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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RAUL DEANDA et al., Plaintiffs and Respondents, v. GUADALUPE MARIA DEANDA, as Successor Trustee, etc., Defendant and Appellant.	E067334 (Super.Ct.No. PROPS1401136) OPINION

APPEAL from the Superior Court of San Bernardino County. Cynthia Ann Ludvigsen, Judge. Affirmed with directions.

Guadalupe Maria DeAnda in pro. per.; the Garcia Law Firm and Gilbert A. Garcia for Defendant and Appellant.

Mesisca Riley & Kreitenberg, Dennis P. Riley, Rena E. Kreitenberg; Law Offices of Mike Vo and Mike N. Vo for Plaintiffs and Respondents.

In 2010, Jose Guadalupe DeAnda set up a trust (Trust), which, upon his death, divided his estate more or less equally among his eight children. Around the same time,

his daughter Guadalupe (Lupe) DeAnda moved in with him and began taking care of him. In 2014, when he was in hospice care, suffering from pneumonia, congestive heart failure, and diabetes, he signed an amendment to the Trust that gave his home to Lupe outright and divided the remainder of the estate equally. Two weeks later, he signed another amendment to the Trust that prevented the sale and distribution of trust principal for at least five years after his death. Less than two weeks after that, he died.

After Jose's death, Lupe failed to keep complete records to back up Trust income and expenses. She decided to pay herself fees out of the Trust that amounted to some 20 percent of its gross income. She admitted that the Trust had "no [net] income" because she was "spending all the money."

Five of the eight children filed a petition[1] that sought, among other things, to remove Lupe as trustee and to invalidate the amendments to the trust. After a full trial, the trial court removed Lupe as trustee and ordered her to return the home to the Trust. Lupe appeals. We will affirm, albeit with directions to clarify the judgment.

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[1] The five petitioners are Raul DeAnda, Antonia DeAnda Nieves, Blanca DeAnda Waughan, Oscar DeAnda, and Lorena DeAnda Ritchie (Siblings). Two of Jose's children — Raquel DeAnda Saldivar and Manuel DeAnda — are not parties.

I

FACTUAL BACKGROUND

A. *The Trust and the Amendments to the Trust*.

Jose and his wife Maria DeAnda spoke only Spanish; they did not understand English.[2] They consistently said they wanted their estate divided equally.

In 2004, Jose and Maria set up a revocable trust (Trust). It was drafted by Attorney Robert Wilkes. One of the children translated the provisions of the Trust (at least in general) for Jose and Maria before they signed it.

The trust property initially consisted of Jose and Maria's then-home on Cherry Avenue in Fullerton, plus residential rental property on Claudina Street in Anaheim and on Lemon Street in Orange.

The Trust was to terminate once both Jose and Maria died. The Cherry property was to go to Oscar. Manuel was to receive nothing, because he had already been given a piece of property on Ogden Street in San Bernardino. All of the other trust property would be divided equally among all of the other children. The Trust named Antonia as successor trustee. It also provided that the successor trustee would "be entitled to reasonable compensation for services rendered."

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[2] At her deposition, Lupe initially testified that Jose did not read, write or speak English. After a lunch break, however, she testified that he spoke it "broken up," and he understood it "perfectly."

In 2007, Jose and Maria bought a new home on Breton Avenue in Chino. They started renting out the Cherry property, and they sold the Lemon property.

In 2009 or 2010, Lupe moved into the Breton house with Jose and Maria so she could take care of them. Manuel and Oscar were also living in the Breton house.

In June 2010, Jose and Maria signed an amendment to the Trust (First Amendment). It was prepared by Attorney Wilkes. It changed the successor trustee to Lupe. It noted that Manuel had returned the Ogden property, and therefore it provided that the trust property would be divided equally among all of the children (other than Oscar, who was still to receive the Cherry property). The First Amendment also placed the Breton house in the Trust. When Jose signed the First Amendment, he commented again that he wanted the estate divided equally.

On March 1, 2012, Maria died.

By 2013, Jose was suffering from diabetes and congestive heart failure. He needed a knee replacement. He was taking "maybe 10" different medications.

Lupe was Jose's primary caretaker. She administered his medications. She drove him everywhere he needed to go. She helped him with his finances. In particular, she helped him manage the rental properties. She had no previous business experience, but Jose showed her how to handle everything.

In July 2013, Jose told one of the children that he wanted the Breton house to be sold when he died and the proceeds to be distributed equally.

In July or August 2013, Jose said "he was ready to let go" and "he didn't want anyone to call an ambulance if anything happened to him . . . ."

At some point, Antonia realized that "Lupe was always there with my dad." Lorena agreed: "[W]hen I would go over there, I was never left alone with my dad . . . . Especially at the end of his life. [Lupe] always either sent her son over, or to that extent, to always be with, watching me."

Once when Antonia was visiting Jose, he suddenly told her, "Go home now. Go home." When she asked why, he said, "Lupe is almost coming." He seemed to be afraid of Lupe. Previously, he had been "a guy that never feared anything."

In December 2013, Jose had an attack of pneumonia. Lupe placed him in hospice care. The pneumonia "never really went away . . . ." As of late January, Jose was "falling in and out of consciousness . . . ."

On January 28, 2014, Jose signed another amendment to the Trust (Second Amendment). Again, it was prepared by Attorney Wilkes. It provided that, "[i]n light of who has cared for me, visited me and helped me," the Breton house would go solely to Lupe. It also provided, "If any of my other children challenge this gift of mine to [Lupe], then their share of the trust shall be reduced to [o]ne [d]ollar ($1.00)."

Lupe denied being "involved at all in the preparation of" the Second Amendment.[3] She merely handed it to the notary, who handed it to Jose.

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[3] Lupe did testify that she heard a phone call in which Jose provided the information that went into the Second Amendment. However, she also testified that this

On February 12, 2014, Jose signed another amendment to the Trust (Third Amendment). Yet again, it was prepared by Attorney Wilkes. It provided that, because of "how my children acted toward me at the end of my life," the Trust would no longer terminate on Jose's death. The Cherry property would not go to Oscar anymore; instead, it would remain in the Trust for ten years. The Claudina and Ogden properties would remain in the Trust for five years. Trust income and principal would be divided equally among his children. The Third Amendment reaffirmed Lupe as the successor trustee.

Lupe denied participating in the preparation of the Third Amendment. She testified that she phoned Wilkes, at Jose's request, and she and Jose, on speakerphone, discussed the Third Amendment with him. She acted as translator for Jose. She also handed the Third Amendment to the notary, who handed it to Jose.

The notary who notarized both the Second and Third Amendments testified that he asked Jose if he agreed with the contents of the documents but did not read them to him.

The children, other than Lupe, were not aware of any of the amendments to the Trust.

On February 23, 2014, at the age of 82, Jose died. At that time, the Trust property consisted of the Cherry property, the Claudina property, the Ogden property, and the Breton house.

[footnote continued from previous page]
was "the phone call [she was] talking about earlier," which was a phone call about the *Third* Amendment (see *post*).

B. *Lupe's Management of the Trust*.

In June 2014, pursuant to the Second Amendment, Lupe transferred the Breton house from the Trust to herself.

In August 2014, she used Trust funds to install an alarm system in the Breton house. She "d[id] not recall" why she charged the Trust "for [he]r own personal alarm system[.]"

She made Oscar move out of the Breton house. However, he left "stuff" behind. She moved his (and some of Manuel's) possessions to her husband's company's warehouse. She refused to return them unless Oscar and Manuel paid "storage fee[s]," which eventually totaled over $19,000. This included a charge for her son's services in moving the items.

Lupe collected the rents from the rental properties (ranging from $850 to $1,750 a month), typically in cash, and gave each tenant a receipt. If a tenant made a partial payment, she would not provide a receipt (and thus she would have no record of the payment) until the remainder was paid. When a tenant was entitled to a credit (e.g., for replacing a ceiling fan), she would create a "[c]redit [m]emo."

She produced rent receipts for April-October 2014 but none for any time thereafter. Even though the rents due totaled $5,400 a month, the rents deposited were usually in lesser amounts.[4]

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[4] To give just two examples: In September 2014, she issued rent receipts totaling $5,400. She did not issue any credit memos. However, she deposited only $4,900, for a shortfall of $500.

Lupe paid most vendors in cash. She claimed she did not get invoices or receipts from them. Instead, she would create an invoice herself.[5] She testified that she had paid a roofer $9,000 "under the table," in cash, without any documentation. She claimed that checks she had written to herself, for $4,000 and $1,000, were actually cashed and used to pay the roofer. On one occasion, she hired workers at Home Depot and paid them in cash and food.

Lupe transferred money from the Trust account into her own personal checking account. She also used a debit card to make "personal payments" out of the Trust account. On two occasions, she used it to buy herself lunch. On another occasion, she used it to buy gas.

She explained that she had decided to pay herself $250 a week for services to the Trust, because she "just felt that was a fair price . . . ." She admitted that this was 20 percent of the gross rental income. The transfers, however, were often in amounts other than $250, and they generally added up to either more or less than $250 a week. She paid herself an additional $300 for painting a room.

[footnote continued from previous page]

Similarly, in November 2015, although she did not produce rent receipts, the rent should, again, have totaled $5,400. She issued credit memos totaling $450 and deposited $4,585, for a shortfall of $365.

[5] The Siblings claim that Lupe admitted that she "simply made up the number for the charge in the invoice." Not so. She admitted that she made up the *sequence number* of the invoice, not the *amount* of the invoice.

She also admitted that she paid herself advances of fees that were not yet due. In one instance, she paid herself fees that would not be due for five months.

She made payments to her husband's company out of the Trust account. She testified that these were for the storage of Oscar and Manuel's possessions. (One such payment, however, was recorded as an "[i]nsurance [e]xpense.") Because she had already transferred the Breton house to herself, she admitted that renting the storage space was "not a trust business."

Lupe admitted that the Trust had "no [net] income" because she was "spending all the money." Thus, she had not made any distributions to the beneficiaries. She promised to provide an accounting but never did.

At one point, Lupe offered to sell two of the properties and to distribute the proceeds equally, but only if the other children agreed not to sue her. Blanca refused.

II

PROCEDURAL BACKGROUND

In December 2014, the Siblings filed a petition to remove Lupe as trustee, to invalidate the amendments to the trust, to recover trust property, and to compel an accounting. Lupe filed objections to the petition.

Between April and July 2016, the trial court held a six-day bench trial. In September 2016, it made an oral ruling granting the petition but "reserv[ing] on the surcharge issue." In October 2016, it entered written "Post[-]Trial Orders" granting the petition. These removed Lupe as trustee and replaced her with Blanca. They also

required Lupe to quitclaim the Breton house back to the Trust. Lupe filed a timely notice of appeal from the Post-Trial Orders.

In October 2017, the trial court entered an "Amended Judgment," which contained the same provisions as the Post-Trial Orders, and in addition, surcharged Lupe $269,360 and ordered her to pay attorney fees totaling $168,287.25. Lupe filed a timely notice of appeal from the Amended Judgment. (*DeAnda v. DeAnda*, Case No. E069270.) That appeal, however, was dismissed after she failed to file an opening brief.[6]

III

APPEALABILITY

There is a substantial issue regarding appealability, because the Post-Trial Orders were not a final judgment. They stated, "*Pending the Court's final judgment* in the matter, the Court makes the following *interim* orders . . . ." (Italics added.) Moreover, the Post-Trial Orders did not determine whether Lupe should be surcharged, or if so, how much; the trial court specifically reserved this issue. The Amended Judgment is the true final judgment in the case; Lupe appealed from it but eventually abandoned that appeal.

"[T]his is an appeal in a trust dispute. As a result, the Probate Code provisions concerning appealability are exclusive." (*Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575.)

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[6] We take judicial notice of the other appeal.

Under Probate Code section 1300, subdivision (g), "an appeal may be taken from the making of, or the refusal to make, any of the following orders: [¶] . . . [¶] . . . Surcharging, removing, or discharging a fiduciary." Thus, to the extent that the Post-Trial Orders removed Lupe as trustee, they are appealable. (*Estate of Reed* (2017) 16 Cal.App.5th 1122, 1126.)

Also, under Probate Code section 1304, subdivision (a), subject to exceptions not applicable here, "[w]ith respect to a trust, the grant or denial of . . . [¶] . . . [a]ny *final* order under . . . Section 17200" is appealable. (Italics added.)

Probate Code section 17200 allows a trustee or beneficiary of a trust to petition the court for purposes of, among other things, "[d]etermining the validity of a trust provision" and "[c]ompelling redress of a breach of the trust by any available remedy." (Prob. Code, § 17200, subds. (a), (b)(3), (b)(12).) Thus, to the extent that the Post-Trial Orders voided the amendments and required Lupe to quitclaim the Breton house to the Trust, they are appealable — provided they are "final."

It is axiomatic that "there is ordinarily only one final judgment in an action. [Citations.]" (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 118.) For purposes of the appealability of a final judgment under Code of Civil Procedure section 904.1, subdivision (a), a judgment is final """'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"" [Citation.]" (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.)

Significantly, however, Probate Code section 1304 speaks in terms of the appealability of a final *order*, not a final *judgment*. Accordingly, if an order finally determines a matter under Probate Code section 17200, it is appealable even if other matters have yet to be determined. (E.g., *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 522-523 [order for accounting, although not normally appealable, was appealable when it effectively determined, under Prob. Code, § 17200, subd. (b)(2), that beneficiary had standing to request an accounting]; *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1124 [order determining beneficiaries of trust, even though not final judgment, was appealable]; see also *Estate of Reed*, *supra*, 16 Cal.App.5th at pp. 1125-1126 [order removing personal representative was appealable, even though it was contained in a statement of decision and trial court had not yet entered final judgment].)

If, on the other hand, an order leaves a matter determined only provisionally and subject to a later determination, it is not final within the meaning of Probate Code section 1304. (E.g., *Aviles v. Swearingen* (2017) 16 Cal.App.5th 485, 492 [order removing trustee "without prejudice" was not appealable]; *Northern Trust Bank v. Pineda* (1997) 58 Cal.App.4th 603, 607-608 [order finding beneficiaries liable for attorney fees but not ordering payment of any particular amount was not appealable].)

Here, with respect to the validity of the amendments and the right to the Breton house, the Post-Trial Orders were final, even though the surcharge issue remained pending. Thus, the Post-Trial Orders were appealable. Lupe was not required to wait to appeal from the subsequent Amended Judgment.

IV

FAILURE TO ISSUE A STATEMENT OF DECISION

Lupe contends that the trial court erroneously refused to issue a statement of decision.

A. *Additional Factual and Procedural Background*.

On September 26, 2016, when the trial court orally granted the petition, it ordered counsel for the Siblings to submit a written order. This exchange followed:

"[COUNSEL FOR THE SIBLINGS]: . . . [W]e are requesting the Court issue a written Statement of Decision. . . .

"THE COURT: Well, this is the Court's Statement of Decision. The court's authorized to make it orally or in writing, and I have made it orally.

"I think the parties requested a Statement of Decision before the end of the trial.[7] And this is when I set the time to announce my statement of decision. So it is announced. You can certainly get the transcript and use that. If you wish to prepare a written one, based on that transcript, you may. But I made my Statement of Decision. I'm not making another one."

The next day, the trial court issued an order "clarify[ing] its statement regarding a statement of decision . . . ." It provided, "The court[']s oral pronouncement was its

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[7] This appears to be a misrecollection. Lupe does not cite any previous request, and we have not found one.

notice of intended decision. Counsel for [the Siblings] is directed to prepare a statement of decision . . . ."

At a hearing on November 9, 2016, counsel for Lupe said that "[a] statement of decision was ordered," but "[n]o statement of decision has been filed." Counsel for the Siblings said, "We're waiving it, your Honor. We agree with your oral decision." Counsel for Lupe responded, "You ordered them to do it." The trial court said, "Then you prepare one. The rules say . . . if one party doesn't do it, the other party can." However, it added, "There are time lines for doing it." Counsel for Lupe concluded by saying, "I will take up my issue regarding the Statement of Decision as your Honor has suggested."

Neither the Siblings nor Lupe ever submitted a proposed statement of decision. Thus, the trial court never issued a written statement of decision.

B. *Discussion*.

"[U]pon the trial of a question of fact by the court, . . . [t]he court shall issue a statement of decision explaining the factual and legal basis for its decision . . . upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. . . .

"The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties." (Code Civ. Proc., § 632; see also Cal. Rules of Court, rule 3.1590.)

"A party that has been ordered to prepare the statement must within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter: (1) prepare, serve, and submit to the court a proposed statement of decision and judgment or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived." (Cal. Rules of Court, rule 3.1590(f).)

Preliminarily, we question whether Lupe has standing to complain about the trial court's failure to issue a tentative decision. Counsel for the Siblings made a timely request for a statement of decision, but Lupe's counsel did not; he did not broach the topic for more than a month after the trial court's oral ruling. (See *Khan v. Medical Board* (1993) 12 Cal.App.4th 1834, 1840.) However, we need not decide this issue.

The Siblings' request for a statement of decision was defective because it did not specify any controverted issues. Thus, it did not place a duty on the trial court to address any issue whatsoever. (See *City of Coachella v. Riverside County Airport Land Use*

Com. (1989) 210 Cal.App.3d 1277, 1292-1293 ["[A] general, nonspecific request for a statement of decision does not operate to compel a statement of decision as to all material, controverted issues."]; see also *Atari Inc., v. State Bd. of Equalization* (1985) 170 Cal.App.3d 665, 675 ["Failure to request findings on specific issues results in a waiver as to those issues."].)

Separately and alternatively, the trial court did not refuse to issue a statement of decision. Initially, it indicated that its oral ruling *was* its statement of decision. However, it promptly realized that this was a mistake; because the trial had lasted more than eight hours and more than one day, it could not give an oral statement of decision — its oral ruling was actually a *tentative* decision. Thus, it directed counsel for the Siblings to prepare a proposed statement of decision.

Counsel for the Siblings did not do so within 30 days. At that point, Lupe had 10 days to serve and file her own proposed statement of decision. In other words, she had the remedy in her own hands, but she failed to make use of it. Thus, the trial court's duty to issue a statement of decision lapsed.

Finally, even assuming the trial court erred, Lupe has not shown that the error was prejudicial. She claims, "A trial court's failure to issue a statement of decision when properly requested is per se reversible error," citing *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1127. *Miramar* was effectively overruled, however, by *F.P. v. Monier* (2017) 3 Cal.5th 1099, which held that "a trial court's error in failing to issue a requested statement of decision is not reversible per se, but is subject

to harmless error review." (*Id.* at p. 1108.) Lupe does not explain how she would have been any better off if the trial court had issued a statement of decision, and it is not apparent to us that she would have been.

V

THE REMOVAL OF LUPE

(AND THE APPOINTMENT OF BLANCA) AS TRUSTEE

Lupe contends the trial court erred by removing her as trustee.

A. *Additional Factual and Procedural Background*.

In its oral ruling, the trial court stated:

"As to removal of the trustee, . . . the trustee can be removed for breach of trust[,] conflicts of interest — there may have been some here, but that wasn't an overbearing issue, really. But there was an issue with hiring the spouse or son and paying them. But I don't think those were the most egregious offenses.

"According to the evidence the trustee asked her siblings to agree to sell and distribute properties if they would agree not to sue. That, I believe, is a breach of trust and really against public policy, and the trustee can't ask for that [—] for distribution on the condition not to sue. It appears . . . that the trust property was not made productive and that it seems to be unproductive. But it is difficult to tell given the state of the accounting records before us . . . .

"The trustee co-mingled her personal funds with the trust funds. She failed to properly maintain books, records, failed to account when asked to, failed to keep the

beneficiaries informed. And the Court believes . . . she's unable to manage the trust finances. . . . I would say the . . . greatest problem is that the trustee dealt in cash.

"When the settlor was alive and that's what he did, that's fine. He owed a duty only to himself, not to anyone else. But . . . once the settlor died, the successor trustee owed a duty to all the beneficiaries and must properly account for and handle any cash. And, quite frankly, it is inappropriate in the Court's view to be dealing with rental monies and other sums in cash the way she did. There is no integrity in any part of these books and records and accounts that cash is not properly receipted and accounted for.

"And this creates a potential liability for the trust to the IRS, to the Franchise Tax Board. . . .

"The trustee made transfers directly to her own account or to cash that were not verified. She advanced herself the trust management fee she had determined to pay herself and paid them in advance of having done the work. . . .

" . . . The trustee create[d] her own invoices for work done at the various rental properties by third parties. . . . There's no truth to that. It's a farce. . . . If somebody is coming in to repair your roof, you don't turn around and write their invoice on your letterhead saying, . . . John Doe, here is your bill for $10,000 to repair the roof. And, oh, by the way, paid it in cash. . . . We have no idea what John Doe really charged to repair the roof . . . [¶] . . . [¶]

"She claimed that some of her cash payments were to hire workers she picked up at Home Depot. This is a violation of labor laws, [s]tate and [f]ederal, and puts the trust at risk for those violations. . . . [¶] . . . [¶]

" . . . [S]he charged . . . storage fees to the trust for one beneficiary's personal property. The trust is not liable for one beneficiary's personal property. . . ."

B. *Discussion*.

A trial court may remove a trustee because, among other reasons, "the trustee has committed a breach of the trust." (Prob. Code, § 15642, subd. (b)(1).)

Lupe asserts that a trustee named by the settlor should be removed "only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust." This is an incomplete statement. The true principle to which she alludes is that: "'The court will less readily remove a trustee named by the settlor than a trustee appointed by the court or by a third person who is by the terms of the trust authorized to appoint a trustee. The court will not ordinarily remove a trustee named by the settlor *upon a ground existing at the time of his appointment and known to the settlor and in spite of which the settlor appointed him*, although the court would not have appointed him trustee.'" (*In re Estate* of *Brown* (1937) 22 Cal.App.2d 480, 486, italics added; accord, *Copley v. Copley* (1981) 126 Cal.App.3d 248, 286-287; Rest.3d Trusts, § 37, com. f.) That is not the situation here. Even a trustee appointed by the settlor may be removed for good cause.

"The removal and substitution of a trustee is largely within the discretion of the trial court. [Citations.]" (*Estate* of *Gilmaker* (1962) 57 Cal.2d 627, 633.) Thus, "[t]he trial court's ruling is reviewed under the abuse-of-discretion standard; factual findings are reviewed for substantial evidence, conclusions of law are reviewed de novo, and 'application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 387.)

In the trial court, the Siblings had the burden of proving a breach of trust. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 853.) Now that the trial court has found a breach of trust and Lupe has appealed, however, "the burden rests upon appellant . . . to affirmatively demonstrate the error which [she] asserts. [Citation.]" (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 70.)

Lupe argues that: (1) "Attempting to enter into a settlement agreement with the beneficiaries is not a breach of the trustee's fiduciary duties," and (2) "dealing in cash is not a breach of fiduciary duty." (Capitalization altered.) This ignores all of the other grounds for removal that the trial court stated: comingling personal funds with trust funds, making advance payments to herself, creating vendor invoices, failing to account on request, failing to make the trust property productive, violating labor laws, and charging the trust for storage of individual beneficiaries' property. Because Lupe has not argued on appeal that these alternative grounds were erroneous, she has forfeited any such argument. (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 970, fn. 7.) We may affirm removal for this reason alone.

In any event, with regard to Lupe's claim that dealing in cash was not a breach of trust, we disagree.

A trustee has a duty to "administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims . . . ." (Prob. Code, § 16040, subd. (a).) In addition, a trustee has a duty to account to the beneficiaries. (Prob. Code, § 16062, subd. (a).) It follows that "[a] trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust . . . ." (Restat.3d of Trusts, § 83.) "[T]he records of a trust must provide information that will enable the trustee to account for receipts [and] expenses . . . and any other information that may be needed in providing a . . . formal accounting to the beneficiaries or in court . . . ." (*Id*., com. a.) "[T]h[is] duty . . . may be satisfactorily discharged by simple, orderly forms of bookkeeping and record maintenance, disclosing information in an understandable manner that will enable beneficiaries to determine whether the trust is being properly administered." (*Ibid*.) Here, Lupe received rents in cash; she had copies of the receipts that she had supposedly given to the tenants, but they stopped after October 2014, without explanation. The bank deposits did not match the rents due. Likewise, she wrote checks to herself and supposedly cashed them to pay expenses, but she had no bills or receipts from the vendors. This made it impossible to tell whether the trust was properly administered.

Lupe quotes *Estate* of *Cousins* (1896) 111 Cal. 441, 449, to the effect that "Mere error of judgment is not sufficient to subject the trustee to punitive responsibility." Actually, what *Cousins* says is, "'*If* [*a trustee*] *has exercised the care and judgment of ordinarily prudent men in their own affairs*, he will not be chargeable for his mere errors of judgment . . . .' [Citation.]" (*Id*., italics added.) Lupe failed to comply with the italicized language.

Lupe pleads that she "had no experience handling a trust or rental properties"; she managed the properties the way Jose had done and the way he taught her to do. However, "[i]t is not an excuse that the trustee's own ability and experience are subnormal and that [s]he used all the care and judgment which [s]he had." (Bogert, The Law of Trusts and Trustees (2d ed. 1993) § 541, p. 174.) Moreover, by August 2014, she had hired an attorney and could have sought his advice.

Finally, we need not reach Lupe's claim that offering to settle with the beneficiaries was not a breach of trust. We repeat that, even assuming the trial court erred in finding that this was a breach of trust, there were ample unchallenged alternative grounds for removal.

As a subsidiary argument, Lupe claims the trial court erred by appointing Blanca as trustee, because she had not been named as successor trustee in any version of the Trust. The original Trust had named Antonia as successor trustee; the First Amendment had named Lupe as successor trustee, with Raul as first alternate.

We must reject this contention because Lupe failed to raise it below. "It is axiomatic that arguments not raised in the trial court are forfeited on appeal. [Citations.]" (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038.) "'[A]ny other rule would permit a party to trifle with the courts. The party could deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable.' [Citation.]" (*N.M. v. Superior Court* (2016) 5 Cal.App.5th 796, 808.)

The Siblings' petition asked that Blanca be appointed in place of Lupe. Lupe's objections to the petition have not been included in the appellate record, so she cannot show that she objected to this request at the time. Likewise, in their trial brief, the Siblings asked again that Blanca be appointed. In her trial brief, Lupe did not argue otherwise. The siblings repeated their request yet again in their closing brief. Lupe argued in her closing brief that she should not be removed, but she did not discuss who should replace her if she *was* removed. Finally, after the trial court issued its Post-Trial Orders, appointing Blanca, Lupe did not file a motion to vacate, motion for new trial, or similar motion for reconsideration. Thus, this contention was not preserved for appeal.

Separately and alternatively, there was no error. Lupe relies on Probate Code section 15660, subdivision (b), which, as relevant here, provides: "If the trust instrument . . . names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument." However, under Probate Code section 15601, a person named as trustee may reject the trust, either in writing or by failing to accept within a reasonable

time. If a vacancy cannot be filled as provided in the trust instrument, "the court may, in its discretion, appoint a trustee to fill the vacancy." (Prob. Code, § 15660, subd. (d).)

Here, the Siblings — including Raul and Antonia, the named successors — requested, in writing, through their attorneys, that the trial court appoint Blanca. The trial court could reasonably regard this as their rejection of the Trust. Accordingly, it was not only permitted but required to appoint some other trustee.

VI

THE SECOND AND THIRD AMENDMENTS

A. *The Validity of the Second and Third Amendments*.

Lupe contends that the trial court erred by invalidating the Second and Third Amendments.

1. *The Trial Court's Ruling*.

In its oral ruling, the trial court stated:

"The issue of undue influence as to the two amendments to the trust, I believe it's the second and third. The standard is clear and convincing evidence. The two trust amendments were executed in the last weeks of . . . the settlor's life. . . . The trustee had been managing his finances for at least two years . . . . She was also his caretaker, administered his medications, took him to the doctor, . . . did whatever it was he needed . . . . At least one sibling testified that in the last year or so of her father's life she was not alone with her father at the house, that either the trustee . . . or her son was always present . . . .

"The Settlor had numerous illnesses and had said several months before that he no longer wanted life-saving measures. He had been on hospice for six or seven months before he died. He suffered from diabetes, pneumonia, congestive heart failure. He was taking ten different medications per day, was on oxygen and all of that was administered by the . . . trustee.

"The notary who witnessed . . . the amendment never testified that he asked Mr. DeAnda if he understood the document to be a change to his trust, only that he asked him if he wanted to sign it and the trustee had handed the document to him to give Mr. DeAnda to sign.

"There was no testimony that any of these trust amendments were read to Mr. DeAnda or translated into Spanish for him. And there is pretty clear evidence that he did not read English and did not understand English that well, did not speak it that well. I assume a bit, but certainly not well enough to understand what he was doing.

"The third amendment . . . the testimony was that they talked to an attorney about drafting it. It was on speaker phone, the Settlor, the attorney and the current trustee acting as translator for her father. Thus she had a hand in procurement of the amendment, . . . the variance with the expressed intention of the Settlor.

"For 20 years the trust estate had been to be divided equally between all the children except for . . . two initially, who had received properties before death, and later the other amendment to the trust added Manuel back in after he deeded the property he had . . . back to his father. . . .

"And yet this new amendment gave . . . what may be the most valuable property of all in this last amendment in the several days before his death . . . to . . . the successor trustee outright. And . . . she was included in the distribution of . . . the remainder of the share, completely contrary to everything they had expressed beforehand. . . .

"The Settlor's physical and mental condition was so weak . . . as to make him susceptible to undue influence. The successor trustee Lupe DeAnda does benefit unduly. She gets the Chino house, as I said, and a share of the remaining assets. It is highly probable in the Court's view that these amendments were procured by undue influence. The burden shifted to the successor trustee to show otherwise and she has not produced sufficient evidence to show that those last two amendments were not the product of undue influence. Therefore, they are to be voided."

2. *Discussion*.

"California courts have long held that a testamentary document may be set aside if procured by undue influence. [Citations.]" (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) "The issue of whether or not undue influence has been exerted frames a question of fact [citations]"; thus, we review a finding of undue influence under the substantial evidence standard. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342, 354.)

"Undue influence" is defined by statute in Welfare and Institutions Code section 15610.70, subdivision (a), made applicable to trust litigation by Probate Code section 86:

"'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In

determining whether a result was produced by undue influence, all of the following shall be considered:

"(1) The vulnerability of the victim. . . .

"(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

"(3) The actions or tactics used by the influencer. . . . [¶] . . . [¶]

"(4) The equity of the result. . . ."

Lupe ignores these statutes. Instead, she uses a definition of undue influence that is taken from *Estate of Sarabia* (1990) 221 Cal.App.3d 599. *Sarabia* stated: "[A] presumption of undue influence arises only if *all* of the following elements are shown: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the actual preparation or execution of the will, such conduct not being of a merely incidental nature; and (3) undue profit accruing to that person by virtue of the will." (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) This definition is inapt, because it states when a *presumption* of undue influence arises. Here, the trial court did not rely on any presumption. Rather, it found that the Siblings had made out a prima facie case of undue influence, and Lupe had not rebutted that prima facie case.

The trial court analyzed each of the four statutory factors, in more or less the statutory order. It found that Jose was vulnerable, in that he was ill, close to death, and

isolated from other family members. It found that Lupe had apparent authority, in that she was not only a family member but also Jose's caretaker. It found that Lupe had used coercive actions and tactics, in that she isolated Jose from other family members, discussed the amendments with Attorney Wilkes, and did not have the amendments translated for Jose. Finally, it found an inequitable result; despite the fact that Jose had consistently manifested an intent that his estate be shared equally among all of his children, Lupe ended up with the Breton house in addition to an equal share of the other trust property.

Lupe does not challenge the trial court's findings on the first three factors. She challenges only its finding of an inequitable result. She asserts: "there was no substantial evidence Lupe unduly profited from the amendments . . . ." "Simply receiving a larger share of an estate is insufficient to establish 'undue benefit.'" She relies, again, on *Sarabia*, *supra*.

In *Sarabia*, the party claiming undue influence sought to have the jury instructed that "'the word "unduly" has only a *quantitative* meaning: it means nothing more than that the beneficiary takes substantially more under the will he procured than he would otherwise have taken . . . ." (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) He argued that the question of whether a legatee had unduly profited had to be determined based solely on the terms of the will itself. In his view, because the named legatee had received more under the will than he would have in the absence of a will, the trial court

should have instructed the jury that, as a matter of law, the legatee profited unduly. (*Ibid.*; see also *id*. at pp. 606-607)

The appellate court disagreed: "For the trier of fact to decide what influence was 'undue' clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary . . . . (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 607.) "The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition. [Citation.] That evidence may include dispositional provisions in previous wills executed by the decedent [citation], or past expressions of the decedent's testamentary intentions. [Citation.] It may also encompass a showing of the extent to which the proponent would benefit in the absence of the challenged will. [Citation.]" (*Ibid.*)

Thus, *Sarabia* merely held that a quantitative profit does not prove an undue profit *as a matter of law*. However, it still may do so *as a matter of fact*. Moreover, *Sarabia* endorsed consideration of any previous expressions of the decedent's intent and any previous testamentary instruments, as well as the law of intestate succession. Here, the trial court considered these matters and properly concluded that Lupe profited unduly.

Lupe also cites *In re Estate of Shay* (1925) 196 Cal. 355,[8] in which the Supreme Court found insufficient evidence of undue influence. (*Id*. at pp. 361-365.) There, the decedent had six children. (*Id*. at p. 358.) He lived with his daughter Margaret for several years before he died. (*Id*. at pp. 359, 362.) When he was seriously ill, Margaret sent for her brother George. (*Id*. at p. 362.) The decedent dictated the terms of a new will to George; George took his notes to an attorney, who drafted the will. George then read the will to the decedent, who "expressed himself as satisfied therewith." (*Ibid*.) After George left, the decedent went, on his own, to the attorney's office and signed the will. (*Id*. at pp. 362-363.) The resulting will was more favorable to Margaret than to the other five children. (*Id*. at pp. 358-359.)

The Supreme Court stated: "It may be conceded that Margaret and George sustained a confidential relationship toward the testator. It may be further conceded that Margaret unduly profited by the will, although the fact that she had lived with and constantly cared for the testator throughout the last years of his life would seem to afford a perfectly good reason for his preferment of her. But there is no evidence that she was active in procuring the execution of the will, or that she participated therein to any extent.

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[8] The Siblings' only response to *Shay* is that it "dat[es] back a hundred years" and "does not address the statutory framework that now exists concerning proof for undue influence claims." However, Probate Code section 86, after defining "undue influence," states, "It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law." Accordingly, older undue influence cases remain worthy of consideration.

There is no evidence that she even knew of the execution of the will until some time thereafter. The circumstances above mentioned of her expressed intention to send for George to have a will made, and the fact that she did send for him, do no more than give ground for a suspicion that she may have participated in procuring the will to be executed. But a finding to that effect based upon such evidence would be the product of speculation and conjecture. The things done by George in this connection . . . do not constitute such activity in procuring the execution of the will as to bring this rule into operation. [Citations.] Neither can it be said that he will unduly profit from this will." (*Estate of Shay*, *supra*, 196 Cal. at pp. 363-364.)

In sum, then, Margaret profited by the will but did not procure its execution; George *neither* profited by the will *nor* procured its execution. Here, however, there was evidence that Lupe both profited by the amendments and also participated in their preparation. Accordingly, *Shay* is not controlling.

Next, Lupe relies on *Estate of Merrick* (1949) 93 Cal.App.2d 624. There, however, the decedent "indicated on more than one occasion that she wanted [her son John] to have [her] home . . . ." (*Id*. at p. 626.) She dictated the terms of her will in front of witnesses, including that her home should go to John; one of the witnesses took notes, and based on them, the will was typed up. John read the will it to her, again in front of witnesses, and she said it was what she wanted. She then signed it. (*Id*. at p. 626; see also *id*. at p. 627.) The trial court found no undue influence (*id*. at p. 625), and the appellate court upheld this finding. (*Id*. at pp. 627-628.)

This case could hardly be more different. Here, Jose repeatedly stated that he wanted his estate divided equally. There is no evidence that he initiated the amendments. The amendments were not read to him before he signed them; in any event, they were in English, which he did not understand. Finally, the trial court did find undue influence; the issue before us is whether that finding is supported by substantial evidence, not whether a contrary finding might also be supported.

The core of Lupe's position is that, while she did receive a larger share of the estate under the amendments, Jose must have decided that she deserved it for taking care of him and Maria. Perhaps the trial court could have come to this conclusion, but it was not required to. Significantly, even though Lupe had been caring for Jose since 2009 or 2010, he still said in July 2013 that he wanted the Breton house sold when he died and the proceeds distributed equally. It was only when he was in hospice care and less than a month away from death that he signed the Second Amendment giving the Breton house to Lupe. This evidence supports the trial court's conclusion that he signed it, not out of gratitude for her loving care, but rather due to her undue influence.

Finally, Lupe seizes on certain comments by the trial court.

At the close of the Siblings' case-in-chief, Lupe made a motion for judgment. (Code Civ. Proc., § 631.8.) In denying the motion, the trial court commented, "I guess we need to see . . . what the arguments are regarding those amendments. There's at least some testimony — I admit, not a lot, but there's some that the father was not — you

know, a couple of those amendments were made at the end. . . . [¶] I agree the testimony is a little — as to whether he had capacity or not during those amendments."

Lupe characterizes this as a finding that there was insufficient evidence of undue influence. That is incorrect, for three reasons. First, the trial court was not bound by its comments in ruling on a motion for judgment. It was free to change its mind — particularly after hearing Lupe's case-in-chief. Second, while it observed there was "not a lot" of evidence, evidently it concluded that there was *sufficient* evidence; otherwise, it would have *granted* the motion for judgment, at least on the cause of action to invalidate the amendments. And third, the trial court was focused on the issue of whether Jose had the *capacity* to sign the amendments. It noted that it had yet "to see . . . what the arguments are regarding those amendments." Thus, it was not addressing the sufficiency of the evidence of *undue influence*.

Lupe also argues: "[T]he [t]rial [c]ourt found 'It is highly probable in the Court's view that these amendments were procured by undue influence.' [Citation.] Highly probable is not a burden of proof. As such, it is not the basis for which the [t]rial [c]ourt can determine undue influence." To the extent that we understand this argument at all, it seems to be that the trial court erred by applying a "highly probable" standard of proof rather than the applicable "clear and convincing evidence" standard of proof. (See *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 545 ["'[u]ndue influence must be proven by clear and convincing evidence.'"].)

However, these are not two different standards; they are one and the same. "'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P*. (1981) 28 Cal.3d 908, 919; accord, *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 112-114 [upholding jury instruction defining "clear and convincing evidence" as evidence "that it is highly probable that the fact is true"].) At the outset of its ruling, the trial court specifically stated, "The standard is clear and convincing evidence." Thus, plainly it was applying the correct standard.

We therefore conclude that the trial court did not err by invalidating the Second and Third Amendments based on undue influence.

B. *The Effect of the Post-Trial Orders*.

Lupe also contends that the trial court never actually *did* invalidate the Second and Third Amendments. She claims that, while the trial court said in its oral ruling that the Second and Third Amendments "are to be voided," it never entered any written order to this effect. The minute order of the hearing said, "Court gives the ruling on the record. [¶] Court grants the petition"; however, it did not explicitly invalidate the amendments. The Post-Trial Orders and the Amended Judgment likewise did not explicitly invalidate the amendments.

This is an odd sort of argument for an appellant to be making. If, in fact, the trial court never invalidated the Second and Third Amendments, how (in Lupe's view) is that an error? How is she aggrieved? And what relief could we possibly give her? In the conclusion of her brief, however, she asserts that the provision of the Post-Trial Order

ordering her to quitclaim the Breton house to the Trust "must be reversed as no true judgment on the issue has been entered." Thus, her position is that, in the absence of a provision expressly invalidating the Second and Third Amendments, the provision ordering her to quitclaim the Breton house cannot stand.

We disagree. Quite the contrary, as we will discuss, the order to quitclaim the Breton house constitutes an implied finding that the Second and Third Amendments are invalid.

Lupe relies on Code of Civil Procedure section 1003, which provides: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." Here, however, the trial court entered the Post-Trial Orders, which undoubtedly qualify as formal written orders. The issue before us is, what is the effect of the fact that the Post-Trial Orders do not explicitly rule on the Siblings' request to invalidate the amendments to the trust?

"'The same rules apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing. [Citation.] The rule with respect to orders and judgments is that the entire record may be examined to determine their scope and effect . . . .' [Citation.]" (*Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 780.) "The rule with respect to orders and judgments is that the entire record may be examined to determine their scope and effect, [citation], and where uncertainty is thereby made plain the defect does not necessitate a reversal. [Citation.]" (*Los Angeles Local*

Joint Executive Bd. of Culinary Workers and Bartenders, A.F. of L. v. Stan's Drive-Ins, Inc. (1955) 136 Cal.App.2d 89, 94.)

When "a statement of decision was available but not requested,[9] we apply the doctrine of implied findings and presume the court made all factual findings necessary to support its order — to the extent substantial evidence supports such findings. [Citation.]" (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.)

The Post-Trial Orders did state: "[*T*]*he Court grants the Plaintiffs' Petition for* Recovery of Trust Property, *Invalidation of Trust Amendments*/Declaratory Relief, Removal of Trustee and Accounting." (Italics added.) They also ordered Lupe to quitclaim the Breton house to the Trust. Under the First Amendment, the Breton house was Trust property; thus, it appears that the trial court did *not* invalidate the First Amendment. On the other hand, under the Second Amendment, the Breton house was to be Lupe's sole property; thus, it appears that the trial court *did* invalidate the Second Amendment. And because the grounds for invalidating the Second and Third Amendment were identical, it appears that it also invalidated the Third Amendment.

In addition, "[t]he rule is well established that oral opinions of the trial judge may be used to interpret, [though they] may not be used to impeach, his order. [Citation.]" (*People v. Clenney* (1958) 165 Cal.App.2d 241, 244; accord, *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1385-1386.) Accordingly, in

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9 Here, as we held in part IV, *ante*, the trial court was not required to issue a statement of decision, in part because there was no valid request for one.

interpreting the statement in the Post-Trial Orders that the petition was "grant[ed]," we may rely on the trial court's oral statement that it intended to invalidate both the Second and Third Amendments (although not the First Amendment).

In sum, the trial court's intention is clear. The failure of the Post-Trial Orders to invalidate the Second and Third Amendments explicitly — rather than implicitly — is a mere clerical error. And "[c]lerical errors may be corrected at any time. [Citation.]" (*Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1085, fn. 3.)

For example, in *Chadwick v. Superior Court* (1928) 205 Cal. 163, a referee's report recommended that the defendant in a condemnation action should be awarded $1,190 for land and $1,746 for improvements, for a total of $2,936. At a hearing, the trial court orally approved the award of $2,936. However, its interlocutory judgment awarded only $1,190. (*Id*. at p. 164.) It denied a motion to amend the judgment. (*Id*. at pp. 164-165.)

The Supreme Court held that, because the error was clerical, the defendant was entitled to a writ of mandate directing the trial court to correct the interlocutory judgment. (*Chadwick v. Superior Court*, *supra*, 205 Cal. at p. 166.) It stated: "Not only has the court power to remedy clerical errors, as distinguished from judicial errors, which may be corrected only through motion for new trial or by appeal, but it is a plain duty to remedy them, the performance of which will be enforced in the furtherance of justice." (*Id*. at p. 165.)

Chadwick refutes Lupe's theory that the trial court's written orders are controlling simply because they are in writing. Instead, we will direct the trial court to modify the Post-Trial Orders and the Amended Judgment, nunc pro tunc, so as to explicitly invalidate the Second and Third Amendments.

VII

EVIDENTIARY RULINGS

Lupe contends that the trial court made several erroneous rulings admitting or excluding evidence.

A. *Bookkeeper's Testimony about Whether Payments were Actually Owed*.

First, Lupe contends that the trial court erred by sustaining an objection to testimony by the bookkeeper for the Trust about how he knew when the Trust owed money.

1. *Additional factual and procedural background*.

Lupe's husband, Steve Klasna, testified that he did the bookkeeping for the Trust, using QuickBooks. Most renters paid in cash; he became aware of rent payments when Lupe told him. Likewise, he became aware that a renter was entitled to a credit when Lupe told him. "[K]eeping track of when payments are made" was "pretty [much] Lupe's job." He also testified that he had been "instructed" to pay Lupe $250 a week.

Counsel for Lupe asked, "Are you aware of money being taken by Lupe that was not owed to her[?]" Counsel for the siblings objected, "Lack of foundation. Hearsay." The trial court sustained the objection.

Counsel for Lupe also asked, "Have you ever made any entries into the Quick Books program of payments made to anyone to which money was not owed?" Counsel for the siblings objected, "[L]ack of foundation. Hearsay." The trial court sustained the objection.

Counsel for Lupe then asked, "Through the Quick Books system, does that make you aware as the bookkeeper as to when monies are owed?" Counsel for the siblings objected, "Leading. Hearsay." The trial court sustained the objection.

Counsel for Lupe argued, "[I]t is not going to the truth of the matter asserted. It's going to a factual basis as to what he does and how he does it." The trial court responded, "I've heard that. I don't know what else I need to hear. I've heard that, you know, somebody tells me this is the amount owed. . . . I put that in the computer every month. And then somebody else tells me, oh, they're paid X-amount. I put that in the computer every month. . . . [¶] . . . That doesn't mean anyone really owed that amount. That doesn't mean anyone really billed that amount."

Klasna went on to testify: "I . . . make sure that billings are not pulled out of the sky, that these billings have a paper trail . . . . I have documentation that tells me that a given billing is valid and a given payable is valid and a given receivable is valid."[10]

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[10] After another paragraph of testimony by Klasna, counsel for the siblings objected, "Objection, move to strike. Hearsay, nonresponsive." The trial court appeared to concur, but it did not strike any of the testimony. As we understand it, the objection did not go to the portion of Klasna's testimony that we quote here; however, even if it did, the testimony was not stricken, and therefore it remained in the record. (*People v. Letourneau* (1949) 34 Cal.2d 478, 489; *People v. Vetri* (1960) 178 Cal.App.2d 385, 394.)

2. *Discussion*.

There was no evidence that Klasna had any personal knowledge about why the Trust made or received any given payment. To the contrary, he testified that he merely relied on what Lupe told him. As a result, his testimony on whether money was actually owed lacked foundation and was necessarily based on hearsay.

Lupe argues that the evidence was admissible to show Klasna's reason for doing an act, under the state of mind exception to the hearsay rule. (Evid. Code, § 1250.) None of the questions, however, went to Klasna's reason for doing an act. Moreover, Lupe does not explain what act she is talking about or why Klasna's reason for doing it was relevant. If she means his reason for making entries in QuickBooks, that was already clear — he made them because Lupe told him to.

In any event, Lupe has not shown that the ruling was prejudicial. (Evid. Code, § 354.) Klasna went on to testify, in general terms, that any payments he entered in QuickBooks were supported by "documentation" — by "a paper trail." This appears to be all that Lupe was trying to establish with the questions to which objections were sustained.

B. *Testimony Regarding the Parents' Statements*.

Next, Lupe contends that the trial court erred by admitting testimony by the Siblings about hearsay statements by their parents.

1. *Additional factual and procedural background*.

Counsel for the Siblings asked Antonia: "What did your parents say regarding disposition of the real property that they owned upon their death?" Counsel for Lupe objected, "[H]earsay." Counsel for the siblings argued that the evidence was admissible under two hearsay exceptions — for statements concerning a declarant's revocable trust (Evid. Code, § 1260) and for a statement of a decedent when offered in an action against his or her estate (Evid. Code, § 1261). The trial court overruled the objection, citing both exceptions.

Antonia then answered, "Our parents said that the boys would inherit it, the property for themselves. And the remainder property would be for the remainder six siblings."

Later, counsel for the siblings asked Raul: "Did your father mention anything to you about the Breton home, the Chino home?" Counsel for Lupe objected, "[H]earsay." The trial court overruled the objection.

Raul then answered, "Actually, . . . he mentioned that precisely[,] saying that the girls were really interested in that house and that it was better that if we sold it."

Raul also testified, over a similar hearsay objection, that his father wanted the Breton house to be sold after his death "[b]ecause the girls also wanted that house and my father did not want problems."

2. *Discussion*.

Lupe argues that Evidence Code section 1260, the hearsay exception for statements concerning a declarant's revocable trust, did not apply, because it allows the admission of evidence that a revocable trust is in effect, but not evidence of the *terms* of the revocable trust. The trial court, however, overruled Lupe's initial objection, citing *both* Evidence Code sections 1260 and *1261*. Lupe does not argue that Evidence Code section 1261 did not apply and thus has forfeited any such contention. (*In re Marriage of LaMoure* (2011) 198 Cal.App.4th 807, 817.) We may reject her contention for this reason alone.

Separately and alternatively, we may assume, without deciding, that the hearsay exceptions in both Evidence Code section 1260 and 1261 did not apply. Even if so, the parents' intent was at issue in the case, and therefore the evidence was admissible under the state of mind exception to the hearsay rule. (Evid. Code, § 1250; *Estate of Aiello* (1980) 106 Cal.App.3d 669, 676 [decedent's hearsay statements about her intentions regarding her will were admissible under state of mind exception].)

C. *Deposition Testimony*.

Finally, Lupe contends that the trial court erroneously precluded her from reading part of a deposition into the record.

1. *Additional factual and procedural background*.

While Raul was on the stand, counsel for Lupe asked to read from his deposition, specifying the portion by page and line numbers. Counsel for the siblings objected,

"Legal conclusion and relevance . . . ." Counsel for Lupe responded, "[T]here was no objection at the time of the deposition." The trial court sustained the objection.

2. *Discussion*.

Lupe has forfeited this contention by failing to make a record as to the content of the excluded testimony. (Evid. Code, § 354, subd. (a).) Specifying it by page and line number does not help us to determine whether it was inadmissible on other grounds or whether its exclusion was harmless.

In any event, Lupe's argument that the objections were forfeited because they were not raised at the deposition lacks merit. Objections "to the form of any question or answer" are forfeited by failure to raise them at a deposition. (Code Civ. Proc., § 2025.460, subd. (b).) However, "[o]bjections . . . to the relevancy, materiality, or admissibility at trial of the testimony . . . are unnecessary and are not waived by failure to make them before or during the deposition." (*Id*., subd. (c).) The objections here — legal conclusion and relevance — went to the substance of the testimony, not to the form of the question. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 8:695, p. 8E-103.) Thus, they were not forfeited by failure to raise them at the deposition.

VIII

DISPOSITION

The Post-Trial Orders are affirmed. We direct the trial court, on remand, to modify the Post-Trial Orders and the Amended Judgment, nunc pro tunc, so as to

explicitly invalidate the Second and Third Amendments. The Siblings are awarded costs on appeal against Lupe.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

MENETREZ
J.