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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SARA MARGARET LOWE,	
Plaintiff and Appellant,	E053071
v.	(Super.Ct.No. RIP094879)
ROBERT CHRISTIAN HOLK,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Daniel A. Drummond for Plaintiff and Appellant.

Dabney Finch for Defendant and Respondent.

Sara Margaret Lowe (Margaret) petitioned the probate court (1) to remove Robert Christian Holk (Chris)[1] as the trustee of the Herbert C. Holk and Sara P. Holk Living Trust dated November 30, 2004 (the trust); (2) to appoint a replacement trustee; (3) review the reasonableness of Chris's compensation as trustee; (4) to compel an accounting by the trustee; and (5) for other relief the court deemed appropriate. Margaret alleged that Chris (1) failed to preserve trust property and make the property productive (Prob. Code, §§ 16006, 16007);[2] (2) had a conflict of interest with the trust property (§ 16004); (3) failed to provide an accounting to the trust beneficiaries (§§ 16061, 16062); (4) failed to provide notice to beneficiaries as required by the Probate Code (§ 16061.7); and (5) proposed excessive compensation for himself. The probate court ordered Chris be surcharged for some items, but that he not be surcharged for others. The total surcharges against Chris amounted to $141,675.58.

Margaret contends the probate court erred by (1) denying a surcharge for five parcels of real property that lost value; (2) miscalculating the surcharge for lost rents as to two parcels of real property; (3) denying a surcharge for Chris's personal use of one parcel of real property; (4) allowing Chris to value one parcel of real property at its 2007 value, as opposed to its distribution date value; (5) denying a surcharge for using

[1] We use first names for the sake of clarity, because some people involved in the case share the same last name; no disrespect is intended. Sara Margaret Lowe is known as Margaret, and was referred to as Margaret in the probate court, therefore, we use "Margaret" in this opinion; Robert Christian Holk was known as Chris, and was referred to as Chris in the probate court, therefore, we use "Chris" in this opinion.

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

trust funds to pay Chris's attorney fees and costs; and (6) denying Margaret an award of her attorney fees and costs. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. TRUST

Herbert C. Holk (Father) and Sara P. Holk (Mother) had three children: Margaret, Chris, and George Plant Holk (Buck) (collectively referred to as "the children").[3] Mother and Father were trustees of the trust. The children were beneficiaries of the trust. The trust held various assets, including seven parcels of real property: (1) 14115 Pear Street, Riverside (Pear Street); (2) 18979 Berry Road, Riverside (18979 Berry); (3) 18985 Berry Road, Riverside (18985 Berry); (4) 7496 Lincoln Avenue, Riverside (Lincoln); (5) 68-665 Hermosillo Road, Cathedral City (Hermosillo); (6) 4401 Tolenas Avenue, Fairfield (Tolenas); and (7) 616 Powderhorn Avenue, Santa Rosa (Powderhorn). The trust held a checking account, money market account, credit union account, life insurance fund, vehicles, and other tangible personal property; however, the real estate created most of the wealth for the trust. There were no mortgages on the real property assets. There was also an eighth parcel of real property in Alabama that Mother held outside of the trust, but which should have been moved into the trust upon Mother's death.

[3] George Plant Holk was known as Buck and was referred to as Buck in the probate court; therefore, we use "Buck" in this opinion. Although we use the collective reference "children," it is only for clarity—the "children" were born in the 1940s and 1950s.

Father died on January 31, 2005. After Father's death, Chris became a cotrustee of the trust. Margaret expressed concern to Mother about Chris becoming a cotrustee because Chris "tended to procrastinate, and [Margaret] was concerned that the terms of the trust would be followed expeditiously." Margaret had initially been named as cotrustee, but was removed prior to Father's death because she was in the military and could be deployed. In April 2005, Margaret asked Chris to step aside as cotrustee, but Chris refused.

Mother died on September 30, 2007. Chris became the sole trustee upon Mother's death. In regard to the real property, the trust provided, "We recognize that the real property may not be divided equally, so we leave it to a majority of our children to decide how our property shall be divided if there is a dispute among them, keeping in mind that it is our direction that they shall divide the property as evenly as possible." If the youngest of the children reached the age of 40 years, then each child could request an unlimited distribution of his or her share of the trust principle.

B. 18979 BERRY ROAD, RIVERSIDE

In 2007, at the time of Mother's death, 18979 Berry was valued at $655,000. Chris had lived in the 18979 Berry house for 25 years. During those 25 years, Chris paid the property tax and insurance for the property, as requested by Mother, but he did not pay rent. Chris had "no idea" what the rental value of the property might be. A rental market analysis presented by Margaret's witness reflected that 18979 Berry had a monthly rental value in 2010 of $2,800. On February 5, 2009, 18978 Berry was transferred from the trust to Chris, via a quitclaim deed. The deed was recorded on February 24, 2009.

At one point, Margaret told Chris he should be paying $500 per month in rent for the property. In response, Chris threw $1,200 down on a table, in order "to shut her up." Chris testified that Margaret ultimately agreed he could live at 18979 Berry for the cost of property tax and insurance. Chris used money from the trust to pay the property tax and insurance. Chris reimbursed the trust for some of the tax and insurance money, but he "still owe[d] a little bit."

C. 18985 BERRY ROAD, RIVERSIDE

In 2007, 18985 Berry was valued at $175,000, and consisted of a .49-acre undeveloped lot; it was immediately adjacent to 18979 Berry. There was not a fence separating the two parcels, and the undeveloped lot was only accessible through Chris's property (18979 Berry). When Father was alive, the undeveloped property was used for maintaining horses. Chris owned two unbroken horses, which he could not control, but he stated that they did not go onto the undeveloped property. In October 2010, Margaret visited the undeveloped lot and found "trails around the lot" and "horse droppings."

In September 2010, 18985 Berry had an appraised value of $35,000. The property was listed for $85,000 in May 2010. At the time of trial, in October 2010, Chris had found a potential buyer for the undeveloped property; however, Chris rejected the buyer's offer of $88,000. Chris wanted to purchase the property himself for $90,000. Chris stated that Buck did not object to Chris paying $90,000 for 18985

Berry. Margaret was skeptical that someone would want to pay nearly two and one-half times the appraised value of a parcel of property. A rental market analysis reflected that the undeveloped lot had a monthly rental value of $200.

D. 68-665 HERMOSILLO ROAD, CATHEDRAL CITY

At the time of Mother's death in 2007, Hermosillo, was valued at $350,000. Buck's family lived in the Hermosillo house; the property was transferred from the trust to Buck, via a quitclaim deed, on February 5, 2009. The deed was recorded on February 24, 2009. During the period between Mother's death and the quitclaim deed, it appeared that Buck did not pay rent on the property. Chris did not determine the fair market rental value of Hermosillo during that 16-month period from 2007 to 2009. A rental market analysis, provided by Margaret's witness, reflected a monthly rental value in 2010 of $1,800.

E. 616 POWDERHORN AVENUE, SANTA ROSA

Margaret did not live at one of the trust properties; however, Margaret's daughter, Michelle, lived in the Powderhorn house. Powderhorn was valued at $507,000 in September 2007. "[A]t some point," Michelle moved out of the Powderhorn residence, but there was a hole in a ceiling, feces or urine on the garage floor, and missing "knobs." After repairs were made, the property was listed to rent at $2,100 per month. It was eventually rented in November 2008 for $1,350 per month.

On February 5, 2009, Chris transferred Powderhorn from the trust to Margaret, via a quitclaim deed. The deed was recorded on July 28, 2009. Chris did not recall informing Margaret of the deed's existence during the five months between signing the deed and recording the deed. A letter dated September 23, 2009, from Chris to Margaret, informed Margaret that Powderhorn had been distributed to her. In October 2009, Margaret became aware that the property was transferred to her.

Initially, Margaret rejected Powderhorn, because she did not know if it was occupied by a renter, if there was insurance on the house, or if the taxes had been paid. Eventually Margaret began depositing the trust checks that accounted for the rent money on the property. Margaret only received rent beginning in August; she did not receive rent from February through July 2009. Margaret sold Powderhorn in July 2010, because she did not want to be "an absentee landlord"; Margaret lives in Texas. Margaret spent between $14,000 and $17,000 repairing the house, and preparing it for sale. Powderhorn sold for "$330,000 with a $10,000 credit to the buyers." Margaret stated that if she had received the property in 2007, close in time to Mother's death, then she would have sold it in 2007 or shortly thereafter.

F. <u>14115 PEAR STREET, RIVERSIDE</u>

In September 2007, Pear Street was worth $550,000. Mother and Father resided at Pear Street prior to their deaths. Buck resided at Pear Street from the time of Mother's death until December 2008—a little over one year. According to Chris, Margaret "insisted" that Buck live in the residence, in order "[t]o prevent the items in the house from disappearing"—the backyard of the house was an iris farm, and the iris stock was valued at $15,000. Buck wanted to live in the house for the same reason—Buck was a member of the Iris Society; however, he did not want to live apart from his family, who lived in the Cathedral City house. According to Margaret, she "suggested" that Buck live at Pear Street, because Buck had promised Mother that he would take care of the irises.

Pear Street was approximately one-quarter of a mile away from Chris's property on Berry Road. Buck did not pay rent while residing at Pear Street. Chris did not determine the fair market rental value of the property while Buck was residing at the property. The trust paid for the utilities at Pear Street while Buck was residing there. Chris did not consider the utility payments to be a contribution to Buck, because Buck did not want to be away from his family. Chris canceled the cable television at the property after two months, because he did not believe it was "a viable trust expense." Chris stated that the trust also paid for Buck's telephone bill, because Margaret insisted Buck have a telephone. Buck had a medical condition that caused periodic blackouts; Margaret wanted Buck to have a telephone so she could check on his medical issues and the property. Margaret did not recall discussing a telephone with Chris.

Chris did not attempt to rent Pear Street after Buck moved out, because Buck left "a lot" of his personal property in the house due to his health issues. Mother's and Father's personal property was also stored in the house. Chris said that he had "not heard hide nor hair from either Buck [or] Margaret" so he could not go through Mother's and Father's belongings, since they were supposed to do it together. Chris also had been storing his 1961 Mercedes at Pear Street for approximately 30 years. Chris explained that the plan was to sell Pear Street, not to rent it. Nevertheless, Chris considered renting the property, but was not sure how he could do so with the backyard iris farm. Chris explained, "It's a question of, okay, you can rent the house but don't go to the backyard." Chris felt the iris farm in the backyard needed to be preserved, since it was a trust asset. A rental market analysis presented at trial showed that in 2010, Pear Street had a monthly rental value of $2,300.[4]

Chris listed Pear Street for sale in May 2010. In September 2010, Pear Street had an appraised value of $280,000. At the time of trial, in October 2010, Pear Street was in escrow; the accepted price was $330,000. Chris agreed that for approximately two years Pear Street was vacant, and during that time it lost $220,000 of its value.

In order to prepare the house for sale, Chris held three yard sales to sell Mother's and Father's personal property. Chris estimated he received a total of "less than $200" from the yard sales. Chris explained, "[A] lot of the stuff" did not sell. Chris did not inform Margaret of the yard sales, and did not consider that she might want some of Mother's and/or Father's personal property. Chris explained he contacted Margaret in 2008 about going through Mother's and Father's property, but she did not follow up with him about scheduling a time to meet. Margaret stated she did not schedule a time to meet with Chris because she was waiting for him to provide her with an inventory of the personal property and appraisal values. Margaret explained Mother had "a tremendous amount of silver[,] Fostoria crystal[,] bone china, Bavarian china, Noritaki china[, and] paintings."

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[4] The reporter's transcript refers to 14115 Berry Road. Due to the exhibit reference, we infer that this is an error, and the property being discussed is Pear Street.

G. 7496 LINCOLN AVENUE, RIVERSIDE

In September 2007, Lincoln was valued at $310,000. Lincoln was rented at $700 per month to an employee of the family who helped maintain Pear Street. The renter did not speak English, but had a verbal lease arrangement with Father. The renter believed that the rent was associated with the number of people residing in the house; therefore, there were times when the renter paid only $300 or $500 per month, based on the number of people at the house. Chris evicted the renter around January 2009 or 2010, due to the discrepancies in the rent payments. After the renter was evicted, "the only thing that occupied [the house] was cockroaches."

Lincoln was never listed for sale, but Chris received a card in the mail from a person interested in buying the property. When Chris received the offer, he had Lincoln reappraised, and was told the house "needed to be demolished, it was not worth saving."[5] The reappraisal value was $55,000; the house suffered from dry rot and termite damage. Chris did not attempt to find other potential buyers for the property. The offer card was sent by Mr. Skalla, and he made an offer, but "then in the process of purchasing the offer Mr. Lum ended up buying" the house. Lincoln ultimately sold for $55,000 in 2010, with $300 being used for property taxes.

Chris did not inform Margaret that he would be selling Lincoln for $55,000. Chris did not offer Lincoln to Margaret, because Margaret "was not interested in

[5] The original appraisal, valuing the property at $310,000, was a "drive-by" appraisal, which involved looking at the outside of the house and making the "extraordinary assumption" that it was in marketable condition.

property[,] she was interested in money." Margaret testified that she would have liked the opportunity to purchase Lincoln for $55,000, so that she could fix it and resell it for a profit. Chris did not offer Lincoln to Buck because "Buck is not in a position to purchase anything." After the sale for $55,000, the property was resold, or "flipped," three months later for $144,000.

H. ALABAMA PROPERTY

The Alabama property consisted of 40 acres of partial timberland. Mother inherited the Alabama property around 1958. Mother held the property outside of the trust; however, she had a "pour over will" that required the Alabama property be moved into the trust. Mother designated Chris as her personal representative in her will. Chris explained that, in order for the Alabama property to be moved into the trust, Mother's will needed to go through probate in California, then he would need to take a document to Alabama showing that probate was completed in California, "pay an exorbitant fee to the state of Alabama, in excess of a thousand," and then go though the probate process in Alabama.

The plan for the Alabama property has always been to transfer it to Buck. Chris planned to circumvent the probate process by using deeds. The Alabama property deed may have an addendum that designated the children as heirs of the property. Chris explained that when a person died, then the property goes to the heirs. So once the property transferred to the heirs, then Margaret and Chris would transfer their interests in the Alabama property to Buck, via a warranty deed or grant deed.

An attorney, Mr. Murphy, sent the warranty deed to Chris. Chris signed his portion of the deed and sent it to Margaret, along with $5 for consideration. Chris said he had previously discussed the deed arrangement with Margaret, so he did not discuss it with her again before mailing the deed. Chris said Margaret had agreed to sign over her interest in the property to Buck. However, Margaret testified she did not intend to sign the deed, because (1) she would incur a gift tax; and (2) she could not attest that she had authority to transfer title, since she had never received a document reflecting she was on the title; Margaret believed a warranty deed guaranteed that the seller had the right to transfer title. Margaret had "no problem" with Buck receiving the Alabama property, but she was concerned with the manner in which he received it.

I. <u>4401 TOLENAS STREET, FAIRFIELD</u>

In 2007, Tolenas was valued at $560,715.[6] Tolenas was rented from September 30, 2007, through June 2008. The property had a variety of damage, such as roof leaks, dry rot, and bathroom plumbing damage. Tolenas was listed for sale in 2009. Buck initially wanted to retain Tolenas for rental income, but Margaret wanted to sell it. When Chris found that it was cost prohibitive to rent the property due to the repairs that were needed, "it was decided to sell the property." Tolenas eventually sold in February

[6] In the reporter's transcript, Chris is questioned about a property at 441 Colinas. We infer from the questions, answers, and exhibit references that "441 Colinas" is a typographical error, and the examination relates to 4401 Tolenas Road. In the reporter's transcript, there is a property referred to as the "Tell property," we infer from the context that this a short reference to 4401 Tolenas Road.

2010 for $340,000. Half the cost of repairing the roof was deducted from the purchase price.

J. BALANCING THE DISTRIBUTION AMOUNTS

Chris was aware that as trustee he was supposed to treat all the beneficiaries equally. Despite Chris distributing the most expensive property to himself, he did not make equalizing distributions to Margaret or Buck—distributions to make up for the difference in the value of the houses they received. Chris intended to sell the properties that were not given to the children, pay the various bills and attorney fees, and then distribute the money to the children so as to balance the distributions, i.e., make-up for the differences in property values. Chris would receive substantially less cash than Margaret and Buck, since the house Chris received was the most expensive.

As of October 2010, Chris had not taken any compensation for his services as the trustee of the trust. Chris believed that he had the discretion to keep trust assets in a nonproductive state. However, Chris explained that he had hoped property values would begin to rise at some point, and then the properties would be sold. Eventually Chris decided to "sell everything off and close this thing out." Chris explained that it became cost prohibitive to wait for the real estate market to improve, because so much money was being spent on legal fees. Margaret had requested a trust disbursement from Chris, but did not receive a response.

Susan Counts (Counts), a retired professional trustee, reviewed the trust and was a witness for Margaret. Counts noticed the trust was "heavily invested in real estate." Counts stated a reasonable trustee would have diversified the trust assets. Counts also stated that if the Alabama property was not part of the trust, it should not be included in the trust accounting.

K. JUDGMENT

The probate court found no "bad faith on the part of the trustee under the Probate Code." The probate court concluded the Alabama property should be part of the trust, but that no damages were proven due to the delay of moving the Alabama property into the trust. Further, the probate court found there was no error in the trust paying the taxes on the Alabama property, because the property would become part of the trust. In regard to the "paper losses on the sales" of Tolenas and Lincoln, the probate court concluded it was "not going to hold [the] trustee responsible for the unprecedented decline in values of California real estate over the past three years." The probate court held that any damages related to the two properties "would be speculative at best." Additionally the probate court found no shortfall in rent for the Lincoln property, because Chris provided a reasonable explanation as to why the rent fluctuated. As to Chris's home at 18979 Berry, the probate court found no additional rent was due, since Chris paid taxes and insurance pursuant to his agreement with Mother.

As to the iris collection, the probate court found Chris did not act reasonably in letting the $15,000 value of the collection decline, and therefore surcharged Chris, as trustee, $15,000. In regard to Buck's utility bills, the probate court found it was "not appropriate" for the trust to be paying those expenses. Thus, the probate court ordered that Chris be surcharged $3,896.75, $963.29, and $178.36, which could be deducted from Buck's share upon distribution. The probate court also found it was improper for the trust to pay Buck's property taxes on Hermosillo after the property had been transferred to Buck. Therefore, the probate court surcharged Chris in the amount of $1,937.18.

As to 18985 Berry, Pear Street, and Hermosillo, the probate court noted a "trustee must make real property productive"; however, the probate court remarked that the trust allows the trustee to hold nonproductive property if doing so is in the best interests of the beneficiaries. The probate court found there was not a showing that holding the three properties in a nonproductive state was in the beneficiaries' best interests. Therefore, the probate court ordered Chris surcharged for lost rents on the three properties: $200 per month for 18985 Berry, $2,300 per month for Pear Street, and $1,800 per month for Hermosillo. The probate court found the three properties could have been rented as of October 2008, and therefore, ordered the surcharge be for 24 months of rent.

The probate court found it was "wrong" for Chris not to immediately notify Margaret that Powderhorn had been transferred to her. The court found Margaret did not suffer damages due to the delayed notice, but did find that she was owed 10 months of rent, at $1,650 per month, and ordered Chris surcharged accordingly. In total, the probate court ordered that Chris be surcharged $141,675.58.

As to attorney fees, the probate court declined to order Chris to reimburse the trust, or surcharge Chris, for the amount of his attorney fees, because the probate court found that Chris's actions were not "the sole or even the primary cause of this litigation." The court declined to order the trust to pay Margaret's attorney fees and costs because (1) it would not be fair to make the beneficiaries, including Buck, bear the burden of the fees; and (2) the "trust would have been administered in its own time without this litigation, although it probably still would have taken too long." The probate court ordered that the trust "be fully distributed forthwith," which meant "within 30 days of the Statement of Decision for all cash assets, and within 30 days of close of escrow on the remaining two pieces of real property, reserving a small amount of the proceeds for exigencies."

DISCUSSION

A. LOSSES IN PROPERTY VALUES

1. *CONTENTION*

Margaret contends the probate court erred by not surcharging Chris for the loss in property values associated with the following properties: (1) Pear Street, (2) 18985 Berry, (3) Lincoln, (4) Powderhorn, and (5) Tolenas. Margaret asserts Chris violated the prudent investor rule (§ 16045, et seq.) by (1) keeping the trust heavily invested in real estate, i.e., not diversifying, and (2) for retaining the real estate assets for too long of a time period. We disagree.[7]

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[7] It is unclear if the prudent investor rule is applicable in this case, because the trust document grants the trustee "sole" and "absolute" discretion in regard to investment powers. (See *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1085 [discussing absolute discretion].) When a trustee is granted "absolute discretion," he is released from the reasonableness standard and is entitled to "speculate, concentrate, buy and sell for appreciation [and] assume large risks." He is only barred from acting arbitrarily or abdicating his judgment. (*Coberly v. Superior Court for Los Angeles County* (1965) 231 Cal.App.2d 685, 689.) Nevertheless, we address Margaret's contentions.

2. *STANDARD OF REVIEW*

As a threshold issue, we address which standard of review we should apply when reviewing the record. Margaret asserts that the independent standard should apply, while Chris contends that the abuse of discretion standard should apply. Contrary to both parties' assertions, when an appellate court reviews a probate court's finding that a trustee did not violate the prudent investor rule, the appellate court applies the substantial evidence standard. (*Estate of Gilliland* (1977) 73 Cal.App.3d 515, 527.) Thus, when reviewing the probate court's finding that Chris did not violate the prudent investor rule when he chose to retain the five investments listed *ante*, we apply the substantial evidence standard of review.

"In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.]" (*In re Estate of Young* (2008) 160 Cal.App.4th 62, 76) "'The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record. [Citation.]'" (*Ibid.*)

3. *THE PRUDENT INVESTOR RULE*

A trustee is required to "invest and manage trust assets as a prudent investor would." (§ 16047, subd. (a).) "A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust." (§ 16047, subd. (b).)

Appropriate circumstances to consider in investing and managing trust assets include: "(1) General economic conditions. [¶] (2) The possible effect of inflation or deflation. [¶] (3) The expected tax consequences of investment decisions or strategies. [¶] (4) The role that each investment or course of action plays within the overall trust portfolio. [¶] (5) The expected total return from income and the appreciation of capital. [¶] (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries. [¶] (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital. [¶] (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." (§ 16047, subd. (c).)

"Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." (§ 16051.) The mere retention of assets, which a successor trustee received is not, in itself, imprudent, especially if the assets have produced an acceptable rate of return over the long-term. (*Estate of Pew* (1994) 440 Pa.Super. 195, 240-241 [Pennsylvania intermediate appellate court opinion].) A trustee is not necessarily liable for a surcharge because an asset diminished in value during a particular, narrowly defined, time period. In other words, a court is not required to disregard the long-term performance of an asset when determining whether a trustee should be subject to a surcharge for acting imprudently. (*Id.* at p. 241; see also *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 913-914 (*Uzyel*) [comparing *Pew* to the Restatement rule].)

4. DIVERSIFICATION

We discuss the diversification issue, and then the procrastination issue. "In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so." (§ 16048.)

When Chris became the sole trustee in September 2007, the trust was heavily invested in real estate. There were seven parcels of property in the trust. Four parcels of property were occupied by beneficiaries of the trust or relatives of the beneficiaries. A fifth parcel was accessible only through a beneficiary's land, and the sixth and seventh parcels were rented. In order to add a different class of investments, such as stocks or bonds, Chris would have needed to liquidate some of the real estate so that the trust could purchase different asset classes.

A portion of the trust document reads, "We recognize that the real property may not be divided equally, so we leave it to a majority of our children to decide how our property shall be divided if there is a dispute among them, keeping in mind that it is our direction that they shall divide the property as evenly as possible." The trust document gave Chris the authority to sell, transfer, exchange, or otherwise dispose of real property. However, it appears that the real property was supposed to be distributed to the children in its current form, i.e., the children were supposed to receive parcels of real property. If Chris had liquidated the real property assets in order to purchase stocks or other investments, then he risked violating the terms of the trust. Thus, substantial evidence supports a finding that Chris acted prudently under the terms of the trust by not liquidating the real property, because it appears that the real property was supposed to be distributed to the children.

Moreover, we note there is nothing indicating that the parcels of real property have declined in value since they were purchased. While the properties have declined in value during the period from 2007 to 2010, they may have gained value since they were purchased. For example, Pear Street was mother's and father's residence. Chris's Mercedes had been stored at Pear Street for approximately 30 years. It can be inferred that Mother and Father owned Pear Street for 30 years. If the property has increased in value over that 30-year time period, then Chris is not per se an imprudent investor by maintaining the investment. While the record reflects a loss in value for the real estate investments over a short time period, an evaluation of Chris's prudence as an investor is not limited to that short time period. If the assets increased in value over time, then that information should also be considered. We find nothing in the record indicating how these properties have performed over an expanded time period.

Margaret asserts that it was not prudent to keep a trust heavily invested in a single asset *class*, i.e., real estate. Chris asserts that courts have only concluded it can be imprudent to invest all the trust money in a single *asset*, i.e., one parcel of property, but they have not held that it is imprudent to invest primarily in a single asset/investment *class*. Margaret supports her assertion with citations to *Estate of Collins* (1977) 72 Cal.App.3d 663 and *Mandel v. Cemetery Board, Dept. of*

Professional and Vocational Standards (1960) 185 Cal.App.2d 583. In *Estate of Collins*, the appellate court held that a trustee violated the prudent investor rule by keeping two-thirds of the trust invested in single asset. (*Collins*, at pp. 669-670.) In *Mandel*, the appellate court held that a trustee could be found to be imprudent by investing more than three-fourths of trust funds in a single security. (*Mandel*, at p. 587.) Margaret has not presented any law directly reflecting it is imprudent to retain a majority of investments that are part of a single asset *class*; she has only shown that it may be imprudent to invest a majority of trust funds in a single asset.

A prudent investor typically diversifies a trust's investments in order to distribute the risk of loss. (*Estate of Collins*, *supra*, 72 Cal.App.3d at p. 670.) By investing primarily in a single asset, there is a large risk of loss because if that single asset loses value then the trust monies could be depleted. However, the same is not necessarily true with an asset class. If a trust owns a variety of stocks then the risk can be distributed across the stock market. Similarly, if a trust owns property in different neighborhoods, then the risk can also be distributed. In sum, primarily investing in a single asset class does not, as a matter of law, equate with being an imprudent investor.

In the instant case, the trust held four parcels of property in Riverside, one in Cathedral City, one in Fairfield, and one in Santa Rosa. It appears that Pear Street and the two Berry Road properties were near one another, but that the four other properties were separated from one another, and not concentrated in a single housing tract or neighborhood. Thus, we are not persuaded by Margaret's argument that Chris acted imprudently by retaining the real property investments, because the properties were located in different areas, which allowed the risk of loss to be distributed in different areas.

5. *PROCRASTINATION*

Margaret contends that Chris was not a prudent investor because he was too slow in (1) diversifying the trust's assets, and (2) distributing the trust property to the beneficiaries. Margaret explains that if the trust property had been distributed in a timelier manner, then she could have sold the house that was distributed to her before the value greatly declined due to the housing market crash. As set forth *ante*, there is substantial evidence that Chris acted prudently by not further diversifying the trust assets. Thus, we focus on the second portion of Margaret's contention, concerning the delay in distributing trust property.

As set forth *ante*, some of the factors that a prudent investor must consider are "[g]eneral economic conditions" and "[t]he expected total return from income and the appreciation of capital." (§ 16047, subd. (c)(1)&(5).)

Chris explained that he held onto the properties because the real estate market had been declining, and he was hoping to sell the properties when the market improved. Eventually Chris decided to "sell everything off and close this thing out." Chris explained that it became cost prohibitive to wait for the real estate market to improve, because so much money was being spent on legal fees. Chris stated $50,000 had been spent on legal fees, so $50,000 was being taken from each child's distributions; it was no longer worth it to wait for the market to improve.

The foregoing is substantial evidence that Chris acted as a prudent investor by trying to retain the properties until the real estate market began to improve. Chris considered both the general economic conditions of the real estate market and potential appreciation of the properties. Chris did not delay in selling the properties merely because he was slow to accept his responsibilities as trustee, rather, he was gauging the market and waiting for an improvement. Accordingly, we conclude substantial evidence supports the finding that Chris did not violate the prudent investor rule by delaying the sales of the properties.

Margaret asserts, "Chris could have, and should have, simply distributed the trust properties to the beneficiaries who then would have been free to make their own investment decisions regarding these properties." Margaret's assertion does not explain why there is a lack of substantial evidence supporting the finding that Chris violated the prudent investor rule by delaying the sale of the properties. Thus, we find the assertion to be unpersuasive.

B. RENT CALCULATION

Margaret contends the probate court erred in calculating the surcharge related to lost rental income for (1) 18985 Berry, and (2) Pear Street. The probate court surcharged Chris for 24 months of rent, but Margaret asserts that it should have surcharged him for approximately 34 months of rent. We disagree.

The probate court has wide discretion to make any order and take any action necessary or proper to dispose of matters presented in a petition. (§ 17206.) "We construe [section 17206] as a grant of discretion to the trial court and therefore review the trial court's selection of the appropriate measure of liability for abuse of discretion. An abuse of discretion occurs only if the reviewing court, considering the applicable law and all of the relevant circumstances, concludes that the trial court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.]" (*Uzyel, supra,* 188 Cal.App.4th at p. 911; see also *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 472 ["the court acted within its discretion in surcharging [the executor]"].)

In reference to (1) 18985 Berry, and (2) Pear Street, the probate court wrote, "Considering the evidence at trial, the court finds that [both] these properties could have been rented by October 2008, and that therefore the trustee should be surcharged for 24 months of rent at these amounts." Trial began in October 2010.

We begin with Pear Street. Mother died on September 30, 2007. Mother and Father resided at Pear Street prior to their deaths. Margaret explained that Mother had "a tremendous amount of silver[,] Fostoria crystal[,] bone china, Bavarian china, Noritaki china[, and] paintings." Chris explained that he contacted Margaret in 2008 about going through Mother's and Father's property, but she did not follow up with him about scheduling a time to meet. Margaret stated that she did not schedule a time to meet with Chris because she was waiting for him to provide her with an inventory of the personal property and appraisal values.

The backyard of Pear Street was an iris farm, which was a trust asset. Chris was not sure how to rent Pear Street with the iris farm in the backyard, because the renters would not be allowed to use the backyard of the house due to the need to preserve the iris farm.

Given the large amount of potentially valuable personal property at Pear Street, the probate court could reasonably find that it would take one year for Chris to create an inventory of the items, receive appraisals for the items, distribute the items, prepare the house, and find suitable renters. Since the iris farm was in the backyard, the probate court could reasonably conclude that it made sense to not rent the house while assessing the personal property. In other words, it would be logical to not move all the personal property into a storage locker or other facility pending valuation and distribution, since the house would be difficult to rent with the iris farm in the backyard. In sum, the probate court's finding that the property could be rented as of October 2008 is within reason, because it is supported by the record.

Next, we address 18985 Berry: 18985 Berry property consisted of a .49-acre undeveloped lot; it was immediately adjacent to Chris's 18979 Berry Road property. There was not a fence separating the two parcels, and the undeveloped lot was currently only accessible through Chris's property. There was not a driveway for the undeveloped lot. When Father was alive, the undeveloped property was used for maintaining horses. Chris owned two unbroken horses, which he could not control.

The probate court could reasonable conclude that it would take Chris one year to install a driveway, install a fence that would separate the properties and contain his horses, and find a renter for the lot. Given that there is evidence supporting the probate court's finding, we conclude that the probate court did not abuse its discretion.

Margaret asserts that Pear Street could have been rented as of November 1, 2007—one month after Mother's death. Margaret contends that 18985 Berry could have been rented immediately after Mother's death. Margaret's argument does not explain why the probate court's decision was unreasonable; rather, it simply provides for an alternative finding that perhaps could have been made. Since the record supports the probate court's judgment, we are not persuaded by Margaret's contention.

C. PERSONAL USE SURCHARGE

Margaret contends the probate court erred in not surcharging Chris for his personal use of 18979 Berry. We disagree.[8]

As set forth *ante*, we review the probate court's decision for an abuse of discretion. (§ 17206; *Uzyel*, *supra*, 188 Cal.App.4th at p. 911.)

The probate court held, "As for 18979 Berry Road, no more rent is due. This has been the trustee's family home for 25 years, on which he paid the taxes and insurance as rent pursuant to his agreement with his mother."

Typically, unless there is a contrary provision in the lease, a landlord's sale of property or transfer of ownership does not affect an existing lease. Instead, the transferee effectively becomes the landlord. (*Kirk Corp. v. First American Title Co.*

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[8] Within Margaret's contention she appears to assert the probate court erred by concluding Chris did not breach his duty of loyalty, duty to avoid conflicts of interest, duty to make trust property productive, and duty to treat all beneficiaries equally. We focus on the argument concerning the probate court's finding that Chris did not owe any more rent on 18979 Berry, because that contention appears in the subsection's point heading and is also discussed in the body of the subsection. (Cal. Rules of Court, rule 8.204(a)(1)(B) [separate point headings].)

(1990) 220 Cal.App.3d 785, 809.) In the instant case, 18979 Berry continued to be held by the trust, it did not change ownership during the "rental" period; however, Chris's trusteeship changed. To the extent Margaret is asserting Chris's rental agreement should have changed due to a change in his trusteeship, Margaret is incorrect. A rental agreement continues despite transfers in "ownership." (*Ibid.*) Thus, the probate court could reasonably conclude that Chris should not be surcharged for rent on 18979 Berry.

D. DATE OF VALUATION

Margaret contends the probate court erred by approving Chris's Second Amended First Accounting, which valued Powderhorn at its September 2007 value, as opposed to its value on the date of distribution. We disagree.[9]

A trustee must provide an accounting when there is a change in trusteeship. (§ 16062, subd. (a).) The accounting must include an "[i]temized list of property on hand, describing each item at its carry value." (§ 16062, subd. (f).) "Carry value" refers to the value of an asset at the time it is acquired by the fiduciary; it is sometimes referred to as "fiduciary acquisition value." (Continuing Education of the Bar (CEB), 1 California Trust Administration (2001 & 2011 update) § 7.71.)

The "Second Amended First Account" submitted by Chris reflects the "carry values" of the real properties, i.e., their values in 2007. The accounting also reflects the money lost on the sales of Tolenas and Lincoln. If the carry values were not used in the accounting, then the losses would not show, and it would appear that Chris was hiding

[9] Chris asserts that Margaret waived this contention by not raising it at the lower court. We address the merits of the contention for the sake of thoroughness.

the losses. Further, in an inventory of the "property on hand," Powderhorn, Pear Street, and 18985 Berry property are listed with their carry values and their dramatically lower 2010 estimated market values. Therefore, Powderhorn's market value is reflected in the accounting. In sum, the accounting complies with the rule requiring the inclusion of carry values, and the market value of Powderhorn is in the accounting; thus, it appears that the probate court did not err by approving the accounting, which included a 2007 value for Powderhorn.[10]

In her reply brief, Margaret asserts that the accounting is erroneous because it does not reflect the market value of Powderhorn on the date the property was distributed to Margaret. This contention is somewhat confusing because the accounting does not reflect *any* distribution of Powderhorn. Powderhorn was listed as "Property on Hand," i.e., it is listed as a trust asset. Consequently, it is unclear how the values of the property listed in the accounting affect Margaret. Nevertheless, even if the listed values did affect Margaret's distribution, the declined market value of Powderhorn is included in the accounting.

In her reply brief, Margaret laments that Chris has "been unable to produce a coherent accounting"; she asserts there will be future litigation due to this issue, and

[10] Margaret's opening brief does not include record citations directing this court to the exact area of the accounting that she finds troubling. As a result, it is unclear to this court if there is a particular line item that Margaret finds erroneous. Therefore, we have reviewed the alleged error as though the contention applied to the entire accounting. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [record citations].)

asks this court to "provide guidance to the trial court." It is unclear to this court exactly what guidance Margaret is requesting we provide. Accordingly, we deny the request.

E. <u>CHRIS'S ATTORNEY FEES</u>

Margaret contends the probate court erred by not surcharging Chris for using trust money to pay his attorney fees and costs. We disagree.

We review the probate court's decision for an abuse of discretion. (*Thomas v. Gustafson* (2006) 141 Cal.App.4th 34, 44.) "Under California law, a trustee may use trust funds to pay for legal advice regarding trust administration [citation] and may recover attorney fees and costs incurred in successfully defending against claims by beneficiaries [citations.]." (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213.)

In Margaret's petition she sought to have Chris removed as trustee. The probate court found that Chris did not act in bad faith, and it did not remove him as trustee; however, it surcharged him a total of $141,675.58. The probate court could reasonably conclude that Chris successfully defended against Margaret's claims, since Chris was not removed as trustee. Chris's victory was not absolute, but finding that he prevailed is not arbitrary or unreasonable. Thus, we conclude that the probate court did not err by not surcharging Chris for his attorney fees.

Margaret contends, "[A] trustee having been surcharged may not look to the trust for reimbursement of his attorney fees incurred in connection with defense of the surcharge." In the instant case, Margaret sought to have Chris removed as trustee and to have another man appointed as successor trustee. Margaret also requested "other relief as the Court deems appropriate." Although Chris was surcharged due to some of the allegations, Margaret lost on her overarching request to have Chris removed as trustee. Thus, the fact that Chris was surcharged is not the sole determining factor of success. Margaret cannot ignore the fact that she lost her request to have Chris removed as trustee. In other words, the fact that Chris was surcharged does not make the probate court's ruling unreasonable or arbitrary.

F. MARGARET'S ATTORNEY FEES

Margaret contends the probate court erred by denying her an award of her costs and attorney fees. We disagree.

We apply the abuse of discretion standard of review. (*Thomas v. Gustafson*, *supra*, 141 Cal.App.4th at p. 44.) "Trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee's conduct, even when they are successful. [Citation.] Section 17211, subdivision (b), however, provides the following exception to the rule: 'If 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.'" (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1595-1596.)

In the instant case, the probate court found that Chris did not act in bad faith. The probate court also found, "[T]he actions of the trustee were [not] the sole or even the primary cause of this litigation." Since the probate court concluded that Chris acted in good faith in defending against Margaret's claims, the court did not err in not awarding Margaret her attorney fees.

Margaret asserts the probate court erred because equitable principles should be applied, in that Margaret's litigation efforts resulted in the trust regaining $141,675.88 in surcharges from Chris, which will benefit all the beneficiaries. Margaret reasons that since the other beneficiaries will benefit from her efforts, she should have been awarded attorney fees. "[B]ased on the probate court's equitable powers alone, it has been held that beneficiaries who have incurred attorney fees, either to vindicate their position as beneficiaries [citation] or for the benefit of the trust [citation], are entitled to have those fees paid by the trust." (*Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1334, fn. 2.)

Chris testified that he was holding onto the various real estate assets because he had hoped that real estate prices would increase, and then he could sell the properties at that point. However, Chris ultimately decided to "sell everything off and close this thing out" because, "[i]t was being cost prohibitive with all the legal activity that was going on, spending close to $50,000 in legal fees, and that $50,000 is coming out of everybody's distribution[.]" Based on this testimony, the probate court could reasonably conclude that Margaret's lawsuit did not benefit the trust. While Margaret may have gained $141,675.88 for the trust, she likely lost money for the trust in that Chris's attorney fees were paid by the trust, and Chris was pressured to sell the trust's real estate assets in a depressed real estate market. In sum, we are not persuaded that the probate court abused its discretion by not awarding Margaret her attorney fees, because it can reasonably be concluded that Margaret's lawsuit did not benefit the trust or other beneficiaries.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.