sharon contends the court erred when it (1) enforced an illegal contract and (2) ignored the plain terms of the purchase contract in concluding the $300,000 payment outside of escrow was intended to be a loan, not a gift of equity.

In resolving this question the court found the following facts: "The record reflects that [Joyce and Austin] began discussing a plan to sell the Ironwood Property to Jacob and Amy as early as 2003. The specific terms of the sale had some variability, but the record consistently reflects the estimated value of the property in the range of $510,000, and that the terms of the transfer would involve both a mortgage and a payment outside of escrow. The earlier discussions reflect a $510,000 purchase price—an amount approximately $25,000 under the appraised value of September 2004. [¶] . . . [¶]

"The weight of the evidence demonstrates that Joyce and Austin intended to sell the house to Jacob and Amy for $510,000, with Jacob and Amy carrying a $300,000 promissory note in addition to the first mortgage of $210,000. Evidence supporting this finding includes the note in the escrow officer's file reciting those terms; the preparation of the deed of trust at the time of sale to be used for recording the promissory note subsequent to the close and recording of the first mortgage (although never executed); the joint efforts undertaken by Sharon, Austin, the family accountant and trust attorney to document the loan; Jacob and Amy's ratification of the loan by payment under its terms; and the eventual execution by Jacob and Amy of a Promissory Note in the amount of $300,000 and a recorded deed of trust in December 2005."[17]

Addressing Sharon, Jacob, and Amy's request that the court find the loan agreement "void and unenforceable as a matter of law based on its status as a prohibited 'secret second' loan, the court stated: "The practice of family members providing undisclosed financial assistance during the home buying process is one fraught with risks on many levels, one of which is prosecution for mortgage fraud. However, this situation is one where the rule against enforcing an illegal contract should not be rigidly enforced." The court quoted *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 721 (*Hirsch*) for the proposition that " '[t]he rule that courts will not aid enforcement of an illegal agreement or one against public policy will be relaxed where the transaction has been completed, no serious moral turpitude is involved, the defendant is guilty of the greater

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[17] The court discussed Austin's participation in the May 3, 2005 meeting at attorney Haskett's office "to discuss the loan issue," where "all agreed that a promissory note was appropriate under the circumstances," and found that "Austin's participation in the meeting and acquiescence to the promissory note to be persuasive that a loan was intended based on his also being a participant in the sale of the property. There is little evidence to support a showing that Sharon, Jacob or Amy meaningfully resisted the imposition of a loan."

moral fault, and where reliance on the rule would permit the defendant to be unjustly enriched at the plaintiff's expense.' [Citations.]"

The court then weighed the equities in this case, explaining: "The facts and circumstances before the court present competing policy considerations. On the one hand, 'secret second' loans should not be countenanced to avoid fraud to the first mortgage lender; on the other, where the interest of that first mortgage lender has been satisfied (which is the case here), the court needs to consider that a rigid application of the rule against enforcement of unlawful contracts will frustrate the Settlors' intent under the trust.[18] In the situation presented, no great moral turpitude arises from Joyce and Austin's decision to assist a grandchild in buying the Ironwood Property under the terms offered—especially at a time when home prices were rising exponentially. On the other hand, Jacob and Amy showed no restraint in burdening the property with debt, even to the extent of not disclosing the full extent of their debt to the next lender. The court finds no substantial justice in relieving Jacob and Amy from the consequences of their actions at the expense of the beneficiaries of the Trust."

First, for the same reasons discussed by the court in its statement of decision, we conclude substantial evidence supports its finding that the $300,000 paid outside of escrow constituted a loan, not a gift. (See *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500-501.)[19] Second, even assuming the agreement between Joyce and Austin on the one hand and Jacob and Amy on the other hand involved an illegal "secret second" loan, we find no abuse of discretion in the court's conclusion that the agreement was enforceable against Jacob and Amy. (See *Hirsch*, *supra*, 107 Cal.App.4th at p. 721; accord, *Adoption*

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[18] The court noted in a footnote that it was "not inclined to overlook the conscientious and diligent efforts made over time by [Sharon] and the family trust attorney, to execute, notarize and record legal documentation in support of a transaction they now assert to have been illegal."

[19] Contrary to Sharon's assertions in her objections to the court's statement of decision, we do not find any omissions or ambiguities in the court's factual findings on this issue. (See *Uzyel*, *supra*, 188 Cal.App.4th at p. 896.)

of Matthew B. (1991) 232 Cal.App.3d 1239, 1256–1257; *Johnson v. Johnson* (1987) 192 Cal.App.3d 551, 556–558.)

As the court found, the equities favored enforcement of the loan agreement between the settlors and Jacob and Amy: The transaction had long been completed. Joyce and Austin's decision to help their grandson buy a residence they owned at slightly below market value, with no attempt to hide their conduct from the title company or lender, did not show great moral turpitude on their part. Jacob and Amy's subsequent burdening of the property with debt while failing to stay current on their interest only payments, and subsequently refinancing the property without informing the lender of the debt to Joyce and Austin, was morally questionable. Based on these facts, the court reasonably concluded that application of the rule against enforcement of an illegal agreement would result in Jacob and Amy being unjustly enriched at the expense of the trust beneficiaries. (See *Hirsch*, *supra*, 107 Cal.App.4th at p. 721.)

While acknowledging the rule set forth in *Hirsch*, Sharon argues that the circumstances in this case are distinct from those in *Hirsch* and similar cases because, here, the question is *not* whether an illegal contract may be enforced against one of the parties to the contract, but whether it can be enforced against Sharon, who is a third party. Sharon misreads the statement of decision. The court first concluded the purportedly illegal contract could be enforced against Jacob and Amy and that, therefore, the $300,000 to be paid outside of escrow was a loan, not a gift. The court found Jacob and Amy liable for repayment of the $300,000 loan and interest, "except as impacted by the results of bankruptcy proceedings."

The court then separately found that Sharon's subsequent act as trustee—releasing the security of the $300,000 note to assist Jacob and Amy in refinancing their first mortgage and paying off their home equity loan—was a transaction "where Sharon had a serious conflict," given that it involved her child. The court found it "proper to invoke the presumption of breach of fiduciary duty that will be applied when the Trustee engages in self-dealing." It observed that no evidence showed that Sharon placed Austin's interests ahead of Jacob's; nor did she reach out to the trust attorney for advice or record a second deed of trust on the promissory note after the close of the mortgage refinance. In light of this breach of trust, the court therefore found Sharon was jointly and severally liable to the trust for the $300,000.

Because the court did not enforce the loan agreement against Sharon, but instead based her liability on her subsequent, improper release of the security interest that had been recorded against that loan, her argument that an illegal contract should not be enforceable against a third party is not applicable here. The issue is not Sharon's unjust enrichment, it is the self-dealing conduct in which she subsequently engaged by placing her son's interests over those of the trust beneficiary and by releasing the security interest on the note that led to the court's finding that she breached her fiduciary duties as trustee.

We also find substantial evidence supports the court's conclusion that Sharon improperly released the security interest on the promissory note. (See *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500-501.) Sharon's conduct as a whole—including her inexplicably releasing the security interest just as her son and his wife were about to refinance their mortgage, which she acknowledged was a mistake; her failure to consult with Haskett or the court about the implications of releasing the security; and her failure to record a second deed of trust on the note—supports the court's finding that she engaged in self-dealing and violated her fiduciary duties as trustee. (See §§ 16003, 16004.)[20]

Sharon next argues that the court improperly considered parol evidence in determining that the $300,000 was a loan. (See Code Civ. Proc., § 1856, subd. (a).) Sharon wants to have it both ways. After first asserting that the undisputed evidence shows that the $300,000 loan to Jacob and Amy was an illegal "secret second" loan

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[20] As the court stated, in finding that Sharon had "a serious conflict" when she released the security interest on the note: "No evidence demonstrated that Sharon gave any thought to Austin's interests ahead of Jacob's. Austin's alleged leniency with regard to late payments on the note does not equate to an approval to release the security. Moreover, if Sharon could not understand the implications of the release of security, the Court finds it unlikely that Austin could be made to understand the situation with a level of comprehension necessary to make an informed decision."

because the purchase contract described the $300,000 to be paid outside of escrow as a gift of equity when the evidence in fact showed the parties intended it to be a loan, she then asserts that this identical evidence cannot be used to contradict the terms of the purchase contract, which states that the $300,000 was intended to be a gift. The evidence to which Sharon points as demonstrating the parties' intent to defraud the lender also shows, however, that the purchase contract, which was apparently prepared, backdated, and then signed at the behest of First Horizon, did not reflect the true intent of the parties. The trial court reasonably concluded this additional evidence—used by Sharon to argue that the obligation was unenforceable because it was an unlawful "secret second" loan—demonstrated that the $300,000 paid outside of escrow was in fact intended to be a loan. (See Code Civ. Proc., § 1856, subd. (g) ["This section does not exclude other evidence . . . to establish illegality or fraud"]; cf. *Nagrampa v. MailCoups, Inc.* (9th Cir. 2006) 469 F.3d 1257, 1291 ["Under California law, when fraud or illegality is alleged, the parol evidence rule does not apply, and evidence of pre-contract representations which vary or contradict the terms of an integrated contract are admissible"].)

IV. *The $60,000 Payment to Jacob and Amy*

Sharon contends the court's finding that she breached her duties as trustee when she wrote the $60,000 check to Jacob and Amy immediately after receiving the proceeds from the Ironwood property sale is not supported by substantial evidence. In particular she argues that, "[g]iven the ambiguity resulting from the conflict in the trial court's decision and the lack of evidence that Sharon knew she was acting as Trustee at that time [i.e., after Joyce's stroke but before her death], the court improperly held Sharon writing a check on a joint account for $60,000 breached her duty *as a Trustee* on September 17, 2004. Sharon objected to the court's proposed statement of decision on this issue on several grounds, including that "the court fails to factually establish the actual date and circumstances that [Sharon's] duties as trustee of the Frye Trust commenced."

The court based its liability finding in part on the fact that "Sharon's testimony regarding the direction from Joyce to provide $60,000 as a rebate is simply not persuasive." The court further found that "Sharon transferred $60,000 in trust monies to

Jacob and Amy under fatally ambiguous circumstances." The court did not find evidence "that Sharon intended a fraudulent transfer to Jacob. Rather, the evidence suggests confusion on behalf of Sharon and Jacob and Amy as to whether the $300,000 promissory note intended a cash advance of some sort that would be re-paid by Jacob and Amy." The court concluded, however, the evidence was insufficient to demonstrate that Jacob and Amy accepted the $60,000 with an understanding that it was a loan. It therefore held only Sharon liable for repayment of that amount to the trust "based on the failure to overcome the presumption that Sharon acted to the benefit of Jacob and in a manner adverse to the Settlors."

On appeal, Sharon first points to alleged ambiguities in the court's statement of decision regarding when she assumed her duties as trustee, arguing that because she was not yet trustee at the time she paid the $60,000, she cannot be held liable for any breach of her trustee duties. She cites a number of passages in the court's statement of decision as demonstrating this ambiguity. For example, the court stated: "By this time [September 17, 2004, when the escrow proceeds were received and Sharon wrote the $60,000 check], Sharon had stepped in as Trustee due to Joyce's incapacity . . . ." The court also stated that "Joyce's debilitating stroke [on September 11, 2004] rendered Joyce unable to act as Trustee from that day forward. Under the terms of the Trust, Sharon appropriately stepped into the role of Trustee as of September 11, 2004." Sharon contrasts these statements with another passage in the statement of decision where the court stated: "Upon taking over Trustee responsibilities at the time of her mother's stroke *and subsequent death,* Sharon had an obligation to oversee the trust in keeping with her parents' intentions . . . ." (Italics added.) Although we do not agree that the highlighted words in this last statement demonstrate an ambiguity in the statement of decision as to when Sharon became trustee, another passage in which the court stated that Sharon "became the primary Trustee upon the incapacity or death of Joyce," arguably is ambiguous on the question of whether the court found that Sharon was a trustee both before and after Joyce's death, starting from the time of her stroke.

Even assuming, however, that the statement of decision is not ambiguous on this question, we nonetheless find problematic the court's conclusion that Sharon became trustee after Joyce's stroke because, as Sharon puts it, even if the court did in fact find that she became the trustee before Joyce's death, "no evidence was presented nor was any cited by the court that Sharon knew the trustee mantle had devolved upon her as of that moment despite [the fact] that Joyce was alive, albeit comatose, for another ten days."

In support of this argument, Sharon cites section 15600, which provides in relevant part: "(a) The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods:

"(1) Signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance.

"(2) Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified . . . ."

In the statement of decision, the court found that Sharon was acting as trustee when she wrote the $60,000 check to Jacob and Amy, under the terms of the trust providing that she would become trustee in the event of Joyce's incapacity. In her objections to the proposed statement of decision, Sharon challenged the court's findings as they related to the $60,000 check on the ground that the court had "not set forth a factual explanation to support such an award" and, as already noted, that the court had failed "to factually establish the actual date and circumstances that [Sharon's] duties as trustee for the Frye Trust commenced." Although she did not specifically object on the ground that the court failed to explicitly find that she *knowingly* exercised her trustee powers under the trust, we find that her objections were sufficient to apprise the court of the need to further explain the factual basis of its finding that Sharon took over as trustee when Joyce became incapacitated. (See § 15600, subd. (a)(2); *Uzyel*, *supra*, 188 Cal.App.4th at p. 896 ["To bring an omission or ambiguity to the trial court's attention for purposes of Code of Civil Procedure section 634, a party must identify the defect with sufficient particularity to allow the court to correct the defect"]; accord, *Ermoian*, *supra*, 152 Cal.App.4th at p. 498.) Accordingly, we will not infer that the court decided in favor of respondents on the question of Sharon's knowledge.

Respondents argue that even if Sharon was not officially a trustee when she wrote the $60,000 check, " ' "[i]t is a well settled rule in the law of trusts that if a person not being in fact a trustee acts as such by mistake or intentionally, he thereby becomes a trustee *de son tort*. . . . The principle to be extracted from the cases is that the party acting as trustee shall not be allowed, in a court of justice, to set up, as against parties interested in the administration of the trust, a state of things inconsistent with his assumed character." ' [Citation.]" (*King v. Johnston* (2009) 178 Cal.App.4th 1488, 1505-1506 (*King*), quoting *England v. Winslow* (1925) 196 Cal. 260, 267-268.) The *King* court noted that Black's Law Dictionary had defined trustee *de son tort* as " '[a] person who, without legal authority, administers a living person's property to the detriment of the property owner.' (Black's Law Dict. (8th ed. 2004) p. 1554, col. 1.)" (*King*, at p. 1505, fn. 16.)

In this case, the court found no evidence "that Sharon intended a fraudulent transfer to Jacob," but instead found that Sharon, Jacob, and Amy were confused as to whether the $60,000 was a cash advance on the $300,000 loan. Nor did the court find that Sharon was "a person not being in fact a trustee," who "act[ed] as such by mistake or intentionally," thereby becoming a trustee *de son tort*. (*King*, *supra*, 178 Cal.App.4th at p. 1506.) Instead, it found that she was liable for a breach of trust, having already assumed trustee duties after Joyce's stroke. The court found no other basis for liability, except as the actual trustee, and we decline to imply such a basis now.

In sum, the evidence shows that Sharon, as Joyce's daughter, followed Joyce's instructions to write a check to Jacob and Amy from one of the US Bank accounts once the Ironwood property sale proceeds were deposited, despite perhaps not understanding or communicating to Jacob the nature of the transfer. Therefore, in light of Sharon's objections and the court's failure to clarify the factual basis for its finding that she was trustee at the time she wrote the check, the court's finding that Sharon had not overcome the presumption that she, *as trustee*, acted to the benefit of Jacob and against the settlors' interests when she made the transfer is not supported by substantial evidence. (See *Ermoian, supra,* 152 Cal.App.4th at p. 501.)

V. *The US Bank Accounts*

Sharon contends the court improperly found that she had breached her duties as trustee when she used money from the joint US Bank accounts for purposes other than caring for Austin and maintaining trust assets.[21] She further contends that even if the bank accounts were trust assets, the court improperly found that she failed to properly account for credit card charges and ATM and other bank withdrawals, and arbitrarily found that she owed the trust restitution for 60 percent of the credit card charges and 50 percent of the cash withdrawals. She also claims the court improperly found that she had to repay the trust $12,562.73 for her half of the sunroom addition on the Paddock property.

In its statement of decision, the court found that, although Joyce and Austin failed to inform the bank that the joint accounts had become trust assets, section 1.03 of the trust and Schedule A, which listed trust assets, were "dispositive to the character of the bank accounts," transmuting them to community property and transferring them to the trust. Schedule A contained a list of "Community Property Trust Assets," which included the US Bank accounts. Other sections of Schedule A listed "Community Property Assets Held Outside of the Trust" as well as "Separate Property Assets of Joyce Eileen Alys Frye Held Outside of Trust." In addition, section 1.03(a) of the trust provided: "**Initial Funding of Our Trust**[:] By executing this agreement, we hereby transfer, convey, and assign to our Trustee the property described in the attached schedule."

The court found that "Sharon failed to fulfill the terms of the Trust by taking ownership of the two accounts she held jointly with Joyce and, additionally, by failing to

[21] There is no suggestion that Sharon contributed any of the funds in the joint bank accounts. (Cf. § 5301, subd. (a) ["An account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each, unless there is clear and convincing evidence of a different intent"].)

treat the three remaining accounts as trust assets." According to the court, "[u]pon Joyce's death, Sharon had an obligation to include the accounts in an accounting for purposes of funding the survivor's and Creditor's trust, or, at a minimum, seeking guidance from the court about doing otherwise. [¶] Insufficient evidence was put forth to demonstrate that Austin, as the surviving Settlor, authorized the removal of the bank accounts from the Trust. As such, Sharon's action in keeping the funds for herself constituted a breach of the duty owed to Austin to keep the funds separate from her own and to be held for Austin's benefit. (§§ 16200, 16400.) Evidence that Sharon was acting with advice of counsel goes to intent and good faith, but does not change the fact that the money was not hers."

The court therefore found that Sharon was required to repay the trust for the following expenditures from the US Bank accounts: (1) $12,562.73 that was used to pay for her half of the sunroom addition to the Paddock property; (2) 60 percent of the total of $137,874.57 in credit card charges, which the court found were "inappropriate and/or not properly accounted for and charged in breach of Sharon's fiduciary duties"; and (3) 50 percent of the total of $39,617.06 ATM and other cash withdrawals, which the court also found to be "inappropriate and/or not properly accounted for and charged in breach of Sharon's fiduciary duties."

A. *The US Bank Accounts Were Trust Assets*

Section 5302, which the court utilized to determine the character of the US Bank accounts, provides in relevant part: "(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent." Sharon argues the court reversed section 5302's evidentiary presumption that the sums remaining on deposit after the death of Joyce and Austin belonged to Sharon unless a different intent was shown by clear and convincing evidence.

The court's "construction of the Probate Code is subject to our de novo review." (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1124 (*Araiza*).) Likewise, " '[t]he interpretation of a written instrument, including a . . . declaration of trust, presents a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein.' " (*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 168.) In addition, "[f]actual issues may be reviewed de novo when the facts are uncontroverted and only one deduction or inference may reasonably be drawn. [Citations.]" (*Ermoian*, *supra*, 152 Cal.App.4th at p. 501.)

In *Araiza*, *supra*, 188 Cal.App.4th at p. 1125, the appellant, who had previously been designated the sole beneficiary of the decedent's savings account under a Totten Trust, contended she remained the sole beneficiary because the decedent had taken no action to change the beneficiary, pursuant to one of the methods for changing the beneficiary of a multiple party account listed in section 5303. (*Araiza*, at p. 1125.)[22] The appellate court rejected this argument, explaining that "[t]his narrow reading of the statute . . . fails to harmonize it with section 5302. Section 5302, subdivision (c)(2) provides that sums remaining on deposit in a Totten trust after the death of the sole trustee belong to the person named as beneficiary, 'unless there is clear and convincing evidence of a different intent . . . .' Here, although the signature card for the savings account named appellant as the beneficiary, there is clear and convincing evidence that [the decedent] had a 'different intent' at the time of her death. She established a living trust that expressly stated her intention to give the savings account to [a trust beneficiary]. The trial court properly relied on the living trust to find that [the decedent] intended to change the beneficiary of her Totten trust from appellant to [the trust beneficiary]. Because the change was made by a living trust rather than by a will, it is not invalidated

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[22] " 'The term Totten Trust describes a bank account opened by a depositor in his [or her] own name as trustee for another person where the depositor reserves the power to withdraw the funds during his [or her] lifetime. If the depositor has not revoked the trust then, upon his [or her] death, any balance left in the account is payable to the beneficiary.' [Citations.]" (*Araiza*, *supra*, 188 Cal.App.4th at pp. 1124-1125.)

Under section 5302, where the multiple-party account is a Totten trust, "[o]n death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent. . . ." (§ 5302, subd. (c)(2).)

by section 5302, subdivision (e) [which provides that rights of survivorship ' "cannot be changed by will"].' " (*Araiza*, at pp. 1125-1126.)

We do not agree with Sharon that the court in this case reversed the presumption in section 5302, subdivision (a) that the money in the joint accounts belonged to Sharon, upon the death of first Joyce and then Austin, absent clear and convincing evidence of a different intent. Instead, the court correctly found that, as in *Araiza*, Joyce and Austin's description of the US Bank accounts as trust assets in Schedule A of the trust, together with the trust provision that transferred certain community property described in schedule A to the trustee of the trust, demonstrated, by clear and convincing evidence, their intent for these accounts to become trust assets, under a broad reading of section 5302, subdivision (a). (See *Araiza*, *supra*, 188 Cal.App.4th at pp. 1125-1126.) Because, under the provisions of the trust, none of these bank accounts belonged to Sharon at the time she made the contested expenditures, the court properly found that her failure, as trustee, to segregate and account for use of these trust funds, together with her use of the funds for purposes that did not benefit Austin, violated her duties as trustee and constituted a breach of trust.[23] (See §§ 16002, 16004, 16009, 16400, 16060; see also *Araiza*, *supra*, 188 Cal.App.4th at p. 1124; *Scharlin v. Superior Court*, *supra*, 9 Cal.App.4th at p. 168; cf. *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 623, 625 [daughter who acted as trustee of mother's trust had no right to withdraw joint account funds for personal use where their source was mother's trust].)

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[23] That Joyce and Austin never changed the signature cards to reflect that the bank accounts belonged to the trust, does not change the fact that their clear intent, as set forth in the trust instrument, was for those accounts to become trust assets. (See § 5302, subd. (a).) Moreover, that Sharon "had previously written checks on the bank accounts at Joyce and Austin's direction," as Sharon points out, does not demonstrate that Joyce, Austin, or Sharon considered her an owner of the accounts. Finally, Joyce's purported statement, testified to by Sharon, that she would change the account designations to the trust "when she was ready," was not, as the court found, sufficient "to counter the clear intention of the Settlors as expressed in the Trust to have the bank accounts treated as Trust assets."

Sharon further argues the court unfairly held her "to a 'should have known' standard," despite the fact that she relied on advice of counsel when she acted in keeping with Haskett's opinion that the bank accounts were not part of the trust. She cites subdivision (b) of section 16440, which provides that "[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 breach of trust] if it would be equitable to do so." The court found that after Joyce's death, Sharon was obligated to include the bank accounts in an accounting for purposes of funding the Survivor's and Creditor's trusts, "or, at a minimum, seek[] guidance from the court about doing otherwise." While the court also found that Sharon acted with advice of counsel, which went to her good faith, it concluded that her good faith "does not change the fact that the money was not hers."

As the court explained in *Uzyel*, *supra*, 188 Cal.App.4th at page 905: a trustee "is strictly prohibited from engaging in transactions in which the trustee's personal interests may conflict with those of the beneficiaries without the express authorization of either the trust instrument, the court, or the beneficiaries. [Citations.] It is no defense that the trustee acted in good faith . . . ." The court in this case was not required to exercise its discretion to excuse Sharon from liability for her breaches of trust based on her good faith. (See *ibid.*; § 16440, subd. (b).)[24]

B. *Credit Card Charges and ATM and Other Cash Withdrawals by Sharon*

Sharon contends the court (1) incorrectly found that Austin did not consent to the US Bank transactions, and (2) applied arbitrary percentages to determine restitution

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[24] The court did take Sharon's good faith into account with respect to its imposition of prejudgment interest when it excused interest for all damages not related to the transfers associated with Jacob or from the Morgan Stanley account for payment of her attorney fees. (See § 16441, subd. (b) ["If 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 prejudgment interest] if it would be equitable to do so"].)

damages for the credit card charges and cash withdrawals it determined constituted breaches of the trust.

Sharon first argues that the court improperly found her liable for credit card charges and cash withdrawals to which Austin consented. In making this argument, Sharon notes the court found that Austin was competent to participate in trust decisions until his death and found against respondents on their elder abuse claims. That does not mean, however, that the court found Austin was aware of or approved of all of Sharon's conduct, particularly given Sharon's position that some of the money in the bank accounts became hers following Joyce's death and her failure to provide Austin with an accounting of her expenditures. Moreover, even to the extent Austin consented to any of these transactions, Sharon could still be liable for a breach of trust if "the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary." (§ 16463, subd. (c); see also subd. (b)(2) & (3) [consent of beneficiary does not preclude beneficiary from holding trustee liable for breach of trust where beneficiary at time consent was given did not know of his or her rights and of material facts that trustee knew or should have known and that trustee did not reasonably believe that beneficiary knew, or where consent of beneficiary was induced by improper conduct].) Indeed, the court noted that its competency finding did not "provide a safe harbor for questionable financial actions by Sharon acting as Trustee," and further found "that Austin was susceptible to undue influence based on his reliance on Sharon and the trust he reposed in her for all things financial."[25]

[25] The court further explained in its statement of decision, "[t]he evidence showed that Austin was probably not capable of undertaking trustee duties for a number of reasons" following Joyce's death. "Witnesses testified that during Joyce's lifetime, Austin deferred to Joyce in all financial matters, which likely impacted his overall financial literacy. The evidence also demonstrates that Austin suffered from long-standing severe diabetes, suspected Amyotrophic Lateral Sclerosis (ALS), and dementia that would vary in severity based on medication and life stressors. . . ." In addition, Austin's medical records reflected his doctor's observation that he was the type of patient "at a high risk for manipulation by outside interests."

Substantial evidence supports the court's findings that Austin did not meaningfully approve of or consent to the expenditures and withdrawals in question and that his competency did not provide a "safe harbor" for any financial acts on Sharon's part that were not fair and reasonable to him. (See § 16463, subd. (c); *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500–501.)

Sharon also argues that substantial evidence does not support the court's determination of the percentage of credit card charges and cash withdrawals she was required to repay because it failed to explain and identify exactly which transactions it had determined were or were not authorized by Austin. The court ruled on the credit card charges totaling $137,874.57, as follows: "The court heard detailed testimony on these charges as well as reviewed exhibits admitted setting forth the charges at issue. The court finds that 40% of these charges were appropriate to the Trust. The balance of the charges is found to be inappropriate and/or not properly accounted for and charged in breach of Sharon's fiduciary duties." The court ruled identically on the ATM and other cash withdrawals totaling $39,617.06, except it found that 50 percent of the withdrawals were appropriate to the trust.

We conclude substantial evidence supports the court's calculation of the amounts Sharon was required to reimburse the trust for unauthorized expenditures. (See *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500–501.) The court explained that it had reviewed detailed testimony and exhibits related to this question, which involved an extremely large number of transactions. In light of this statement, Sharon's claim that the court imposed "arbitrary percentages lacking any evidentiary basis whatsoever," is

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The court also addressed application of the presumption of breach of trust that affects the burden of proof applicable to any self-interested transactions under section 16004: "Even though the court finds that Austin was competent throughout Sharon's term as Trustee, Sharon's burden of proof under the Probate Code remains high. In fact, Austin's health challenges in combination with his underdeveloped financial literacy are more appropriately viewed as *raising* the evidentiary bar for demonstrating that a Trustee's self-regarding acts were communicated, understood and approved by the Settlor."

unpersuasive. The record reflects that there was extensive documentary evidence—including credit card statements, bank statements, and other documents addressing the various expenditures—as well as a great deal of testimony—by Sharon, her husband Gary, and Kevin—about the credit card expenditures and bank withdrawals, from which the court could reasonably find that some transactions went far beyond caring for Austin's needs.

In just one example, the evidence showed that $71,240.86 was spent on improvements and repairs to the Paddock property, which Sharon was to receive at Austin's death under the terms of the trust. There were also large payments for vacations, as well as for travel and other expenses related to the college graduation of Sharon's daughter. Although Austin went on most of these trips, the trust apparently paid the travel expenses for Sharon's family as well. The trust also paid for plane trips home from college for Sharon's daughter because, according to Sharon, Austin wanted to see his granddaughter. The trust paid gym membership dues for Sharon as well.

Regarding the ATM and other cash withdrawals, Kevin testified that he did not believe Austin even knew how to use an ATM and that he had trouble using his fingers due to his illness, while Gary testified that Austin used $10 a week in bank withdrawals to pay for lottery tickets. Gary had never seen Austin use an ATM machine. Sharon testified that she withdrew between $40 and $100 in cash per month from the US Bank accounts for Austin's use. There were, however, over $39,617 in cash withdrawals from those accounts between Joyce's death in 2004 and Austin's death in 2009. The rest of these withdrawals were not fully explained.

Given that it was Sharon's failure to treat the US Bank accounts as trust assets and properly account for all of these transactions (see §§ 16060, 16062, 16063 [trustee has duty to report and account at least annually]) that caused any confusion in determining which expenditures and withdrawals were appropriate to the trust, the court reasonably reviewed the available evidence and determined the applicable percentages.[26] Nor has Sharon pointed to specific evidence showing that the particular transactions in question were made for the benefit of the trust.[27] Reviewing the evidence in the light most favorable to the trial court's judgment, we find the evidence sufficient to support the court's findings. (See *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500–501.)

Finally, after Sharon and Austin agreed that each would pay for 50 percent of the sunroom addition to the Paddock property, Sharon paid her share from one of the US Bank accounts. As with Sharon's other personal expenditures from those bank accounts, which belonged to the trust, the court reasonably found that Sharon was required to repay the trust $12,562.73 for her share of the sunroom expense. (See *Ermoian*, *supra*, 152 Cal.App.4th at pp. 500–501.)

VI. *Court's Award of Attorney Fees to Kevin*

Sharon contends that because respondents did not prevail on their elder abuse claims and the facts of those claims overlapped with the other allegations in the petition, "it was improper to award fees to [Kevin] or to not at least apportion the fee award to reflect the intent of Welfare and Institutions Code § 15657.5," subdivision (a), which provides for an award of attorney fees to a plaintiff who prevails on a cause of action alleging financial abuse of an elder adult.[28]

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[26] Sharon does not dispute that she failed to provide Austin with an annual accounting, which, under the terms of the trust, was to include "the receipts, disbursements, and distributions occurring during the accounting period and a balance sheet of the trust property."

[27] While Sharon's expert did testify that the credit card expenditures he examined from both before and after Joyce's death do not reflect any significant change in amounts spent other than a spike in spending for work done on the Paddock property and a rental house shortly before Austin's death, as discussed, the court's findings regarding the percentage of expenditures that were not made for Austin's benefit were reasonable in the circumstances, especially given that after Joyce's death, she obviously was no longer using any of the money in the accounts.

[28] Sharon did not challenge the amount of attorney fees below, and does not attempt to do so on appeal.

The court found that respondents were the prevailing parties under Code of Civil Procedure section 1032 and awarded Kevin $440,000 in attorney fees. The court observed that it had found in favor of respondents on their claims related to accountings and breach of trustee duties, and against them on the elder abuse claims. The court stated that, "[b]ased on the circumstances of this case and the authority to exercise broad equitable powers in the probate court, the court awards attorneys' fees to Kevin using the common fund approach, which results in a charge against the entirety of the Trust res. Funds remaining after attorneys' fees are paid will be distributed according to the terms of the Trust." The court further "acknowledge[d] that as a result of application of the common fund, Kevin will bear a proportionate burden related to attorneys' fees. The court finds this result just and appropriate not based on any one factor and not because any claim was patently or impliedly inappropriate, e.g., the Elder Abuse claims. The court finds this result just because so much 'cost' associated with this litigation—financial, familial, and court resources—could have been minimized by acting sooner and while Austin was still alive."

"California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees. [Citations.] . . . The Legislature has since enacted several statutory exceptions to the American rule, and [our Supreme Court has] relied on [its] 'inherent equitable authority' to develop three additional exceptions," including the common fund theory of recovery. (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.)

The common fund doctrine, on which the court in this case based its fees award, "is based on the principle that 'where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund.' [Citation.] The purpose of the doctrine is to allow a party, who has paid for counsel to prosecute a lawsuit that creates a fund from which others will benefit, to require those other beneficiaries to bear their fair share of the litigation costs. [Citation.] In other words, the common fund doctrine permits plaintiffs' attorneys to recoup their fees from the fund." (*Northwest Energetic Services, LLC v. California Franchise Tax Board* (2008) 159 Cal.App.4th 841, 878; accord, *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.)

"Compensation of an attorney from a common fund is an equitable doctrine and its application depends upon all of the circumstances of the case. [Citation.] Whether to grant or deny such an award depends largely on the discretion of the trial court whose decision should not be reversed unless that discretion was abused. [Citation.]" (*Estate of Ott* (1979) 99 Cal.App.3d 605, 614.)

Sharon has not cited to, and we have been unable to find, any argument in her opposition to the motion for attorney fees filed in the probate court related to the alleged impropriety of awarding or at least not apportioning fees due to respondents' failure to prevail on the overlapping elder abuse claims. Her failure to raise the issue below forfeits it on appeal. (See, e.g., *Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1192 [where defendant did not request that trial court apportion fees, appellate court refused to consider issue on appeal].)

In addition, as the court explained, with an award of attorney fees based on the common fund doctrine, Kevin must bear a proportionate burden with respect to the fees awarded, which the court found equitable in light of the totality of the circumstances. Even were the issue preserved on appeal, we would conclude the court's award was reasonable in the circumstances and, hence, there was no abuse of discretion. (*Estate of Ott*, *supra*, 99 Cal.App.3d at p. 614.)[29] Moreover, although we have found the court improperly held Sharon liable for the $60,000 check she wrote to Jacob and Amy, that

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[29] The case cited by Sharon on this issue, *Wood supra*, 151 Cal.App.4th 1186, is distinguishable. There, the appellate court held that a *defendant* who successfully defended an action that included an elder abuse claim was not entitled to attorney fees where all causes of action arose from the same transaction. (*Id.* at p. 1188.) The court relied on *Carver v. Chevron U.S.A., Inc*. (2004) 119 Cal.App.4th 498, 504, in finding that to permit recovery of fees of a prevailing defendant would create a "judicially imposed reciprocity" not intended by the Legislature. (*Wood*, at p. 1191.)

finding does not change our conclusion, given that the remaining benefit to the trust totaled $544,012.

DISPOSITION

We shall reverse the court's order that Sharon reimburse the trust $60,000 for the check she wrote to Jacob and Amy. In all other respects, the judgment and attorney fees order are affirmed. The parties shall bear their own costs on appeal.

Kline, P.J.

We concur:

Stewart, J.

Miller, J.

Frye et al. v. Collins et al. (A143623)