

SUPREME COURT DOCKET No. S197694

**IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA**

TIMOTHY GIRALDIN, TRUSTEE TO THE WILLIAM A. GIRALDIN TRUST DATED
FEBRUARY 11, 2002, AND PATRICK GIRALDIN,

Defendants and Appellants,

vs.

CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN,

Plaintiffs and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G041811

ANSWER TO PETITION FOR REVIEW

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SUPREME COURT
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Deputy

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
I. WHY REVIEW SHOULD BE DENIED	1
II. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW..	3
III. SUBSTANTIAL EVIDENCE SHOWS THAT MARY DID NOT WAIVE HER COMMUNITY PROPERTY RIGHTS	4
IV. SUBSTANTIAL EVIDENCE SHOWS THAT BILL DID NOT CONVEY THE RESIDENCES INTO THE TRUST	7
V. CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE.....	10

TABLE OF AUTHORITIES

Cases

<i>Estate of Buchanan</i> (1857)	
8 Cal. 507.....	4
<i>Estate of Dunphy</i> (1905)	
147 Cal. 95.....	6
<i>Estate of Heggstad</i> (1993)	
16 Cal.App.4th 943.....	7, 8
<i>Estate of Murphy</i> (1976)	
15 Cal.3d 907.....	4
<i>Estate of Richter</i> (1993)	
12 Cal.App.4th 1361.....	5
<i>Estate of Roach</i> (1959)	
176 Cal.App.2d 547.....	5, 6
<i>Estate of Wolfe</i> (1957)	
48 Cal.2d 570.....	5
<i>In re Estate of Smith</i> (1895)	
108 Cal. 115.....	5
<i>In re Gwin's Estate</i> (1888)	
77 Cal. 313.....	5
<i>In re McCarthy's Estate</i> (1932)	
127 Cal.App. 80.....	5, 7
<i>Osswald v. Anderson</i> (1996)	
49 Cal.App.4th 812.....	8
<i>People v. Davis</i> (1905)	
147 Cal. 346.....	3

<i>People v. Groves</i> (1939)	
9 Cal.App.2d 317.....	3
<i>People v. Rios</i> (2000)	
23 Cal. 4 th 450.....	3
<i>Snukal v. Flightways Mfg., Inc.</i> (2000)	
23 Cal.4 th 754.....	3
<i>Spreckels v. Spreckels</i> (1916)	
172 Cal. 775.....	4
<i>Reagh v. Kelley</i> (1970)	
10 Cal.App.3d 1082.....	7

Statutes

Probate Code section 201.....	4
Probate Code section 5020.....	6
Probate Code section 5021.....	6
Probate Code section 15202.....	7
Probate Code section 15206.....	7, 8

Rules

California Rules of Court, rule 8.504.....	10
California Rules of Court, rule 8.510.....	3
California Rules of Court, rule 8.516.....	3

California Constitution

California Constitution Article VI, section 12(c).....	3
--	---

Treatises

Restatement (Second) Trusts section 17 (1959).....	7
--	---

TO THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT AND ALL PARTIES OF RECORD:

Appellant, Mary Girdalin (“Mary”¹) respectfully submits the following Answer to the Petition for Review of Respondents, Christine Girdalin (“Christine”), Patricia Gray (“Patricia”), and Michael Girdalin (“Michael”) (collectively “Respondents”) and prays that the Petition for Review be denied.

I.

WHY REVIEW SHOULD BE DENIED

By their Petition, Respondents seek this Court’s review of the published decision of the Fourth District Court of Appeal, Division Three that reversed the Trial Court’s orders relating to 1) Respondents petition to remove Timothy Girdalin (“Tim”) as Trustee of the William A. Girdalin Trust, dated February 11, 2002 (“Trust”), and for surcharge against him and his brother Patrick Girdalin (“Patrick”); 2) Tim’s accounting and the objections thereto filed by the Respondents; and 3) Mary’s Spousal Property Petition. Although the Court of Appeal’s decision and the Trial Court’s Judgment addressed all three matters together, the issues relating to Mary are entirely different and unique from those issues relating to Tim and Patrick and should be viewed separately by this Court in determining whether to grant review. This Answer does not address those issues related to Tim and Patrick as they are represented by different counsel.

¹ First names are used throughout this Answer not out of disrespect for the parties but for ease of reference since this is a family dispute and many of the parties bear the same surname.

With respect to the Court of Appeal's decision reversing the Trial Court's denial of Mary's Spousal Property Petition, Respondents fail to raise any important questions of law in their Petition and fail to cite any legal issues in which the Courts of Appeal are divided. Respondents devote a mere half page of their Petition to Mary's issues and provide no relevant legal authority for their proposition. Respondents' issues with respect to Mary, only concern the decision in this case and the rights of the particular parties concerned here. These issues do not involve any important public policy questions or other matters significantly affecting the administration of justice. Respondents do not show any compelling reason why this Court should review the well-reasoned decision by the Court of Appeals with respect to Mary.

The record and the well established law amply support the Court of Appeal's decision that Mary did not waive her community property rights after her husband William ("Bill") died and that the undisputed evidence in the Trial Court establishes that no property had been identified in the "Schedule 1" - the purported list of assets purportedly initially transferred into the Trust, and therefore since Mary and Bill's home and their Lake Hume cabin were never conveyed into the Trust, that those assets were not part of the Trust.

In a last ditch effort to seize the only substantial assets left in the Trust, and despite Bill's clear intention that his wife of over forty (40) years be well provided for, Respondents seek review of the Court of Appeal's decision, while ignoring the undisputed facts and well established law.

Without rendering an opinion as to the issues relating to Tim and Patrick, Mary requests that Respondents' Petition for Review, as it relates to Mary, be analyzed separately and segregated from those issues relating to

Tim and Patrick and that the Court deny the Petition for Review as it relates to Mary.

II.

THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW

Review as to Mary should be denied for the simple reason that this case presents neither an important question of law nor a necessity to secure uniformity of decision. (See Cal. Rules of Court, rule 8.510(b)(1).)

The Supreme Court has discretion to grant review on selected issues, leaving undisturbed the Court of Appeal's decision on other issues. (Ca. Const. Art. VI, § 12(c) – Supreme Court authorized to review all or part of a decision; Cal. Rules of Court, rule 8.516; see *People v. Rios* (2000) 23 Cal. 4th 450, 459; *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 772-773.)

The scope of the Supreme Court's revisory power does not extend to alleged errors of fact by a Court of Appeal which are important only to the decision of the particular case and of the rights of the particular parties concerned. (See *People v. Davis* (1905) 147 Cal. 346, 347.) The Court of Appeal is deemed competent in correctly ascertaining the facts from the records before them in each case decided. (*Id.*, See also *People v. Groves* (1939) 9 Cal.App.2d 317, 321.)

The issues relating to Mary are very narrow and as explained below, based on well settled law and undisputed facts. In other words it is well settled that a wife is entitled to at least one-half of the community property on her husband's death and the husband's testamentary power of such property is limited to his remaining one-half unless the husband's will expressly requires the wife to make an election or if the husband purports to dispose of the wife's share of the community property and the will shows that to satisfy the wife's community property rights while giving effect to its

provisions with respect to the remaining property would thwart the testamentary intent. It is also well settled that the statute of frauds requires that a conveyance of real property into a trust be memorialized in a written agreement.

As shown in the record, Bill's will and Trust did not attempt to dispose of Mary's one-half of the community property and did not require Mary to make an election. Additionally, there is no written evidence in the record that Bill conveyed the two residences into the Trust.

III.

SUBSTANTIAL EVIDENCE SHOWS THAT MARY DID NOT WAIVE HER COMMUNITY PROPERTY RIGHTS

As noted in the Court of Appeals' decision, "The doctrine of spousal election is explained in *Estate of Murphy* (1976) 15 Cal.3d 907, 912 as follows: 'Following antecedent Mexican law, the rule in California has always been that a wife is entitled to at least one-half of the community property on her husband's death and the husband's testamentary power over such property is limited to the remaining half. (Prob. Code § 201; *Spreckels v. Spreckels* (1916) 172 Cal. 775, 779; *Estate of Buchanan* (1857) 8 Cal. 507.) Accordingly, when a husband's will describes the property which it gives to the wife and others in general terms, e.g., 'all my property,' without affirmatively indicating any intention to deal with the wife's community property interest, the operation of the will upon community property is confined to the husband's interest and the surviving wife is entitled to receive both her half of the community property by operation of law and any interested in the deceased husband's share given her by will. (Citations omitted.)"

A "widow's election" is not required by statute. An election is necessary only if expressly mandated in the will/trust or if it is implicitly

necessary to effectuate the decedent's estate plan. "It is the well established rule of law in California that, unless the terms of the will are such as to require election by the widow, she may accept under the will and, in addition, assert her community interest in the property owned by herself and her deceased husband." (*Estate of Roach* (1959) 176 Cal.App.2d 547, 550.)

The Trust instrument does not contain any provision requiring Mary to make a "widow's election." No election is necessary when the testator refers to devised property in general terms without identifying the property as community or separate which is the case here. The testator is deemed to have intended to dispose only of his or her separate property and one-half community property interest. (*Estate of Richter* (1993) 12 Cal.App.4th 1361, 1368–1370.) Where the testator describes his property in general terms, such as "all of my property" or "all of my estate," he is presumed to dispose of only his own interest, and an intention to dispose of his wife's community property interest will not be implied where another construction is permissible. (*Estate of Wolfe* (1957) 48 Cal.2d 570, 574-575.)

In re McCarthy's Estate (1932) 127 Cal.App. 80, 85 holds:

Before a widow can be denied her right to elect upon distribution to take her half of the community property, it must be found that, with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid those acts and disclaim her intent. (*In re Estate of Smith*, 108 Cal. 115.) A wife is not estopped by causing the will of her husband to be probated or by becoming the executrix thereof (*In re Gwin's Estate*, 77 Cal. 313); nor does her declaration before distribution that she intends to

assert her rights in the community property have that effect, as she has the right to ascertain what part of the estate is community property before being required to elect (*Estate of Dunphy*, 147 Cal. 95).

Under Probate Code sections 5020 a provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse is not effective as to the nonconsenting spouse's interest in the property and does not effect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer. Such a transfer of the nonconsenting spouse property shall be set aside by the court under Probate Code section 5021.

Not only is there nothing in the Trust instrument that requires Mary to make a widow's election, there is nothing about the Trust instrument that even implies that such an election is necessary. Nowhere in the Trust instrument does Bill declare that he is transferring to the Trust anything other than his own community property interest. In fact, nothing in the Trust instrument even describes any property Bill is purporting to transfer to the Trust. Thus, under the authorities cited, including, *Estate of Roach* (1959) 176 Cal.App.2d 547, 550, the Trust is presumed to hold only Bill's community property interest, and there is nothing inconsistent with Mary receiving distributions from the Trust to pay her living expenses, and at the same time receiving her one-half share of the community property. Indeed, the Trust instrument provides that Mary is entitled to all income from the Trust and is entitled to invade principal as well to meet her living expenses - without consideration being given to her other assets or income.

Therefore, Mary was not required to make a “widow’s election,” and the Court of Appeal was correct in reversing the Trial Court’s finding that Mary waived her community property rights by accepting distributions from the Trust and not making a timely “widow’s election.” Additionally, given the testimony that Mary never saw the Trust instrument, never knew what property was transferred to the Trust, or never knew that anyone else had any rights or interests in the Trust, it is impossible to say that Mary “with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid those acts and disclaim her intent” as is required to make an effective waiver. (*In re McCarthy's Estate, supra* 127 Cal.App. at 85.)

IV.

SUBSTANTIAL EVIDENCE SHOWS THAT BILL DID NOT CONVEY THE RESIDENCES INTO THE TRUST

A trust is created only if there is trust property. (Probate Code § 15202.) For a trust to be effective, there must be an intervivos transfer of the principal to the trust, and if there is no effective transfer to the trust, the trust fails as to the principle. (*Reagh v. Kelley* (1970) 10 Cal.App.3d 1082, 1094; Restatement (Second) Trusts § 17 (1959).)

Although Respondent’s rely on *Estate of Heggstad* (1993) 16 Cal.App.4th 943, to support their position, it actually supports Mary’s position. *Heggstad* holds that, in the case of real property, the statute of frauds (Probate Code § 15206) requires a signed writing to effect a transfer of real property – including a transfer to a trust. (*Heggstad, supra*, 16 Cal.App.4th at 948.)

In *Heggstad* the Court of Appeal determined that a trust instrument, which identified real property owned by the trustor and declared that the trustor, as trustee of his own trust, held the property in trust was in effect a declaration that the property was held in trust – because the trustor and the trustee were the same person.

Additionally, *Osswald v. Anderson* (1996) 49 Cal.App.4th 812, expressly holds that a trust instrument which adequately describes real property, but which identifies a trustee who is not the same as the trustor, does not meet the requirements of Probate Code § 15206 and is not sufficient to transfer title of the real property to the trust. (*Osswald, supra*, 49 Cal.App.4th at 820.)

The Trust instrument in this case does not describe any property to be transferred to the Trust. Rather, the Trust contemplates a separate “Schedule 1” which is supposed to describe the property being transferred. The testimony at trial was clear and unequivocal that when Bill signed the Trust instrument, Schedule 1 had not even been drafted. The drafting attorney testified that although he prepared various drafts of Schedule 1 after the Trust had been executed, Schedule 1 was a “work in progress” and that Bill never even saw it, let alone signed it. Tim testified that to his knowledge, Bill never saw or approved any of the drafts of Schedule 1. Accordingly, Schedule 1 did not transfer any interest in any property to the Trust.

The Court of Appeals invited the Respondents to provide a comprehensive recitation, including citations to the record, of the evidence they believed established that the disputed properties had been transferred to the Trust. After the Respondents complied with the request, the Court of Appeals found that although Respondents cited various evidence they

contended establish Bill's intention to transfer the properties to the Trust, Bill's mere intention to transfer ownership would not be sufficient to make that happen and there was no evidence in the record that Bill actually transferred the disputed property into the Trust.

Therefore, since Tim was the Trustee, not Bill, and Bill never declared in any written instrument that he held the disputed property in the Trust, as a matter of law the properties were not assets of the Trust and the Court of Appeals was correct in reversing the Trial Court's finding that Bill conveyed the property into the Trust.

It also follows that if the Cabin and Lakeshore house are not Trust assets, then Mary cannot, under any circumstances, be deemed to have "waived" a "widow's election" with respect to such property.

V.

CONCLUSION

For the foregoing reasons, this Court should treat Respondent's Petition for Review differently with respect to Mary, and deny the Petition for Review.

DATE: November 18, 2011

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to rule 8.504(d)(1) of California Rules of Court, the enclosed Answer to Petition for Review was produced using 13-point type, including footnotes and contains approximately 3322 words, which is less than the 8400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATE: November 18, 2011

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PROOF OF SERVICE

I, Nancy B. Barocio, certify and declare as follows:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 1901 Newport Boulevard, Suite 284, Costa Mesa, CA 92627. At my place of business, on this 18th day of November 2011, I served the foregoing document described as:

ANSWER TO PETITION FOR REVIEW

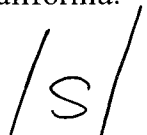
addressed in an envelope with postage fully prepaid to the following:

Clerk of the Court of the Fourth District Court of Appeal, Third Division 601 W. Santa Ana Blvd. Santa Ana, California 92701	Clerk of the Court of the Superior Court of California Lamoreaux Justice Center 341 The City Drive Orange, CA 92868
Stephen M. Lowe, Esq. FREEMAN, FREEMAN & SMILEY 3415 Sepulveda Blvd. Penthouse #1200 Los Angeles, CA 90034-6060 Tel: (310) 255-6100 Fax: (310) 391-4042 Attorneys for Respondents, Christine Giralдин, Patricia Gray and Michael Giralдин	Richard D. Keys, Esq. BIDNA & KEYS, APLC 5120 Campus Drive Newport Beach, CA 92660 Tel: (949) 752-7030 Fax: (949) 752-8770 Attorneys for Appellants, Timothy Giralдин and Patrick Giralдин

in this action by placing a true copy thereof as follows:

[X] By Mail. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of November 2011, at Costa Mesa, California.


Nancy B. Barbicio