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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Conservatorship of the Person and Estate of
MARIE H. JONES.

CASSANDRA D. JONES, as Conservator,
etc.,

Petitioner and Appellant,

v.

LOUIS JONES et al.,

Objectors and Respondents.

G043185

(Super. Ct. No. A216240)

OPINION

CASSANDRA D. JONES, as Trustee, etc.,

Plaintiff and Appellant,

v.

LOUIS JONES et al.,

Defendants and Respondents.

G043186

(Super. Ct. No. A218268)

Appeals from an order of the Superior Court of Orange County,
Mary Fingal Schulte, Judge. Affirmed.

Cassandra D. Jones, in pro. per., for Petitioner and Appellant and for Plaintiff and Appellant.

Ernest L. Hayward for Objectors and Respondents and for Defendants and Respondents Louis Jones and Tracey Bronson.

BettyJane Champlin for Objector and Respondent and for Defendant and Respondent Judith A. Okonski.

* * *

INTRODUCTION

Following a trial on requests for approval of the accounts and reports of Cassandra D. Jones,¹ both as the conservator of her mother Marie Hicks Jones's person and estate, and as the trustee of her mother's trust, the trial court denied all requests for approval, found Cassandra had breached her fiduciary duties, and surcharged her for the financial losses suffered by Marie and by the trust, as a result of those breaches.

Cassandra appeals from the order. We affirm.

Substantial evidence supported the trial court's findings of Cassandra's breaches of fiduciary duty, and the court did not abuse its discretion in surcharging Cassandra as a result. Although Cassandra faced difficult financial circumstances as trustee and conservator, the trial court properly found those problems were caused by Cassandra's mismanagement and breaches of her fiduciary duty.

Collateral estoppel did not bar the trial court from determining that Cassandra did not have an ownership interest in one of the trust's real property assets. Although another judge had previously made a ruling granting Cassandra such an interest, that issue was not properly before the trial court at the earlier hearing, and therefore was neither actually litigated nor necessarily determined. Further, the minute

¹ Because this case involves many members of the same family, several of whom share the same last name, we will refer to all the family members by their first names to avoid confusion. We intend no disrespect.

order containing the court's ruling regarding ownership of the trust property was not a final decision on the merits of the issue.

Cassandra's additional assignments of error are without merit. Counsel's failure to serve the final order on Cassandra before submitting it to the trial court for signature and filing did not prejudice Cassandra. Any errors by the trial court in taking or refusing to take judicial notice of various documents were harmless. Cassandra has failed to demonstrate that the trial court was biased or prejudiced against her.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Marie was the mother of appellant Cassandra and respondents Louis Jones and Tracey Bronson. Marie established The Marie Hicks Jones Revocable Trust of December 19, 1995 (the trust). Marie also formed Jones Community Care, Inc. (Jones Community Care), which operates several residential care facilities for adults with developmental disabilities. The trust owns the properties at which those care facilities operate, as well as other real and personal property.²

In December 2000, Cassandra became the successor trustee of the trust, pursuant to its terms.

² Marie purchased a condominium at 630 West Palm Avenue, Unit 11, Orange, California, in January 1984, in her own name as an unmarried woman (the Palm property). Marie quitclaimed the Palm property to the trust in August 1996. (The timing of this quitclaim is consistent with a transfer of personal assets to the trust, which was created in December 1995.) The trust sold the Palm property in October 2002.

In 2002, Cassandra used the trust's money to purchase a residence located at 2517 Falconer Way, Orange, California (the Falconer property). Title to the Falconer property was taken in Marie's name as an unmarried woman.

The trust also owned a commercial property (the Broadway property), which contained multiple offices. Cassandra used part of the space rent free as her law office, but never rented out any remaining portion of the office space.

I.

*APPOINTMENT OF A SERIES OF CONSERVATORS OF MARIE'S PERSON AND ESTATE,
AND OF SUCCESSOR TRUSTEES OF THE TRUST*

On November 8, 2002, a petition for the appointment of a conservator of the person and estate of Marie was filed by Louis and Tracey. On November 14, Linda Rogers was appointed as a temporary conservator of Marie's estate, and Louis and Tracey were appointed as temporary coconservators of Marie's person.

On December 11, 2002, Rogers filed a petition for substituted judgment and for suspension of Cassandra's powers as successor trustee. Following a trial on the petition, which was conducted in October 2003, the trial court, Judge Marjorie Laird Carter presiding, issued a minute order on October 23, 2003, reading, in part, as follows: "Petition for substituted judgment is denied. Linda Rogers is removed as interim trustee and bond exonerated as of 10-31-03. Linda Rogers is removed from the board of directors of [Jones Community Care]. Actions of share holders['] meetings since the appointment of Linda Rogers are void. Powers of Cassandra Jones as trustee are reinstated as of 11-1-03. Linda Rogers to prepare an accounting through 10-31-03. The court finds the property on Palm was held in trust for Cassandra Jones and shall be considered a gift to Cassandra Jones. The court finds the Falconer property was purchased as a trust asset, however Cassandra Jones has made all payments and has an interest in the property. The court finds Marie Jones intended Cassandra Jones to have use of the Broadway property as a law office without rent. The trust is subject to court supervision. Statement of decision is to be prepared by Cassandra Jones and reviewed by attorneys Magro and Hayward by 12-15-03." A statement of decision was never prepared. Formal orders regarding the appointment of Cassandra as Marie's conservator and Cassandra's reappointment as trustee were signed and filed by the court; no order regarding the court's decisions on the property issues was ever signed or filed.

Cassandra was appointed conservator of the estate and person of Marie on November 6, 2003. On its own motion, the trial court appointed a guardian ad litem for Marie on September 12, 2007. The guardian ad litem filed petitions in March 2008 and July 2008 to appoint Judith A. Okonski as successor trustee and successor conservator of Marie's person and estate, respectively. Louis and Tracey later filed petitions to remove Cassandra as trustee and conservator, but unlike the guardian ad litem, they asked that they be appointed successor cotrustees and successor coconservators. The trial court appointed Okonski as successor conservator of Marie's estate, and successor trustee; Cassandra remained as the conservator of Marie's person. Letters were issued to Okonski as successor conservator on October 6, 2008, and the order appointing Okonski as successor trustee was filed on November 24, 2008.

Marie died on April 14, 2011. On May 26, this court granted the motion of the guardian ad litem, who had been a party to this appeal, to withdraw.

II.

CONSERVATOR'S REPORTS AND OBJECTIONS THERETO

Cassandra filed a first account current and report as Marie's conservator on December 15, 2004; Louis and Tracey filed objections. Cassandra filed a supplement to the first account on March 24, 2005. She then filed second and third accounts current and reports on April 1, 2008; Louis and Tracey again filed objections, as did Okonski and the guardian ad litem for Marie. Cassandra filed supplements to each of her three accounts current and reports on September 11, 2008, and again on April 17, 2009.

III.

TRUSTEE'S REPORTS AND OBJECTIONS THERETO

In her role as trustee, Cassandra filed an accounting on December 15, 2004.³ Louis and Tracey filed objections. Cassandra filed a supplement to her first

³ On our own motion, we augment the record on appeal in Court of Appeal case No. G043186 with the following documents, both of which were filed in *In re The Marie*

account and report on March 24, 2005. She filed her second and third accounts current and trustee's reports on April 1, 2008. On August 19, 2008, Cassandra filed a verified supplement to the first account. The guardian ad litem and Louis and Tracey filed objections to the second and third accounts current and reports in August 2008. In November 2008, Okonski filed objections to the third account current and report.

IV.

TRIAL ON THE ACCOUNTS AND REPORTS OF THE CONSERVATOR AND TRUSTEE

A consolidated trial on the various requests for approval of Cassandra's accounts current and reports as both conservator and trustee occurred on several days between April and June 2009; Judge Mary Fingal Schulte presided. On October 8, 2009, the trial court issued a tentative statement of decision denying all of Cassandra's requests. By its terms, the tentative statement of decision was to become the statement of decision "unless within ten days a party specifies one or more controverted issues or makes proposals not covered in the tentative decision." No party filed objections or proposed additions to the tentative statement of decision. On November 12, 2009, the court signed an order prepared by counsel for Louis and Tracey, pursuant to the court's request. Cassandra timely appealed.

DISCUSSION

I.

COLLATERAL ESTOPPEL

Cassandra argues that Judge Schulte was bound by Judge Carter's earlier decisions regarding the Palm property under the collateral estoppel doctrine. "Collateral

Hicks Jones Trust, Dated December 19, 1995, Orange County Superior Court case No. A218268: (1) first account current and report of trustee, petition for its settlement and for approval of trustee fees and attorney fees, filed on December 15, 2004; and (2) supplement to first account current and report of trustee, petition for its settlement and for approval of fees to trustee and to attorney, filed on March 24, 1005. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

estoppel precludes relitigation of issues argued and decided in prior proceedings.’ [Citation.] The doctrine applies ‘only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements.’ [Citation.] ‘Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting.’ [Citation.]” (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943-944.)

Whether collateral estoppel barred Judge Schulte from deciding the ownership of the Palm property depends on whether the issue was actually litigated and necessarily decided in the earlier trial before Judge Carter, and whether the October 23, 2003 minute order was a final decision on the merits.

The ownership of the Palm property was not an issue before the trial court in connection with the petition for substituted judgment and for appointment of a new trustee. That petition mentioned Cassandra’s failure to timely pay homeowners association dues on the Palm property, putting the trust’s property at risk, as an example of the breach of her fiduciary duties. Cassandra’s objection to the petition argued that the homeowners association’s management company failed to keep accurate records; it did not raise a claim that the Palm property was not an asset of the trust.⁴

⁴ At the later trial before Judge Schulte, testimony was offered that the homeowners association dispute was actually regarding the Falconer property, not the

In Cassandra's opening appellate brief, she contends: "Among the allegations in this Petition were that Appellant, as Successor Trustee . . . had breached her Trustee obligations by self-dealing regarding real property interests of The Trust, namely, the ownership interest of The Trust and Appellant in the 'Palm' property and the 'Falconer' property" A review of the petition refutes Cassandra's contention. It is a longstanding rule of jurisprudence that the court's ruling must be confined to the issues raised by the pleadings. (*Gould v. Stafford* (1888) 77 Cal. 66.)

We augment the appellate record with the following documents, all of which were filed September 5, 2003 in the case of *Conservatorship of the Person and Estate of Marie H. Jones* (Super. Ct. Orange County, No. A216240): (1) joint pretrial statement; (2) joint statement of the case for trial; (3) joint witness list; (4) joint list of stipulated facts; (5) trial brief of petitioner, Linda Rogers, temporary conservator of the estate of Marie H. Jones; and (6) objector Cassandra D. Jones trial brief. (Cal. Rules of Court, rule 8.155(a)(1)(A).) Those documents all pertain to the trial before Judge Carter, which culminated in the October 23, 2003 minute order. In none of those documents is the issue of the ownership of the Palm property mentioned.

Further, we have no evidence before us of what actually happened at the earlier trial; Cassandra has failed to show that the issue of the Palm property's ownership was before the court at that time. Cassandra lodged a copy of the transcript of the October 23, 2003 hearing with the trial court during the trial before Judge Schulte. Judge Schulte stated on the record that she had read the transcript, but did not receive the transcript in evidence.

We have also reviewed the transcript (although it is not designated as part of the appellate record), and find nothing in it that bears on whether the issue of the ownership of the Palm property was before Judge Carter. The transcript merely captures

Palm property. If true, then the Palm property was not truly mentioned in the earlier petition.

Judge Carter's ruling, and is generally consistent with the October 23 minute order. It does not, however, provide any basis for determining that the issue of the ownership of the Palm property, or, indeed, any issue other than the requests for substituted judgment on behalf of the temporary conservator and for removal of Cassandra as trustee, was properly before the court.⁵ We therefore agree that Judge Carter's decision regarding the ownership of the Palm property was in excess of the court's jurisdiction, and conclude collateral estoppel did not prevent Judge Schulte from considering, during the trial to approve the trustee's accounts and reports, whether Cassandra had breached her fiduciary duties as trustee with respect to the Palm property.

Additionally, the October 23, 2003 minute order was not a final decision on the merits. A minute order is not a final, appealable order when a statement of decision or formal order or judgment is required. (*Hirschberg v. Oser* (1947) 82 Cal.App.2d 282, 286; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 162, p. 238.) The minute order makes clear that it is not final in and of itself, as it requires the preparation of a statement of decision. (*InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1137, fn. 7 [minute order directing preparation of judgment to be signed by court is not a final order].) We note that the changes of Marie's trustee and conservator, which were addressed in the minute order, were finalized through formal orders, strengthening our determination that the minute order itself was not a final order.⁶

⁵ Cassandra argues on appeal that findings of fact and conclusions of law regarding the Palm property "were necessary to the determination of issues raised in the Petition of the Temporary Conservator and the Petition [for] Appointment of Conservator filed by Respondents." However, Cassandra does not explain *why* such findings and conclusions were necessary, and nothing in our review of the record supports Cassandra's contention.

⁶ Cassandra contends the minute order was final because everyone acted as if the minute order's direction that she would be subject to continuing court supervision as successor trustee and conservator was a final order. However, statutory and case law, and its own inherent powers gave the trial court the authority to exercise supervision over Cassandra as successor trustee and conservator, separate and apart from the language of

Because the minute order was not a final decision on the merits, collateral estoppel did not prevent Judge Schulte from considering the issue of the ownership of the Palm property.

Cassandra also argues the doctrines of waiver and laches barred Judge Schulte from reconsidering the issue of the ownership of the Palm property. It is true that neither Louis and Tracey nor the guardian ad litem demanded that Cassandra prepare a statement of decision following the October 2003 hearing, and it is further true that no party filed an appeal from the October 23, 2003 minute order. As noted *ante*, that minute order was not a final, appealable order, and the other parties to this case had no obligation to bring Cassandra's failure to finalize the trial court's orders to her attention. Neither waiver nor laches applies in this case.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT CASSANDRA BREACHED HER FIDUCIARY DUTIES AND SHOULD BE SURCHARGED.

At trial, Judge Schulte considered whether Cassandra had fulfilled her duties as trustee and as conservator, which was determined by whether her actions on behalf of the trust and the conservatee were reasonable under the circumstances. (*Conservatorship of Pelton* (1982) 132 Cal.App.3d 496, 501, fn. 2.) "The trustee shall 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 to accomplish the purposes of the trust as

the minute order. (See *Estate of Gump* (1982) 128 Cal.App.3d 111, 116 ["The scope of judicial supervision of a trustee's standard of performance [citation] includes continuing jurisdiction to settle periodic accounts and to pass upon the acts of the trustee"]; Prob. Code, § 2102 ["A . . . conservator is subject to the regulation and control of the court in the performance of the duties of the office"].) In this case, Judge Carter stated on the record that the "court has assumed jurisdiction of both the trust and the conservatorship." No formal order was required to give the court the authority to exercise continuing supervision over Cassandra as successor trustee and conservator after the court assumed jurisdiction over the trust and conservatorship.

determined from the trust instrument.” (Prob. Code, § 16040, subd. (a).) “The . . . conservator . . . has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate.” (Prob. Code, § 2401, subd. (a).)

The Probate Code authorizes a surcharge if the conservator breaches his or her fiduciary duties: “(a) If the . . . conservator breaches a fiduciary duty, the . . . conservator is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the estate resulting from the breach of duty, with interest. [¶] (2) Any profit made by the . . . conservator through the breach of duty, with interest. [¶] (3) Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty. [¶] (b) *If the . . . conservator has acted reasonably and in good faith under the circumstances as known to the . . . conservator, the court, in its discretion, may excuse the . . . conservator in whole or in part from liability under subdivision (a) if it would be equitable to do so.*” (Prob. Code, § 2401.3, italics added.) Breaches of fiduciary duty by a trustee are addressed similarly: “(a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. [¶] (2) Any profit made by the trustee through the breach of trust, with interest. [¶] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust. [¶] (b) *If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.*” (Prob. Code, § 16440, italics added.)

We review the trial court’s factual findings supporting its refusal to approve Cassandra’s accounts current and reports, and surcharging Cassandra for her breaches of

fiduciary duty, to determine whether they are supported by substantial evidence. (*Manson v. Shepherd* (2010) 188 Cal.App.4th 1244, 1259; *Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1529-1530; *Estate of Beard* (1999) 71 Cal.App.4th 753, 778-779.) We review the trial court's decision to surcharge Cassandra for her breaches of fiduciary duty for abuse of discretion. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 911.)⁷

Cassandra's overall contention is that she was forced to make hard decisions regarding the finances of the trust and of Marie personally, due to cash flow problems, and she opted to use available funds for Marie's care. What Cassandra fails to note, and what the trial court based its decisions on, is that the cash flow problems occurred because Cassandra mismanaged the trust's assets, failed to make the trust's assets income-producing, and incurred additional, unnecessary debt.

A.

Failure to file income tax returns for Marie

Regarding Cassandra's failure to file tax returns, the order reads: "The Court finds that Cassandra D. Jones failed to file federal and California fiduciary income tax returns during her tenure as Trustee, and failed to pay federal and California income taxes when due in various years. The Court further finds that these breaches of Trustee's duty have resulted in tax liens being filed against Marie Hicks Jones by the California Franchise Tax Board in the approximate amount of \$36,000, to date. Cassandra D. Jones also failed to file federal income tax returns, which has resulted in the imposition of both interest and penalties charged to Marie Hicks Jones, in amounts yet to be fully determined."

⁷ The trial court also made factual findings of breaches of fiduciary duty regarding Cassandra's failure (1) to make the Broadway property income-producing; (2) to pay court-ordered fees and costs to the temporary conservator; (3) to pay court-ordered attorney fees; (4) to pay court-ordered gifts to Louis and Tracey; and (5) to pay fees to the Department of Motor Vehicles. Cassandra does not make any argument about those findings on appeal.

There was ample evidence that Cassandra failed to file income tax returns for Marie. Cassandra does not dispute that she failed to file the tax returns, but contends her failure was reasonable under the circumstances because she believed the Jones Community Care corporate tax returns were incorrect, and possibly fraudulent. Okonski testified that as successor conservator and trustee, she filed extensions with the Internal Revenue Service and the California Franchise Tax Board because she did not have the necessary K-1 form for Jones Community Care. Cassandra does not explain why she could not have filed extensions for the income tax returns or otherwise have communicated with the relevant taxing authorities, rather than simply failing to file the returns. Louis testified he reviewed the Jones Community Care tax returns with its tax professional, and he had no concerns regarding their accuracy.

The trial court surcharged Cassandra for all interest and penalties assessed against Marie or the trust due to the failure to file income tax returns or pay taxes: “Cassandra D. Jones is surcharged the amount of all interest and penalties charged or assessed against Marie Hicks Jones, personally, or against her Trust by both the California Franchise Tax Board and Internal Revenue Service for each year that tax returns were not timely filed and taxes not timely paid, and for the amount of all interest and penalties charged or which arose during the period of her tenure as Trustee, to wit: October 23, 2003 through September 11, 2008, and all interest and penalties that accrue or are charged by the taxing authorities thereafter, until all income taxes, interest and penalties are paid in full for each of the tax years commencing with the period of her tenure as Trustee, until the date of her removal.” This order is appropriate under the circumstances, and we find no abuse of discretion.

B.

Failure to pay property taxes

The trial court concluded Cassandra failed to pay property taxes on the trust’s properties, and should be surcharged for interest and penalties charged against the

trust. “The Court finds that Cassandra D. Jones frequently and consistently failed to pay property taxes on various improved real properties held in the Trust, and that many of these properties are presently encumbered with tax liens totaling over \$100,000 at this time, with interest continuing to accrue and most of the property taxes still not paid, due to lack of sufficient funds on hand in the Trust.”

Cassandra claims she paid property taxes through December 2006 for all the trust’s properties, and was in the process of resolving one issue with the Broadway property’s taxes. She admitted she did not pay property taxes in 2007 because the trust was having cash flow problems, “[s]o at that time I made a decision that I’m not gonna pay the property taxes, and I’m gonna keep what moneys there are on hand in order to provide for mom’s care. And that’s what I did.” Delinquent property tax statements for various properties owned by the trust, showing failure to pay property taxes between 2003 and 2007, were admitted at trial. Those tax statements, in addition to Cassandra’s testimony that she intentionally opted to pay other bills rather than property taxes, supports the trial court’s finding of Cassandra’s breach of fiduciary duty.

The court did not abuse its discretion in surcharging Cassandra for financial loss caused by the breach of her fiduciary duty. “Cassandra D. Jones is surcharged the amount of all interest and penalties charged or assessed against Marie Hicks Jones, personally, or against her Trust by the Orange County Tax Collector for each year in which property taxes on Trust real property interests were not timely paid, and for the amount of all interest and penalties charged or which arose during the period of her tenure as Trustee, to wit: October 23, 2003 through September 11, 2008, together with all interest and penalties that accrue or are charged by the Orange County Tax Collector thereafter, until all property taxes, interest and penalties are paid in full for each of the Trust properties, and for each of the tax years, commencing with the period of her tenure as Trustee, until the date of her removal.” As with the other surcharges in the trial court’s

order, under the circumstances of the case, this surcharge was appropriate, and was not an abuse of discretion.

C.

Payment of trustee fees and loan repayments

“The Court finds that Cassandra D. Jones, without court approval, made various payments to herself on loans allegedly made by her to the Trust, one payment for which was for \$167,000. The Court further finds that ‘loan or loans’ are not disclosed and do not appear as a Trust or Conservatorship liability on any of her several filed accountings and supplements, nor did Cassandra D. Jones ever file a Trustee’s petition for court instructions or obtain authority of the court to repay this loan or loans. The Court further finds that just prior to her removal as Trustee Cassandra D. Jones repaid to herself an additional \$77,000.00. [¶] . . . The Court finds, based on a preponderance of the evidence, that Cassandra D. Jones has paid the following fees, loans, or ‘uncategorized’ amounts to herself, commencing October 23, 2003, through December 31, 2007: [¶] 1st Account, Trustee Fees \$15,000.00 [¶] 2nd Account, Trustee Fees \$22,500.00 [¶] 2nd Account, Loan \$37,500.00 [¶] 2nd Account, Uncategorized \$5,500.00 [¶] 3rd Account, Loan \$100,000.00 [¶] 3rd Account, Uncategorized \$37,000.00 [¶] Total: \$217,500.00 [¶] . . . The Court finds that Cassandra D. Jones never reported or carried the ‘loan’ balances allegedly due to her in any of her accountings or supplements. The alleged balances were never listed or enumerated as liabilities in either the conservatorship or trust accountings or any filed supplements, as is required pursuant to California Probate Code Section 1063 (g). The Court further finds that Cassandra D. Jones never sought court authority or court instruction on the payments to herself, relying instead on her interpretation of language in the Trust instrument that she believed permitted her to pay herself first, and all other obligations later, if at all.”

Cassandra claimed at trial that “the moneys paid to Cassandra D. Jones as trustee are moneys that were owed to me from the trust for the Palm property.” Cassandra admitted she had no written substantiation of any loan she made to the trust. The record is devoid of any evidence that Cassandra (1) made a loan to the trust, (2) reported any loans in any of her reports and accounts as trustee or conservator, or (3) sought court approval before repaying her alleged loans to the trust; therefore, the fact of those payments alone constitutes substantial evidence supporting the trial court’s finding that Cassandra’s payments of trustee fees to herself was a breach of her fiduciary duties.

Cassandra argues that at a hearing on November 2, 2004, Judge Carter ordered Cassandra could pay herself trustee fees and then account. Cassandra never augmented the appellate record with the reporter’s transcript from that hearing, so we have no way of knowing what Judge Carter did or did not say in that regard. The minute order from that hearing, however, does not make any reference to trustee fees. Even if Cassandra was authorized to pay herself trustee fees without a prior court order, she breached her fiduciary duties by doing so in a self-interested way.

On appeal, Cassandra argues that the trust provided for the payment of trustee fees, and she did not need court approval to pay herself such fees. The trust provides that “[i]ndividuals acting as Successor Trustees . . . shall be entitled to an amount equal to one-half (1/2) of the fee set forth in the generally prevailing corporate and/or institutional trustee fee schedules then effective, which fee shall be divided equally between them, plus reimbursement for expenses incurred by the individual Co-Trustee directly for the benefit of the trust.” We find nothing in the appellate record either setting forth the prevailing corporate trustee fees schedules, or summarizing the expenses incurred by Cassandra for the benefit of the trust. Further, it is undisputed that the trust was in financial distress, at least in terms of being cash poor; under such circumstances, it was a breach of Cassandra’s fiduciary duties to pay her own trustee

fees, even if authorized by the trust, ahead of other legitimate creditors, such as the Internal Revenue Service and the local property tax collector. Although Cassandra's argument on appeal is new, it is not tenable.

The trial court surcharged Cassandra for the amount of the payments she made to herself: "Cassandra D. Jones is surcharged the amount of \$217,500.00, and the additional sum of \$77,000.00, for a total of \$294,500.00 for the improper and unauthorized payment of all Trustee fees, loan reimbursements and 'uncategorized' reimbursements which she made to herself from the Marie Hicks Jones 1995 Trust from the date of her reinstatement, October 23, 2003, until the end of September, 2008." We find no abuse of discretion in the trial court's surcharge order regarding the trustee fee payments and loan repayments.

D.

The Falconer property

The trial court made findings that the Falconer property was Marie's personal asset, Cassandra had no ownership interest in the Falconer property, Cassandra had mismanaged the Falconer property, and the purchase of the Falconer property was unnecessary and a waste of funds. "The Court finds that Cassandra D. Jones, as 'attorney in fact' pursuant to a power of attorney for asset management, executed by Marie H. Jones, purchased improved real property located at 2517 Falconer Way, Orange, California 92867, whereon escrow closed on or about August 30, 2002. The Court finds that this purchase of a residence was not a necessary Trust expense, in that Marie Hicks Jones owned a residence on Daniel Lane in Orange Park Acres, and a residence on Walnut, in Orange, both of which were free of mortgage or deed of trust. The Court finds that the acquisition of the Falconer property by Cassandra D. Jones added debt to Marie Hicks Jones by way of an encumbrance of approximately \$480,000.00, with the obligation to make monthly payments to service that debt, which was secured by a deed of trust. The Court further finds that there are, or have been late mortgage payment fees,

with penalties and interest, and non-payment claims as a result of homeowner's association action with regard to liens on the property, and legal actions in the effort to resolve the amounts of all payments due to the homeowner's association as a result of the attempts to legally enforce the obligations secured by those liens. [¶] . . . [¶] . . . Title to the Falconer property remained in the name of Marie H. Jones, an unmarried woman, and was a conservatorship asset until the recent court order issued under Substituted Judgment, allowing and directing Judith A. Okonski, as conservator of the estate for Marie H. Jones, to transfer the Falconer property from the conservatorship to the Marie Hicks Jones 1995 Trust. There is insufficient evidence to support any ownership claim in the Falconer property by Cassandra D. Jones.”

Cassandra purchased the Falconer property in Marie's name as her attorney in fact, using Marie's money for the purchase; Cassandra claimed the Falconer property was purchased for Cassandra's benefit, and the money used for the downpayment was intended by Marie as a loan to Cassandra. Cassandra claimed ownership in the Falconer property based on her making mortgage payments and improvements to the Falconer property; Cassandra admitted she had never asserted a right to ownership of the Falconer property or sought reimbursement of moneys spent on it in any of her accountings or reports as trustee or conservator.

Cassandra admitted at trial that she did not pay all of the homeowners association dues on the Falconer property, causing the association to pursue a trustee's sale, because she had disputes with the association.

The documentary evidence is sufficient to support the trial court's findings regarding the Falconer property, and Cassandra's testimony does not overcome it.⁸

⁸ Cassandra contends she asserted a claim to the Falconer property in her objections to the petition for substituted judgment; a review of those objections shows this is untrue. Further, the minute order from the October 23, 2003 hearing only provides that Cassandra has “an interest” in the Falconer property, so, under any analysis, at least the issue of the extent of Cassandra's interest in the Falconer property remained to be

“Cassandra D. Jones is surcharged the amounts of all late mortgage payment fees, penalties and interest, and for the full amounts of non-payment claims as a result of homeowner’s association action with regard to liens on the Falconer Trust property, and with all legal fees and costs associated with the trial or other resolution of legal actions for which Marie Hicks Jones or the Marie Hicks Jones 1995 Trust paid fees, or were liable for the payment of fees in the effort to resolve the amounts of all payments due to the homeowner’s association as a result o[f] the attempts to legally enforce the obligations secured by those liens. . . . [¶] . . . The Court rules that there is insufficient evidence to support any ownership claim in the Falconer property by Cassandra D. Jones.” The trial court did not abuse its discretion in surcharging Cassandra for all amounts incurred due to her mismanagement of the Falconer property.

E.

Commercial Capital Bank Certificate of Deposit

“The Court finds that Cassandra D. Jones, whether purposefully or by neglect, allowed a \$42,000 certificate of deposit account to remain un-marshaled, which went by escheat to the uncollected property division of the California State Controller. The Court further finds that this omission could have been discovered had Cassandra D. Jones simply reviewed the 1099 forms sent to her from Commercial Capital Bank.” The order does not surcharge or otherwise punish Cassandra for this error. Exhibit No. 27 in the conservatorship proceeding shows property escheated to the State of California. There is no evidence that a 1099 form was ever sent to or received by Cassandra regarding this property. Evidence was presented that notices of the existence of the escheated property were mailed to the addresses of trust-owned properties, but there was

determined. We note that the reporter’s transcript for the October 23 hearing uses more equivocal language; the court stated on the record that Cassandra “*may* have an interest in” (italics added) the Falconer property. The different language regarding this issue strengthens our conclusion, *ante*, that the October 23 minute order was not a final order.

no evidence showing when those notices were sent, preventing any inference that they were received when Cassandra was acting as trustee or conservator.

We conclude there was not sufficient evidence to support the trial court's findings that Cassandra breached her fiduciary duties as trustee or as conservator of Marie's estate by failing to marshal the assets in the Commercial Capital Bank certificate of deposit before those assets escheated to the state. However, because the trial court did not surcharge Cassandra in connection with the escheated property, the inclusion of the findings on this issue did not prejudice her in any way. There are many other acts and omissions supporting the trial court's conclusion that Cassandra breached her fiduciary duties; any error in this finding is harmless.

F.

The Palm Property

The trial court made extensive factual findings regarding the Palm property.

“The Court finds, based on the evidence, that Marie Hicks Jones, as an unmarried woman, purchased improved real property located at 630 W. Palm Avenue, Unit 11, Orange, California 92868. Further, the evidence shows that by quitclaim deed, Marie Hicks Jones transferred the Palm property to Marie Hicks Jones, Trustee of the Marie Hicks Jones Trust dated December 19, 1995, on August 21, 1996, and that the deed was recorded with the Orange County Recorder on September 3, 1996, Document Number 19960449463. The evidence establishes that Cassandra D. Jones, as Successor Trustee of the Marie Hicks Jones Trust, sold the Palm property on or about October 18, 2002 to Joey Juarez, a single man, pursuant to the Grant Deed recorded with the Orange County Recorder on October 18, 2002, Document Number 20020905343. Thereafter, the evidence establishes that Hartford Escrow, Inc., issued a check to Cassandra D. Jones, as Successor Trustee of the Marie Hicks Jones Trust, for the net proceeds of sale on the Palm property in the amount of \$242,236.38. The evidence establishes that these funds

were thereafter deposited into the Wells Fargo Marie H. Jones Trust Account, account number 376-4624098.

“ . . . While the Court acknowledges that Cassandra D. Jones claims that the property located at 630 W. Palm Avenue, Unit 11, Orange, California was a completed gift to her from her mother, and while the Court acknowledges that Cassandra D. Jones is claiming that she is entitled to the entirety of the net proceeds of sale in the amount of \$242,236.38, the Court finds that neither a claim of ownership nor a claim of a completed gift of this property was raised in the pleadings as an issue for judicial determination in either the conservatorship or the Trust matters. The Court further finds that the clerk’s Minute Order dated October 23, 2003 merely recites gratuitous comments made by Judge Marjorie Laird Carter on matters not properly before her for adjudication. What was before Judge Carter for hearing was a Petition for Substituted Judgment and a Petition for Suspension of Powers of Trustee.

“ . . . The Court finds, based upon a review of a certified copy of a transcript of proceedings held before Judge Marjorie Laird Carter on October 23, 2003, at page 8, that Cassandra D. Jones was instructed by the Court to draft a Statement of Decision after trial, despite the fact that there is *nothing* disclosed in the record on that date to support a statement of decision on the issues of ownership or gifting of the Palm property. The Court further finds that no Statement of Decision was ever completed and filed with the court. Therefore, the Court finds that there is no order adjudicating ownership of the Palm property. Furthermore, the Court finds that no petition was ever filed pursuant to California Probate Code Section 850 with respect to the legal and/or equitable ownership of the Palm Property. The Court thus finds that the entirety of the \$242,236.38 deposited to the Marie H. Jones Trust Account, account number 376-4624098 as a result of the sale and close of escrow on the Palm property, is an asset of, and rightfully belongs to the Marie Hicks Jones 1995 Trust.”

Marie took title to the Palm property in 1984 in her name alone as an unmarried woman, and quitclaimed the Palm property to the trust in 1996. No documents were offered in evidence transferring title of the Palm property to Cassandra. (See Evid. Code, § 622 [presumption that owner of legal title to real property is the owner of full beneficial title may only be refuted by clear and convincing evidence].)

A friend of Marie's testified Marie said the Palm property was her property, and would never be Cassandra's property. Marie never told the woman who regularly worked as her real estate agent that she wanted to gift the Palm property to Cassandra. Cassandra contends this testimony was different from the evidence presented to Judge Carter in 2003, but failed to present any of that earlier alleged evidence to Judge Schulte or to this court.

The appellate record includes a grant deed conveying the Palm property from the trust to Joey Juarez. The grant deed was signed by Cassandra, as trustee, on September 26, 2002, and recorded on October 18, 2002. The proceeds of that transaction were deposited in the trust's bank account. Cassandra testified that after the trial court issued its minute order in October 2003 determining that the Palm property had been gifted to her, she began to use money from the trust account, on the ground it was hers.

Substantial evidence supports the trial court's finding that the Palm property was an asset of the trust that was never gifted to Cassandra, making Cassandra's use of money from the sale of the Palm property a breach of her fiduciary duties. As explained *ante*, Judge Carter's extrajudicial statements regarding the Palm property were in excess of the court's jurisdiction, and ineffective. The issue of the ownership of the Palm property was properly before Judge Schulte.

"The Court rules that the entirety of the \$242,236.38 deposited to the Marie H. Jones Trust Account, account number 376-4624098 as a result of the sale and close of escrow on the Palm property, is an asset of, and rightfully belongs to the Marie Hicks Jones 1995 Trust." The court did not abuse its discretion in determining Cassandra must

repay any money she took from the trust's account attributable to the sale of the Palm property.

III.

FAILURE TO SERVE FINDINGS AND ORDER ON CASSANDRA

Cassandra complains that Louis and Tracey's counsel improperly submitted findings to the trial court for signature without serving them on her first. Cassandra cites *Bainbridge v. Lachenmaier* (1932) 123 Cal.App. 560, 564, in which the court held, "[f]indings need be served on the parties to the action only where the court directs a party to prepare the findings." Cassandra's initial premise is incorrect. The trial court did not instruct Louis and Tracey's counsel to prepare the findings; the court issued its own findings in the tentative statement of decision, and requested Louis and Tracey's counsel to "prepare the judgments and orders consistent with this decision." By the time the order was submitted to the court for signature, the tentative statement of decision, by its terms, had become the statement of decision, because no party filed any objections or corrections to it.

In any event, Cassandra was not prejudiced by counsel's failure to serve the order on her before submitting it to the trial court for signature. She concedes she must show prejudice by the failure to serve the order before she may obtain a reversal on this ground, citing *Miller v. Murphy* (1921) 186 Cal. 344, 350. Cassandra claims one instance of alleged prejudice: she argues the statement of decision surcharged her \$217,500, while the order prepared by counsel surcharged her in the total amount of \$294,500. Cassandra fails to note the statement of decision found she paid herself \$77,000 in trustee fees just before she was removed as a fiduciary, and also found disallowance of fees paid should be charged to Cassandra along with surcharges. That counsel lumped those two types of charges together in the order is of no moment.⁹

⁹ At oral argument, for the first time, Cassandra identified multiple paragraphs in the formal findings that are allegedly inconsistent with the trial court's statement of

Cassandra also notes that the court's statement of decision was only 11 pages long, while the order prepared by counsel is 22 pages long, and from that deduces she was prejudiced by counsel's failure to serve the order on her before submitting it to the court for signature. We do not agree that a difference in the number of pages, without more, constitutes prejudice.

Cassandra failed to specify any other differences between the statement of decision and the order prepared by counsel, and therefore failed to establish any prejudice.

IV.

EVIDENTIARY ISSUES

Cassandra complains that the trial court improperly took judicial notice of certain documents, while failing to take judicial notice of others. We conclude the trial court properly took judicial notice of the various petitions, accounts, and objections filed in the two companion cases as court records. (Evid. Code, § 452, subd. (d)(1).)

It appears Cassandra is correct in noting the trial court failed to admit any of the trial exhibits as evidence, but, instead, took judicial notice of all the exhibits presented by the parties. While this is not the proper procedure, any error was harmless. The only trial exhibits we have relied on are the grant deeds for the various properties at issue, and the notices by the Internal Revenue Service and the Franchise Tax Board, all of which are proper subjects of judicial notice. (Evid. Code, § 452, subd. (c).) Additionally, witnesses competently testified regarding the content of those documents.

Cassandra claims that the trial court erred in failing to take judicial notice of the October 23, 2003 minute order, because Cassandra did not attach a copy of the minute order to her request for judicial notice. Our review of the record shows that the trial court actually refused to take judicial notice of the minute order because it could not

decision. Cassandra has waived any argument in this regard. (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6.)

find the minute order in the court's records. Cassandra is technically correct that when judicial notice of a part of the court's own file is sought, the requesting party is not required to provide a copy of it to the court. (Cal. Rules of Court, rule 3.1306(c).) Providing a copy in a case such as this, where the parties had vigorously litigated two different matters for six and one-half years, creating a huge amount of material in the case file, would probably have been more than merely a "thoughtful practice." In any event, any error in the trial court's failure to take judicial notice of the October 23 minute order was harmless, because the minute order was not a final order of the trial court.

We find no abuse of discretion in the trial court's application of the rules of judicial notice.

V.

CASSANDRA FAILS TO ESTABLISH ANY BIAS OR PREJUDICE BY THE TRIAL COURT

Cassandra claims that Judge Schulte expressed an "overt and obvious dislike" for her, but completely fails to support this claim with any reference to the record. Cassandra mentions that Judge Schulte complimented documents prepared by Louis and Tracey's counsel, but this cannot prove the court was prejudiced against Cassandra. She also complains that the court started the trial without her. The trial court has the inherent power to control the proceedings before it. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) The trial court began the trial at the scheduled time, and started with preliminary matters. Testimony did not begin for almost 20 minutes; Cassandra arrived in the courtroom 30 minutes after the scheduled start time. We find nothing objectionable about the trial court's handling of the trial of this matter.

One of the overarching rules of appellate procedure is that an appellant must affirmatively demonstrate prejudicial error in order to prevail on his or her appeal. (*In re Marriage of Ruiz* (2011) 194 Cal.App.4th 348, 358.) Cassandra has failed to do so.

DISPOSITION

The order is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.