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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Estate of GUADALUPE G. DEL CASTILLO, Deceased.	
ROBERT DEL CASTILLO, Petitioner and Respondent, v. ALBERT DEL CASTILLO, Objector and Appellant; PATRICIA LOBELLO, Trustee etc., and Respondent.	E030988 (Super.Ct.No. RPR01431) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Jeffrey King, Judge. Affirmed.

Skousen & Skousen and Robert James Skousen for Objector and Appellant.

Law Office of Maureen Muratore and Maureen Muratore for Petitioner and Respondent.

Sacks, Glazier, Franklin & Lodise, Margaret G. Lodise and Matthew W. McMurtrey for Trustee and Respondent.

Alfred and Guadalupe Del Castillo (father and mother, respectively) had four surviving adult children: Albert, Alice, Ralph and Robert. Robert, the youngest, was developmentally disabled and suffered from cerebral palsy.

Father and mother created a revocable inter vivos trust, into which they placed the bulk of their property. They managed the marital trust for their own benefit while both lived. At the father's death, mother continued to administer the trust for her benefit.

Robert, the disabled child, lived at home and was cared for by his parents, and then by his mother, until the mother's death. Upon the death of the second spouse, the trust named Robert as the sole successor beneficiary, with the apparent intent to provide for his care and support.

Mother died in 1999. She left two wills; Alice sought letters of administration under one will, and Albert, a short while later, sought letters of administration under the other. Albert also became the successor trustee under the trust. Under either will, the residue of the estate was designed to pour over into a trust. Since becoming trustee, Albert has bent his efforts to declaring Robert not to be a beneficiary of the trust; presumably, if Robert is not a beneficiary, the corpus would be distributed, free of trust, equally to the surviving children. This appeal arises out of a challenge to Albert's attempts to declare his brother Robert not a beneficiary of the trust.

The parents, who had established the trust and ordered their estates ostensibly to provide for the extraordinary needs of Robert, would undoubtedly turn over in their graves could they but know that some of the other children have instead squandered a

considerable portion of the assets, over $300,000, in divisive litigation, marked by finger-pointing, name-calling, personal animosity, self-aggrandizement and misfeasance, at the expense and to the detriment of their disabled sibling.

The probate court ultimately removed both Alice and Albert as personal representatives of their mother's estate and removed Albert as trustee of the trust. The court appointed an independent trustee and personal representative, ordered Albert to deliver all the trust and estate assets to her, and ordered Albert to file a further accounting. Albert contests these and other orders. For the reasons which follow, we shall affirm the orders of the probate court.

FACTS AND PROCEDURAL HISTORY

The Family

As noted, father and mother had four adult children who survived them: Albert, Alice, Ralph and Robert. A fifth child, Richard, apparently did not survive, and left no issue.

Mother's 1991 Will

Mother executed a will in 1991. The 1991 will provided that mother's personal property (clothing, jewelry, etc.) would pass to the surviving spouse or, if the spouse did not survive, then equally to the surviving children. The residue was to be poured over into a trust created in 1987. Father was named as the executor of the will; if father did not survive, then Alice was named first alternate executor, and Robert as the second alternate executor. The 1987 trust instrument does not appear in the record, but other

evidence indicates that the 1987 trust directed the trust assets ultimately be distributed to Robert.

The 1996 Pour-over Will

Father and mother created a new trust in 1996. Mother also executed a new will in 1996. The 1996 will poured over all of the estate property, including the personal property (such as clothing, jewelry, etc.), into the 1996 trust. The 1996 will nominated father as the executor but, if he did not survive, mother nominated alternative executors: first Robert, then Albert, and then Paul Del Castillo (a grandson).

The 1996 Trust Was a Revocable Inter Vivos Trust While the Parents Lived

Under the 1996 trust, father and mother were to act initially as cotrustees; the survivor of them would continue as the trustee after the first death. Upon the death of the second spouse, the trust nominated Robert as first successor trustee, Albert as second successor trustee, and Paul Del Castillo as third successor trustee. The 1996 trust provided that, during the parents' lifetimes, the trustee would pay the community property income, upon demand, to the settlors. Income derived from separate property held by the trust would be paid, upon demand, to the settlor to whom the separate property had belonged. Any income not paid out during a calendar year was to be added to principal. Father and mother jointly could require the trustee to invade the principal of community property assets, upon written demand; similarly, either spouse could, upon written demand, invade the principal of his or her separate property held by the trust.

Thus, while the parents lived, they could administer the trust property as they pleased, for their own benefit.

At the death of the first spouse, the trust directed that standard decedent and survivor ("A-B") trusts would be created, if needed for tax purposes (i.e., if the trust estate exceeded the federal estate exemption). At the death of the second spouse, the trust corpus would be placed in a successor beneficiaries trust.

Irrevocable Successor Beneficiary Trust After the Second Death

At the death of the second settlor and creation of the successor beneficiaries trust, the trust would become irrevocable. The trust instrument named Robert as the 100 percent successor beneficiary.

The trust called for the division of the trust estate into beneficial shares, according to the percentage of interest assigned to each successor beneficiary. Inasmuch as Robert was named as the 100 percent successor beneficiary, the entire trust corpus would become Robert's beneficial share. The trust authorized the trustee to "distribute Trust principal or earnings to or for the direct benefit of a successor beneficiary," up to the beneficiary's entire share, "as the Trustee deems in his/her sole discretion to be necessary for the maintenance, support and education of the respective successor beneficiary." The trust declared the share of any successor beneficiary over the age of 21 to be fully vested; at that time, the successor beneficiary "shall be entitled to his or her full distribution from the Trust estate." The trustee was "directed to distribute the vested share in its entirety."

The trust also provided that, "[i]f the beneficiary is a minor or incompetent[,] or a person whom the Trustee deems unable to properly manage such distributions, the Trustee may make such distributions in any one or a combination of the following ways: 1) Directly to the beneficiary; 2) to a guardian, conservator, or fiduciary responsible for the beneficiary and his or her estate; 3) to any person or organization furnishing support for the beneficiary; and 4) by the Trustee retaining principal and making payments directly for the support of the beneficiary."

The trust property included several real property holdings, including the father's and mother's home. The trust provided that, on the death of the surviving settlor, "the principal residence or home . . . may, at the discretion of the Trustee, be retained in the Trust estate for use by one or more successor beneficiaries, or their children, or it may be sold to any qualified buyer, or rented to a third party. It is understood, however, that a beneficial interest in the home may for a period of time be held by the Trustee for one or more successor beneficiaries who may or may not be living in the home and that any such home or interests therein that is retained by the Trustee shall be part of the principal of the Trust estate . . . ." The trust instrument thus contemplated that one or more successor beneficiaries might use or continue to live in the family home.

<u>"Handicapped Beneficiary" Provision</u>

A section of the 1996 trust dealt with the topic of "Handicapped Beneficiaries." That provision provides, in full, as follows:

"'Handicapped Beneficiary' . . . shall mean any issue of the Settlors who has been determined by a court of competent jurisdiction to be incompetent or unable to adequately manage his or her affairs. Additionally, the Trustee may make a determination, in accordance with the procedures for the determining the competency [*sic*] of a Trustee, of the incompetence of any beneficiary. . . .

". . . The Trustees shall hold and maintain such incompetent beneficiary's share of the Trust Estate in Trust and shall, in the Trustees' sole discretion, distribute for and provide for such beneficiary as provided for in this Trust for benefits to minors, and under the section 'Support and Education'.

"Notwithstanding the foregoing, any Beneficiary who is diagnosed for the purposes of governmental benefits (as hereinafter delineated) as being not competent or as being disabled, and who shall be entitled to governmental support and benefits by reason of such incompetence or disability, shall cease to be a Beneficiary, and Trustee if so named, of this Trust if such aid is jeopardized by reason of the individual's status as a Beneficiary or Trustee. Likewise, they shall cease to be a Beneficiary if any share of [*sic*: or] portion of the principal or income of the Trust shall become subject to the claims of any governmental agency for costs or benefits, fees, or charges.

"The portion of the Trust Estate which . . . would have been the share of such incompetent or handicapped person shall be retained in Trust for as long as that individual lives. The Trustee, at the sole discretion of the Trustee, may utilize such funds for the individual as specified under the section 'Support and Education.' . . . While the

Trustees hold Trust property available for the benefit of any handicapped beneficiary, it is the intent of the Settlors, and they direct that the Trustee(s), in their sole and absolute discretion, provide life enrichment benefits for that handicapped beneficiary would otherwise be entitled. [*Sic.*] Such benefits may include: training to develop skills and abilities, special needs, transportation, educational support, tutoring, adaptive vocational skills training, home and residential adaptation assistance, and any other programs to provide 'life enrichment' as may be permitted by law. Upon the death of this individual the residual of this share shall be distributed as otherwise specified in the Trust.

"If such individual recovers from incompetence or disability, and/or is no longer eligible for aid from any governmental agency, including costs or benefits, fees, or charges, such individual shall be reinstated as a Beneficiary and Trustee, as the case may be . . . ." The death distribution and termination provisions of the trust immediately follow.

Provisions Related to "Support and Education"

Despite references to a section of the trust document regarding "Support and Education," no support and education section, as such, appears in the text. Passing references are made in other parts of the document, however. For example, the provision for "Distribution of Principal" from the decedent's trust to the surviving settlor permits the trustee to issue principal to the surviving settlor "if, in the sole discretion of the Trustee, such distribution is necessary for proper maintenance and support of the

surviving Settlor." No further elaboration of the terms "proper maintenance and support" is made in the distribution provisions.

Similarly, the trust provided that, so long as any of the successor beneficiaries were minors, the trustee could "distribute Trust principal or earnings for the direct or indirect benefit of any one or more of the successor beneficiaries, as the Trustee deems in his sole discretion to be necessary for the customary maintenance, support and education of all the respective successor beneficiaries." "[C]ustomary maintenance, support and education" are not further defined in the minor beneficiary provisions. In addition, as to any beneficiary under the age of 21, the trustee was given sole discretion to distribute earnings or principal, "up to the whole amount of [the beneficiary's] share, as the Trustee deems in his/her sole discretion to be necessary for the maintenance, support, and education of the respective successor beneficiary."

The trust provided that, if the settlors became incapacitated, the successor trustees, in order of nomination in the instrument, should be appointed to administer the trust, "look[ing] to the reasonable support, comfort, health, shelter, and care of the Settlors and pay for same from the principal and/or earnings of the Trust estate."

The general definitions section of the trust did define the term "support" -- that term was stated to include "proper support, maintenance, medical care, and education, including grade, secondary or high schools, public or private, and all types of college, vocational, or trade schools." Finally, the "Handicapped Beneficiaries" provision itself, as noted, recited that the trustee was to "provide life enrichment benefits for that

handicapped beneficiary," including, "training to develop skills and abilities, special needs, transportation, educational support, tutoring, adaptive vocational skills training, home and residential adaptation assistance, and any other programs to provide 'life enrichment' as may be permitted by law."

Characteristics of Robert, the Named Successor Beneficiary

Father died in 1996, leaving mother as the sole trustee and beneficiary. Mother died in 1999. At the time of mother's death, Robert was 42 years old. He was developmentally disabled and suffered from cerebral palsy. As far as the record indicates, Robert had been disabled for almost all of his life, and he had received government benefits for many years for his disability. He had apparently never lived alone up to the time of his mother's death; we infer that he had lived with his parents.

Robert's disabilities were obvious and of long standing; mother could not have been unaware of them. Remarkably, however, mother's first will named Robert as an alternate executor, to serve without bond, the second will nominated him as the first named alternate executor (in the absence of the surviving spouse), again without the requirement of bond, and he was also named as a successor trustee of the 1996 trust. Robert was apparently the 100 percent successor beneficiary under either the 1987 trust or the 1996 trust. Evidently, father and mother did not consider Robert's deficits so severe as to automatically disqualify him from decision-making about the probate or trust estates.

Attorney Skousen Represents Alice Under the 1991 Will, and Then, Representing Albert, Petitions for Her Removal Because of "Discovery" of the 1996 Will

On November 3, 1999, attorney Robert J. Skousen of Skousen & Skousen, as attorneys of record for Alice, prepared and filed a petition to probate the 1991 (first) will, which had nominated Alice as executor. The petition for letters testamentary averred that mother's probate estate was valued at approximately $50,000 (i.e., within the amount allowed under the Independent Administration of Estates Act). The petition appended a declaration, signed by Robert and dated September 29, 1999. The declaration recited that Robert was a "named Alternate Executor under the Will of GUADALUPE DEL CASTILLO," without otherwise identifying the particular will. The declaration further recited that Robert "does hereby waive his right for appointment as personal representative and executor," and further that he "declines, refuses, renounces and disclaims all his duties, rights, title and interest in the aforementioned estate and does forever decline to act in the capacity of Alternate Executor." The waiver, on its face, appears not only to waive Robert's right to appointment as executor, but also disclaims all his interest in the estate.

Eight months later, in June of 2000, attorney Skousen, representing Albert, filed an ex parte petition to suspend Alice's powers, pending resolution of a petition to remove her as the personal representative of mother's estate. The petition to suspend Alice's powers as personal representative alleged that "[t]he cause for removal is . . . *the discovery of a subsequent pour over will* executed by the decedent [i.e., the 1996 will]

where the decedent appointed Robert Del Castillo as the Executor in lieu of Alice Del Castillo." (Italics added.) The moving papers asserted that, upon the admission to probate of a later will, a pre-existing grant of letters testamentary must be revoked.[1] No other ground or justification for the application to revoke Alice's appointment appears in the record.

Simultaneously with his ex parte motion to remove Alice as the personal representative of the estate, Albert applied for appointment as the personal representative under the 1996 will, now offered for probate. That application, like the earlier one in favor of Alice, included Robert's affidavit declining his nomination as executor and waiving his interest in the estate. Albert's application for letters testamentary, unlike Alice's, claimed that the probate estate was valued at $100,000.

Upon examination, we noted a peculiarity with respect to Robert's waiver affidavit. The waiver document appended to Albert's petition is an identical copy of the "waiver," dated September 29, 1999, that had been affixed to *Alice's* petition under the 1991 will. We did not note this peculiarity in the earlier appeal because the record there did not include Albert's ex parte motion or his application for letters testamentary under the 1996 will. This is not altogether surprising, however, because the grounds for Alice's removal were not at issue in the earlier appeal.

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[1] Citing *Estate of Moore* (1919) 180 Cal. 570, 574.

Alice has presented evidence here that, on September 29, 1999, a few weeks after mother's death, she had met with both Albert and attorney Skousen at Skousen's law office. The "purpose of this meeting was to learn if Robert Del Castillo was exposed to any liabilities, and if so, what liabilities." Alice claimed that, at the meeting of September 29, she gave both wills to attorney Skousen; thus, "Attorney Robert Skousen has known [of] the existence of both 'Wills' since our first meeting with him." Even though all the parties, according to Alice's evidence, at all times knew about both wills, she nevertheless applied for letters testamentary under the earlier, superseded, will, because attorney Skousen advised her to do so.

Albert's version of events both corroborated and differed from Alice's. Albert stated that, on September 29, 1999, he "retained the law office of Skousen & Skousen to represent me in closing my mother's estate under the terms of her 1991 [will] . . . and to arrange care for Robert." Albert lived in Nebraska. He was designated as the second successor trustee of the 1996 trust, and he succeeded as the trustee after Robert allegedly signed a document declining his appointment as the first successor trustee (no such document appears in the record, however).

Alice lived in Nevada. Albert averred that he asked Alice to help him care for Robert, and asked whether "she could help me in closing our mother's estate so that I would save some money by not having attorneys do all of the foot work." At the meeting with attorney Skousen on September 29, 1999, Albert claimed, he "made it absolutely clear to both Alice and Mr. Skousen that Alice was only my 'contact person' in

California. I also made it clear that Alice's only involvement was to help me save money by doing the foot work that I needed done to close my mother's estate." Albert informed attorney Skousen that, "since I was paying for his services, and was in charge of caring for Robert, . . . that I was the client and that I would be in charge of all decisions . . . . I again reminded everyone that Alice was just there to help me by doing all the foot work that needed to be done so that I could save some money in attorney's fees." According to Albert, he was in charge, and Alice orally agreed that "anything I [Albert] sa[id] 'would go.'"

At the meeting, therefore, Albert wanted certain "specifics" clarified, including "the chain of authority in this case," to the effect that "I was the client and I would therefore have the ultimate decision in all matters regarding the estate," notwithstanding Alice's nomination as the personal representative. Albert desired complete control; he claimed that "we all agreed . . . that Alice's only assignment was to close our mother's account and transfer that money to the trust. Alice was to have nothing else to do unless I needed her to do something for my mother's estate." Again, Albert averred that he had "told Mr. Skousen that if Alice was agreeable to just closing the accounts, and helping to transfer the money in the accounts to the trust, I would be agreeable to *letting Alice be the executrix*." (Italics added.) In other words, in Albert's view, he was the "real" personal representative of the estate; Alice was to serve only at his pleasure, and her nomination as executor was a mere sham to "save money."

Albert further acknowledged that "[t]here was also a will written by my mother in 1996," though he said nothing about when or how he came to know of the 1996 will.

Albert became unhappy at certain action Alice was taking or not taking -- e.g., she wanted compensation of $10 per hour for "estate business," and she did not comply with Albert's demands that she "get busy closing [mother's] accounts." Because Albert was "[t]ired of Alice's delay, . . . [he] told Alice to resign from her position as executrix." According to Albert, Alice refused; Albert then "directed my attorney to stop using Alice as the executrix of my mother's estate. I also directed my attorney to do whatever was necessary to remove Alice as executrix and to have me appointed executor as mother had instructed under the 1996 Will. [¶] . . . Since I was the client, Mr. Skousen said [he] would do as I directed." Accordingly, attorney Skousen "filed some papers against Alice for the purpose of removing Alice as executrix."

No evidence, aside from attorney Skousen's ex parte petition itself, indicates that Albert and attorney Skousen were unaware of the 1996 will at the time the 1991 will was offered for probate. The distinct implication of Albert's evidence is, indeed, to the contrary. According to his own statements, Alice was nominated as executor under the 1991 will simply as a subterfuge. This arrangement was made for Albert's convenience, as he at all times desired to exert de facto control over both the trust and the estate.

Albert was not the only one to take this view; attorney Skousen later stated that his representation of Alice was "nominal" only, and that therefore he saw no specter of conflict in having represented Alice on the petition under the 1991 will, and then

representing Albert against her, seeking her removal as personal representative. Indeed, attorney Skousen repeated at oral argument the view that he did not "really" represent Alice, despite filing the initial probate petition as *Alice's* attorney of record. In essence, attorney Skousen asserts that he made only a so-called "special appearance" for Alice, and owed her no fiduciary duty. This court debunked the notion that an attorney's "courtesy" representation of a litigant by "special appearance" is not a genuine representation.[2] It is. An attorney's documentary statement that he or she is the attorney *of record* for a litigant, is an a fortiori case. Alice, as much as Albert, was attorney Skousen's client, and he owed her a duty of loyalty and care.

Attorney Skousen maintained at oral argument the claim that he had no knowledge of the 1996 will at the time he filed Alice's petition under the 1991 will. When pressed for details, however, about how and when the 1996 will was discovered, attorney Skousen told this court that *his paralegal* found the 1996 will in approximately February of 2000. It was coincidentally about the same time that Albert and attorney Skousen began having difficulties with Alice as a personal representative. That attorney Skousen's employee "discovered" the 1996 will confirms that the 1996 will was in fact at all times in attorney Skousen's possession; this remarkable assertion actually corroborates Alice's evidence that she had delivered *both* wills to attorney Skousen.

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[2] *Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444.

The supposed ground for the petition to remove Alice, that the 1996 will was newly "discovered," thus seems to be false. The circumstances strongly suggest that Albert and attorney Skousen simply withheld the 1996 will, which then provided an easy means of removing Alice as the personal representative when Albert became disenchanted with her actions.

Deliberate suppression of a will is highly irregular, to say the least. Probate Code section 8002 requires a petition for probate to attach to the petition a photographic copy of *the will*." Probate Code section 7000 provides in relevant part that "title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's *last will* . . . ." (Italics added.) Attempting to probate a will *known* not to be the testator's last will, is improper.[3]

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[3] These events, and others detailed in this opinion, have raised serious questions about the ethical conduct of attorney Skousen throughout the proceedings below and on appeal. He continues to maintain, as noted, that Alice was never his "real" client, and that his dual representation of Albert and Alice did not raise any question of conflict. At oral argument, he continued to justify the actions taken and the expenditures of funds in multiple jurisdictions to declare Robert not a beneficiary of the trust. He showed little or no inclination to accede to this court's request for his personal appearance at oral argument, despite three telephone contacts from the Clerk of the Court, thus necessitating the issuance of a written order. Attorney Skousen's explanation that his paralegal "found" the 1996 will in February of 2000 confirms rather than negates the evidence that the will was in his possession all along. In short, attorney Skousen's conduct and statements at oral argument were wholly unrepentant, and he demonstrated no apprehension of the seriousness of the issues raised herein, or of the gravity of a personal request issued by a court.

Canon 3D of the California Code of Judicial Conduct (West's Cal.Ann., Codes, Rules, (appen.) (2003 supp. pamphlet) p. 498) requires us to "take appropriate corrective

[footnote continued on next page]

Robert's Duplicated Waiver Was Not Shown to Be Knowing

Proffering a questionable will for probate is not the only matter as to which the parties have played fast and loose with the probate court. As indicated by our earlier remarks, we are also troubled by Robert's purported waivers of his right to appointment as executor (and waiver of *all* rights) under each of the wills.

Alice's petition under the 1991 will appended a document, signed by Robert, purporting to waive his appointment as personal representative of mother's estate, as well as all other rights to the estate. Albert's petition, under the 1996 will, likewise appended Robert's waiver of his appointment as personal representative and of all rights to the estate. Examination of the record demonstrates that both "waivers" are absolutely identical; one appears to be a photocopy of the other. Because they are in all respects identical, both bear the same date: September 29, 1999. That is the very date on which Albert and Alice attended the initial meeting with attorney Skousen. Alice averred that Robert was present at that meeting.

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action," in any case of "personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct." (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 173.) While we are not in a position to make a determinative finding on the question, the attorney's conduct in this case is sufficient to raise a reasonable suspicion that he has violated Rule 3-310 (Representation of Adverse Interests), Rule 4-200 (Charging Unconscionable Fees), Rule 5-200 (Failing to Use Only Means Consistent with Truth; Misleading Judge), and other possible disciplinable misconduct. Accordingly, we order a copy of this opinion to be transmitted to the State

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Robert was nominated as a second alternate executor under the 1991 will, and the first alternate executor under the 1996 will. Strictly speaking, no waiver was required under the 1991 will; in the absence of a waiver under Alice's petition, she was still the first nominated personal representative.

Under the 1996 will, however, absent a valid waiver, Robert would have been the first nominated personal representative. But, when Albert and attorney Skousen offered the 1996 will for probate, they did not seek a separate waiver from Robert declining his appointment as executor. Instead, they simply photocopied Robert's earlier waiver. At oral argument, attorney Skousen did not deny that he had simply reused Robert's waiver document.

A waiver is defined as the relinquishment of a *known* right.[4] If the 1996 will was not discovered until June of 2000, Robert could not have known, in September of 1999, of his appointment under the 1996 will. Robert therefore could not have signed a waiver of his right to that appointment. If attorney Skousen's representations to the court were truthful, the September 29 waiver could not apply to the 1996 will.

The circumstances strongly suggest that attorney Skousen must have known of the 1996 will before he proffered the 1991 will for probate; his later averment that it had

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Bar of California for investigation of the appropriateness of initiating disciplinary action against attorney Robert James Skousen.

[4] *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 49.

been subsequently discovered is problematic. It simply cannot be true both that the 1996 will was after-discovered and that the September 29, 1999 waiver applied to the 1996 will.

The "waiver" itself is quite vague: it says only that Robert was "a named Alternate Executor under the Will of [mother]." The document does not more specifically identify the will referred to. It then recites that Robert waived his right to serve "as personal representative . . . in the aforementioned estate," again without specifically identifying the document under which Robert purports to waive his appointment. The very vagueness of the language of the waiver supports the inference that Albert or attorney Skousen did not intend to ask Robert to make proper separate waivers as to each will. Rather, the conclusion seems inescapable that Robert was induced to sign one all-purpose document, which Albert and attorney Skousen simply held in reserve for multiple future uses.

As to Robert's right to appointment as executor, the point may well be moot; at one point in the proceedings, the parties stipulated that Robert would have 10 days to file a petition for nomination as the executor. Apparently, no such petition was filed. It is also unlikely, in any event, that Robert would have wanted to be, or that he could have qualified to be, the personal representative. Nevertheless, we do not countenance the re-use of the earlier waiver, under circumstances strongly suggesting that it could not have been knowingly made.

The Trust Purpose Was to Provide for Robert's Care

Alice averred that the purpose of mother's estate plan, including the pour-over will and the trust, was to provide for Robert's welfare. Albert also seemed to acknowledge that, as trustee, and knowing his mother's wishes, he bore primary responsibility for Robert's care: Albert saw his role as to "close my mother's estate and transfer the assets into a trust for my brother," because "[t]his is what my mother wanted."

Robert Is Left Alone, Removed From the Family Home, Placed in Assisted Living, and Denied Trust Benefits

Albert has insisted from the beginning, and reiterated numerous times, that Robert has been "diagnosed" as "mentally retarded." We note, as an aside, that this insistence is inconsistent with the proposition that Robert could knowingly waive anything. Offering Robert's purported waiver of his rights under either will is incompatible with the thesis that he is as mentally disabled as Albert claims. We also observe that, despite Albert's repeated statements, in fact no "diagnosis" of "mental retardation" has been made. The expert upon whose testimony Albert relies was very careful to state that Robert was *not* mentally retarded; Robert's actual diagnosis was of "borderline" mental capacity -- a fairly nebulous concept, but one nevertheless distinct from "mental retardation."

We accept, however, that Robert patently had significant mental deficits. Albert also admittedly knew at all times that "[f]or all of Robert's life, Robert has been unable to care for himself and has had to rely on others to meet his daily needs." We infer that Robert had lived at home with, and was cared for by, his parents while they lived.

The trust made express provision for a beneficiary to continue living in the family home, and permitted the trustee to use funds for "life enrichment" of a handicapped beneficiary, including "home and residential adaptation assistance." Nevertheless, Albert as trustee initially made no provision for in-home assistance for Robert after mother's death.

Instead, Albert permitted Robert to live alone on a "trial basis" of five weeks, and apparently provided Robert with significant sums of money (i.e., attorney Skousen averred that he was "personally aware" that Albert had sent money to Robert). The result was that Robert, left completely without help or supervision, ran up credit card charges of $15,000 for inappropriate items, such as pornographic videos, purchased 20 subscriptions for magazines "marketed towards young women," and "gave substantial donations to various charities."

Apparently, Albert considered the "independent living" experiment an abject failure, and then, in October 1999 (approximately two months after mother's death), removed Robert completely from the family home and his familiar surroundings, and instead "referred [Robert] to" a full-time care facility. By January of 2000, the family home had been sold and Alice delivered the proceeds, some $266,586.02, to Albert as trustee.

Since October of 1999, Robert has been living in care facilities paid for by his governmental benefits. Attorney Skousen informed the probate court at one point that Robert received $740 per month in disability benefits (SSI) from the Social Security

Administration. Alice's attorney, concerned that Robert was "not being taken care of consistent with the intent of both the trust instruments and the will instruments," represented to the court at a hearing that Robert had been simply placed "in assisted living. He's living barely above his SSI."

There are also indications in the record that, while Albert had, as trustee, initially paid some of Robert's bills and given him some spending money, "within a few weeks of assuming the role of trustee, ALBERT refused to pay any more of ROBERT's bills or to send ROBERT any more funds for his personal needs." Alice reported that, when she asked attorney Skousen what should be done about Robert's credit card bills, the attorney advised them not to pay the bills; he opined that it would be better to simply ruin Robert's credit so no companies would issue him cards in the future. Alice further averred that, as of October 1, 1999, Albert had also taken possession of Robert's personal checkbook, so that Robert had no access to any funds.

Rather than using the trust provisions and assets to provide limited "life enrichment" benefits to Robert, or attempting to help Robert continue to live at home, Albert seized upon the "Handicapped Beneficiary" provisions of the trust and merely declared Robert not to be a beneficiary of the trust. Albert averred that the provision permitting the trustee to determine a handicapped beneficiary was not a beneficiary of the trust was designed to protect the handicapped beneficiary's receipt of governmental benefits. Because Robert was unable to care for himself and he was receiving governmental benefits, Albert decided to declare Robert not a beneficiary.

Albert professed concern that the governmental agencies that were paying Robert's benefits to board and care facilities were seeking, or would seek, reimbursement from the trust. Thus, Albert "has also taken the position that [because] Robert lives in a care facility, [because he] already receives money from Social Security, [because he] has all of his living and medical expenses provided, [because he] cannot handle money on his own, [because he is subject to] the right of Social Security Administration to lien upon any money received by Robert from the Trust, and because Robert is not a beneficiary under the terms of the Trust, no more money should be sent to Robert for his own protection." Albert therefore has "long sought a judicial determination as to the status of Robert as a beneficiary under the Trust." Albert appears to argue that, "[u]nless this determination is made" -- i.e., that Robert is not a beneficiary of the trust -- he will be left with only two possible choices: that "Robert may lose his governmental benefits" or that he would "squander away the assets of the Trust on pornographic videos and materials as he did before."

The Conservatorship Actions

Albert thereafter directed his attorney, in October of 2000, to file a petition (case No. RC 00314) to establish a conservatorship over Robert. Alice filed a competing conservatorship petition in November of 2000 (case No. RC 00319). The conservatorship cases were consolidated under case number RC 00314. Robert's attorney, Maureen Muratore, opposed the appointment of a conservator. So far as the record shows, no final determination of the conservatorship action has been reached.

Albert's and Alice's Management of the Trust and the Estate

The estate and the trust, rather than being used to provide support and care for Robert, have instead been largely consumed by divisive litigation and questionable actions by both of Robert's siblings.

Alice Delays in Completing Transfer of Assets to the Trust

According to Albert, Alice committed many acts of misfeasance while she was the executor of mother's estate. Albert had demanded that Alice simply close accounts and transfer money to the trust. Alice instead delayed. She claimed she had expended over 1,000 hours of "service" to the estate, for which she wanted to be paid $10 per hour. Hardly any of the time, however, was spent in either marshaling, managing, accounting for, or transferring estate assets.

The Suit Over the Los Angeles Apartment Building

Albert accused Alice of misfeasance with regard to trust assets, as well as estate assets. That is, Alice went to an apartment building in Los Angeles, owned by the trust, and started collecting the rents herself. She did not turn the rents over to the trust, but apparently dissipated them on her own account. She also allegedly took money from coin-operated laundry facilities on the apartment premises. Alice wrote a letter to the property manager of another apartment building in Hawaii, directing the property manager to cease acting on behalf of the trust, and to forward all rents to Alice.

Albert intervened as to the Hawaii building, reasserted his authority as trustee, and directed the property manager to continue remitting payments to the trust. Albert alleged

that, as to the Los Angeles apartments, Alice attempted to sell the building at a substantial discount to a friend; Albert was obliged to sue both Alice and Alice's friend to stop the below-market-value sale. This suit was apparently successful in halting the sale. Albert also evicted numerous tenants that, he alleged, Alice had allowed to live in the apartments without paying full rent. Albert averred that he was successful in resolving the tenant problems, and ultimately sold the Los Angeles apartment building for over $500,000, approximately $325,000 more than Alice's attempted sale.

Albert Starts Proceedings to Remove Alice as Executor

Albert then produced the 1996 will and petitioned to remove Alice as executor, based upon the supposed new discovery of that document. At the removal hearing, Albert's attorney estimated that the estate should have property worth $110,000, but he was concerned that some of the money was missing. The court ordered Alice to post a bond of $132,000 pending determination of the petition. Alice was concerned that she might not be able to obtain a bond, particularly if the court suspended her powers right away. The court replied that it did not intend to suspend Alice's powers immediately and that the cost of a bond "can be taken from the estate." Alice posted the bond.

Alice, Removed as Executor, Files an Accounting

Ultimately, the court did remove Alice as the personal representative, and ordered her to prepare an accounting, in anticipation of appointing Albert as the personal representative under the 1996 will. Alice filed the accounting on behalf of the estate. She listed property received by the estate totaling $116,169.69, and reported income

(interest on all the accounts) of $293.67. She reported disbursements of $6,959.67, consisting of the bond payment, a transcript of Alice's deposition, a hearing aid for Robert, postage, bank charges, and attorney fees of $5,000 to her attorneys, Reiss & Johnson. The assets, less the disbursements, were calculated at $109,503.69. The property remaining on hand totaled $107,371.69; the difference was $2,132. Alice's accounting showed that she had liquidated the personal property at an estate sale; she had turned over the proceeds -- exactly $2,132 -- to Albert as trustee of the trust.

Albert had filed objections to the accounting, complaining that Alice had failed to obtain court authorization for any of the disbursements, and that the accounting did not comply with statutory standards, because it did not expressly identify the time period covered, and because the balances were not equal (Albert failed to take into account, however, the portion of the property received by the estate -- $2,132 representing the personal property of the decedent -- which had been liquidated and turned over to him as trustee). Albert complained of every single disbursement Alice had made -- not only about the attorney fees of $5,000 Alice had paid to attorney James Reiss, but also Robert's hearing aid, and even the cost of the bond which the court had imposed at Albert's request.

The Court Orders Alice to Turn Over Estate Assets and File an Amended Accounting

The court ordered attorney Reiss to return the $5,000 Alice had paid him for attorney fees, and ordered Alice to "disgorge all estate funds received," and to turn them over to Albert's attorneys. Alice was further ordered to provide an amended accounting.

Alice Files a Second Accounting, Increasing Her Disbursement Claims, and Files a Request for Allowance of Fees

Alice did provide a second accounting; at approximately the same time, she petitioned the probate court for an order for extraordinary fees for herself and attorney Reiss. The new accounting omitted the $2,132 in personal property, inasmuch as that portion had already been given to the trust, and had been one source of apparent confusion in the earlier account. Most of the figures were substantially the same as in the earlier accounting, but this time Alice added claims amounting to $12,500 for fees for her attorneys, and indicated she had paid herself $9,128.04 in so-called "reimbursement expenses" for her work on the estate. She stated that she had returned the $5,000 in attorney fees, which the court had previously ordered "disgorged," and had transferred that sum to Skousen & Skousen (as attorneys for Albert on his petition to be appointed executor under the 1996 will). Alice had not yet restored to the estate the remaining $7,500 in attorney fees, and had not yet repaid $10,416.21 in moneys that Alice had paid herself from the estate. Alice then listed herself and her attorneys as creditors of the

estate, in the amounts of $12,500 for the claimed attorney fees, and $10,416.21 to herself for "estate services."

Alice's simultaneous claim for an allowance of fees from the estate essentially echoed her accounting: she requested that the court authorize paying her attorneys $12,500, and giving her $10,416.21 for "time and expense" she alleged she had devoted to the estate.

Appeal of the Order for Partial Allowance of Fees

Albert objected to the request for partial allowance of fees for Alice and her attorneys. The probate court allowed Alice $6,500 in compensation while acting as executor, and allowed $4,000 in extraordinary fees to attorney Reiss. It was this order which generated the earlier appeal. We reversed the order allowing executor fees to Alice and extraordinary attorney fees to Alice's attorney.

The only fees allowed to a personal representative or an attorney for an estate are statutory fees and extraordinary fees. Alice's personal claim was not for statutory fees; it was a claim for extraordinary fees. Alice's ledger showed, however, that many of her claimed "expenses" had nothing to do with mother's estate. Rather, they related to work done for the trust (e.g., sale of the family residence), acts connected to the trust, not the estate (e.g., Albert's suit against her over the Los Angeles apartment building), actions taken in the separate conservatorship action, and numerous other ordinary personal matters not proven to have any particular necessity or connection to the estate. For example, Alice purported to charge mother's estate for her uncle's groceries, eyeglasses,

and medical appointments. She also charged the estate with hundreds, if not thousands, of dollars for rental cars, gasoline, meals, and motel rooms whenever Alice and her boyfriend traveled from Nevada to California. Alice even asserted claims for her own doctor visits, which she alleged "result[ed] from [an] auto accident while on executrix business."

As to attorney fees, again attorney Reiss's representation of Alice encompassed trust matters, the Los Angeles lawsuit, the conservatorship proceedings, and other matters which clearly had nothing to do with mother's estate. The few matters which did relate to mother's estate were in no way extraordinary, and did not justify an award of extraordinary attorney fees.

Alice Fails to Deliver All the Estate Assets; Attorney Skousen Files a Premature Action on the Bond, Seeking Double Recovery of Some Amounts

After Alice was removed as executor, she was supposed to turn over all assets in her possession to attorney Skousen, on behalf of Albert as the new executor. Albert later complained that, of the $116,169.69 Alice said the estate had initially received, she transferred only $51,971.81. Thus, Albert claimed, Alice was still holding $64,197.88 in assets belonging to the estate. Albert claimed that Alice also took improper amounts from the estate while she was the executor, and argued that Alice owed the estate an additional $23,604.21, representing the cost of the bond, the deposition transcript, attorney fees of $12,500, Robert's hearing aid, and the expenses Alice had paid herself. Albert therefore took the view that Alice's bond should be charged both for the full

amount of the assets the estate initially received, and for the "disbursements" Alice had claimed in her accountings. Attorney Skousen filed a civil action, asserting a claim of $87,802.09 against the bond. The court ruled that the claim was premature, as attorney Skousen had never obtained a surcharge order.

We note that the claim, for $87,802.09, effectively sought a double recovery for the amounts Alice used for "disbursements." The estate was opened with $116,169.69 in total assets. Alice had already delivered $2,132 from the sale of mother's personal items to Albert as Trustee. After she was removed as the executor, she turned over another $51,971.81. A payment of $62,065.88 would be sufficient to fully restore the estate, except for any income the estate property would have earned. Attorney Skousen's claim improperly sought to recover Alice's disbursement payments twice: once in restoring the estate to full value (the $64,197.88 portion of the claim), and again to "reimburse" amounts Alice had paid to herself (the $23,604.21 portion).

After Albert's civil action on the bond was dismissed, attorney Skousen filed an ex parte application to appoint a special administrator for the estate, to marshal the estate assets and to collect the balance of funds and assets held by Alice. Attorney Skousen averred that, "[o]nce these tasks are completed, the Trust will be able to recover the $87,802.09 in undisgorged assets still being held by Alice . . . plus penalties under Probate Code § 9869."

The Conservatorship Court Asserts California Jurisdiction Over the Trust, Finds Robert Is Not Automatically Disinherited, and Directs Robert's Attorney to Petition for an Accounting

In the conservatorship proceedings, Albert apparently took the view that the trust, and himself as trustee, were not subject to the jurisdiction of the court. On April 13, 2001, the court ruled that it had jurisdiction over both the trust and Albert as trustee. The court noted that the provisions of the trust may have been intended as a qualifying "special needs" trust for Robert, such that his governmental benefits would not be affected by his status as a beneficiary of the trust. Robert's attorney could petition the court to construe the ambiguous language. In the meantime, however, the court ruled that the "handicapped beneficiary" provision "does not automatically disinherit Robert on its face." The court directed that Robert's attorney file a request for an accounting from the trust within the probate action, and ordered Albert to "prepare an account after the noticed petition has been filed."

Robert's Attorney Petitions to Compel Albert to File an Accounting of the Trust

Pursuant to the conservatorship judge's recommendation, Robert's counsel, in April of 2001, filed a petition requesting an accounting of the trust since Albert had become trustee.

Albert Attempts to Remove Action to Federal Court

Albert responded by trying to remove the estate case to federal court. Still apparently insisting that Robert was automatically disqualified from beneficiary status

under the trust, Albert sought a determination from the federal court; if Robert was properly determined not to be a beneficiary, then he had no standing to request an accounting of the trust. Albert's removal papers alleged that the conservatorship action had not been resolved, and that he had been unsuccessful in obtaining a ruling from the probate court confirming his decision that Robert was not a beneficiary of the trust. Therefore, in May of 2001, he removed the case to federal court to try to obtain such a ruling.

The federal court almost immediately returned the matter to state court.

Robert's Attorney Files a Motion to Disqualify Albert's Attorneys

Some time after the matter was returned to state court, Robert's attorney apparently took the unusual step of moving to disqualify attorney Skousen and his law firm from representing Albert. The text of this motion does not appear in the record, though Albert's responsive papers do. We infer that ground of the motion was some kind of conflict of interest, though the details are not clear. Although attorney Skousen had represented both Albert and Alice, and had both represented and opposed Alice in these proceedings, he had never represented Robert as attorney of record.

We recall, however, Alice's averment that Robert, as well as she and Albert, attended the meeting of September 29, 1999, in attorney Skousen's office. It was apparently there that Robert signed the purported waiver of his right to appointment as executor of mother's estate, as well as all other rights under the will; presumably, he was advised of his rights and of the meaning and consequences of his actions at that time.

Ever after, both attorney Skousen and Albert have steadfastly maintained that Robert is mentally retarded and incompetent either to testify, to sign verifications of pleadings, or to manage his own affairs.

The conservatorship judge also looked askance at attorney Skousen's actions with respect to Robert: "While you were representing Alice, you also had Robert, a man suffering from cerebral palsy and borderline mental functioning, but not considered mentally retarded, sign a declaration to serve as executor, a recognition as successor trustee and a disclaimer of any assets of the estate. Now, while representing Albert, you are asserting a challenge against Robert's rights as a beneficiary of the trust. [¶] Do you see this as a conflict of interest?"

Attorney Skousen replied, "No, because we never represented Robert in any form or fashion," and denied that anyone in the Skousen firm had "assisted" Robert in signing the waiver form. Rather, Robert had simply "appeared with his brother and sister and he signed those documents," as if the Skousen firm had no responsibility for procuring the document and did not participate in its creation.

Stipulation to Provide an Accounting

At a hearing concerning the petition for an accounting, the parties entered into a stipulation. They agreed that the motion to recuse attorney Skousen would be set for an evidentiary hearing on December 19, 2001. Albert was to file a verified accounting of the trust on or before November 14, 2001. A hearing date on the accounting would be held on December 7, 2001. When Albert filed his verified accounting, the

disqualification motion would be dismissed with prejudice and its hearing date vacated. For purposes of that motion, the parties agreed that Alice waived any right to disqualify the Skousen firm based on their earlier representation of her. Albert as trustee reserved the right to dispute Robert's standing to request an accounting or Robert's status as a beneficiary.

Albert Seeks a Continuance to File the Accounting, and Pursues an Action to Register the Trust in Nebraska

On November 9, 2001, five days before the accounting was due to be filed, Albert filed an ex parte application for a continuance of the accounting due date. Apparently, the continuance was granted; in any event, Albert did not file an accounting by November 14.

In the meantime, Albert obtained Nebraska counsel, and directed his Nebraska attorney to open proceedings to register the trust in Nebraska. The Nebraska petition did not disclose that the California court had asserted jurisdiction over the trust. As the court later observed, "the new filings in Nebraska basically represent that no other Court has assumed jurisdiction over this trust which I believe is incorrect and is not an appropriate representation to a Nebraska court." Robert's attorney discovered this maneuver and intervened to stay or continue the Nebraska action.

Albert's Counsel Files a First and a Second Accounting

On November 16, 2001, Albert's counsel filed documents entitled "First Accounting of Trust Assets," covering a period from September 29, 1999 to September

30, 2000, and "Second Accounting of Trust Assets," covering the period from October 1, 2000, to September 30, 2001.

Among other things, these accountings showed that the original trust estate consisted of 10 parcels of real property (not valued), and cash or other assets of approximately $66,000. Albert sold some of the properties, bringing in net cash of approximately $430,000. In two years, Albert had spent over $327,000 in attorney fees, paid to Skousen & Skousen. The value of the remaining trust property was somewhere in the neighborhood of $370,000, plus some unvalued lots of real property.

Robert's Counsel Petitions to Suspend Albert's Powers and to Remove Him as Trustee

Upon discovering Albert's attempt to have the Nebraska court take jurisdiction of the trust, Robert's counsel petitioned to suspend Albert's powers as trustee, and to remove him and appoint a neutral trustee.

Albert opposed the petition, alleging that Robert had no standing to bring the petition because he was not a beneficiary. At a hearing on November 21, 2001, the court granted the ex parte motion, suspending Albert's powers as trustee. The court appointed Patricia Lobello as special trustee, and also appointed her special administrator of mother's estate. Albert was ordered to surrender all trust property to the special trustee, and all estate property in his possession to the special administrator.

Five days later, on November 26, 2001, the court granted temporary restraining orders prohibiting Albert from withdrawing any of the trust's investment or bank funds,

from incurring or paying any further trust obligations, or from selling, transferring or encumbering any real property owned by the trust.

At the November 26 hearing, the court vacated the date of December 7, 2001, which had been set for hearing on the motion for an accounting. The parties considered having further hearings on the motion for an accounting and on the propriety of the ex parte orders on the same date, December 14, upon which the court was scheduled to hear the merits of the petition to remove the trustee and to appoint a successor trustee. Ultimately, the parties agreed to reschedule all the matters for hearing on December 13, 2001, one day earlier than previously planned. Albert's attorney filed a formal notification of the change of date.

Albert Files a Separate Federal Action to Declare Robert Not a Beneficiary of the Trust

Albert responded by directing the Skousen firm to file an independent action in federal court, requesting a declaration that Robert is not a beneficiary of the trust. This action was filed on November 29, 2001, eight days after his powers as trustee had been suspended and three days after Albert had been ordered not to change the status of any trust property or to incur further debts. Albert filed this independent federal action, notwithstanding that the federal court had already ruled, in the earlier removal attempt, that Albert had failed to establish the requisite amount in controversy to satisfy the requirements for diversity jurisdiction.

The Court Removes Albert as Trustee

Robert's counsel filed a supplemental petition requesting Albert's removal as trustee, noting that Albert had filed the federal action while his powers were suspended, and had incurred filing fees and attorney fees after he had been ordered not to change the status of any trust assets. Albert also had failed to turn over the trust assets to the special trustee as previously ordered. In fact, on December 24, 2001, the court made an additional order to effectuate its prior orders, again ordering Albert to turn over assets to the special trustee.

Albert objected to the December 13, 2001, hearing on the ground, among others, of insufficient notice. Albert also opposed the supplemental petition for his removal as trustee, on grounds that the supplemental petition was unverified, and that, inasmuch as the supplemental petition was filed one day before the scheduled hearing, Albert had been deprived of proper notice. Robert's counsel supplied the missing verification.

The matter eventually came on for hearing on January 7, 2002. At that time, the court removed Albert as trustee of the trust and appointed Patricia Lobello in his stead. The court stated, "At this point in time, not that I have any inclination whatsoever to believe that Albert Del Castillo would follow any Court order in the world, at this point in time, as trustee, he's terminated as trustee of the Del Castillo trust. The basis for it is twofold: One, he's failed to comply with further Court orders of a court that he has subjected to his jurisdiction and of a court that has jurisdiction over this trust. Additionally, I believe he has breached every conceivable duty of a trustee by allowing

attorneys fees to accumulate in the amount of $387,000, which based upon my knowledge of the file is totally unwarranted. . . . [B]asically, through his agreement to allow Skousen and Skousen to continually represent this trust, the trust has in essence been looted, in my mind." The court also reiterated, "not that it will be the least bit obeyed, [but] Mr. Del Castillo is ordered to facilitate the transfer of all assets over to Ms. Lobello as trustee of the trust."

First Notice of Appeal

On January 18, 2002, Albert filed an appeal from (1) the November 21, 2001, order suspending his trustee powers, (2) the November 26, 2001, temporary restraining order, (3) the December 24, 2001, order to effectuate prior orders, directing him to turn over assets to the special trustee, and (4) the January 7, 2002, order removing Albert as trustee.

Trustee Lobello Files Objections to Albert's First and Second Accountings

After she was appointed successor trustee, trustee Lobello reviewed Albert's accounting documents and, on February 14, 2002, filed objections to those accountings. The court heard argument and took the matter under submission, allowing Albert time to file an amended accounting voluntarily; ultimately, the court ordered Albert to make a further accounting, complying with the requirements of the Probate Code.

Second Notice of Appeal

Albert filed a second notice of appeal, appealing from the court's order of March 12, 2002, requiring him to make a further accounting.

Procedure on Appeal

After Albert's second notice of appeal, trustee Lobello moved to dismiss the portion of the appeal purporting to appeal from the order for a further accounting. Albert opposed on the ground that the order for a further accounting was entered after he had filed his first notice of appeal. Albert argued that the first appeal stayed all action in the case below; therefore, the trial court was without power to order a further accounting. This court reserved ruling on the motion for partial dismissal of the appeal.

On July 15, 2003, trustee Lobello filed an extensive request to augment the record on appeal or, in the alternative, requesting judicial notice. The matters requested included: (1) Albert's first accounting, (2) Albert's second accounting, (3) the motion of November 16, 2001, to suspend Albert's trustee powers (after Albert filed the Nebraska action), (4) the notice of ruling filed by the Skousen firm, informing the parties of rescheduling hearings from December 14, 2001, to December 13, 2001, (5) a notice of continuance of hearings filed by Robert's counsel, (6) Robert's counsel's objections to Albert's accountings, (7) Robert's supplemental petition to remove Albert as trustee (after Albert filed the independent federal action), (8) minute orders of December 28, 2001, (9) the formal order after the hearing of January 7, 2002, removing Albert as trustee, (10) trustee Lobello's objections to Albert's accountings, (11) the conservatorship orders of August 28, 2001, asserting jurisdiction over the trust, and finding that Robert was not automatically disinherited on the face of the trust, and (12) Robert's evaluation report, filed in the conservatorship case, by Inland Counties Regional Center, Inc.

On July 18, 2003, trustee Lobello filed a request for judicial notice, asking this court to take judicial notice of the same 12 items listed in her motion to augment the record on appeal.

At approximately the same time, on July 18, 2003, Robert's counsel moved this court to take judicial notice of certain documents relating to the conservatorship proceedings: (1) the register of actions in the conservatorship matter, (2) Robert's memorandum of points and authorities in that case, supporting the court's exercise of personal jurisdiction over the trust, (3) corrected findings and orders entered on August 28, 2001 (after hearing on Apr. 13, 2001), and (4) an evaluative report, prepared by Inland Counties Regional Center, Inc., in connection with the conservatorship.

Albert opposed Lobello's request for augmentation of the record, arguing that it was untimely. Albert also opposed both Robert's and trustee Lobello's requests for judicial notice.

In the meantime, Lobello had also filed a request for calendar priority.

This court granted trustee Lobello's augmentation motion in part. We deemed the requested items part of the record, except for items 11 (conservatorship orders) and 12 (conservatorship evaluation). Lobello's request for judicial notice was denied as duplicative. Her motion for calendar preference was granted. We reserved ruling on Robert's request for judicial notice, to be decided in conjunction with the appeal.

Albert's attorney then moved to augment the appellate record with the transcript of the conservatorship hearing held on April 13, 2001. Neither Lobello nor Robert

opposed Albert's motion; this court deemed Albert's request to be one for judicial notice and granted that request.

Inasmuch as Albert has requested judicial notice of the oral transcript of the April 13, 2001, conservatorship hearing, and because the conservatorship proceedings are intertwined with the sequence of events in the estate case, we now grant Robert's request for judicial notice of the conservatorship register of actions, the corrected findings and orders after the April 13, 2001, hearing, and the evaluation report. We deny judicial notice of the points and authorities memorandum, as only the face sheet of that document was included in the request for judicial notice. We further note, as Albert has pointed out, that the corrected order of August 28, 2001, is stamped with Judge King's name, although Judge Borba was the presiding bench officer at the hearing. Nonetheless, the substance of the order conforms in every respect to the orders made by Judge Borba at the hearing, as borne out by the transcript of which we have taken judicial notice at Albert's request.

Issues on Appeal

We are thus now poised to examine the substantive issues raised by Albert's notices of appeal. Albert's first notice of appeal purported to challenge (1) the order of November 21, 2001, suspending his powers as trustee, (2) the temporary restraining order of November 26, 2001, (3) the "Order to Effectuate Prior Order" of December 24, 2001 (declaring certain assets to be assets of the trust and ordering Albert to deliver them immediately to the special trustee), and (4) the order of January 7, 2002, removing him as

trustee. The second notice of appeal purported to appeal from an order of March 12, 2002, requiring Albert to make a further accounting.

Albert raises a global attack on the suspension, restraining, and removal orders: he argues, as a threshold matter, that this court should affirm his determination that Robert is not a beneficiary of the trust. If Robert is not a beneficiary, then he had no standing to request an accounting or to seek Albert's suspension or removal as trustee. Albert further argues that the evidence was insufficient to support the removal order. He also contends that the ex parte motion for removal was improper because he was afforded insufficient notice.

Albert next raises the issue that appointment of a special administrator for mother's estate was not justified. The notices of appeal had not previously specified an order appointing a special administrator as one of the orders from which Albert wished to appeal.

Finally, Albert argues that the order for a further accounting should be reversed, because it was entered after the first notice of appeal had been filed. Albert takes the view that the first notice of appeal automatically stayed all trial proceedings, such that the trial court was powerless to enter such an order.

We find none of Albert's contentions meritorious. Accordingly, we shall affirm.

ANALYSIS

I. Robert Could Properly File a Motion to Suspend or Remove Albert as Trustee

The first issue Albert raises is a preliminary one: rather than attacking the merits of the court's orders, he attacks Robert's standing to bring a motion for removal in the first instance. Albert maintains that Robert is not a beneficiary; thus, as a stranger to the trust, Robert has no cognizable interest which would permit him to bring a motion to remove the trustee.

Albert makes much of the general rule that a court normally defers to a trustee's good faith, discretionary decisions.[5] Discretion confided to a trustee is not, however, absolute; it is not unlimited and cannot be exercised arbitrarily.[6] Albert's actions are not beyond the scrutiny of the courts; the trust instrument does not insulate his declaration, that Robert is not a beneficiary of the trust, from all review.

Albert has consistently maintained that the language of the trust instrument, particularly that a handicapped beneficiary "shall cease to be a Beneficiary" if his governmental benefits are "jeopardized by reason of the individual's status as Beneficiary," operates as a virtually automatic or mandated disqualification. Thus, Albert states that Robert "had always been receiving governmental benefits. It was

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[5] See, e.g., *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 459 ["'courts will not attempt to exercise discretion which has been confided to a trustee unless it is clear that the trustee has abused his [or her] discretion in some manner'"].

undisputed that the assets of the Trust were valued at more than $1,752. Accordingly, Robert would have lost his governmental benefits had he been a beneficiary." Therefore, he argues, he correctly "determined" that Robert was not a beneficiary of the trust.

Now is not the time, and this court is not the place, for an exposition on the intricacies of social security benefit law. Suffice it to say that the questions of disqualification, whether from receiving SSI benefits or from receiving the benefits of the trust, are not so simple. It is not the case that every SSI recipient automatically loses governmental benefits upon becoming the beneficiary of a trust valued at over $1,752. SSI benefit law does permit a recipient to be the beneficiary of a properly structured "special needs" trust.[7] It is undisputed that Robert received SSI benefits for many years, including many years while his parents were alive. They must have known that Robert was receiving SSI benefits. Robert was named the 100 percent beneficiary of the parents' trust. Surely, they did not intend the beneficiary designation to be an idle act, i.e., that naming Robert a beneficiary of the trust would automatically result in his disqualification as a beneficiary of the very same trust.

The obvious, conceded purpose of the trust was to help care for Robert, the disabled adult child. Albert could, as trustee, have applied to the court for a construction

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[footnote continued from previous page]

[6] See Civil Code section 2269; *Estate of Miller* (1964) 230 Cal.App.2d 888, 908; *Estate of Ferrall* (1953) 41 Cal.2d 166, 173-174.

[7] See Title 42 United States Code Annotated section 1396p, subdivision (d)(4)(A).

of the trust instrument, to reform its provisions to conform to the requirements of a special needs trust for Robert. If the trust could not be construed or reformed in this manner, Albert could have exercised his discretion as trustee to determine whether it was in Robert's best interests to be cared for with trust funds and forgo, for the time being, his SSI benefits, or to continue receiving SSI benefits. Albert declined to take either course, and simply cut Robert, the intended beneficiary, off, relegating him to the pittance of $740 per month in SSI benefits.

A trustee's exercise of discretion is reviewable for abuse of that discretion.[8] Judge Borba in the conservatorship proceedings ruled that the "Handicapped Beneficiary" provisions of the trust did not, on their face, automatically disqualify Robert as a beneficiary. Albert never appealed that ruling. There has been no court determination, therefore, that Robert is not a beneficiary of the trust. Instead, Albert has attempted to make the decision unilaterally, without court review, in contravention of the obvious purpose of the trust. He has further used the trust property as if it were his own, largely to enrich his lawyers and himself at his disabled brother's expense. These actions were an abuse of his discretion as trustee.

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[8] *Estate of Ferrall*, *supra*, 41 Cal.2d 166, 173-174.

The only lower court pronouncement on the issue is that Robert is not disqualified as a beneficiary of the trust. Robert thus clearly had standing to bring motions to hold Albert, as trustee, accountable for his management of the trust.[9]

Other provisions of the trust also militate against a finding that Robert had no beneficial interest in the trust. The "Handicapped Beneficiaries" section includes a provision that a handicapped beneficiary is to be "reinstated as a beneficiary," in case of recovery from incompetence or disability, or in case the eligibility for governmental benefits ceases. The reinstated beneficiary is to be restored to his or her portion of the trust estate, which the trust document binds the trustee to retain in trust for the life of the beneficiary. Although somewhat self-contradictory in its beneficiary and nonbeneficiary terminology, the thrust of the trust instrument's provisions is to preserve the handicapped (non)beneficiary's share notwithstanding the characterization as "ceas[ing] to be a Beneficiary." Unless and until the handicapped beneficiary dies, there is always the theoretical possibility of a recovery or loss of benefit eligibility, and thus of restoration of the share which the trustee is duty-bound to preserve. Thus, *even if* Robert had "ceased" to be a beneficiary for purposes of the handicapped beneficiary clause, the same clause imposed upon Albert as trustee the duty to maintain Robert's share--i.e., the entire corpus of the trust--under the highest standards of fiduciary care, against the eventuality of Robert's reinstatement by means of recovery or loss of benefits eligibility. This fiduciary

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[9] See Probate Code sections 16420, 17200.

relationship between Albert and Robert was sufficient in and of itself, to ensure Robert's standing to call Albert to account, even if Robert had been adjudicated a "handicapped beneficiary."

Robert's petition to remove Albert as trustee was therefore proper.

II. The Court Properly Removed the Trustee

We review the trial court's decision to remove the trustee for abuse of discretion.[10] We find none.

On April 13, 2001, Judge Borba in the conservatorship proceedings had ordered Albert to provide an accounting of the trust upon application by Robert's counsel in the estate case. Robert's attorney filed such an application in April of 2001, but Albert failed to act on the request for several months. Instead, he tried, unsuccessfully, to remove the action to federal court, even though federal jurisdiction was patently lacking.

In October of 2001, the parties entered into a stipulation that Albert would provide a verified accounting by November 14, 2001. Albert thereupon immediately filed a petition to register the trust in Nebraska, without informing the Nebraska court that the California court had already asserted jurisdiction over the trust. He also sought a continuance of the accounting due date while his Nebraska petition was pending.

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[10] *Estate of Bixby* (1961) 55 Cal.2d 819, 826; *Estate of Baird* (1955) 135 Cal.App.2d 343, 351.

Upon discovering Albert's actions, the court suspended his powers as trustee and issued a temporary restraining order, precluding him from dissipating the trust assets further. Albert failed to surrender any trust assets to the special trustee, and reacted by filing a complaint for declaratory relief in the federal court.

The accountings Albert did file raised serious questions about his management of the trust, inasmuch as he spent over $327,000 in attorney fees over a period of just two years, and paid himself $37,682.79 in the same period.

Albert relies on the policy that courts normally will not remove a trustee named by the settlor of a trust for a conflict of interest which would have been apparent to the settlor.[11] This reliance is misplaced, however, because a court may properly remove even a nominated trustee "for demonstrated abuse of power detrimental to the trust."[12]

Albert's claim that Robert failed to present any evidence of incapacity, dishonesty, or lack of qualifications to administer the trust is equally hollow. Behavior which the trial court characterized as "looting" the trust betrays, if not dishonesty, at least a severe lack of "qualifications" to properly administer the trust. Albert's patent inability to comply with court orders also evidences either dishonesty or lack of qualification to manage the trust.

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[11] Citing *Estate of Bixby*, *supra*, 55 Cal.2d 819, 826.

[12] *Estate of Gilliland* (1977) 73 Cal.App.3d 515, 528; *Estate of Bixby*, *supra*, 55 Cal.2d 819, 826.

Albert asserts that he did not breach his duties, as alleged in Robert's petition, by failing to file accountings, because in fact the accountings were filed in November of 2001. The accountings filed were, however, not in full compliance with the standards of Probate Code section 16063. What documents Albert did file were also sufficient, as they stood, to raise serious questions about his management of the trust assets.

Albert argues that no reliance can be placed upon the accounting documents because they are "affidavits," and affidavits are inadmissible as evidence in contested probate proceedings.[13] The point is not well taken. Although in general an affidavit is not admissible in evidence in the absence of some statutory provision,[14] many statutes do provide for the use of affidavits.

The Probate Code itself prescribes the form and contents of an accounting, and provides for settling the account made by a trustee.[15] Surely the accounting, in its prescribed written form (which Albert asserts is an "affidavit") is intended by the statute to be used as evidence of something, e.g., how the funds were used. Were Albert's contention correct, the accountings could not be considered in contested proceedings concerning those very accountings. Albert cannot claim there is no statutory authority for considering the accountings for their manifest and statutorily required purpose.

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[13] Citing Probate Code section 1022; *Estate of Wallace* (1977) 74 Cal.App.3d 196, 201; *Estate of Duncan* (1969) 1 Cal.App.3d 212, 215.

[14] See Code of Civil Procedure section 2003; Evidence Code section 1205; see also 1 Witkin, California Evidence (4th ed. 2000) section 297, page 1006.

In addition, even in proceedings where affidavits would otherwise be inadmissible, the hearsay objection may be waived by failing to raise it below.[16] Here, Albert failed to raise this objection below. The court could properly consider the contents of Albert's verified accountings in deciding whether or not to remove him as trustee.

Albert next contends that the motion for his removal as trustee was flawed because Robert was incompetent to sign the verification in support of the motion, and that the "facts" alleged are not within Robert's knowledge, so that he would be unable to testify to them. Not so.

Although Robert's cognitive abilities showed significant deficits, there was no showing that he was incompetent to sign a verification; inasmuch as Albert procured Robert's waiver of all rights under the will, and presumably as first nominated trustee of the trust, Albert should be estopped from asserting that Robert is incompetent to sign documents of legal significance.[17] He cannot have it both ways.[18]

In any case, the salient facts are matters of judicial record, within the knowledge of anyone who examines the court file in this matter, together with pleadings Albert filed

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[15] Probate Code sections 16061, 16062, 16063, 17200.

[16] *Estate of Fraysher* (1956) 47 Cal.2d 131, 135.

[17] Cf. *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 ["'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite'"].

in other jurisdictions. Those pleadings are matters of which judicial notice may be taken.[19] Albert's own affidavits do not contradict but directly admit the essential facts, i.e. as to the actions Albert has taken, though not, of course, their alleged effects or motivations. Thus, for example, Albert straightforwardly admitted in his opposition to the motion to remove him that he undertook to remove the proceedings to federal court, that he filed the petition to register the trust in Nebraska, and that he filed the separate federal action after his trustee powers were suspended.

Albert argues that there were no grounds for removal, such as misfeasance, or hostility between himself and Robert. The record shows to the contrary.

Albert's accountings were evidence of potentially serious breaches of trust. He proved himself incapable of honoring court orders. His entire course of conduct was antithetical to the manifest purpose of the settlors. Within two months of his mother's death, Albert unilaterally declared Robert not a beneficiary of the trust. He attempted to remove the estate action to federal court for the purpose of declaring Robert not a beneficiary of the trust. He tried to register the trust in Nebraska for the same purpose. When those efforts failed, he filed a separate action in federal court for a declaration that

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[18] See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1150.

[19] Evidence Code sections 452, 453; *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127 ["Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the existence of judicial opinions and court documents . . . .'"]. (Italics omitted.)

Robert was not a beneficiary of the trust. Albert's single-minded purpose, almost since the beginning, has been to make sure Robert was excluded from participating in the trust benefits. In the meantime, Albert has liquidated assets and spent over $327,000 in attorney fees, and paid himself nearly $40,000 in trustee fees, while paying virtually nothing for his disabled brother, the intended beneficiary of his parents' bounty. As trustee Lobello argues, Albert's contention that there is no evidence of hostility between himself and Robert is belied by the entire course of these proceedings.

Much of the litigation, admittedly begun at Albert's behest, has resulted in little or no benefit to the trust. The accountings Albert filed also fail to account in detail for the sums spent on litigation, even as to those portions which did benefit the trust.

Among other things, Albert petitioned the probate court to remove Alice as executor of the estate. In this he succeeded. He also successfully appealed an award of extraordinary fees to Alice and her attorneys. This action recouped $10,500 for the estate.

While the appeal was pending, Albert and Alice filed competing petitions to obtain conservatorship over Robert. The court ruled that it had jurisdiction over the trust, that Robert was not automatically disqualified from beneficiary status under the trust, and that Albert must file an accounting upon Robert's application to the probate court. Albert never appealed that order. So far as can be determined, this litigation has not benefited the trust.

When Albert was told that Robert was not automatically disqualified as a beneficiary, Albert sought to remove the estate case to federal court. The case was returned to state court for lack of diversity jurisdiction. The trust derived no benefit from this litigation.

Albert brought a civil suit against Alice to stop her from selling a trust asset (the Los Angeles apartment building) at below-market value. This suit was apparently successful, and prevented a loss of trust assets.

Albert initiated litigation in Nebraska for the purpose of declaring Robert not a beneficiary of the trust. The Nebraska action, and an ensuing appeal, were unmeritorious and were of no benefit to the trust.

Albert filed an action to recover funds on the bond Alice had posted in connection with her executorship of mother's estate. This action was dismissed for failure to first obtain a surcharge order against Alice. The premature litigation did not benefit the estate or the trust.

Albert was suspended as trustee, and restrained from incurring debts or otherwise encumbering or changing trust assets. In complete disregard of this order, he filed an independent action in federal court, making the identical claim of diversity jurisdiction which the federal court had expressly rejected in the earlier removal attempt. This litigation has not been shown to benefit the trust in any way.

The court's determination to remove Albert as trustee was more than justified by the record. We discern no abuse of discretion.

III. Notice of the Removal Motion Was Proper

Albert argues that his removal as trustee was achieved without proper notice. The motion was filed on November 19, 2001. The motion papers themselves noticed the hearing for December 14, 2001. Albert makes the remarkable claim that, because the face of the motion papers gave less than 30 days' notice of hearing, the court was automatically divested of any jurisdiction even to consider the motion. The contention is without merit.

Probate Code section 17203, subdivision (a) provides that notice of hearing on a petition for removal must be given to a trustee "[a]t least 30 days before the time set for hearing."[20] Nonetheless, Probate Code section 1203, subdivision (a) provides: "Subject to subdivision (b), unless the particular provision governing the notice of hearing provides that the time for giving notice may not be shortened, the court may, for good cause, shorten the time for giving a notice of hearing." Nothing in Probate Code section 17203, subdivision (a), governing notice to trustees, prohibits an order shortening time.

The local rules required four hours' notice of ex parte hearings. Albert's counsel was given such notice. Albert's counsel attended proceedings on November 21, 2001, in which the matter of notice was discussed. The court noted its "extreme fear . . . that one, funds are being wasted; and two, funds are not being accounted for. . . . [¶] . . . And I think it's of such an urgency . . . that I think it would be inappropriate to wait for thirty

days to give notice because I think the situation is that exigent." The evidence before the court provided good cause for its concerns; Albert had delayed many months in providing the ordered accounting; he had attempted to remove the matter to federal court immediately after the request for an accounting was filed; he had entered into a stipulation to provide the accounting, but then ran to the Nebraska court in an apparent attempt to shift jurisdiction away from the California court. Albert's accounting, when he did file it, lacked the requisite detail, but was sufficient to show that substantial moneys had been drained out of the trust, without adequate showing of their purpose. "Good cause" supported the court's order shortening time.

Albert's counsel thereafter attended another hearing on November 26, 2001, at which time the court signed a temporary restraining order, precluding Albert from incurring obligations or transferring trust assets. At that hearing, all counsel, including Albert's counsel, agreed to set hearing on the merits of the removal motion for December 13, 2001. Albert's counsel himself gave notice that the scheduled hearing was changed to December 13, 2001. Albert thus also waived any defect in the notice.

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20 Probate Code section 17203, subdivision (a).

Albert was not deprived of due process with respect to notice of the court's actions in suspending him, entering a restraining order against him, or in removing him as trustee.[21]

IV. Albert Failed to Appeal the Order Appointing a Special Administrator of the Estate

Albert next argues that the trial court erred in appointing a special administrator for mother's estate. Unfortunately for Albert, his notice of appeal failed to include this issue. He has waived the right to contest the matter on appeal. The court's "'jurisdiction on appeal is limited in scope to the notice of appeal and the judgment or order appealed from.'"[22] Here, Albert's notice of appeal specified that he appealed from "the Court's November 21, 2001 ex parte order suspending [his] power . . . as trustee . . , the Court's November 26, 2001 temporary restraining order . . , the Court's December 24, 2001 Order to Effectuate Prior Order, and the Court's January 7, 2002 order terminating [him] as trustee . . . ." He filed a second notice of appeal, purporting to appeal from "the Court's March 12, 2002 Order Regarding Further Accounting." None of the specified rulings purports to challenge the court's appointment of a special administrator for mother's estate.

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[21] *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178 ["In short, this record clearly demonstrates that [the party] had adequate notice [of the proposed adverse action]"].

[22] *Soldate v. Fidelity National Financial, Inc.* (1998) 62 Cal.App.4th 1069, 1073, citing *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436.

Albert's claim otherwise is without merit, if not dishonest: he argues that he did indeed appeal from "the Court's November 21, 2001 ex parte order," period, full stop, deliberately ignoring the remainder of the language, "*suspending the power of Albert Del Castillo as trustee of the Del Castillo Trust*." (Italics added.) Albert never purported to appeal from any order appointing a special administrator of the estate.

V. The Order for Further Accounting Is Not an Appealable Order

Finally, Albert contends that the lower court's order for a further accounting must be reversed; he claims that the first notice of appeal acted as a stay of all lower court proceedings and thereby deprived the court of jurisdiction to order a further accounting.

Albert relies on Code of Civil Procedure section 916, which provides in part: "(a) . . . [T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order. [¶] (b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from."

Albert argues that the order for further accounting "affected" or "embraced" the same matters as he appealed. That is, he contends that the court erred in not ruling that Robert was not a beneficiary; if Robert is not a beneficiary, then Robert had no right to request an accounting in the first place. If Robert had no right to request an accounting,

then the order for a further accounting interfered with the appellate determination of Robert's incapacity, as a non-beneficiary, to request an accounting.

Albert's argument is seriously flawed. Albert never appealed the order requiring him to file an accounting. Indeed, he stipulated that he would comply with the order, and filed his accountings for the first two years. Whether the court required further amplification of the accountings filed is not a matter "embraced" within or affected by the orders appealed -- i.e., the orders suspending, restraining, or removing Albert as trustee.

"Probate Code section 1310, subdivision (a), provides that, subject to listed exceptions, an appeal stays the operation of an order. Subdivision (b) states the exception: '[F]or the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary . . . as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.'"[23] Here, the trial court retained power to direct the exercise of fiduciary powers to prevent loss of trust property, notwithstanding Albert's appeal. Albert was required to marshal and turn over trust assets to trustee Lobello for the protection of the trust estate. Necessarily, he was required to account properly for those assets, so that trustee Lobello could carry out her

portion of the fiduciary duties as directed by the court. The accounting matters were not stayed by Albert's first notice of appeal.[24] In addition, the order for further accounting was itself not an appealable order, under Probate Code section 1304, subdivision (a)(1).[25]

Counsel for trustee Lobello has asked this court to dismiss Albert's appeal from the accounting order as a nonappealable order. We reserved ruling on that motion for consideration with the appeal. While we agree that the accounting order was not appealable, we also reject Albert's argument for reversal (i.e., that the first appeal stayed the action and deprived the trial court of jurisdiction to make the order) on its merits. Accordingly, we shall simply affirm the order requiring Albert to submit a further accounting.

DISPOSITION

We find none of the appellate issues meritorious. Accordingly, the orders appealed from are affirmed. In particular, the order for a further accounting was proper,

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[23] *Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 555-556.

[24] At oral argument, counsel for Lobello represented to this court that proceedings on the order for a further accounting have been continued or held in abeyance pending this court's ruling on the issue of an appellate stay. We state unequivocally that there was and is no stay of the proceedings requiring Albert to render a full accounting to the probate court of his management of the trust and its assets. Proceedings on the accounting should not be delayed any longer by any appellate review proceedings.

[25] Probate Code section 1304, subdivision (a)(1): "With respect to a trust, the grant or denial of the following orders is appealable: [¶] (a) any final order under Chapter 3 (commencing with Section 17200) . . . *except the following*: [¶] (1) Compelling the Trustee to submit an account or report acts as trustee." (Italics added.)

and not stayed by appeal. The proceedings on that order should go forward without further delay. Respondents shall recover their costs on appeal.

Finally, as noted in footnote 3, *ante,* we order a copy of this opinion to be transmitted to the State Bar of California for purposes of investigating the appropriateness of initiating disciplinary action against attorney Robert James Skousen.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ Gaut
J.