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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

BRYAN LUSTRE,

Plaintiff and Appellant,

v.

ROSEMARY LUSTRE, as Trustee, etc.,

Defendant and Respondent.

F062884

(Super. Ct. No. P24707)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Crabtree Schmidt and Robert W. Crabtree for Plaintiff and Appellant.

Robert T. Haden for Defendant and Respondent.

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Bryan Lustre (Bryan), a beneficiary under his parents' trust, petitioned the trial court to have his aunt, Rosemary Lustre (Rosemary), removed as trustee. In support of the petition, Bryan claimed that Rosemary failed to pay sums needed for his comfortable financial support, refused to correct an asset allocation error, misused trust income and failed to furnish timely accountings. Bryan also asserted there was antagonism between himself and Rosemary that could only be resolved by appointing a new trustee. The trial court considered the evidence presented at trial and denied the petition, concluding that Bryan had failed to show facts warranting the removal of Rosemary as trustee under all of the circumstances. Bryan now appeals from that judgment. Because the trial court's denial of the petition was within its broad discretion, we will affirm.

### **FACTS AND PROCEDURAL HISTORY**

#### **Trust Established**

On July 31, 1997, Bryan's parents, Vernon and Alma Lustre (Vernon and Alma; or the settlors), created the Vernon E. and Alma M. Lustre Revocable Trust (the Trust). Vernon and Alma were the owners of a successful business known as Cressey Sand & Gravel, Inc. (CS&G), and the Trust included their shares in CS&G, along with their family home and adjacent parcels of real property situated near the Merced River in the area of Merced County known as Cressey. These and other assets placed in the Trust were the community property of Vernon and Alma, who were also the initial trustees of the Trust. The Trust provided that on the death of the first settlor, the surviving spouse's share of community property would be put into a subtrust called the "Survivor's Trust," and the decedent's share of community property would be put into a subtrust called the "Decedent's Exempt Trust" (the Exempt Trust).<sup>1</sup> The Trust further provided that the

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<sup>1</sup> There was also a provision for a Marital Trust, but that was not applicable under the circumstances.

surviving settlor would have a general power of appointment over the Survivor's Trust and a special power of appointment over the Exempt Trust.

Vernon and Alma included provisions in the Trust for the comfortable support of their son, Bryan, as determined in the trustees' discretion based on need and other factors. Specifically, the Trust as well as Vernon's will (as noted below) included similar support provisions, requiring the trustees "to pay to [Bryan] or apply for his benefit, in quarter-annual or more frequent installments, such amounts of the income or principal, or both, of this trust as the trustees deem appropriate for his comfortable support, care, and general welfare, taking into account, if and to the extent the trustees deem appropriate, other means of support known to them and reasonably available for these purposes."

#### Sale of CS&G Assets Results in the Holl Note

In 2003, Vernon and Alma sold the assets of CS&G to Bob Holl Sheet Metal (Holl).<sup>2</sup> The sale resulted in a \$1.5 million promissory note payable by Holl to CS&G, under the terms of which Holl was to make monthly payments (the Holl Note). The first 36 payments were to be in the amount of \$7,500 and all subsequent payments were to be in the amount of \$12,650.85.

#### CS&G Note to Repay Loans from Vernon and Alma

Shortly before the sale to Holl, Vernon and Alma hired Edward Spinardi to be their accountant. Prior to hiring Mr. Spinardi, Alma had been primarily responsible for the finances of CS&G and the Trust. Mr. Spinardi reviewed the financial records and discovered that Vernon and Alma had made numerous loans to CS&G over the years that had not been repaid. Mr. Spinardi went back through decades of financial records and tax returns in order to reconstruct the loans. He then prepared a promissory note to memorialize the shareholder loans that Vernon and Alma had made to CS&G, which note was executed by CS&G in 2003 (the CS&G Note). The CS&G Note reflected a total

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<sup>2</sup> CS&G was then owned 70 percent by the settlors and 30 percent by Bryan.

principal obligation of \$385,605 together with accrued interest of \$355,870.98, for a total of \$741,475.98. The CS&G Note specified that payments were to be made to Vernon and Alma as trustees of the Trust—that is, all payments under the CS&G Note would go to the Trust.

As a result of the CS&G Note, which was expressly secured by the Holl Note, whenever monthly payments were received by CS&G from Holl on the Holl Note, those amounts were paid over by CS&G to the Trust. The income stream from the Holl Note, flowing through CS&G to the Trust, was the primary income of the Trust.

#### Rosemary Appointed Co-Trustee After Alma's Death

In the summer of 2003, Rosemary moved to Atwater, California, from her former residence in Nevada. At that time, she had recently retired after working for more than 37 years as a school psychologist and had just sold her house in Nevada. Her original plans were to buy a home in Southern California and do some traveling. Ultimately, after an escrow fell through on a house she hoped to buy in Canyon Lake, California, her brother Vernon convinced her it would be much more affordable to move to the Merced area. Rosemary then moved to an apartment in Atwater.

Alma suffered a heart attack and died on September 13, 2003. After Alma died, Vernon came over to Rosemary's apartment in Atwater and ended up staying there for a full year. While Vernon was living with Rosemary, he was completely dependent on her. She did all of the cooking, cleaning and housework. Shortly after he moved in with her, Vernon asked Rosemary to be his co-trustee. He told her that she was the only person he could trust. She explained that she had no experience as a trustee and did not know what to do. Vernon assured her that he would teach her, and that after he died, she would have the assistance of his accountant, Mr. Spinardi, and his attorney, Robert Haden. Rosemary agreed to serve as a co-trustee.

Although Rosemary was co-trustee of the Trust, Vernon conducted the Trust business himself and he did so very informally. He would treat the various accounts for

the business and the Trust as though they were one large pot, depositing funds or writing checks based on whatever account or source of funds was convenient at that moment.

#### Trust Asset Allocation Agreement

In 2004, Vernon and Rosemary executed an agreement entitled the “Trust Asset Allocation Agreement” (the Allocation Agreement), the purpose of which was to divide the Trust assets into separate subtrusts as contemplated by the Trust provisions. The Allocation Agreement assigned assets to the Survivor’s Trust and to the Exempt Trust, with the value of the total assets assigned to each of the two subtrusts being approximately equal. However, the CS&G Note was omitted from the Allocation Agreement and, therefore, it was not specifically allocated to one or both of the subtrusts, which failure the attorney for Rosemary, Mr. Haden, conceded was an oversight on his part.

#### The Move to the Cressey House

During Vernon’s stay with Rosemary in Atwater, he asked Rosemary whether she would be willing to move with him back to his house in Cressey, California, on the Merced River, “if he fixed the place up.” Rosemary, who was in her mid-70’s at that time,<sup>3</sup> was hesitant to make such a move “because that place was a mess.” She described the inside of Vernon’s house as filthy, full of cobwebs, and needing paint, carpets (last replaced in 1962) and various other repairs, cleanup and improvements to make the place livable. Outside, the land around the house was overgrown with a thick hedge of bamboo, brush and ivy which “so enclosed” the house that “you couldn’t see” and “air could not come up from the river” to reach the house. Rosemary testified that unless the condition of the property was rectified, “[t]here was no way I would have moved out there to live the way that place was ... [i]t was spooky.”

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<sup>3</sup> At the time of trial, Rosemary was nearly 81 years old.

To convince Rosemary to move with him to the house in Cressey, Vernon not only promised to “fix the place up,” but he also put a provision in his will giving her a life estate in the house and authorizing Rosemary to use Trust income to repair and maintain the property so that it would not become a burden to her. Rosemary agreed to move with Vernon to the house as soon as the lease on her apartment in Atwater was concluded in September 2004.<sup>4</sup>

A number of repairs and improvements to the house were commenced. Vernon made all of the arrangements to have the work done to the house, enlisting the services of people he had done business with in the past. These arrangements were often made with a handshake rather than a written contract. Work on the house was ongoing throughout the time that Rosemary and Vernon lived there, but there were frequent breaks in the construction activity due to Vernon’s declining health. Several of the projects were completed after Vernon’s death.

At the Cressey house, Rosemary continued to take care of Vernon. In the last two years of his life, Vernon had severe health problems and was “[i]n and out of the hospital, [and] in and out of nursing homes.” When Vernon was back home after periods of hospitalization or nursing home convalescence, Rosemary would take care of him 24 hours a day, seven days a week. When she had to get groceries, she would have someone come stay with him until she returned. Bryan and his wife, Patricia, did not assist in caring for Vernon.

#### Vernon’s Efforts to Financially Help Bryan

Bryan’s residence was on the acreage referred to as Lot 4, one of several neighboring parcels of real property owned by the Trust adjacent to the Merced River. Lot 4 was up the road a short distance from the Cressey house where Vernon and

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<sup>4</sup> Initial work was done to the house even before Vernon and Rosemary moved there in September 2004.

Rosemary lived. Bryan had always lived on Lot 4 rent-free. He also did not pay property taxes, as such expenses were paid by the Trust.

In 2004, Vernon sought to help Bryan by offering to give him two parcels of real property (Lots 4 and 5) if Bryan would pay off the small loan balance on those properties plus closing costs, for a total \$31,387.72. Vernon opened an escrow, but when Bryan failed to deposit funds to pay off the existing encumbrance, the escrow never closed and the transfer did not occur.

In 2005, still wanting to help his son, Vernon mortgaged the Cressey house and loaned Bryan \$275,000. The loan enabled Bryan to purchase and erect a new, manufactured home on Lot 4, pay certain taxes and fees, and pay off a number of debts that Bryan and Patricia had amassed. Vernon and Bryan agreed to share in the responsibility to repay the loan in proportion to how much each had received. Accordingly, Vernon was to pay \$324.23 per month, while Bryan was to pay \$1,687 per month. Under Vernon's directions, Rosemary prepared and sent Bryan a promissory note evidencing the loan. Bryan refused to sign it and made only one monthly payment before refusing to pay further. Bryan testified that he understood that his father was going to transfer Lots 4 and 5 to him as part of the transaction, so when his father informed him the lots would not be transferred at that time, Bryan refused to make further payments. Since then, the Trust has been left with the entire mortgage payment each month, including Bryan's portion thereof. Vernon was angered and disappointed by Bryan's refusal to repay his monthly share of the mortgage loan.

#### Vernon Exercises Powers of Appointment

On February 12, 2007, after two years of declining health, Vernon died. In his will, under article I (entitled "Gifts of Specific Properties"), Vernon exercised the general power of appointment (with respect to the Survivor's Trust) by giving Rosemary a life estate in the Cressey house and also giving Rosemary the right to use "trust income" to "maintain and repair said residence, as well as pay all taxes and insurance associated

therewith.” The same provision made clear that Bryan had the remainder interest in the Cressey house and would receive title to it upon Rosemary’s death. Under article II (entitled “Residuary Gift”) of his will, Vernon exercised the general and specific powers of appointment by providing that all “the residue” of both the Survivor’s Trust and the Exempt Trust would be for the benefit of Bryan and Bryan’s children. Under this residuary clause, Vernon reiterated substantially the same provision as was set forth in the Trust that “the trustees shall pay to [Bryan] or apply for his benefit, in quarter-annual or more frequent installments, such amounts of the income or principal, or both, of this trust, as the trustees deem appropriate for [Bryan’s] comfortable support, care, and general welfare, taking into account, if and to the extent the trustees deem appropriate, other means of support known to them and reasonably available for these purposes.”

#### Rosemary Becomes Sole Trustee

After Vernon’s death, Rosemary became the sole trustee of the Trust. She continued to use Trust income for repairs and maintenance of the residence in which she had a life estate, as authorized by Vernon’s will. She also used Trust funds on improvements that were contracted for by Vernon prior to his death. In attempting to administer the Trust on her own, Rosemary came to realize that Vernon’s loose way of operating the Trust and business accounts as one large pot was not correct. She consulted with the attorney and the accountant Vernon had used regarding the Trust, Mr. Haden and Mr. Spinardi, and with their guidance she began to put the Trust in order.

Several months after Vernon’s death, Rosemary began to hear reports that Bryan was experiencing health problems. On June 5, 2007, Bryan’s attorney, Robert Crabtree, sent a letter to Rosemary’s attorney, Mr. Haden, stating that “Bryan ... is no longer able to work and has severely diminished income and increasing expenses.” Mr. Crabtree’s letter argued that “any reasonable interpretation of the trust and Bryan’s situation would dictate that Bryan be receiving regular trust benefits.” Rosemary received this letter and, in late July 2007, also received an e-mail from Bryan’s cousin stating that Bryan was

having a medical problem and could no longer drive a crane or truck on public highways, which activities were a part of what Bryan did for a living. Through Mr. Haden, Rosemary asked for more information regarding these matters so that she could have a better understanding of Bryan's situation and confirm his financial needs.<sup>5</sup> Bryan and his attorney did not provide the requested information until they sent a responsive letter dated December 21, 2007.

After receiving this information, Rosemary made distributions to Bryan of \$3,000 in both January and February 2008.<sup>6</sup> In March 2008, Rosemary sent Bryan \$5,000 for that month, the full amount of monthly support that Bryan had requested. At about that same time, the instant lawsuit/petition was filed by Bryan seeking to remove Rosemary as trustee. By stipulation of the parties entered through their attorneys, the amount of future monthly support to be paid to Bryan was set at \$5,000 per month.

During 2008, Holl was unable to pay the entire amount he owed each month to CS&G under the Holl Note. Although he was required to pay \$12,500 per month for a period of approximately one year, Holl reduced what he was paying to \$9,300 per month. Then, in November 2009, Holl indicated in a letter that he would not be able to make anymore payments. Through Mr. Haden, Rosemary then entered into negotiations with Holl. Since then, the payments from Holl have been irregular and in varying amounts. Rosemary testified that because she needed to keep an adequate reserve on hand to pay the mortgage and taxes on the property, the diminished income received by the Trust due

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<sup>5</sup> Rosemary said she believed Bryan was still working at that time, since Steve Porter, the man who assisted in Bryan's crane and backhoe work, was still situated on a trailer near the house and would regularly leave to (she thought) assist Bryan on the job.

<sup>6</sup> In December 2007, Rosemary also paid Bryan \$2,000 to help out with Christmas expenses. She was under the impression he was still working at that time, so she did not consider it a support payment, but thought Bryan might appreciate the extra cash for Christmas.

to Holl's erratic payments meant that sometimes Rosemary could not pay Bryan's monthly support. When she thought there was sufficient income to do so, after considering the other Trust obligations, Rosemary continued to make disbursements to Bryan.

#### Bryan Demands Accountings

On March 15, 2007, Bryan's attorney (Mr. Crabtree) wrote a letter to Rosemary's attorney (Mr. Haden) requesting information, documents and accountings concerning the Trust. Subsequent requests or reminders were also made for accountings. For whatever reason, there was considerable delay in providing accountings regarding the Trust. Rosemary sent her check registers, receipts and other financial information to the Trust accountant, Mr. Spinardi, who then organized the information and produced written accountings. Accountings for 2007 and 2008 were completed and sent to Mr. Crabtree and Bryan in July 2009. Prior to trial in 2010, Mr. Spinardi prepared additional financial or accounting statements regarding the Trust for the year 2009, although Bryan disputes on appeal whether there was adequate proof at trial of a 2009 accounting.<sup>7</sup>

#### Dispute Regarding Failure to Allocate CS&G Note to Subtrusts

On Bryan's behalf, Mr. Crabtree informed Rosemary and Mr. Haden that the CS&G Note—a significant Trust asset—had been omitted from the Allocation Agreement and was never allocated to the subtrusts. Demand was made that Rosemary, as trustee, correct this error. By his letter of December 27, 2007, Mr. Crabtree asserted that if the CS&G Note had been allocated to the subtrusts as required, the Exempt Trust would have been receiving one-half of the income stream that flowed from the Holl Note

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<sup>7</sup> In his initial petition to remove Rosemary as trustee, Bryan's allegations of failure to provide accountings included the years 2003 through 2006, during which Rosemary was a co-trustee with Vernon. At trial, however, Bryan, through counsel, repeatedly made clear that he was not concerned with anything that happened before Vernon's death.

to CS&G and then to the Trust. He insisted that a corrected allocation should be made, retroactively assigning one-half of the CS&G Note to the Exempt Trust and one-half to the Survivor's Trust, which would mean that "there is ... income and cash in the [Exempt] Trust ...." In a subsequent letter, Mr. Crabtree asserted that failure to correct this error would be evidence of a conflict of interest or a breach of fiduciary duty on the part of the trustee, since Rosemary personally benefitted from income in the Survivor's Trust that could be used by her for maintenance and repair of the Cressey house, but that was not true of income in the Exempt Trust.

On behalf of Rosemary, Mr. Haden responded by letter that such a corrected allocation was unnecessary. Mr. Haden admitted that the failure to include the CS&G Note in the Allocation Agreement was an oversight on his part. However, Mr. Haden stated that he did not see any point in having Rosemary go back and "reinvent history" in regard to Vernon's handling of the Trust in the years prior to his death. Moreover, Mr. Haden stated he could not believe that Mr. Crabtree would "seriously want the current Trustee to artificially divide the Trust, reallocate assets, and go through the time and expense to do all of that when it doesn't result in any benefit to anyone."

#### The Petition, Trial and Statement of Decision

On March 26, 2008, Bryan filed his petition in Merced County Superior Court seeking to remove Rosemary as trustee. Due to use of an erroneous case number, the petition was amended and refiled on April 21, 2008 (the petition). The petition sought Rosemary's removal on several grounds, including that she allegedly failed to follow the Trust instrument and breached her fiduciary duty to Bryan by failing to pay comfortable support to Bryan, refusing to correct the past failure to allocate the CS&G Note to the subtrusts, and misusing Trust income by paying for "improvements" at the Cressey house (where she had a life estate) rather than on mere "maintenance" and "repairs" as allowed by the Trust. The petition further alleged that Rosemary failed to provide accountings and that there was obvious friction or antagonism between Rosemary and Bryan that

made it necessary to replace Rosemary. The petition requested appointment of an independent fiduciary by the name of M. Terry Campbell to act as the trustee in place of Rosemary. As noted above, shortly after the petition was filed, Mr. Haden and Mr. Crabtree stipulated that Rosemary would pay Bryan \$5,000 per month from the Trust for his support.

A court trial of the matters raised by the petition was held on April 12, April 13, June 7 and June 9, 2010, before the Honorable John D. Kirihara. During the trial, Mr. Crabtree clarified that Bryan's petition was only focusing on actions taken by Rosemary after Vernon's death to show that she should be removed as trustee, and that Bryan was not addressing or challenging how Vernon conducted the Trust or spent Trust income during his lifetime. Following the conclusion of the trial, the parties submitted simultaneous posttrial closing briefs on June 18, 2010, and the matter was then taken under submission.

On February 10, 2011, the trial court issued a tentative decision, mistakenly labeled as a "JUDGMENT." On February 22, 2011, Bryan filed a request for a statement of decision. On April 21, 2011, the trial court issued its statement of decision. No objections were filed to the trial court's statement of decision. In the preliminary findings of the statement of decision, the trial court noted that "[d]espite trust provisions requiring the surviving trustee to divide trust assets into separate trusts ..., Vernon failed to do so and continued to manage trust assets as a single entity." The trial court further observed that after Vernon died and Rosemary assumed responsibility for the Trust, she "began a process of creating more organization and structure to the trust, including employing accountants and legal counsel for assistance." In resolving the issues and contentions relating to the ultimate question of whether Rosemary should be removed as trustee, the trial court concluded, among other things, as follows: (i) although hostility or animosity existed between Rosemary and Bryan, it was mainly on Bryan's part and did not justify Rosemary's removal; (ii) Rosemary properly exercised her discretion with

respect to paying support to Bryan; (iii) the failure to allocate the CS&G Note between the Survivor's and Exempt Trusts as required by the Trust did not result in any significant injury to Bryan because "his \$5,000 payment and portion of the mortgage payment owed by Bryan would have been paid from the Exempt Trust and would have more than exhausted the income into said trust each month"; (iv) Rosemary's use of trust funds for construction projects around the Cressey house were within her discretion under the terms of the Trust (which allowed expenditures for maintenance and repairs) or arose out of prior contracts initiated by Vernon; and (v) although the Trust accountings were long delayed, that was not sufficient to warrant removal of Rosemary as trustee. In summary, the trial court found that Bryan had failed to show sufficient cause for removal of Rosemary as trustee. Hence, the petition was denied and judgment was entered in favor of Rosemary. Bryan's timely appeal followed.

## DISCUSSION

### **I. Standard of Review**

The removal of a trustee is a matter entrusted to the sound discretion of the trial court. (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633.) A trustee may be removed on grounds that include breach of trust, failing or declining to act, and "[f]or other good cause." (Prob. Code, § 15642, subd. (b)(1), (3), (4) & (9).) The power to remove a trustee is one that the trial court "should not lightly exercise," particularly where the trustee has been appointed by the settlor of the trust. (*Estate of Bixby* (1961) 55 Cal.2d 819, 826.)<sup>8</sup> "Whether a trustee should be removed ... is a matter within the sound discretion of the trial court and is "dependent upon the circumstances of each particular case.'" [Citation.]" (*Jones v. Stubbs* (1955) 136 Cal.App.2d 490, 502.) On appeal, we

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<sup>8</sup> "The right to displace a trustee originally appointed by the settlor is said to be very limited." (13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 51, p. 622 [cases listed].)

review the trial court's decision for abuse of discretion. (*Id.* at p. 500; *Tevis v. Butler* (1894) 103 Cal. 249, 250-251.) The appropriate test for abuse of discretion is whether the trial court's decision exceeded the bounds of reason under the circumstances. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) To the extent that we review factual determinations underlying the trial court's exercise of discretion, we apply the substantial evidence test. (See *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1254.) "It is the duty of the trier of fact to determine the credibility of witnesses and the value of evidence and to resolve any evidentiary conflicts. [Citation.] Thus, so long as substantial evidence supports the trial court's findings, we must affirm. [Citation.]" (*Ibid.*)

## **II. Denial of Petition Was Not An Abuse of Discretion**

Bryan contends that the trial court abused its discretion in denying his petition to remove Rosemary as trustee. He argues that the evidence showed that in several different respects Rosemary failed to follow the Trust instrument and/or breached her fiduciary duty to him, and he insists that because of such conduct, Rosemary should be removed as trustee as a matter of law. We address Bryan's several arguments below, beginning with the matter of the parties' antagonistic relationship.

### **A. Antagonism Between Trustee and Beneficiary**

As he did in the trial court, Bryan contends on appeal that the evidence showed a level of antagonism existed between Rosemary and Bryan that made it necessary to remove Rosemary as trustee. Rosemary admits there was antagonism, but argues it did not justify her removal as trustee. The trial court agreed with Rosemary's position, characterizing the animosity as primarily coming from Bryan. As we explain, the trial court's conclusion was adequately supported by the record and no abuse of discretion is apparent.

Courts are reluctant to remove a trustee originally appointed by the settlor, since the settlor has placed confidence in that person to serve in that role in the circumstances involved. (See 13 Witkin, Summary of Cal. Law, *supra*, Trusts, § 51, p. 622.)

Ordinarily, therefore, a trustee named by the settlor will not be removed for mere hostility or antagonism between the trustee and the beneficiary when, as here, the settlor was aware of the facts indicating the potential for such friction and yet still proceeded to name that person as the trustee. (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 286-289; see also 13 Witkin, *supra*, § 51, p. 622 [such a trustee will not ordinarily be removed “upon grounds that were known to the settlor” when trustee appointed].) Similarly, “[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.” (*Estate of Gilliland* (1977) 73 Cal.App.3d 515, 528.)

Notwithstanding the fact that courts are reluctant to remove a trustee appointed by the settlor, hostility or antagonism between the trustee and the beneficiary is a sufficient ground for removal of the trustee if it is shown that the hostility or antagonism “impairs the proper administration of the trust.” (*Estate of Gilmaker, supra*, 57 Cal.2d at p. 632 [removal of trustee required where trust provided that beneficiary was to be an active consultant on trust investments, but intense hostility and lack of cooperation between the trustee and beneficiary prevented that from taking place]; cf. *Copley v. Copley, supra*, 126 Cal.App.3d at pp. 286, 288 [no showing that hostility impaired administration of trust].)

Here, although there was evidence showing that hostility existed between Rosemary and Bryan, any conclusions that should be drawn from that evidence would depend on the particular weight and credibility given to the various strands of testimony and other evidence received by the trial court. Of course, it was the trial court’s role to determine the credibility of witnesses, decide the weight and value of evidence, and resolve any evidentiary conflicts. (*Adoption of Matthew B., supra*, 232 Cal.App.3d at p. 1254.) As will be seen, it appears that the trial court credited or gave greater weight to the testimony of Rosemary concerning the nature of the parties’ relationship.

We briefly summarize the gist of the testimony. Bryan's wife, Patricia, and their daughter testified there were occasions in which Rosemary yelled in anger at Bryan or Patricia. In particular, though, it seemed that Patricia and Rosemary did not get along well. Patricia and her daughter mentioned that Rosemary "exhibited [the] finger" toward Patricia on a number of occasions and that Rosemary called Patricia a "bitch." Patricia testified of an incident that took place before Vernon died when Patricia came over to the Cressey house to pick out chairs from several which Vernon had said she could have her choice. Rosemary became very upset, allegedly shoved Patricia and yelled, "[y]ou can't have those chairs" and "[t]his is my house." Patricia described another occasion when she and Bryan were visiting Vernon in the hospital. Rosemary stepped in close to Bryan and began arguing loudly with him in the visiting room, "trying to start trouble with Bryan," and Patricia had to stand between them and ask Rosemary to leave Bryan alone. Rosemary then grabbed her and Patricia warned that she would call the police if Rosemary touched her again. Patricia also referred to an incident shortly after Vernon's death when Bryan stopped the car on the driveway that ran past the Cressey house, got out and walked down to where Rosemary was standing. Patricia could hear yelling but she could not see what was happening. She went over to investigate and saw that "Bryan had his hands on her shoulders, and [Rosemary] was screaming up at him." When Bryan turned to leave, Patricia asked Rosemary about the money in the Trust and Rosemary responded, "Can't you wait until Vernon is cold in the ground." Shortly thereafter, a sheriff's deputy arrived at Bryan's home because Rosemary reported that Bryan had been physically threatening toward her, although the deputy stated that Rosemary would not press charges if they agreed not to use that driveway anymore.<sup>9</sup> During the trial, Bryan testified that after his father died, he did not want to have anything to do with Rosemary

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<sup>9</sup> Rosemary described Bryan's action as a physical attack or assault. Bryan and Patricia told the deputy they would not to use that driveway anymore.

and, therefore, communications were primarily made through letters or through his attorney to Rosemary's attorney.

Rosemary's testimony offered a somewhat different perspective on her relationship with Bryan. According to Rosemary, when she first moved to the Cressey house with Vernon, she thought that her relationship with Bryan would be "fine," since she believed she had a good relationship with him in the past. It soon became apparent, however, that Bryan felt differently. This came to light when Vernon asked Rosemary to come to a CS&G corporate meeting since Vernon wanted Rosemary to take Alma's place as secretary/treasurer. At that meeting, Bryan stated to Rosemary as she entered the meeting room that "Well, I see you're here to get yours." Rosemary was "taken back," and told Bryan that she "had no idea [he] felt like that." Another indicator was that during the entire three-year period after the move to the Cressey house before Vernon died, there were only two or three occasions that Bryan and Patricia were together in the same room with Vernon and Rosemary. Once, shortly after her move to the Cressey house, Rosemary attempted to visit Bryan and Patricia at their house on her own, while going for a walk. Rosemary asked Patricia if she would like to join her on the walk. Patricia opened a window and spoke to Rosemary, did not ask Rosemary in, refused to go for a walk, and more or less made it known that Rosemary was not welcome. Since this was the way it was, in administering the Trust, Rosemary got used to communications with Bryan taking place solely through letters. Rosemary stated that she was "perfectly willing to sit down and talk with him as long as [she was] safe. But he [didn't] want that." For example, Rosemary indicated she could never personally ask him questions about his income or needs, since "[h]e [wouldn't] talk to [her]." Rosemary was able to communicate to Bryan through letters, either personal notes or through her attorney, Mr. Haden, and her letters appeared to reflect a reasonable effort on her part to set aside any personal feelings and administer the Trust in a civil manner.

Moreover, there is no question that Vernon contemplated the existence of such friction when he appointed Rosemary. That is, since Vernon experienced friction and tension himself with Bryan in the years before Vernon's death, it is reasonable to infer that he would have understood that Rosemary, when she eventually followed in his footsteps as trustee, would be placed in much the same situation. This was evidenced by Vernon's disappointment and anger when Bryan refused to make payments following the \$275,000 loan, the fact that Bryan actually sued Vernon during that time period, and Bryan's anger displayed in his comment to Rosemary at the CS&G corporate meeting. These things, along with the fact that when Vernon and Alma established the Trust, they included provisions that expressly (i) prohibited Bryan (or Patricia) from becoming a trustee and (ii) placed the matter of Bryan's support in a spendthrift clause under the trustee's discretion, indicated that Vernon contemplated there would likely be friction with Bryan once Rosemary took over the administration of the Trust.<sup>10</sup> Nevertheless, Vernon went forward with his estate plan and placed his confidence in Rosemary by naming her to serve as trustee in these circumstances.

On this record, we conclude that the trial court was within the bounds of reason when it determined that the hostility involved was predominantly from Bryan's side and did not warrant Rosemary's removal as trustee. Whatever friction was present between Rosemary and Bryan, it was anticipated by Vernon (as settlor) and did not interfere in any significant way with the proper administration of the Trust by Rosemary. (See *Copley v. Copley*, *supra*, 126 Cal.App.3d at p. 288 [where trust involved trustee discretion in making distributions and where terms of the trust favored one of the beneficiary children over others, friction was anticipated by the settlor and did not constitute grounds for removal of trustee since trust was being carried out as planned].)

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<sup>10</sup> As the trial court noted, this sort of discretionary support provision in a trust is sometimes referred to as a "spendthrift" clause.

Although we have addressed this issue separately, our conclusion that there was no interference with proper administration of the trust will become clearer as we discuss the issues that follow below.

B. Delay in Paying Support to Bryan

Bryan contends that Rosemary failed to follow the Trust and violated her fiduciary duty to him by failing or refusing to timely pay support when requested and, therefore, she must be removed as trustee. Rosemary argues that she properly exercised her discretion concerning support payments to Bryan, and that the trial court correctly so found. We agree with Rosemary.

As noted previously above, the Trust language (as well as Vernon's will) provided that the trustee shall pay to Bryan or apply for his benefit such amounts of income or principal as the trustee deems appropriate for Bryan's comfortable support, care, and general welfare, taking into account other means of support that are known and reasonably available. "It is the general rule that if the power of the trustee is discretionary, and the trustee is fairly employing his judgment ..., the court will not control his action merely because it disagrees with him, but it must find some abuse of discretion or bad faith before it will interfere." (*Estate of Greenleaf* (1951) 101 Cal.App.2d 658, 662.)

In June 2007, Rosemary received Mr. Crabtree's letter indicating that Bryan had a medical condition and was unable to work in his usual occupation. Rosemary's response, through her attorney Mr. Haden, was a request that further details be provided so that Rosemary could fairly determine Bryan's needs. For reasons that are not clear, Bryan did not provide that information to Rosemary until December 21, 2007, in Mr. Crabtree's letter of that date. Once Rosemary became aware of the details of Bryan's situation, she began making support payments. In January and February 2008, Rosemary paid Bryan \$3,000 per month. In March 2008, Rosemary began paying Bryan \$5,000 per month, the full amount requested by Bryan. On April 2, 2008, a stipulation was entered by the

parties that Rosemary would continue to pay Bryan the net amount of not less than \$5,000 each month.

Several months before the 2010 trial of this matter, Holl announced he would stop making monthly payments as required under the Holl Note, which was the main source of income for the Trust. Rosemary immediately notified Bryan of this fact and told him that she would do what she could to rectify the situation. Through Mr. Haden, Rosemary then entered into negotiations with Holl. Through the time of trial, the payments from Holl in 2010 were sporadic and in varying amounts. Rosemary testified that because she needed to keep an adequate reserve on hand to pay the mortgage and taxes on the Trust property, the diminished income received by the Trust due to Holl's erratic payments meant that on occasion Rosemary could not pay Bryan's monthly support. Under the circumstances of the unexpected reduction in Trust income, Rosemary's actions appear reasonable and do not indicate a breach of the Trust in regard to Bryan's support.

We note that besides these monetary support payments, Bryan received other Trust benefits after Vernon's death. Rosemary continued to pay the entire mortgage on the Cressey real property even though Bryan, due to the loan from Vernon, was obligated to pay \$1,687 per month. Also, Bryan has continued to live on Trust property rent-free and without paying real property taxes.<sup>11</sup>

Finally, Bryan argues that Rosemary's failure to comply with his request for an additional \$5,290.33 in November 2008 was an abuse of the trustee's discretion to pay support. This contention is not supported by the evidence. Rosemary responded that based on the balance in her check register and information she had received on taxes and

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<sup>11</sup> Bryan also had possession of property owned by CS&G (the majority shares of which were Trust assets), including a crane that he sold. Bryan received the proceeds from the crane sale without informing Rosemary or the Trust accountant. As stated in the Trust, Rosemary could consider other sources of income when deciding on support payments, but Bryan chose not to mention the income he received from the 2008 crane sale.

other amounts due, she did not believe there was sufficient money in the Trust bank account to handle the extra expense at that time. In addition, because the Trust gave Rosemary discretion as to the amount of distributions to Bryan, she was not obligated to comply with Bryan's demand that she send him additional funds.<sup>12</sup>

In summary, we agree with the trial court's holding that the evidence at trial was sufficient to show that Rosemary properly exercised her discretion as trustee to provide regular payments to Bryan for his support. Putting it in the converse, Bryan has failed to show on appeal that the trial court's conclusion on this issue was outside the bounds of reason under the facts and circumstances presented at trial. That is, no abuse of discretion has been shown.

C. Asset Allocation Issue

Bryan contends, as he did in the trial court, that Rosemary should be removed as trustee because she has not rectified a past failure to allocate one of the Trust assets, the CS&G Note, into the two subtrusts. The Allocation Agreement, which had divided the Trust assets into the Survivor's and Exempt Trusts following Alma's death (during Vernon's administration of the Trust), omitted the CS&G Note from that allocation. Nothing in the record sheds light on how Vernon, as the surviving settlor and trustee, would have allocated the Trust assets generally, or the CS&G Note in particular, if the CS&G Note had been specifically considered at the time the Allocation Agreement was entered. By letter dated December 27, 2007, the solution demanded by Mr. Crabtree on Bryan's behalf was for Rosemary to allocate the CS&G Note one-half to the Exempt Trust and one-half to the Survivor's Trust, which Mr. Crabtree urged should be given a retroactive effect. Mr. Haden conceded that the omission of the CS&G Note from the

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<sup>12</sup> Unbeknownst to Rosemary, Bryan made this demand for additional funds despite the fact that he had recently received \$10,000 as a down payment on the sale of the crane, with further proceeds from that sale expected.

Allocation Agreement was an inadvertent oversight, but he could not see the point in having Rosemary try to “reinvent history,” particularly after Vernon had for so long treated the Trust as a single fund.

Concerning this issue, the trial court found that Rosemary’s failure to divide the CS&G Note between the Survivor’s and Exempt Trusts “[did] not justify removing her as trustee.” The trial court explained its ruling as follows:

“a. Both parties concede that the income into the trust consisted primarily of the monthly payments from Holl and that the shareholder note from [CS&G] was not allocated.

“b. Bryan seeks to remove Rosemary as trustee because Rosemary failed to allocate the [CS&G] Note to the Survivor’s and ... Exempt Trust[s] as required. Rosemary argues that failure to divide the note proceeds evenly between the two trusts resulted in no injury to Bryan since his \$5,000 payment and portion of the mortgage payment owed by Bryan would have been paid from the Exempt Trust and would have more than exhausted the income into said trust each month.

“c. The Court is persuaded that the failure to divide the trust income into the Survivor’s and Exempt Trusts would not have altered the trust income paid to Bryan in any significant way. [Bryan] has failed to present a scenario in which the failure to create the two trusts resulted in injury to him.”

The trial court’s analysis above, which gives a practical description of how the Trust income would reasonably have been administered if the proposed allocation had been made, was adequately supported by substantial evidence. The amount payable under the Holl Note to CS&G was \$12,657.85 per month. When such payments were received by CS&G, then pursuant to the CS&G Note, CS&G would pay that entire amount to the Trust. If the CS&G Note had been divided one-half into each subtrust, the Exempt Trust would then have received approximately \$6,328.93 for that month (assuming Holl paid the full amount due under the Holl Note). Since Vernon exercised the power of appointment over the Exempt Trust in favor of Bryan, the \$5,000 support payment could have been made entirely from the Exempt Trust income, leaving the

balance at \$1,328.93. Then, in light of Bryan's refusal to repay the \$275,000 loan from Vernon, which was due in monthly installments of approximately \$1,687 per month, that monthly installment owed by Bryan would be deducted from the Exempt Trust, leaving a zero or negative balance to the income received by the Exempt Trust each month.<sup>13</sup>

Since the trial court's premises had the support of substantial evidence, so did its conclusion that Rosemary's failure to allocate the CS&G Note into the two subtrusts did not result in significant injury to Bryan. Therefore, the refusal to remove Rosemary as trustee on this ground was within the bounds of reason under all of the circumstances and was not an abuse of the trial court's discretion.

In passing, we note that Bryan also argued that if the CS&G Note could be treated as though it were entirely in the Survivor's Trust (as he said Rosemary was doing by not specifically allocating it), there would be a gross inequality in the total assets of each subtrust.<sup>14</sup> He stated further, "[t]he way the allocation has been handled has allowed Rosemary Lustre to retain for herself the benefit of the entire trust rather than just one-half thereof as was the intention of Vernon Lustre." The trial court implicitly found such characterizations were unpersuasive and/or inadequate to demonstrate that Rosemary should be removed as trustee. Instead, on the narrow question of whether the failure to

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<sup>13</sup> Bryan claimed he refused to pay because he thought his father was going to transfer Lots 4 and 5 to him as part of the loan arrangement. The trial court's ruling on the allocation issue (as noted above) necessarily found that the loan had to be repaid by Bryan; therefore, the trial court implicitly rejected Bryan's testimony. Further, there was substantial evidence to support the trial court's finding that Bryan had to repay the entire \$275,000 loan.

<sup>14</sup> Bryan brings up new matter on this issue in his reply brief. Those matters are not self-explanatory in regard to the issues at hand and, in any event, should have been placed in the opening brief under the heading where the allocation error was discussed. We do not consider improperly presented material or argument raised for the first time in a reply brief. (*Sacramento Cable Television v. City of Sacramento* (1991) 234 Cal.App.3d 232, 244.)

allocate the CS&G Note warranted removal of Rosemary as trustee, the trial court was satisfied that Bryan's interests were sufficiently protected in light of the monthly support payments and loan payment offsets, as indicated above in the trial court's injury analysis. Since the trial court had a reasoned factual basis for that approach and conclusion, we need go no further.<sup>15</sup>

D. Trust Income Used for Maintenance or Improvements

As we noted previously above, Vernon exercised the power of appointment in his will regarding the Survivor's Trust by giving Rosemary a life estate in the Cressey house along with the right to use income of that trust "to maintain and repair said residence, as well as pay all taxes and insurance associated therewith." This was a specific gift to Rosemary, followed in Vernon's will by a residuary clause wherein the "residue" of both subtrusts was appointed for the benefit of Bryan (or Bryan's descendants) in accordance with the terms of the reiterated spendthrift clause for Bryan's support.<sup>16</sup>

Bryan argues that Rosemary used Trust income on expenses relating to the Cressey house that were not authorized by the precise wording of the Trust and that such expenditures benefitted her interests as opposed to Bryan's.<sup>17</sup> In particular, Bryan contends that Rosemary expended Trust income not only for maintenance and repairs, as permitted by the Trust, but also for *improvements* of the Cressey house in which she had

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<sup>15</sup> Although we hold that there was no abuse of discretion on the limited issue of whether to remove the trustee, that conclusion does not mean that if there are unresolved Trust administration issues, the parties may not seek to have them addressed in the trial court by other appropriate requests or petitions for relief.

<sup>16</sup> Because Rosemary's gift was specific and Bryan's was residual, her gift has priority over his, and she could have used all of the Survivor's Trust income for the repair and maintenance of the Cressey house. (14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, §§ 242-243, pp. 321-322.)

<sup>17</sup> Bryan neglects to mention that *he also* has an interest in the upkeep and maintenance of the Cressey house, since Rosemary only possesses a life estate, but he holds the remainder interest—that is, it will belong to him after Rosemary dies.

a life estate. Allegedly, such improvements could not be paid for from Trust income and, in doing so, Rosemary not only exceeded the literal terms of the Trust but pursued her own conflicting self-interest and breached her duty of loyalty to Bryan. Other Trust expenditures made by Rosemary, such as for utilities, pest control and ongoing employment of two individuals to help Rosemary on the property with maintenance, were also challenged by Bryan on the ground they were not authorized by the precise Trust language, allowing her only to maintain and repair the Cressey house.<sup>18</sup>

While a trustee has a duty to avoid a conflict of interest with trust beneficiaries (Prob. Code, § 16004), the trustee is *also* required to administer the trust according to the “expressed intent of the trustor” (*Union Bank & Trust Co. v. McColgan* (1948) 84 Cal.App.2d 208, 213). Accordingly, the express terms of the trust may permit the trustee to take certain actions that would otherwise violate her duty of loyalty. (*Estate of Thompson* (1958) 50 Cal.2d 613, 616.)

On this matter, the trial court held as follows: “Rosemary’s use of trust funds for various construction and improvement projects on and around the property in which she holds a life estate do not constitute an abuse of discretion and are therefore not grounds for removal.” The trial court explained that the expenditures were justified either as within the reasonable range of the express discretion that Vernon left to Rosemary to maintain the property after his death<sup>19</sup> or, alternatively, as Rosemary’s appropriate

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<sup>18</sup> In referring to the Trust language, what we and the parties mean is the Trust as modified by Vernon’s will. For convenience, we simply refer to the Trust in much of our discussion of this issue.

<sup>19</sup> Rosemary testified that she interpreted the term “maintenance” to reasonably include such expenses as pest control and utility bills, because one could not properly maintain and keep a place like that in good repair without these expenses and, further, Vernon had discussed such matters with her personally and he “never intended for this place to become a burden to [her].”

decision to honor binding agreements that Vernon entered before he died, but which were completed or performed after his death.

We believe the trial court's holding was supported by substantial evidence and a reasonable interpretation of the written provision at issue. First, Rosemary's testimony at trial substantiated the fact that Vernon was responsible for initiating the improvement and construction projects at the Cressey house, and that before his death Vernon had entered into oral agreements for a number of such projects—some of which had to be completed or performed after his death. Thus, Rosemary was appropriately honoring the contracts that Vernon had already made. Second, considering that the express permission to use Trust funds to maintain that particular property (i.e., an older, rural home on over three acres, fronted on a river) was made in the special context of Vernon's provision of a life estate to his elderly sister, Rosemary, so that she might be able to continue to reside there, we believe the trial court appropriately declined to construe maintenance in a narrow, rigid or technical sense. In interpreting a will or trust, where the goal is to ascertain the intent of the testator or settlor, it is appropriate for the court to consider the circumstances and context in which the document was made (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453), and to place itself in the position of the testator or settlor whose language it seeks to construe (*Estate of Russell* (1968) 69 Cal.2d 200, 210-211). The trial court did so here and adopted a construction to which the wording was reasonably susceptible. Under the circumstances, we agree with that construction and find no abuse of discretion.

E. Conflict of Interest

Along the same lines, Bryan argues there is an irreconcilable conflict of interest because Rosemary is trustee of both the Survivor's and Exempt Trusts, while she is also a beneficiary of the Survivor's Trust inasmuch as income from it may be used for repair and maintenance of the property where she is living. Bryan's argument fails because the conflict he describes was clearly contemplated by Vernon. "When 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.” (*Estate of Gilliland, supra*, 73 Cal.App.3d at p. 528.) In such cases, a trustee will not be removed based on conflicts the settlor was aware of and sanctioned, unless there is evidence of extreme misconduct such as dishonesty or obvious abuse. (*Ibid.*) Since no such showing has been made in this case, the existence of such a conflict of interest is not a sufficient ground for Rosemary’s removal as trustee.

F. Accountings

Bryan argues that Rosemary’s failure to timely provide accountings to him mandated her removal as trustee. Following Vernon’s death, Bryan requested accountings.<sup>20</sup> The trial court found that “[a]fter a considerable delay, accountings were provided for 2007, 2008, and 2009.” The trial court explained that the delay in providing the accountings was insufficient to justify Rosemary’s removal as trustee: “While a complete failure to account is sometimes grounds for removal, a failure to account promptly is not. (*Jones v. Stubbs*[, *supra*,] 136 Cal.App.2d 490.) The Court finds that while more timely responses to the requests for accounting would have been desirable, the failure to provide timely accountings does not constitute grounds for removal of the trustee.” The trial court’s recitation of the law was correct. That is, although a trustee has a duty to account to beneficiaries under Probate Code section 16062, the question of whether or not to remove a trustee when it is asserted that an accounting or other information was not adequately or timely provided remains in the trial court’s discretion. (See *Jones v. Stubbs, supra*, at p. 498.) Here, there was substantial evidence to support

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<sup>20</sup> Through his counsel, during trial, Bryan waived his request for accountings other than for the period after Vernon’s death—i.e., accountings for 2007, 2008 and 2009.

the trial court's finding that accountings were provided for 2007, 2008 and 2009.<sup>21</sup>

Bryan has failed to demonstrate that any abuse of discretion occurred concerning the trial court's decision not to remove Rosemary as trustee on this particular ground.

G. Rosemary as Sole Trustee

Bryan contends the trial court abused its discretion in its refusal to remove Rosemary because the Trust language requires that there be two trustees if one is not a licensed professional fiduciary. However, the actual language of the Trust provides there shall be two trustees "to the extent practicable." Moreover, Bryan's petition concerned the issue of whether there was good cause to remove Rosemary as trustee, not whether there should be more than one trustee. For these reasons, we hold that the trial court did not abuse its discretion for declining to remove Rosemary based on the two-trustee provision of the Trust.

H. Attorney Fees

Bryan contends that Rosemary's payment of attorney fees from the Trust to defend this action constituted a breach of trust and a reason for removal. The language of the Trust explicitly gave the trustee power "[t]o prosecute, defend, contest or otherwise litigate legal actions or other proceedings for the protection or benefit of a trust or the Trustees." A separate provision allowed the trustee to employ and "compensate from the trust" lawyers and accountants to aid or assist in the management, administration and protection of the Trust estate. Bryan has failed to cite any evidence in the record showing fees paid that were improper under the terms of the Trust or under relevant case law.

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<sup>21</sup> The 2009 accounting was prepared by Mr. Spinardi after gathering information from Rosemary's check register, receipts, and other financial information she provided to him. It was sent from Rosemary's counsel to Bryan's counsel just a few days prior to trial. Although at trial Rosemary indicated that she had not yet seen the final document presented as the 2009 accounting, it is nonetheless clear that substantial 2009 accounting information was provided to Bryan through Mr. Spinardi and Mr. Haden.

Bryan has also failed to explain why Rosemary's employment of Mr. Haden to defend against Bryan's litigation could not be compensated from the Trust, especially where Bryan was challenging the settlor's named and intended trustee. The two cases cited by Bryan are distinguishable because in both cases there was no reason for the trustee to have taken anything other than a neutral position in the litigation. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230-1231; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1462.) Obviously, it was not possible for Rosemary to have taken a neutral position in the present case. We conclude that Bryan has failed to demonstrate any abuse of discretion relating to the payment of attorney fees from the Trust.

### **III. Statement of Decision**

On April 21, 2011, after the parties had requested a statement of decision, the trial court issued its statement of decision in this litigation. No objections were made to the trial court's statement of decision. Bryan now contends the trial court's statement of decision was inadequate or contained omissions. His failure to object in the trial court means we will not consider his contentions on appeal, since Bryan was required to bring any asserted deficiencies in the statement of decision to the trial court's attention. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1136.) "[I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Id.* at pp. 1133-1134.)

To get around his failure to object below, Bryan asks that we make numerous findings of fact on appeal. We decline the invitation. The California Supreme Court has directed that the authority under Code of Civil Procedure section 909 to make findings of fact on appeal "should be exercised sparingly," and that "[a]bsent exceptional circumstances, no such findings should be made." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, italics omitted.) "The purpose of the section is to enable appellate courts, in the interest of expeditious administration of justice, to terminate litigation by affirmance, or

modification and affirmance, where the record discloses that remand for further proceedings would serve no useful purpose.” (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 813.) We find there are no exceptional circumstances present warranting the exercise of our power to make findings on appeal.

**DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to Rosemary.

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Kane, J.

WE CONCUR:

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Cornell, Acting P.J.

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Franson, J.