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 GIRLADIN,

Plaintiffs and Respondents.

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

ANSWER BRIEF ON THE MERITS

BIDNA & KEYS, APLC
Richard D. Keys (SBN: 105901)
Howard M. Bidna (SBN: 81604)
Jon A. Longerbone (SBN: 90570)
5120 Campus Drive
Newport Beach, CA 92660
Rkeys@bidnakeys.com
Hbidna@bidnakeys.com
Jlongerbone@bidnakeys.com
Attorneys for Appellant,
Timothy Giraldin

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 GIRLADIN,

Plaintiffs and Respondents.

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

ANSWER BRIEF ON THE MERITS

BIDNA & KEYS, APLC
Richard D. Keys (SBN: 105901)
Howard M. Bidna (SBN: 81604)
Jon A. Longerbone (SBN: 90570)
5120 Campus Drive
Newport Beach, CA 92660
Rkeys@bidnakeys.com
Hbidna@bidnakeys.com
Jlongerbone@bidnakeys.com
Attorneys for Appellant,
Timothy Giraldin

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

California Cases:

TABLE OF AUTHORITIES

Page

Out-of-State Cases:

Stautes & Rules:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

Stautes & Rules:

Texts & Other:

I.
INTRODUCTION

This Court's order granting review designates the issue presented in this case as follows: "When a settlor of a revocable inter vivos trust appoints, during his lifetime, someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable, do the reminder beneficiaries have standing to petition the court for relief for breaches of fiduciary duty committed by the trustee during the period of revocability?"

The answer to that question is "no." In this brief Respondent Timothy Giraldin ("Tim") will explain why. However, Tim must also point out that the *facts* of this case actually call for a slightly different question. As detailed below, under the peculiar facts of the case, none of the petitioners are actually "remainder beneficiaries" of the William Giraldin Trust (the "Trust"). Rather, at the time of trial, and to this day, *all* of the Petitioners are *contingent* remainderman who currently have no vested interest in the Trust and may *never* have any vested interest in the Trust. Accordingly, the actual question presented by the facts of this case is whether "a contingent remainder beneficiary has standing to petition the court for relief for breaches of fiduciary duty committed by the trustee during the period of revocability." The answer is clearly "no," and Tim will explain the additional reasons why this is so.

II.
SHORT ANSWER TO THE ISSUE PRESENTED BY THIS COURT

"Standing" is the right to relief in court, and the right to seek relief for breach of a duty belongs to the person to whom the duty is owed. California

has a well developed statutory scheme defining the rights and standing of beneficiaries of a revocable trust. Property held in a revocable trust is the property of the settlor and the settlor is free to do with his or her property as he or she wishes. A remainderman named in the trust instrument has no rights to the trust corpus whatsoever, and the settlor is free to divest the remainderman of his or her contingent interest on a whim. The trustee of a revocable trust owes a fiduciary duty *exclusively* to the settlor and owes *no duty* to the remainderman/beneficiary. Because the trustee owes no duty to the remainderman, the remainderman has no standing to sue for breach of fiduciary duty. The Probate Code and case law embody and reflect such concepts. These principals make clear that in this case the Petitioners have no standing to pursue a direct claim against Tim.

Merely because a remainderman does not have standing to assert a claim against a trustee does not mean, as Petitioners suggest, that a defalcating trustee is free to disregard his fiduciary duty to the settlor without concern for reprisal once the settlor passes away. A breach of fiduciary gives rise to a tort claim, that survives the death of the settlor. California law provides that such claim is vested in the personal representative of the deceased (or the "successor in interest" of the deceased). But, Petitioners[1] are neither, and therefore have no standing to sue for the claims they assert. There are also alternative remedies available to Petitioners - such as a claim for elder abuse under Welf. & Inst. Code §§ 15600, et.seq. However, Petitioners asserted no such claims.

---

[1] The original Petitioners in the trial court were Christine Giraldin, Michael Giraldin, Patricia Gray and Philip Giraldin, and judgment was entered in favor of all of them. During the pendency of the appeal, Philip Giraldin died. As discussed below, his death has significant ramifications.

III.
FACTS

The facts of this case are succinctly set forth in the Court of Appeal's opinion ("*Opinion*"). The pertinent facts may be summarized as follows (and as the Court of Appeal noted, there is no evidence that suggests that the following facts are not true):

— Prior to creating the Trust, William Giraldin ("Bill") made both a decision and a commitment to invest $4 million into SafetyZone. [Exhibit 189]

— Prior to creating the Trust, Bill told the attorney he hired to draft the Trust that he had committed to invest $4 million in SafetyZone, that his son Tim was a major player in SafetyZone, and that he nevertheless wanted to make Tim the trustee of the Trust. [RT: 279-280; 699–701; 733-734]

— Bill, himself, actually made the $4 million investment in SafetyZone - he went to the bank, withdrew the funds, and on many occasions went to SafetyZone to personally give a check to SafetyZone's general counsel. [RT :370-385]

— Bill told Tim to write checks to make the various "loans" (actually inter vivos gifts) to his sons Tom, Pat, and Tim (which were the subject of the petition in the trial court), and Phil and Mike (which were not addressed in the petition filed by, among others, Phil and Mike). [RT: 427-429; 1162-1167;1184-1185; 1319-1323] [Exhibits 55, 59]

— Bill completed his investment in SafetyZone three years before he died. Each of the Petitioners was aware for years that Bill had made a substantial investment in SafetyZone, and *not one of them* asked Bill about the

details. Instead, they waited until nearly a year after Bill died - then sued Tim. [RT: 406; 410-415; 1069; 1089; 1092; 1295; 1308][Exhibit 170-1]

While Petitioners cited to many "findings" and "factual determinations" by the trial court regarding Bill's "capacity," what Bill "understood," and what Bill was "capable of understanding," the Court of Appeal has determined that such "findings" are the result of material errors of law committed by the trial court (the trial court erroneously sustained hearsay objections to virtually every question posed by Tim's counsel seeking to elicit information concerning what Bill knew or was told about SafetyZone or the "loans") such that, regardless of the decision by this Court, the trial court's judgment must be reversed. *See, Opinion* at page 4, fn. 3 and page 14, fn 13. Accordingly, in deciding this case, the Court should not rely on the trial court's "factual findings." Indeed, because the Court of Appeal has determined that the trial court's "findings" are flawed and its decision must be reversed under any circumstances, the issues to be considered by this Court are essentially based on the *allegations* of the petition filed in the trial court.

It is, however, important to note that there was no allegation (let alone any "finding") that Tim *ever* made any misrepresentation to Bill, did anything that constituted "elder abuse," or exerted "undue influence" over Bill. *Opinion*, page 10, fn. 8.

IV.
LEGAL ARGUMENT

A. Standing Requires That the Plaintiff Be Vested with a Right to Relief in Court.

The *Opinion* (page 18) succinctly summarizes the definition of "standing" as follows:

> "Standing to sue . . . is the right to relief in court." *(Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604, quoting *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224). And the right to seek relief for breach of duty belongs to the person to whom, the duty was owed. (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 297; *Nelson v. Anderson* (1999) 74 Cal.App.4th 111, 124-125 [minority shareholder lacked standing to bring claim in individual capacity for breach of duty owed to corporation].)

B. A Trustee of an Inter Vivos Trust Owes No Duty to Remainder Beneficiaries - Period

As this Court and the Courts of Appeal have consistently held, while the settlor of an inter vivos trust is alive, the settlor and the trust are effectively one and the same, and any property (real, personal or intangible) held in the trust belongs to the settlor and the settlor has unfettered power to dispose of such property as he or she deems appropriate. *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319 ["property transferred to, or held in, a *revocable* inter vivos trust is deemed the property of the settlor...."]; *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83 Remainder beneficiaries have no vested rights whatsoever in the corpus of the trust - and absolutely no say in what the settlor does with the corpus.

In *Steinhart* , this Court, in holding that a transfer of real property to a revocable trust is not a present transfer of real property, went on to state as follows:

> Moreover, "[p]roperty transferred to, or held in, a *revocable* inter vivos trust is deemed the property of the settlor...." (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633, 82 Cal.Rptr.3d 835, italics added; see also *Arluk Medical Center Industrial Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324, 1331–1332, 11 Cal.Rptr.3d 194 ["a settlor with the power to revoke a living trust effectively retains full ownership and control over any property transferred to the trust"].) Any interest that beneficiaries of a revocable trust have in trust property is "merely potential" and can "evaporate in a moment at the whim of the [settlor]."

Johnson v. Kotyck (1999) 76 Cal.App.4th 83, 88 explains the nature of a beneficiary's rights in a revocable trust as follows:

> So long as a trust is revocable, a beneficiary's rights are merely potential, rather than vested. The beneficiary's interest could evaporate in a moment at the whim of the trustor or, in the case of a conservatorship, at the discretion of the court. Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable. We cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only *hopes* to have upon the death of the trustor, but only if the trust has not been previously revoked and the beneficiary has outlived the trustor.

Because the settlor owns all of the property in the trust, and the beneficiaries have no rights whatsoever, it logically follows that a third party trustee therefore owes duties exclusively to the settlor. The specific provisions of the Probate Code expressly state that the trustee's duty is solely and exclusively owed to the settlor.

Probate Code § 15800(a) provides that with respect to a revocable trust, while the person holding the power to revoke is alive, such person, *"and not*

the beneficiary, has the rights afforded beneficiaries under [Division 9 of the Probate Code - Trust Law - Probate Code §§ 15000 - 19403]."

Probate Code § 15800(b) provides that with respect to a revocable trust, "The duties of the trustee are owed to the person holding the power to revoke."

In this case, the person holding the power to revoke the Trust was Bill, and only Bill. Probate Code § 15800 is clear and unequivocal. Any duties that Tim owed as trustee while Bill was alive were owed *exclusively* to Bill. Thus, Tim owed no duties whatsoever to Petitioners during the period between the creation of the Trust and Bill's death.

Petitioners' arguments that there is "some ambiguity" in Section 15800 and/or that Section 15800 is somehow inconsistent with Probate Code § 15801 are simply not valid. Section 15801 provides:

> (a) In any case where the consent of a beneficiary may be given or is required to be given before an action may be taken, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the power to consent or withhold consent.
>
> (b) This section does not apply where the joint consent of the settlor and all beneficiaries is required by statute.

Section 15801 is entirely consistent with Section 15800. Because a trustee of a revocable trust owes no duty to a remainderman (or beneficiary) other than the settlor, it follows that if consent to any act by the trustee is necessary, then only the consent of the settlor is necessary. If the remainderman has no rights, and is owed no duty, there is no reason for the

trustee to seek the consent of a remainderman. Moreover, requiring a trustee to seek consent from a remainderman before following the settlor's instructions would create an untenable conflict.

Petitioners are correct that if a trustee needs consent of the settlor, but acts without it, the trustee may be liable "to someone." However, as discussed below, "the someone" to whom the trustee may be liable is solely and exclusively the settlor - the only person to whom the trustee owes a duty to obtain consent.

C. The Probate Code Expressly Provides That the Trustee of an Inter Vivos Trust Has No Duty to "Account" to Any Remainder Beneficiary for the Period the Trust Was Revocable

The right of a trust beneficiary to an accounting is based on the provisions of Division 9, Article 3 of the Probate Code (Sections 16060 - 16064). In the case of a revocable trust, Probate Code § 15800(a) provides that while a trust is revocable, *only* the person holding the power to revoke is entitled to an accounting. That section expressly provides that a "beneficiary" who does not hold the power to revoke does not have *any* rights afforded to beneficiaries under Division 9 of the Probate Code. *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83 holds the right to an accounting of a revocable trust belongs exclusively to the person holding the power to revoke, and that a remainderman/ beneficiary, such as Petitioners, have no right to an accounting, even following the appointment of a conservator for the settlor.

Former Probate Code § 16064(b),[2] applicable to the present case, provided in applicable part as follows:

> The trustee is not required to report information or account to a beneficiary in any of the following circumstances:
>
> (b) In the case of a beneficiary of a revocable trust, as provided in Section 15800, *for the period when the trust may be revoked.*

The italicized portion of former Section 16064(b) quoted above was added by the 1992 amendments to the Probate Code. 1992 Cal. Legis. Serv. Ch. 871 (A.B. 2975) (WEST). The addition makes clear that the exception to the trustee's duty to account is *for* the period during which the trust is revocable, not *while* the trust is revocable.

Thus, the Probate Code expressly provides that Tim cannot be required to account to Petitioners *for* any period prior to Bill's death.

Petitioners cite *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615 for the proposition that Tim owed a duty to Petitioners and/or that Petitioners, as beneficiaries of the Trust, could compel Tim to account for the Trust during Bill's lifetime. As the *Opinion* points out (page 20), to the extent *Evangelho* actually supports such positions, *Evangelho* is simply wrong. *Evangelho* is inconsistent with the terms of the Probate Code and case law, including this Court's opinion in *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298 and the Court of Appeal's 1999 decision in *Johnson v. Kotyck* (1999) 76

---

[2] Probate Code § 16064 was amended effective January 1, 2011. The former provisions of section 16064(b) were reenacted as Probate Code § 16069 without change.

Cal.App.4th 83 (which was decided after *Evangelho*, but did not mention *Evangelho*).

In *Evangelho*, the residuary beneficiaries of a revocable trust, following the death of the settlor, obtained an order compelling the trustee to provide an accounting of a specific bank account, that was outside the trust, on which the trustee and the settlor were named as the joint account holders. The specific holding of *Evangelho* is that the trial court had the authority to order the trustee to provide an accounting for the bank account. There was no damages award or surcharge of the trustee rendered in the trial court - and obviously such issue was not part of the appeal. The Court of Appeal itself noted that to the extent the trial court's order merely required the trustee to provide an accounting of the trust, such order was not appealable, as a matter of law. 67 Cal.App.4th at 622, citing to Probate Code § 1304 (which provides that an order compelling an accounting of a trust is not appealable). Thus, the only part of the order that was appealable, and thus the limited scope of the appeal, was whether the trial court could properly require the "trustee" to account for the funds held in the joint bank account outside the trust. To the extent *Evangelho* stands for the proposition that under the particular facts of the case a person who was a trustee of the settlor's revocable trust and also was a co-account holder on a bank account outside the trust could be required to render an accounting of such bank account, such holding is not based on trust law, and has nothing to do with the instant case.

To the extent that *Evangelho* suggests that even though a beneficiary or remainderman has no rights in property held in a revocable trust and is owed

no duty by the trustee so long as the trust is revocable, upon the trust becoming irrevocable, the trustee somehow *retroactively* owed a duty to the beneficiary such idea is simply illogical. If a trustee did not owe a duty to the beneficiary while the settlor was alive (and indeed owed a duty exclusively to the settlor during such time), the death of the settlor cannot change that. The settlor's death certainly cannot after the fact impose on the trustee a duty that he or she never assumed or owed.

To the extent that *Evangelho* holds that once the settlor dies and a trust becomes irrevocable the beneficiaries can require the trustee to account for periods when the trust was revocable, such holding is clearly in conflict with the precise wording of former Probate Code § 16064(b). Former section 16064(b) says that the trustee of a revocable trust has no duty to account to a beneficiary or remainderman *for* any period when the trust is revocable (i.e. *for* any period when the beneficiary had no rights in the trust or its corpus). Section 16064(b) states that the trustee may not be required to account to a contingent beneficiary *for* any period when the trust may be revoked - regardless of *when* the accounting is requested. *Evangelho* reads Section 16064 to state that "*during* the time the trust may be revoked, the trustee is not required to account to a beneficiary." 67 Cal.App.4th at 623-624. Such statement is simply inconsistent with the precise wording of Section 16064(b) - the trustee need not account to the beneficiary *for* the period during which the trust may be revoked. Section 16064(b) does not limit the prohibition for a contingent beneficiary to obtain an accounting to only the time period *during* which the trust is revocable. Rather, the section explicitly says that a trustee is not required to account to such a beneficiary *for* any time when the beneficiary has no vested right. Such a provision is entirely consistent with

Section 15800(b) that expressly provides that a trustee owes *no duty* to a contingent beneficiary of a revocable trust - if a trustee owes *no duty* to a beneficiary, the trustee cannot be required to account to the beneficiary for a period of time when the trustee owed *no duty*.

Moreover, the "spin" *Evangelho* puts on section 16064 is simply inconsistent with the language of the section and its purpose. The reason a trustee has no duty to account to a beneficiary for any period when the beneficiary has no interest in the trust or its corpus is obvious - the trust corpus belongs to the settlor - and exclusively the settlor - and only the settlor has any rights in the corpus. Because the beneficiary has no rights in the corpus, the beneficiary has no right to an accounting for something in which the beneficiary has no interest.

Requiring a third party trustee to account to contingent beneficiaries for transactions that occurred at a time when such beneficiaries had no vested interest in the trust, and the trustee was duty bound to honor the whims of the settlor, would create an untenable conflict. If a third party trustee was required to look over his/her shoulder and take into consideration the possible objections of some future possible beneficiary, such a trustee might well be hesitant to follow the directions of the settlor, least the trustee find himself second guessed, and sued, after the settlor passed away. The repercussions of a holding by this Court that a contingent beneficiary has a right to second guess the trustee's fidelity to the settlor could have a significant effect on the entire professional trustee industry.

Finally, *Evangelho*'s interpretation of Section 16064 does not distinguish between the settlor who acts as trustee and a third party who acts as trustee, and such failure to do so illustrates the fallacy of the reasoning of such opinion. How could it ever be that a settlor, such as Bill, would ever have any obligation to "account" to the trust beneficiaries he selected to receive a post death gift for anything that Bill decided to do with *his money?* Nevertheless, the inevitable, but illogical, extension of *Evangelho* is that a *settlor* could be required to account to his own beneficiaries for his own actions, or a new trustee who is appointed upon the settlor's death could be required to account for the settlor's own actions. Adopting the Petitioner's reading of *Evangelho* would also open up to challenge decisions that a settlor may have made to change his estate plan/trust perhaps to favor one beneficiary over another, or to disinherit a beneficiary.

As the *Opinion* (page 20) further points out, *Evangelho* was decided before *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83 and *Steinhart v. County of Los Angeles* (2010). *Johnson* holds that the right to an accounting of a revocable trust belongs exclusively to the person holding the power to revoke, and that a beneficiary, such as Petitioners, have no right to an accounting, even following the appointment of a conservator for the settlor. *Steinhart* holds that property held in a revocable trust is deemed property of the settlor, and any interest the "beneficiaries" of such trust may have is "merely potential." Such holdings effectively reject the basic theory upon which Petitioners base their claims, which is that by virtue of their status as beneficiaries of a revocable trust they are "entitled" to have some say regarding the assets held in the trust.

Petitioners' argument (at page 29 of their brief) that Probate Code § 16420(b) would allow the Court to order a trustee to account for the period the trust was revocable "upon a showing that breaches of trust may have occurred" is misplaced and puts the cart before the horse. Because beneficiaries have no standing to complain about the trustee's actions while the trust was revocable, they have no right or ability to seek relief under Probate Code § 16420(b).

D. The Express Terms of the Trust Provide That Tim Has No Duty to Account to Petitioners for Anything That Happened Prior to Bill's Death.

In addition to the clear pronouncements of the Probate Code, the concept that Tim is or was required to account to Petitioners for anything that transpired during Bill's lifetime is entirely inconsistent with, and contrary to, the express terms of the trust instrument (Trial Exhibit 67).

Paragraph 15.5 of the trust instrument (on page 17) provides as follows:

> **Disclosure to the Beneficiaries.** During my lifetime, the Trustee shall have no duty to provide any information regarding the trust to anyone other than me. After my death, while my wife survives, the Trustee shall have no duty to provide any information regarding the trust or subtrusts created under this Trust Agreement to any one other than my wife, except as required by law. Probate Code §§ 16060 and 16061 shall not apply to any trust created under this Trust Agreement until after the death of the survivor of me and my wife. Prior to the death of the survivor of me and my wife, the Trustee shall have no duty to disclose to any beneficiary other than my surviving wife the existence of this trust or any information about its terms or administration, except as required by law.

Paragraph 15.6 of the trust instrument (on page 18) provides (in part):

> **Reports and Accounts.** I hereby waive all statutory requirements, including the requirement under Probate Code §16062(a), that the Trustee of any trust created under this Trust Agreement render a report or account to the beneficiaries of the trust. The Trustee shall not be required to make any current reports or render any annual or other periodic accounts to any trust beneficiary or to any court, whether or not required by statute, except pursuant to court order. . . .

E. To the Extent California Law Is "Inconsistent With" the Common Law, the "Law of Other Jurisdictions," or the Uniform Trust Code, Such Is an Issue Left to the Wisdom of the Legislature

Petitioners argue that the *Opinion* is "in conflict with recent common law sources and the law of other jurisdictions." Exactly how California law is in conflict with such "other law" is not clear from the authorities Petitioners cite, including the Restatement Third of Trusts and the Uniform Trust Code. The Restatement Section that Petitioners cite does not specifically address the subject of when or whether the trustee of a revocable trust may be liable to beneficiaries (except to note that a trustee can have no liability if the trustee follows the settlor's written or oral instructions).

Petitioners' citation to Bogert, *The Law of Trusts and Trustees*, § 964 is misleading, for a number of reasons. First, as noted above, in this case there is no allegation of that Bill had lost capacity, there is no allegation that Bill was subject to undue influence, and it is a fact that Bill directed Tim's

actions - which are the *key factors* noted in the portion of the treatise Petitioners cite as supporting a beneficiary's ability to assert a claim against a trustee. Second, the "lead case" cited by the treatise for the proposition cited by Petitioners is *Evangelho*, which, as demonstrated above, is simply wrong. Third, an analysis of the other authorities cited in the treatise reveals that most of the cases cited are based on Florida law (which differs from California law), all turn on the specific nature of the trust (such as irrevocable testamentary trusts), and often are based on unique specific state statutes (e.g. *Davis v. Davis* (2008) 889 N.E.2d 374) - which held that the trustee's violation of a specific statute warranted removal - not damages). Finally, the law of other jurisdictions is neither binding nor persuasive, because, as demonstrated above, the specification of what duties are owed to a beneficiary of a revocable trust are a matter of *statute* in California. Indeed, as this Court long ago stated, in California the "right" of inheritance is "strictly statutory." *In re Darling's Estate* (1916) 173 Cal. 221, 223.

Petitioners' citation to the Uniform Trust Code is completely out of place. The California Legislature has not adopted the Uniform Trust Code and in fact adopted provisions, such as Probate Code § 15800, 15801, and 16069, which are contrary to the provisions of the Uniform Trust Code Petitioners cite.

The specific out of state cases that Petitioners cite are of no moment either (and indeed, Petitioners' citations are the same cases as are cited in Bogert's). The *Brundage* case, decided under Florida law, is itself questionable. The court's decision was based on an earlier Florida case, *Smith*

v. Bank of Clearwater (1985) 479 So.2d 755 and a New York case, *Siegel v. Novak* (2006) 920 So.2d 89 (and Petitioners separately cite both cases). *Smith* actually involved a claim by the remainder beneficiaries of an *irrevocable* testamentary trust. 479 So.2d at 756. *Siegel*, on the other hand, was based on a New York statute which *specifically gave contingent beneficiaries standing to seek an accounting of a revocable trust*. 920 So.2d at 97.

Petitioners citation to Probate Code § 850 is curious at best. Petitioners did not bring an action under Probate Code § 850. And, there is no allegation that Tim (or anyone else) holds property belonging to the Trust. The citation to *Estate of Young* (2008) 160 Cal.App.4th 62 for the proposition that remaindermen have standing to file a petition under Section 850 to recover trust assets is entirely inappropriate. That case involved a claim by *the decedent's personal representative* (not a trust beneficiary) to recover the decedent's property that had been transferred to a trust through fraud and undue influence perpetrated against the decedent, and the plaintiff's standing to assert such claim was based on a specific statute - C.C.P § 377.30, discussed below.

F. The Concept of a Beneficiary Having "Standing" to Sue for a Breach of Fiduciary Duty Vis-a Vis the Settlor Claim Is Inconsistent with the Statutory Scheme Adopted by the Legislature Related to the Survival of Actions

The California Legislature has enacted an entire statutory scheme to preserve any claims that a deceased settlor/trustor may have had against his or her trustee. The position Petitioners advocate is inconsistent with that scheme.

A claim for breach of fiduciary duty is a claim that sounds in tort. *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708. As with other tort claims, assuming the statute of limitations has not run, such claim "survives" the death of the settlor and is vested in, and may be asserted by, his or her personal representative (or if there is no personal representative, then by his or her "successor in interest"). C.C.P. §§ 377.20 and 377.30

C.C.P. § 377.30 provides as follows:

> A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.

The Legislative comment to Section 377.30 reads as follows:

> Section 377.30 restates the first part of former Code of Civil Procedure Section 353(a) and part of former Probate Code Section 573(a) without substantive change, but adds the

> reference to the successor in interest drawn from former Code of Civil Procedure Section 385. Under this section, an action or proceeding may be commenced by the decedent's successor in interest only if there is no personal representative. The distributee of the cause of action in probate is the successor in interest or, if there is no distribution, the heir, devisee, trustee, or other successor has the right to proceed under this article. See Section 377.11 ("decedent's successor in interest" defined). See also Prob. Code § 58 ("personal representative" defined). The addition of the reference to the successor in interest makes the rules applicable to commencement of an action consistent with the rules applicable to continuation of a pending action. Thus, the distinction between commencing and continuing the decedent's action drawn in Everett v. Commissioner, T.C.M. (P-H) ¶ 89,124 (Mar. 27, 1989), is not applicable under Sections 377.30 and 377.31. [22 Cal.L.Rev.Comm.Reports 895 (1992)]

As this Court explained in *Steinhart*, property held in a revocable trust is and remains property of the settlor. A tort committed against the settlor of a revocable trust, whether related to the trust or not, belongs to *the settlor* - because it is *the settlor* who has been harmed (in the case of a breach of fiduciary duty causing monetary damages, it is *the settlor* who has lost money, not "the trust" or the beneficiaries). The tort claim survives the death of the settlor and, pursuant to C.C.P. § 377.30, may be commenced by the settlor's *personal representative* (or if there is no personal representative, then by the decedent's "successor in interest"[3]). C.C.P. § 377.30 controls the disposition

---

[3] C.C.P. §§ 377.10 and 377.11 define "successor in interest" to be (1) where the decedent died testate, the beneficiary(ies) named in the decedent's *will* who by terms of the will succeed to such cause of action and (2) where the decedent died intestate, to the decedent's heirs at law under Probate Code §§ 6401 and 6402. In other words, a settlor of trust who dies holding a claim for breach of fiduciary duty against the trustee of his/her revocable trust may direct by *will* to whom the chose in action passes. Thus, depending upon the precise estate plan of such settlor, the claim against the

of the chose in action - and it follows that because the chose in action vests in the personal representative, it does not vest in the beneficiaries of the trust.[4]

Giving "beneficiaries" of a revocable trust a direct right of action against the trustee is entirely inconsistent with Section 377.30. There can only be one holder of the settlor's claim - otherwise both the personal representative of the settlor's estate and the trust beneficiaries could sue a trustee in different lawsuits, in different counties, possibly even in different states. Such result is clearly not what the Legislature intended.

It is significant to note, as the *Opinion* points out (pages 23 - 26), that Petitioners never sought to assert any of *Bill's rights* - instead they argued throughout the proceedings that *they* had been damaged by Tim's actions. And, as the *Opinion* points out (at pages 23-24), under the facts of the case, it was undisputed that Bill wanted to make an investment in SafeTzone, and that in implementing Bill's decision, Tim was following Bill's directions.

---

fiduciary may be devised to one or more specific beneficiaries by will (which could name the settlor's trust as a beneficiary of the will). However, the analysis will always be fact specific - and the terms of the settlor's will control the disposition of the chose in action.

[4] Such is entirely consistent with the nature of a trust. A trust such as the one at issue in this case is effectively a means of making a testamentary devise, and is the functional equivalent of a will. *Empire Properties v. County of Los Angeles* (1996) 44 Cal.App.4th 781, 788. Upon the settlor's death, the trust conveys to the beneficiaries only the property or rights which the trust instrument directs be conveyed. There is *nothing* in the William Giraldin Trust which conveys any interest in any claim Bill may have had against Tim (or anyone else) to Petitioners.

G. Assuming a Breach of Trust Occurred, There Are Adequate Remedies

Petitioners themselves acknowledge that there are several alternative remedies to address a breach of fiduciary duty viz-a-viz the settlor of a revocable trust, including an action for statutory elder abuse (which may be brought by a number of persons in accordance with Welf. & Inst. C. § 15657.3), appointment of a conservator for the settlor while he or she is alive, or a suit by the personal representative under C.C.P. § 377.30.[5] Petitioners' criticism of a claim for elder abuse as a remedy is that there is a right to jury trial in such cases. How could giving the both sides to a dispute a right to a jury trial be a disadvantage? Moreover, the elder abuse statutes also provide for the recovery of attorney fees to a plaintiff who successfully brings a claim for financial elder abuse, which would make such a claim a preferred remedy. Welfare & Inst. Code § 15657.5(a). Petitioners' comments about the inefficiency of a conservatorship proceeding ring particularly hollow. In point of fact, Petitioners were aware for several years prior to Bill's death that Bill had made a substantial investment in SafeTzone. Yet, *none of them* asked Bill anything about it or took any steps to ensure that *Bill's* rights were "protected." Instead, they waited until after Bill died and the investment went sour to raise any complaint - and then sued to recover for the alleged harm caused *to them.* (*Opinion* at page 15, fn 16.) Petitioners' argument that a claim by the personal representative under C.C.P. § 377.30.is overly cumbersome where the personal

---

[5] Presumably Petitioners could have, but chose not to, pursue any of these "remedies."

representative is the target defendant misses the mark.[6] Merely because a particular remedy provided by the Legislature requires an "extra step" in a particular case is not grounds for giving standing to an entire class of potential plaintiffs that the Legislature has not provided. In any event, the efficiency (or the perceived lack of efficiency) of a statutory remedy already provided by the Legislature is a matter best addressed to the Legislature.

H. Even If the Court Were to Conclude That a Beneficiary of a Revocable Trust Has Standing to Sue for Breaches of Trust by the Trustee Committed While the Trust Was Revocable, Such Holding Would Not Answer the Question of Whether Petitioners Have Standing in this Case

As noted at the outset of this brief, the facts of this case do not squarely fit within the confines of the issue the Court asked be addressed. Under the peculiar terms of the William Giraldin Trust, as of the time of trial, and to this day, none of the Petitioners are vested beneficiaries in the trust and they are still *contingent remaindermen who may never have any right to receive anything from the Trust.* The trust instrument (trial exhibit 67 included in Appellant's Supplemental Appendix of Exhibits, at page 95) provides in Article 4 (page 101) that upon Bill's death, the corpus of the trust is to be

---

[6] As the *Opinion* notes (at page 29), any claim for breach of duty held by Bill was vested in his personal representative. Assuming that was Tim, Petitioners were not powerless. They had the ability to petition the Probate Court to appoint an independent personal representative who could investigate Petitioners' claims, and if he or she felt they had merit, pursue them on Bill's behalf, for the benefit of all of his heirs.

divided into two trusts - a "QTIP trust" (a qualified terminal interest trust designed to postpone payment of estate taxes) and a "Bypass Trust." Bill's wife, Mary, is the primary beneficiary of both subtrusts. Articles 7 and 9 provide for the administration of such subtrusts. Pursuant to Article 7.3, the entire corpus of the QTIP Trust is available to Mary to pay for "health, education, maintenance and support." Article 9.1 provides that the entire corpus of the Bypass Trust is likewise available to Mary to allow her to enjoy her "accustomed standard of living." No beneficiary other than Mary has any rights whatsoever to income or principal from either the QTIP Trust or the Bypass Trust while Mary is alive. Thus, it is entirely possible that the corpus of the trust will be exhausted by Mary, in which case Petitioners would stand to receive nothing. Given this potential outcome for Petitioners, it is difficult to see why or on what basis they would have a right to sue a former trustee for harm to their non-existent interests.[7]

Article 4 further provides that upon Mary's death, the remaining corpus of both subtrusts is to be distributed in equal shares to "each of [Bill's] children" *who survive Mary*. In the event a child does not survive Mary, then either the devise to that child lapses or, if the child had surviving issue (i.e. grandchildren), passes to another trust created for such issue. In the event none of Bill's children survive Mary, and none of Bill's children have issue who survive's Mary, the entire corpus of the trust goes first to any of Bill's living "heirs at law," and if none, then to charity.

---

[7] Furthermore, Article 15.5 of the trust instrument expressly provides that following Bill's death and for so long as Mary is alive, the trustee shall have "no duty to provide any information regarding the trust" to anyone other than Mary.

Mary is still alive. The result of the provisions of Article 4 is that as of the time of trial *none* of the Petitioners were vested beneficiaries under the Trust - and none of the Petitioners are vested beneficiaries to this day. The Petitioners had and have no right to receive *anything* from the trust and thus had no legal entitlements to enforce or protect. Moreover, it is possible that *none* of the Petitioners will *ever* be vested, because it is possible that none of the Petitioners will outlive Mary. This potential, and the impact it would have, is demonstrated by the fact that one of the original Petitioners in the trial court, Phil Giraldin, died shortly after trial and while the appeal was pending. Because Phil did not outlive Mary, Phil *never had* an interest in the trust. Nevertheless, he did obtain a judgment that was based on his status as a "beneficiary" - which makes absolutely no sense - because he was never anything more than a contingent remainderman who might, if certain things happened (i.e. Mary died before he did), obtain a vested interest in whatever was left of the trust corpus after it was used to benefit Mary. Had Philip been the only petitioner, his death would have created the anomalous situation of a judgment having been entered in favor of a person who never had a vested interest in the trust and who never had any right to anything.

Thus, the question that the petitioners would have the Court address is not what rights a vested beneficiary may have, but what rights a *contingent remainderman* may have. As the Court of Appeal properly determined, and as discussed above, the answer to that question is <u>none</u>.

V.
CONCLUSION

For the foregoing reasons, Tim requests that the Court hold, consistent with the *Opinion* of the Court of Appeal, that Petitioners lacked standing to assert the claims they did, and that therefore the judgment must be reversed. Should the Court disagree, and hold that beneficiaries such as Petitioners do have "standing" to assert a claim against a trustee for breach of trust while the settlor was alive and the trust was revocable, then the case should nevertheless be remanded to the Court of Appeal for further proceedings. The Court of Appeal held that the trial court committed several errors of law, mostly by improperly excluding relevant probative evidence, which under any circumstances require reversal of the judgment (although in such case, a retrial would presumably be ordered by the Court of Appeal).

DATED: March 22, 2012

BIDNA & KEYS, APLC

By: _____

Howard M. Bidna
Richard D. Keys
Jon A. Longerbone
Attorneys for Timothy W. Giraldin

CERTIFICATE UNDER RULE 8.520(c)

The undersigned certifies that according to the word count feature of the word processor program by which this brief was prepared, this brief contains 7,155 words, exclusive of the matters that may be omitted under CRC Rule 8.520(c).

DATED: March 22, 2012

Bidna & Keys, APLC

By: _____

Howard M. Bidna

Richard D. Keys

Jon A. Longerbone

Attorneys for Timothy W. Giraldin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1888 Century Park East, Suite 1900, Los Angeles, California 90067.

On March 22, 2012, I served true copies of the following document(s) described as

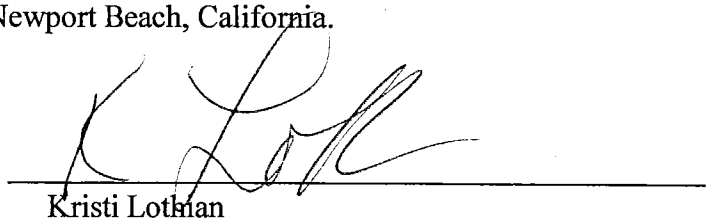
ANSWER BRIEF ON THE MERITS

on the interested parties inthis action indicted on the attached Service List.

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Bidna & Keys, APLC's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 22, 2012, at Newport Beach, California.



Kristi Lothian

SERVICE LIST

Stephen M. Lowe, Esq.
Jared A. Barry, Esq.
Freeman, Freeman & Smiley, LLP
1888 Century Park East, Suite 1900
Los, Angeles, California 90067
Phone (310) 255-6100
Fax: (310) 391-4042

Patricia Gray
1500 San Pasqual Street
Pasadena, CA 91106

Christine Giraldin
40080 Via Caballos
Murietta, CA 92562

Michael Giraldin
14051 Dall Lane
Tustin, CA 92780

Vicki Giraldin
24 Foxhill
Irvine, CA 92604

Mary Giraldin
75 Lakeshore
Irvine, CA 92604

Linda Rogers, Successor Trustee
c/o Stephen M. Magro, Esq.
Attorney at Law
14101 Yorba Street, Suite 101
Tustin, CA 92780

Claudia G. Kelly
478 Westridge Circle
Anaheim, CA 92807

Thomas W. Giraldin
1518 Sierra Lane
Los Banos, CA 93635-4645

James P. Giraldin
20370 Skyhawk Lane
Topanga, CA 90290

Timothy Giraldin
1 Westford
Ladera Ranch, CA 92694

Patrick W. Giraldin
8 Bennington Path
Ladera Ranch, CA 92694

Mark A. Ross, Esq.
Ross Law Group, APC
1901 Newport Boulevard, Suite 284
Costa Mesa, CA 92627
Phone (949) 631-3374
Fax (714) 540-9575
Attorneys for Appellant Mary Giraldin

Clerk, Court of Appeal
Fourth District, Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Clerk, Superior Court
County of Orange
Lamoreaux Justice Center
341 The City Drive
Orange, CA 92668