

FILED

OCT 18 2019

Clerk of the Court
Superior Court of CA County of Santa Clara
BY J. Morriss DEPUTY

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

In re
THE TABATA LIVING TRUST dated
October 24, 1986, as amended

Lead Case No. 16PR178371

For Consolidated Matters:

Case No. 16CV298516

Case No. 16CV298424

TENTATIVE DECISION

From April 2 to 15, 2019, the parties in the above-captioned matter appeared for trial on the Petition for Order Settling Account, Approving Acts of Trustees, for Instructions, and for Partial Distribution (Accounting Petition), filed July 22, 2016, and the Supplement to the Accounting Petition, filed August 23, 2016, by Trustees George and Jean Neyama (Trustees), and the Petition for Removal and Replacement of Trustees (Removal Petition), filed December 18, 2017, by Objector Kathy Sugishita (Objector).¹ Trustees were personally present at trial and

¹ Kathy's Petition to Construe Trust Instrument, filed September 7, 2016, and her civil complaint against Trustees alleging elder abuse of Janet Tabata were before the court solely for pretrial rulings as to whether they were time-barred and whether they supported application of the no-contest clause.

1 represented by attorneys Michael G. Desmarais, Steven P. Braccini and Wendy Krog; Objector
2 was personally present and represented by attorneys Maureen A. Harrington and Bridgett R.
3 O'Hara. The Court took the matter under submission after the parties' filing of written closing
4 arguments and responses and now announces its tentative decision to deny the Accounting
5 Petition.²

6 RELEVANT FACTUAL BACKGROUND

7 The Tabata Living Trust Dated October 24, 1996, was settled by Flyer Tabata and his
8 wife, Janet Tabata, as a virtually copperplate A-B-C trust to minimize estate tax liability on the
9 death of either settlor. Flyer³ died on April 6, 2000, at which time the Tabata Living Trust was
10 divided into the revocable Survivor's Trust and the irrevocable Marital and Family Trusts.

11 After Flyer's death, Janet executed four successive amendments to the Trust. In the
12 Fourth, she designated Kathy Sugishita, wife of Flyer's nephew, Tim Sugishita, as successor
13 trustee after Eva Tabata, Flyer's sister and Tim's aunt.

14 In the Fifth and Sixth Amendments, Janet designated Jean Neyama (Janet's niece) and
15 her spouse, George Neyama, as successor trustees ahead of Kathy. Jean died July 23, 2015.

16 The Neyamas are 16.82 percent beneficiaries of the Survivor's Trust, but only 9.89
17 percent beneficiaries of the Family Trust.⁴ Objector and her spouse, Tim Sugishita (Flyer
18 Tabata's nephew) are 11.91 percent beneficiaries of the Survivor's Trust and 3.3 percent
19 beneficiaries of the Marital/Family Trusts. Accordingly, the personal net benefit for both sides

20
21 ² The parties having stipulated today to vacate submission as to the prayed-for removal of
22 Trustees and disinheritance of Objector and her spouse, pending resumption of settlement efforts,
23 the Court accordingly omits here any reference to its tentative decisions on these two issues. It
24 should be noted that the Court's tentative position as to the Trustees' account, even if finally
25 adopted, should not be construed as dependent upon or dispositive of the merits of any other
26 issue.

27 ³ Because certain parties and others relevant to the proceedings share the same surnames,
28 the Court uses their given names for clarity where needed to distinguish between them. No
disrespect is intended.

⁴ For both sides, these percentages aggregate the individual shares of each spouse, and are
further augmented as a consequence of predeceased beneficiaries.

1 would be optimized to the extent that the final accounting confirms the Survivor's Trust to now
2 dwarf the other two, and when the assets allocated to it appeal to routinely outperform the
3 Marital and Family Trusts.

4 The Sugishitas⁵ maintain that the Trustees' account disproportionately benefits the
5 beneficiaries of the Survivor's Trust at the expense of those beneficiaries (like Eva Tabata) of the
6 Marital/Family Trusts only, and that this imbalance is at odds with the design of the Trust and
7 the shared intention of the settlors during their joint lifetimes.

8 DISCUSSION

9 Trustees "are 'entitled to the benefit of the presumptions of regularity and good faith,'
10 and so long as they support the correctness of the charges or credits, they are not required 'to
11 anticipate and defend against charges of dereliction of duty and malfeasance which do not arise
12 from anything on the face of [their] accounts but are grounded on other matters.' (*Neel v.*
13 *Barnard* (1944) 24 Cal. 2d 406, 420-21, citing *Estate of Vance* (1940) 141 Cal. 624, 656; *Burke*
14 *v. Maguire* (1908) 154 Cal. 456, 468.) Here, however, it is the face of the Neyamas' account that
15 first raises an inference of irregularity: its allocation of assets is conspicuously imbalanced as
16 between the Survivors Trust and Marital Trust, despite the clear design of the Trust. Scrutiny of
17 the evidence offered to bolster the account further reinforces that inference.

18 I. Disparate Impact of Trustees' Chosen Allocation Methodology

19 Trustees contend that it had to have been Janet's legitimate exercise of her rights as
20 beneficiary during her lifetime that produced any imbalance between the Trusts, but this
21 otherwise plausible theory is at odds with the Accounting Petition or its attached exhibits, their
22 expert's Profit & Loss by Class statement, dated 9/30/16, and other record evidence. Had it been
23 Janet Tabata's entitlement to income from all three trusts that produced the vertiginous disparity,
24 one might expect to see the growth of the Marital/Family Trusts over the 15 years to lag behind
25 that of the Survivor's Trust, assuming that income from any of the trusts was thereafter

26
27 ⁵ Though not a party to the trial, Tim Sugishita testified at some length as a fact witness,
28 and his own counsel, following cross-examination by Trustees, sought to begin redirect
examination.

1 reinvested disproportionately or exclusively in the Survivor's Trust. But the value of the
2 Marital/Family Trusts did not merely stagnate or retard in growth: it tanked. In contrast to the
3 116.33 percent growth of the Survivor's Trust (from \$6,289,560 to 13,606,254.84), the Marital
4 Trust lost 41.02 percent of its value (from \$4,631,119 to 2,731,458.75), and the Family Trust lost
5 36.8 percent of its value (from \$675,016 to 426,611.20). In the 15 years that Janet Tabata
6 survived her husband, the Survivor's Trust realized \$412,223.22 in short-term capital gains,
7 compared to the Marital Trust's \$33,977.99. The Survivor's Trust generated \$472,617.17 in
8 distribution income, to the Marital Trust's \$70,522. The Survivor's Trust realized gains of
9 \$24,155.59, to the Marital Trust's realized *losses* of \$91,941.99 and Family Trust's realized
10 losses of \$273,586.30. The Survivor's Trust realized dividend income of \$2,252,926.72, the
11 Marital Trust little more than a tenth that figure, at \$273,586.30.

12 As a threshold matter, the Court defines "income" as that term is employed in the Living
13 Trust instrument more narrowly than Trustees have – both during trial and in the Declaration of
14 Michael G. Desmarais, filed October 11, 2016. It should not, of course, be necessary to observe
15 that Janet's entitlement during her lifetime to income from the Marital and Family Trusts, as well
16 as the Survivor's Trust, was to net income and not gross revenues. Moreover, "the word
17 'income' means returns from investments or earnings of property, as distinguished from
18 appreciations in value of the property or profits from buying and selling." (*In re Davis' Estate*
19 (1946) 75 Cal.App.2d 528, 533.) Trustees, on the other hand, appear to use profit and income
20 interchangeably, broadly characterizing as income the information summarized in their expert's
21 Profit & Loss by Class, despite the inclusion therein of realized gains, return of capital, and
22 short-term capital gains, etc.

23 Nor does the analysis by Trustees' forensic accountant assuage the Court's concerns. On
24 its face, the expert's report dated May 26, 2016, provides no explanation for a methodology that
25 distills \$12 million to four pages of spreadsheet. Although the "non-pro-rata basis" for
26 allocation that Trustees have invited the Court to endorse may well be appropriate in other
27 circumstances, its operation here rewards one class of beneficiaries and penalizes another, in a
28 manner that the Court finds to be arbitrary, at best, and arguably discriminatory.

1 Merely skimming the surface of the account uncovers further basis for concern. The
2 evolution of Trustees' forensic accounting is striking in not only its variability but also the
3 absence of any record justification for the most significant tactical choices reflected in it. In her
4 February 23, 2016 draft, Trustees' expert had initially calculated that \$1,587,289 had wrongly
5 been allocated to the Survivor's Trust that should instead be restored to the Marital Trust. By her
6 report of May 26, 2016, this delta was slashed to \$829,229. As reflected in the expert's
7 summary spreadsheets, the principal engine of this Wonderland-worthy shrinkage was the
8 unexplained shift from the original allocation methodology used in the February 2016 draft – by
9 proportional shares of each asset – to what appears to be a selective migration of investment-
10 grade assets to the Survivor's Trust. For example, the Survivor's Trust was allocated all
11 161,571,009 shares that the living trust had held in the Putnam California Tax Exempt Income
12 Fund, valued at \$1,325,498. In contrast, Flyer's Body Shop, Inc. – an owner-operated business,
13 no longer a going concern upon Flyer Tabata's death in 2000 – was allocated to the Marital
14 Trusts. Valued at \$1,560,780, Flyer's Body Shop, Inc., constituted a third of the Marital Trust
15 holdings in the funding of the trusts posited upon Flyer Tabata's death. The virtue of the
16 February 23, 2016 draft, in contrast, was that by allocating to each Trust a proportional interest
17 in each individual asset, it spread the risk – of loss, depreciation or the simple failure to marshal
18 a known asset – equally among the Trusts and the beneficiary classes therein represented.

19 II. Potential Misapplication of the Suspect Allocation Methodology

20 Assuming, for argument's sake, that the methodology of the Trustees' May 26, 2016
21 accounting had been appropriate to this particular case, the trial evidence underlying the
22 summary report and spreadsheets calls into further question the reliability of this approach *even*
23 *as applied*. At the same time that the Trustee's expert nominally allocated Flyer's Body Shop,
24 Inc., to the Marital Trust column, she simultaneously allocated certain of its few investment-
25 grade holdings to the Survivor's Trust. Shares in Caribbees Investors, L.P., accounted for
26 \$288,600 of the net worth of Flyer's Body Shop, Inc., but while the body shop's Caribbees
27 holdings could not be located by the Trustees' expert, an identical investment was allocated to
28 the Survivor's Trust, and all distributions from Caribbees were deposited into a Survivor's Trust

1 account. At best, the expert could only cite her “understanding ... that the [Flyer’s Body Shop,
2 Inc.] interest in Caribbee no longer exists,” even as she was at a loss to explain what had become
3 of them. Similarly, Flyer’s Body Shop, Inc., held shares in Franklin California Tax-Free Income
4 Fund and Delaware Tax-Free Fund: although Trustees’ expert traced these assets to an MML
5 investment account ending in 8156, Trustees maintain that because this MML account was
6 opened by Janet Tabata after her spouse died, the Court should presumptively treat this as a
7 Survivor’s Trust asset. Although the Court is unaware of any probate obverse to the presumption
8 that property acquired during the joint lifetimes of married persons is community property, even
9 if Trustees are able to cite authority for such a presumption, their expert’s testimony tracing
10 assets of Flyer’s Body Shop, Inc., to the MML account would be sufficient to rebut that
11 presumption at least in part. Even the fixed assets of Flyer’s Body Shop, included the 2000
12 valuation at \$116,854, are out of the Marital Trust’s practicable reach, given that Trustees
13 authorized a non-beneficiary to remove the body shop’s equipment and tools from the Tabatas’
14 garage for himself.

15 III. Trustees’ Arguments

16 Trustees have offered different factual hypotheses and legal theories in support of the
17 Court’s approval of their Accounting Petition. The Court finds their arguments in this regard to
18 be unsupported by the record or by persuasive authority.

19 A. No Conflicting Expert Testimony Is Required

20 Trustees contend that they are entitled to settlement of their account on the ground that
21 Objector has presented no conflicting expert testimony. They rely on *Borrayo v. Avery* (2016) 2
22 Cal.App.5th 304, 310, for the proposition that the Court should rely exclusively on Ms. White’s
23 testimony as a matter of law. But the analogy they wish to draw with a motion for summary
24 judgment mischaracterizes the equitable role of the Superior Court sitting in probate. Trustees’
25 position that a court is obliged to accept a trustee’s account if it is not met with a verified
26 objection by one with standing runs counter to hornbook law – that trustees, as fiduciaries, are
27 subject to the super-fiduciary oversight of the Court. (Prob. Code, § 17003.) Were it otherwise,
28 the requirement of an account submitted to the Court would be rendered a nullity.

1 B. No Evidence of Invasion of Marital Trust Principal

2 The Trust did grant Janet the ability to invade principal both on request as the surviving
3 spouse beneficiary and in the exercise of discretion as Trustee. That authority was not, however,
4 unlimited. Under the 5-or-5 provision of Article VIII.C.3 and VIII.B.3, Janet's power to invade
5 the Marital and Family Trusts was limited to the \$5,000 or five percent of the value of principal,
6 per year, and was expressly non-cumulative.

7 The power to invade principal under the 5-or-5 provision was further conditioned on her
8 "request in writing" as the surviving spouse. Even assuming the absence of a surviving writing
9 is not necessarily fatal to Trustees' position, the absence of any supporting evidence for their
10 theory that the growth of the Survivor's Trust was traceable to annual five-percent invasions of
11 the others is, given the magnitude of that growth. Janet's authority – as Trustee – to apply
12 Marital or Family Trust principal for her benefit as surviving spouse was likewise limited.
13 Although "the rights of the remaindermen" in the Marital and Family Trusts "shall be considered
14 of secondary importance" in the Trustee's exercise of these powers, "secondary" is not
15 synonymous with negligible. Furthermore, "so long as the surviving spouse is acting as Trustee
16 hereunder, the power to make distributions from the Marital [and Family Trusts] shall not be
17 deemed to be discretionary and shall be expressly limited" to "as much of the principal ... as ...
18 necessary for the surviving spouse's proper support, maintenance, health and education, in ... her
19 accustomed manner of living." Janet as Trustee was further obligated, in assessing her needs as
20 surviving spouse, to "tak[e] into consideration ... any income or other resources of the surviving
21 spouse, outside of the Marital [and Family] Trust[s], known to the Trustee and reasonably
22 available for these purposes. So long as the Survivor's Trust remains in effect, all principal
23 payments for the benefit of the surviving spouse shall first be made from the Survivor's Trust
24 until said trust is exhausted." No evidence was presented at trial to suggest that Janet's
25 accustomed manner of living ever required invasion of any Living Trust principal. To the
26 contrary, Trustees' premise is that she in fact lived quite modestly, with much less in the way of
27 valuable household goods or jewelry than upon Flyer's death, despite the income at her disposal
28 from the Survivor's Trust alone.

1 Trustees suggest that this provision permitted Janet “to distribute to herself \$33,750 (5%)
2 from Family Trust principal and \$231,555.95 (5%) from the Marital Trust principal each year.
3 Nothing in the Trust required Janet to provide notice to anyone of any distributions to herself
4 during her lifetime, nor that she memorialize any such distributions. [¶] Given Janet’s “5 or 5”
5 power over the fifteen years following Flyer’s death, she was entitled to transfer to the
6 Survivor’s Trust in the neighborhood of \$506,250 from the Family Trust and \$3,473,339 from
7 the Marital Trust - or approximately \$4 million.” The defect in the Trustees’ argument is that it
8 presumes (1) that the assets in the Family and Marital Trust maintained their 2000 value, and (2)
9 that the growth of the Survivor’s Trust was the result of Janet’s application of both the income to
10 which she was entitled from the Marital and Family Trusts and an annual 5-or-5 exercise.
11 Neither premise is valid. The assets allocated to the Marital and Family Trusts, per the
12 Neyamas, lost value from the date of Flyer’s death, as was predictable for Flyer’s Body Shop,
13 Inc. And the growth of the Survivor’s Trust cannot be explained solely by the exercise of the 5-
14 or-5 powers. Leaving aside the absence of evidence that any growth in the Survivor’s Trust was
15 attributable to transfers from the Marital or Family trusts during Janet’s lifetime, the delta still
16 suggests that the allocation of assets between the Survivor’s Trust and the irrevocable trusts
17 resulted in those assets with growth potential being allocated disproportionately to the Survivor’s
18 Trust, and those assets lacking such potential being allocated disproportionately to the Marital
19 and Family Trusts.

20 As for Trustees’ effort to void the Living Trust’s express requirement that the surviving
21 spouse make such a request in writing, the Court concludes that the Tabatas meant what they
22 said. It is certainly not unprecedented for such formalities of communication to be required in
23 probate. (See, e.g., *Gardenhire v Superior Court* (2005) 127 Cal.App.4th 822 [Prob. Code, §
24 15402 does not permit trustor’s revocation of trust by her later will, rather than by a writing
25 delivered to herself as trustee].) Nor was it unprecedented for Janet Tabata to observe such
26 formalities, for example by issuing just such a writing to her own agent/financial adviser, Sandra
27 Lanoie, on November 23, 2012, rather than relying solely on unwritten communications to her
28 attorneys-in-fact.

1 C. Allocation Decisions of the Predecessor Trustee Are Not Irrevocable

2 a. Janet's Authority As Trustee Was Not Unlimited

3 Trustees rely upon the Trust's grant of broad discretion to the Trustee to allocate assets,
4 but as their own authorities reflect, a trustee's discretion is not unlimited, as a matter of law.

5 "[T]he court will not interfere *unless* the trustee in exercising or failing to exercise the power acts
6 dishonestly, or with an improper even though not a dishonest motive, or fails to use [her]
7 judgment, or acts beyond the bounds of a reasonable judgment." (*Hearst v. Ganzi* (2006) 145
8 Cal. App.4th 1195, 1209, italics added.) Even "if a trust instrument confers 'absolute,' 'sole,' or
9 'uncontrolled' discretion on a trustee, the trustee shall act in accordance with fiduciary principles
10 and shall not act in bad faith or in disregard of the purposes of the trust." (Prob. Code, § 16081.)
11 "That is, section 16081 requires that even under a grant of absolute discretion, the trustee is not
12 authorized to neglect its trust or abdicate its judgment. [Citations.] Courts will review the
13 trustee's action to determine whether they are reasonable, arbitrary, capricious or in bad faith.
14 [Citation.]" (*Penny v. Wilson* (2004) 123 Cal.App.4th 596, 606 (*Penny*)). Accordingly, "a person
15 who is a beneficiary of a trust that permits the person, either individually or as trustee or
16 cotrustee, to make discretionary distributions of income or principal to or for the benefit of
17 himself or herself pursuant to a standard, shall exercise that power reasonably and in accordance
18 with the standard." (*Ibid.*)

19 "Under section 16047, subdivision (c), the trustee has the duty to invest and manage trust
20 assets, and take into consideration the appreciation of capital. The purpose of the trust is
21 paramount, and the trustee must act impartially toward all beneficiaries." (*Penny, supra*, 123
22 Cal.App.4th at p. 604.) The purpose of the Trust in this case was to minimize estate tax liability
23 upon the death of the first spouse by allocating half the community estate to the Marital Trust,
24 less the minimum required to fund the bypass Family Trust under the relevant tax provision. The
25 cost of this genteel tax dodge the surviving spouse's ceding any authority to modify or revoke
26 the Marital and Family Trusts. As in *Penny*, Janet's duty of impartiality ran to the beneficiaries
27 of the Marital and Family Trusts that became irrevocable upon Flyer's death.

1 b. Trustees Are Not Bound By Their Predecessor's Titling Or Intended
2 Allocation

3 Trustees further argue that they are powerless to deviate from Janet Tabata's allocation of
4 assets after Flyer Tabata's death. Their position finds no support in any provision of the Trust,
5 which on the contrary only permits a successor trustee to "accept the *final accounting* of a
6 predecessor trustee without the necessity of an audit or investigation thereof." There having
7 been no accounting by Janet Tabata, let alone a final one, Trustees were not entitled to presume
8 the regularity of her actions, particularly where it is undisputed that there were numerous assets.
9 Nor did Trustees' accountant endorse their litigation position, posing as she did (at least
10 initially) that the non-pro-rata basis for allocation on which Trustees rely should be supplanted
11 by a pro-rata allocation of each asset. All later iterations of her accounting, even after she was
12 inexplicably moved to abandon the pro-rata allocation, presumed that some clean-up of Janet's
13 asset allocations was essential because the allocation of estate assets upon Flyer's death was not
14 consistent with the Trust design. Even Trustees themselves have argued, through counsel, that
15 the titling of an asset is not dispositive, and that Janet during her lifetime had no obligation to
16 formally retitle assets, so long as she was able to account for them. (Cf. *Estate of Heggstad*
17 (1993) 16 Cal.App.4th 943, 950.) To the extent Trustees may, unlike the initial instinct of their
18 expert, wish to default to the allocation method adopted by Janet Tabata, that allocation "is not a
19 binding and conclusive act." (*Penny, supra*, 123 Cal.App.4th at p. 607.)

20 Nor is the Court persuaded by Trustees' contention that any challenge to allocation of
21 assets by Janet is time-barred under Code of Civil Procedure section 366.5, subdivision (a): "If a
22 person against whom an action may be brought on a liability of the person, whether arising in
23 contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the
24 applicable limitations period, and the cause of action survives, an action may be commenced
25 within one year after the date of death, and the limitations period that would have been
26 applicable does not apply." But Kathy's argument is not predicated on "an action brought on a
27 liability of the person," on any allegation of tortious or bad-faith actions by Janet, but rather the
28 standing that a class of beneficiaries have to challenge the first accounting that they have ever
been entitled to receive. It is Trustees who have brought the Accounting Petition, and it is they

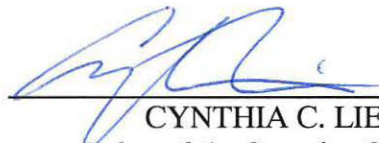
1 who have an obligation to defend it. “The remedies of a beneficiary against the trustee are
2 exclusively in equity.” (Prob. Code, § 16421.) “If the successor discovers a breach by the
3 predecessor trustee that can be corrected, the successor is obligated to do so as soon as is
4 practicable.” (*Purdy v. Johnson* (1917) 174 Cal. 521, 528.)

5 CONCLUSION

6 For the foregoing reasons, the Court’s tentative decision is to deny the Accounting
7 Petition. The parties are free but not required to submit written objections to this tentative
8 decision on or before November 27, 2019.

9 It is so ordered.

10 Dated: October 18, 2019

11 
12 _____
13 CYNTHIA C. LIE
14 Judge of the Superior Court