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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re THE STEPHEN PESTANO
REVOCABLE TRUST DATED JULY 28,
1992 AND THE AMENDMENTS
THERE TO.

B228976

(Los Angeles County
Super. Ct. No. BP107646)

DAMON PESTANO,

Appellant,

v.

ADA P. SANDS et al.,

Respondents.

APPEAL from an order of the Superior Court of Los Angeles County, Michael I. Levanas, Judge. Affirmed.

Borden Law Office and Alex R. Borden for Appellant.

Sands & Associates, Ada P. Sands and Heleni E. Suydam for Respondent Ada P. Sands.

Law Offices of Barry P. King and Barry P. King for Respondent Wendy Pestano.

INTRODUCTION

Damon Pestano (Damon) appeals from an order removing him as interim successor trustee of The Stephen Pestano Revocable Trust Dated July 28, 1992 and the Amendments Thereto (Pestano Trust).¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

A. Background

Damon is the adult son of Stephen Pestano (Stephen) by a previous marriage. Respondent Wendy Pestano (Wendy) is Stephen's wife, whom he married in 2001 after being in a relationship with her for over 10 years.

Stephen, the original trustee of the Pestano Trust, named Damon as successor trustee and residual beneficiary of the trust in the declaration of trust. In 2002, Stephen amended the trust to name Wendy as successor trustee and to provide her with a life estate in the principal estate assets.

¹ Damon purports to appeal from a September 20, 2010 order, but the document filed on that date was the statement of decision. We liberally construe the notice of appeal to refer to the subsequently-filed order removing him as interim successor trustee. (Cal. Rules of Court, rules 8.100(a)(2), 8.104(d); see *Roston v. Edwards* (1982) 127 Cal.App.3d 842, 846.)

² Rule 8.204(a)(1)(C) of the California Rules of Court requires that a party's briefs "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) To the extent the parties have made reference to factual or procedural matters without record references, we will disregard such matters. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.)

Stephen developed severe dementia/Alzheimer's disease.³ Wendy cared for him in the family home in Manhattan Beach. Stephen owned other, income-producing, properties and had a large investment portfolio, the proceeds of which were being used to provide him with full-time care.

B. Pretrial Proceedings

On November 13, 2007, Damon filed a petition to remove Stephen and Wendy as trustees and for his appointment as trustee. In May 2006, Stephen and Wendy had transferred three Manhattan Beach properties from the trust to themselves as community property. In April 2007, they had obtained a loan secured by a deed of trust on one of the properties.

Damon claimed that Stephen was not qualified to act as trustee because he had been diagnosed with dementia in 1999 and did not have the ability to understand the nature and effect of his actions. Damon claimed that Wendy should be removed as trustee because she was a co-owner of the property transferred from the trust and therefore had a conflict of interest which precluded her from acting in the interest of the trust.

At the same time, Damon filed a petition to be appointed conservator of Stephen's estate. On December 10, 2007, respondent Ada P. Sands (Sands) was appointed to serve as a Probate Volunteer Panel (PVP) attorney for Stephen. On January 30, 2008, Wendy filed a petition to be appointed conservator of Stephen's person and estate.

Damon's petition to remove Stephen and Wendy as trustees was heard by Judge Aviva K. Bobb on January 20, 2009. The judge ordered that Wendy file an accounting and that the transfer of the Manhattan Beach properties be null and void and the properties remain in the trust. A hearing on the petition was set for May 26.

³ Respondent Ada P. Sands notified us that Stephen died on April 19, 2012.

On May 26, Judge Bobb considered the papers filed by Damon and Wendy and heard argument by counsel. The judge then suspended Wendy as trustee until June 12 and appointed Damon as interim successor trustee. Wendy was to file an accounting and the matter was to be heard on June 12. Judge Bobb retired, and the order suspending Wendy and appointing Damon interim successor trustee was signed by Judge Mitchell L. Beckloff.

The case was assigned to Judge Michael I. Levanas, who conducted a hearing on June 12. Based on the papers filed by the parties and argument by counsel, the court ordered that Wendy's powers remain suspended and Damon's appointment as interim successor trustee remain in effect through August 13. Wendy was ordered to file a supplemental accounting. The court ordered that Damon "shall pay to Wendy Pestano the amount of \$27,000.00 per month (to the extent there is sufficient liquidity in the Trust to make said payments), commencing June 24, 2009, for a monthly allowance for Stephen Pestano's expenses (all of which will be subject to court review and substantiation by Wendy Pestano)."

In August 2009, Sands met with counsel for Damon and Wendy in an attempt to resolve their disputes in order to ensure sufficient funds were available for Stephen's care. Although Damon and Wendy agreed to do whatever was necessary to provide for Stephen's needs, they continued fighting with one another. Damon was behind in making the court-ordered payments to Wendy for Stephen's care. Damon refused to provide funds to Wendy unless she provided him with an accounting for previous expenditures, and he closed the bank account to which she had access.

On November 9, 2009, Sands filed an ex parte application for appointment of an independent trustee over the Pestano Trust, on the ground that, as a result of Damon's and Wendy's competing interests in maintaining control over the trust funds and continuing feud, Stephen's needs were not being met.

At the November 23, 2009 hearing on the ex parte application, the court questioned Sands as to the current financial situation, and she informed the court as to the difficulties in providing funds for Stephen's care. She noted that there was a private

lender who was willing to make a loan secured by Stephen's real property, but the lender would not do so unless an independent trustee was appointed in order to avoid the conflict between Damon and Wendy.

The private lender was present in court and testified that he was a friend of Wendy's and willing to make the loan to help Stephen, but he was not willing "to loan it for the purposes of paying attorney fees and fighting in court." The court appreciated his position but indicated that it was not going to remove Damon as interim successor trustee without a trial.

The court turned to the question of the matters on calendar, including "the status of refinances, . . . the status of any loans, the status of payments to Wendy Pestano pursuant to the court's orders that she receive approximately \$27,000, whatever the orders are. They remain in full force and effect. The trustee is not authorized to withhold any funds that he has . . . in the trust account for any liquidity issues, unless there is a further court order. Any funds coming in need to be a priority to payments to Wendy Pestano and Stephen Pestano for the care of Stephen Pestano pursuant to my orders. . . ."

Damon filed an objection on numerous grounds to the appointment of an independent trustee, and Wendy filed her response. The court continued the matter for trial and ordered that Damon remain interim successor trustee until that time.

Sands filed a report on February 23, 2010, stating that since November 9, 2009, the dispute between Wendy and Damon "has so intensified to a point where Court intervention has been sought. Funds continue to be depleted and [Wendy] has had to borrow funds as well as utilize her marital property to care for [Stephen]." Damon was not making the court-ordered payments to Wendy for Stephen's care, "probably because available funds have been depleted."

Sands had learned that Damon had been able to obtain a loan, but on terms "much more costly to the estate" than those of the private lender. Sands continued to recommend that Damon be removed as interim successor trustee and that an independent trustee be appointed.

At a hearing on March 1, 2010, Damon's counsel, Alex R. Borden (Borden), confirmed that the loan had been funded. The court questioned why Sands had not been provided with a copy of the loan documents, stating that the failure to disclose this information created cause for concern.

The court asked whether the loan proceeds had been used to make the court-ordered payments for Stephen's care, and Wendy's counsel indicated payments had been made, but there had been no back payments to make up for the previous months in which no payments were made. When asked why, Borden gave a convoluted explanation. The court found nothing in its prior order "that would cause the trustee, in my opinion, to not make" the payments.

The court stated, "I'm confused because I think I made it extremely clear, and I did not want to have somebody in charge of the purse strings that was going to not follow the court's order . . . , and I'm sitting here now looking at an order that looks like someone's just playing fast and loose and not complying with the order of the court." Borden again tried to justify Damon's actions. The court responded that it thought Sands was correct, and an independent trustee was necessary. It made orders, and they were not obeyed.

The court ordered Wendy and Damon to return to court to answer questions regarding payments. It added, "In my opinion, this is costing way too much money to get basic things done. . . . [Y]ou've got a conflict between an income beneficiary and a residual beneficiary, and I think it's showing itself. And I think Ms. Sands is on the right path. And my inclination at this point would be to appoint a successor" The court also ordered disclosure of the loan terms.

At a hearing on March 10, 2010, the court questioned Borden regarding the accounting the court had ordered submitted. Borden acknowledged he had not submitted it, claiming he had interpreted the court's order as requiring him to provide it to counsel. After he submitted it to the court and the court took a recess to examine it, the court questioned why it did not include dates and explanations for withdrawals of funds. Borden acknowledged his error in not doing so.

Wendy's counsel then informed the court that on January 13, Damon had transferred \$125,000 of the loan proceeds to Borden. When asked about it by the court, Borden stated that the money was put into his client trust account "[b]ecause there was an outstanding balance of legal fees due in rendering services to the trustee." The court asked how he could take fees without court approval. He responded that "[t]his is not a trust that's under the court's jurisdiction requiring an accounting." The court pointed out that it had appointed Damon interim successor trustee, assuming he was "going to act appropriately under the appointment." Borden stated that he believed Damon was acting appropriately. The court indicated that the transfer of funds that were to be used for Stephen's care into Borden's account "bothers me." Pending trial, no further funds were to be paid to Borden.

The court was also upset by Damon's questioning of Wendy's expenditures, pointing out that it has "specifically said that it is the court's review, not Damon's review, . . . and this is precisely why Damon should not be the trustee. There is dissension between these two people. Under no circumstances did Damon have the right to presume that he's the court and that he should be the judge of what Wendy Pestano gets for the benefit of her husband."

The court reiterated that "[t]he order is the order until [the accountings are] reviewed by the court. And I don't want anymore quibbling about it. Ms. Sands has appeared to be a more brilliant person than I've seen in a long time when she said you've got to stop this. This is bleeding everybody. You've got a conflict between two people; one as a life estate, one as a residual beneficiary. You've got the person who wants to save the money in as an interim successor trustee. You've got to stop this because it will not finish. This has to finish. We've set dates for trial. . . ."

While the matter was pending, Wendy filed an emergency petition to compel the return of the trust funds paid to Borden. The basis of this motion was that the trust would be out of cash within a little over a month.

C. Trial

1. Damon's Testimony

On direct examination by Sands, Damon testified that he had not seen Stephen in two months. In general, he saw Stephen four or five times a year.

Damon understood that after Stephen and Wendy died, he would inherit what was left. So the less there was left in the trust, the less he would inherit.

Damon lived in Redwood City and, in his position as interim successor trustee, he was managing Stephen's properties in Manhattan Beach. He had not felt the need to inspect the properties but had communicated with the tenants.

Wendy emailed Damon with her requests. If Stephen or the tenants had a need, Damon responded. Any time he sent Wendy money, he asked for information as to how it was being spent. On October 15, 2009, when Wendy emailed him that Stephen was out of money, he responded, "At the current run rate, you will spend approximately \$330,000 per year." He told her that "[a]s trustee, I am responsible for trust assets, and request that you provide an accounting for the \$28,000 before any more funds are transferred." He did not send her the funds she requested "due to the balances on the account." He was aware at the time that the court had ordered monthly payments of \$27,000 for Stephen's expenses.

In November 2009, Wendy emailed Damon explaining that Stephen's medications had been costly, she had to pay payroll tax, and she still owed money to one of Stephen's caregivers. If she paid the caregiver, she would be overdrawn, and she needed money. Damon responded that it was "unfortunate that you are unwilling to work with me" by "refusing to provide me with an informal accounting so that I can fulfill my duties and responsibilities as trustee." When Sands asked if he "felt at that time that you were entitled to a personal accounting before you would send additional funds," he said that he was "just concerned about providing for my father's care. And we only requested the information, never demanded it."

After more questioning by Sands and Wendy's counsel on this topic, questioning turned to the money Damon had sent to Borden for attorney's fees. The trial court noted

that there was “a volley of emails back and forth regarding give me an accounting of this, justify this, to Wendy Pestano.” But the day after the loan was funded for \$393,000, Damon transferred \$125,000 to Borden. The court asked him, “You have this very specific interest in how this money is being used, these trust monies are being used. Are you telling me you wired 125 without knowing what was at that time owing to Mr. Borden?” Damon said he knew it was more than \$125,000.

In response to questions by Wendy’s attorney, Damon said he did not recall the questions asked of Borden on March 10 regarding the \$125,000. He acknowledged that the \$125,000 was not the only trust money paid to Borden; he had paid Borden an additional \$40,000 on March 1 for future services. He did not know if all of the money paid was for services rendered after his appointment as interim successor trustee. He never considered seeking a court order before making the payments because “Mr. Borden has worked hard . . . [a]nd those services are not free, as you know, and everything I’ve done for my dad is above-board.”

2. Wendy’s Testimony

Borden questioned Wendy regarding her withdrawal of trust funds from the trust account after being removed as successor trustee in June 2009. She acknowledged that she did despite a court order that she was not to do so.

Borden also questioned Wendy regarding the loan from a private lender that she had attempted to arrange. She testified as to certain contingencies the lender had placed on the loan.

Finally, Wendy testified as to her discussions with Sands about not having enough money for Stephen and the household and Damon’s refusal to give her the money. They also discussed removal of Damon as interim successor trustee.

3. Sands’ Testimony

Borden questioned Sands as to her characterization of the situation “as reaching a crisis proportion.” This characterization was based on emails from Wendy “in which she

was crying out for funds for the care of her husband,” saying she did not have money for payroll or payroll taxes. Sands felt it was her duty as PVP attorney to step in. Sands “felt that a neutral trustee might cut through a lot of inherent conflict between these two people which has cost the estate an enormous amount of money and would prevent, if this crisis got solved, another crisis, which I believe is coming soon if things don’t change.” The court asked what further crisis Sands was referring to, and she answered, “I think they were going to run out of money, your Honor. I think we’re going to be faced with the same problem very soon, and these things have to be resolved.”

Borden asked whether Sands “believe[d] that Stephen Pestano’s quality of life has been threatened in any way . . . as a result of Damon acting as trustee?” She said she believed there was a potential threat if funds were controlled by “a person who has more to gain by not providing funds for the care of someone because in the end he or she will get more inherited money.” Specifically, Damon’s failure to make payments when the money was needed constituted a threat. She did not believe she had “to wait, as a P.V.P. attorney, until . . . medication cannot be bought or caregivers can’t be paid or payroll taxes can’t be paid for caregivers”

4. Attorney’s Fees

The court ordered Damon and Borden to produce copies of the invoices that triggered Damon’s payments totaling \$165,000 to Borden. They produced documents, but the court did not find any “invoice that was presented to [Damon] that caused him then to send a check for \$125,000.” The court asked Borden whether he sent such an invoice and Borden said he was sure that he sent one and “could probably retrieve a copy of that.”

The court reiterated to Borden, “I want to see that invoice.” It expressed “concern[] as to whether or not trust monies were sent to you for work done on behalf of Damon Pestano before he was appointed, and that’s the point of my concern here. So when you sent him a billing and he responded by sending you \$125,000, I want to know what that was.” Borden responded, “I can tell the court with certainty, the billing that

was sent to Mr. Pestano was for everything from the inception of the billing before you up through that date, and so, therefore, the bill did cover services that were rendered prior to Mr. Pestano becoming trustee.”

The court turned to Damon and asked, “Well, Mr. Pestano, you’re under oath, why would you send Mr. Borden money from the trust for work done before you were appointed as the trustee?” Damon responded, “You Honor, I was—you know, it was my understanding that we were out and trying to maintain and protect and preserve my father’s assets, and we were doing that successfully. And it was my understanding, you know, the successes we were having, decisions made here in court.”

Borden then offered a memorandum of points and authorities regarding “the propriety of a beneficiary recovering and being entitled to allowance of fees and costs from a trust,” even without a court order. The court noted that Damon also “paid himself back for his arbitration costs.” It stated, “I can’t believe that someone who is appointed a trustee has the authority without court approval, without notice to the beneficiaries, without anybody hearing anything about it, he just basically used the trust as a piggy bank to pay for all the costs of litigation that occurred before they had any authority to marshal any of the assets of the trust.”

Borden asked to respond, and stated that Damon’s acts would be scrutinized by the court when he filed an accounting. When the court asked him for authority for his position, he mentioned authority which “discusses the allowance of fees to beneficiaries to bring litigation concerning a trust matter on various levels. The courts have allowed fees and costs to be paid to beneficiaries.” The court noted that the allowance of fees by the court was different than a trustee who “uses the trust as his own personal bank account to take care of all the litigation costs without any court review.”

5. Removal of Damon as Interim Successor Trustee

The court questioned whether Damon should remain a trustee when he “testified extensively about all of his efforts to make sure that his father was given all the money that was available. And right when he’s doing all of that, he basically just yanks out a

huge amount of money from what's available for his father's care, and that causes me to have some concerns as to whether or not he is acting as an appropriate fiduciary as the interim successor trustee." Borden wanted to explain, but the court indicated it understood his position. It said Borden would "just have to try to convince me that [Damon's] conduct, in light of scarce resources, was appropriate and he should remain as a trusted fiduciary for this trust."

After extensive argument, the court was still of the opinion that it "is for the court to decide . . . whether monies spent were for the benefit of the trust. That is not for Damon Pestano to be appointed and decide that by himself. He cannot make that decision. There is nothing in the trust that permits it. There is nothing in the case law that permits someone to do that, barring the court's making a finding it was for the benefit of the trust." Whether the court ultimately determined that the expenditure was for the benefit of the trust or not, Damon was required to act as a fiduciary and not for his own benefit. "And as a fiduciary, the only way he can take the money is when the court determines his acts and the efforts he made are for the trust."

The court continued, stating that "[a]s long as the court has significant concerns about the actions of Mr. Pestano, at this point, the court finds under [Probate Code section] 15642, that he did breach his duties to this trust, including he committed a breach of the trust by paying for his own legal services . . . that he incurred before he was appointed the trustee without the court making a finding that it was for the benefit of the trust." The court found Damon took excessive compensation within the meaning of subdivision (b)(5) of Probate Code section 15642, in that "he just took money that didn't belong to him" when he paid for his own legal services from trust funds.

Additionally, the court "noted that there is significant hostility and lack of cooperation. . . . [I]t is clear from all the evidence before this court that these are two parties that are hostile to each [other]. They refuse and are unable to cooperate."

The court also found "that since this matter has been brought to the court's attention that payments were made and there's real questions as to whether they were for services rendered before he was appointed trustee . . . there is not one time where Mr.

Pestano has come to the court and explained to the court, ‘You know what, just a glitch, a minor glitch of judgment here. That money has been immediately returned back to the trust for the support of Stephen Pestano.’ And the court does consider that in terms of how it can either rely or not rely on Damon Pestano to act as a trustee in this matter. [¶] For all of those reasons, the court will order that a third-party successor trustee be selected by the attorneys.”

In its statement of decision, the court specifically found that Damon “used Trust money to pay for personal legal services that were incurred prior to his appointment as interim successor trustee” both without court permission in violation of Probate Code section 15642, subdivisions (b)(1) and (b)(5), and “without proper concern about the difficulty that existed to raise funds for Stephen Pestano’s support from real estate assets.” The court also specifically found that there was “significant hostility and lack of cooperation between” Damon and Wendy, and Damon improperly demanded that Wendy provide him with an accounting as a condition of his paying her the court-ordered payments for Stephen’s care.

The court concluded that Damon’s use of trust funds to pay his attorney’s fees was “in excess of his authority as the Trust’s interim successor trustee, and violated his fiduciary duties to the Trust and its beneficiaries.” His actions “violated his ‘duty to administer the trust according to the trust instrument . . .’ solely in the interests of Stephen Pestano, who is the Trust’s sole beneficiary until the time of his death.” They also violated his duties to protect trust assets and provide for Stephen’s care and not to use trust assets for his own purposes. In addition, he withheld the information about his use of trust funds to pay his attorney’s fees, violating his duty to keep the beneficiaries reasonably informed. For these reasons, the court found “substantial and reasonable cause to remove Damon Pestano as Interim Successor Trustee” under Probate Code section 15642, subdivisions (b)(1)-(5). It ordered Damon removed as trustee as of August 26, 2010.

6. Subsequent Proceedings

Thereafter, counsel for the parties stipulated to the appointment of interim successor co-trustees. They also stipulated that \$63,437 would be transferred from Borden's client trust fund to the co-trustees.

DISCUSSION

The probate court has the responsibility to supervise the administration of a trust in order to protect the trust assets and beneficiaries, and it has the discretion to remove a trustee when necessary in order to fulfill its responsibility. We will not interfere with the probate court's exercise of its discretion absent a clear abuse of discretion. (*Estate of Hammer* (1993) 19 Cal.App.4th 1621, 1633-1634.) ““The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the [probate] court, and we will interfere with its ruling if we find that under all the evidence, viewed most favorably in support of the [probate] court's action, no judge reasonably could have reached the challenged result.’ [Citation.]” (*Id.* at p. 1634.)

However, “[w]hile it is the duty of the courts carefully to protect the interests of [trusts], the rights of those who are appointed to take charge and manage them should not be overlooked. [A trustee] should not be removed except for good and sufficient cause [citation].” (*Estate of Hammer, supra*, 19 Cal.App.4th at p. 1634.)

Damon contends that the probate court abused its discretion in removing him as interim successor trustee where no potential for ongoing impairment of the administration of the trust was shown. He further contends that the court abused its discretion by frustrating, without good cause, Stephen's expressed intent. We disagree.⁴

⁴ Damon makes other claims of error throughout his brief. “We discuss those arguments that are sufficiently developed to be cognizable. To the extent [Damon] perfunctorily asserts other claims, without development and, indeed, without a clear

In support of his contentions, Damon relies on several principles. One is that, “[w]hen the settlor of a trust has named a trustee, fully aware of possible conflicts inherent in his appointment, only rarely will the court remove that trustee, and it will never remove him for potential conflict of interest but only for demonstrated abuse of power detrimental to the trust,” including proven dishonesty. (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 286-287.) Another is that “[h]ostility between the beneficiary and the trustee is a ground for removal of the trustee when the hostility impairs the proper administration of the trust.” (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 632.) Contrary to Damon’s arguments, however, the record contains ample evidence of an actual conflict of interest between Damon and Wendy, and evidence that the hostility between them impaired the proper administration of the trust.

There is substantial evidence to support the court’s finding of “significant hostility and lack of cooperation between” Damon and Wendy, and that this hostility impaired the proper administration of the trust. Despite being ordered by the court to pay Wendy a specific sum each month for Stephen’s care, Damon improperly demanded that Wendy provide him with an accounting before he would pay her, even when Wendy pleaded for money to pay for Stephen’s caregivers and care. Damon and Wendy did not speak to one another but communicated by email, and Wendy used Sands as an intermediary when Damon was unresponsive. Clearly, the hostility and lack of communication between the two jeopardized Wendy’s ability to provide care for Stephen. This supports the probate court’s decision to remove Damon as interim successor trustee. (See *Estate of Gilmaker*, *supra*, 57 Cal.2d at p. 632; *Copley v. Copley*, *supra*, 126 Cal.App.3d at p. 270.)

Damon does not dispute the probate court’s findings of hostility and lack of cooperation. Rather, he argues that by the time the probate court ordered his removal as interim successor trustee, “all legitimate concerns regarding further use of Trust assets to pay attorneys’ fees, and the potential resulting inability to pay for the ongoing health and

indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis.” (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

maintenance needs of Stephen Pestano, were eliminated, and all potential bases for removing the interim successor trustee were likewise eliminated.”

That the attorney’s fees issue was resolved did not mean there was no basis for removing Damon as interim successor trustee. The hostility and lack of cooperation between Damon and Wendy support a reasonable inference that conflicts would continue to arise that would affect not only the trust’s ability to provide for Stephen’s care but also, upon Stephen’s death, Wendy’s life estate in any principal estate assets remaining.

Damon notes that the purpose of removing a trustee is not punishment for past actions but to preserve trust assets. (*Moore v. Bowes* (1937) 8 Cal.2d 162, 165.) He argues that his removal did not serve to preserve trust assets, in that the facts giving rise to the disputes between him and Wendy “(the lack of liquidity, and Damon’s requests for an accounting from Wendy) no longer exist (due to the found ability to convert equity in Trust real properties into liquid assets) and there is no present threat to trust assets. With the sources of friction in the management of Trust affairs removed, no legitimate basis existed for disputes between Damon and Wendy that would be serious enough to the administration of the Trust.”

That two ways in which Damon abused his power as trustee had been addressed by the court did not mean that “the sources of friction in the management of Trust affairs [had been] removed.” As the probate court observed, the conflict was “between an income beneficiary and a residual beneficiary.” This conflict would not be removed merely because some specific issues between the two had been resolved.

Moreover, Damon’s refusal to obey court orders, failure to keep the court and Wendy informed of his actions, and continued efforts to excuse rather than take responsibility for his actions led the court to believe that it could not rely on Damon to act properly as trustee. This concern over Damon’s ability to fulfill his responsibilities led the court to remove Damon as trustee; it did not remove him merely as punishment for past actions.

Damon also argues that Stephen “surely did not intend that his only child . . . should be removed as successor trustee based on his use of \$38,000.00 of Trust assets to

pay for the attorneys fees and costs that he incurred, following his effective efforts to preserve and protect, and actually re-capture Trust assets that had been diverted from the Trust. Moreover, the administration of the Trust has not been impaired as a result of anything Damon has done. To the contrary, he added substantial value and benefit to the Trust as a result of his efforts.”

It is the duty of the probate court to carry out the settlor’s intent. (*Copley v. Copley, supra*, 126 Cal.App.3d at p. 270.) Stephen’s intent, as evidenced by the terms of the trust (*ibid.*), was that the trust assets be used for his care, then for Wendy during her lifetime, with Damon to take whatever was left after Wendy’s death. To the extent Damon took funds from the trust for his own use and refused to give Wendy funds for Stephen’s care, it was Damon who thwarted Stephen’s intent.

In sum, the evidence supports the probate court’s finding of ““good and sufficient cause”” to remove Damon as interim successor trustee. (*Estate of Hammer, supra*, 19 Cal.App.4th at p. 1634.) It follows that the court did not abuse its discretion in removing him. (*Ibid.*)

DISPOSITION

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

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.