

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of WILLIAM A. GIRALDIN,
Deceased.

CHRISTINE GIRALDIN et al.,

Plaintiffs and Respondents,

v.

TIMOTHY GIRALDIN et al.,

Defendants and Appellants.

G041811

(Super. Ct. No. A240697)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed and remanded.

Bidna & Keys, Howard M. Bidna and Richard D. Keys, for Defendant and Appellant Timothy Giralдин.

Mary Giralдин, in pro. per.; Ross Law Group and Mark A. Ross, for Defendant and Appellant Mary Giralдин.

Freeman, Freeman & Smiley, Stephen M. Lowe, Duncan P. Hromadka and Thomas C. Aikin for Plaintiffs and Respondents.

* * *

At the trial of this trust administration case the parties presented radically different versions of the late William Giralдин’s capacity to make – and follow through with – his estate plan.¹ The plaintiffs, four of William’s nine children led by Christine Giralдин, presented substantial evidence William was an old and foolish man, not in anything approaching his perfect mind, and so much under the influence of his ambitious son Timothy that he barely knew enough to come in out of the rain. Timothy, by contrast, tried to present evidence William was crazy like a fox – the sort of devious rich old man straight out of an Agatha Christie story who, about to die, implements an idiosyncratic estate plan that leaves his children without much of an inheritance. Under Timothy’s version of the case, as long as William knew his widow Mary would be provided for, and William was able to support Timothy’s start-up company, William really didn’t care if he left much of anything to the rest of his children.²

The key word in the preceding paragraph is “tried.” Many times during the trial Timothy attempted to present evidence William was quite competent and fully intended to put the bulk of his estate at the service of Timothy’s venture. Of course,

¹ This case has now been before this court and then to the California Supreme Court. In this opinion we adopt the party designations used by our high court in *Estate of Giralдин* (2012) 55 Cal.4th 1058: Settlor of the William Giralдин revocable trust is called William, William’s widow Mary Giralдин is referred to as Mary, Christine and her three siblings who brought this action are called the plaintiffs, and defendant twin brothers Timothy and Patrick Giralдин are called Timothy and Patrick, respectively.

² Agatha Christie herself, easily the best selling author of the 20th Century, proved a model of the get-rid-of-most-of-it-before-death theory of estate planning. When her will was made public in April 1976, many people were astounded to learn her estate consisted of (for her) a truly modest £ 106,683. (See <http://www.christiemystery.co.uk/agatha_christie_biography.html> [as of Apr. 5, 2013] [“On Agatha Christie’s death, rumours abound of a multi-million pound fortune and a final book waiting to be published. However Christie was known to have been a shrewd businesswoman, anxious to avoid leaving too much of her personal fortune to the taxman. Agatha once said: ‘I only write one book a year now, which is sufficient to give me a good income. If I wrote more, I’d enlarge the finances of the Inland Revenue who would spend it mostly on idiotic things.’ [¶] •Dame Agatha Christie’s will was published on 30 April 1976 and revealed she had left only £106,683, having managed to dispose of most of her wealth before she died.”].)

William being dead by the time of trial, much of the evidence had to come from individuals who heard William's own words and could convey those words back to the court: Those witnesses included William's widow Mary, but also William's attorney James Mellor, William's next door neighbor Dr. John Moutsatson, and Michael Watson, a friend at the church William attended. And of course they also included the obviously interested twin brothers Timothy and Patrick, each of whom had a stake in Timothy's start-up company.

But the trial judge would hear none of it. He believed such evidence had to be excluded under the hearsay rule, and in fact told Timothy to "Go some place else" with his argument the evidence was offered to show William's state of mind.

After a trip to the California Supreme Court on the sole issue of standing, the high court has returned this case to us to decide the remaining issues. We have. As we explain anon, the excluded evidence was subject to the state of mind exception set out in Evidence Code section 1250 and should have been received. Moreover, the excluded evidence is particularly relevant in the wake of what the Supreme Court said about the nature of the plaintiffs' claims against Timothy. Now the focus is on how faithfully Timothy implemented *William's* intent, so William's state of mind is critical.

BACKGROUND

Though both our earlier, now vacated decision, and the now controlling *Estate of Giralдин* case contain relatively lengthy expositions of the facts, in the present posture the essential facts can be stated relatively quickly.³

William founded Mission Savings and Loan in the 1950's. It was later acquired by Washington Mutual. As we noted in our previous decision, in early 2002 he

³ In fact, because this case must go back for retrial, we keep our statement of facts deliberately short and as neutral as possible. Taking the Supreme Court's lead, most of these facts are distilled from our previous opinion. (See *Estate of Giralдин*, *supra*, 55 Cal.4th at p. 1062, citing Cal. Rules of Court, rule 8.500(c)(2).) While the Supreme Court's grant of review had the effect of depublishing that opinion (see Cal. Rules of Court, rule 8.1105(e)) it may still be cited or relied on to the degree it is relevant under the doctrines of law of the case, res judicata, or collateral estoppel. (Cal. Rules of Court, rule 8.1115(b).)

revoked his old estate plan and established a new revocable family trust, with Timothy as trustee. William was the sole beneficiary of the revocable trust during his lifetime. A few days after he signed the trust document he began transferring a portion of his assets to SafeTzone, a company started some years earlier by Patrick, Timothy's twin brother, in which Timothy had become a part owner.⁴ Altogether, from 2002 through William's death in 2005, roughly \$4 million of William's fortune would be funneled to SafeTzone via the trust, which ended up owning a substantial share of SafeTzone, and still does. Additionally, numerous distributions from the trust were made to Timothy and Patrick. (For purposes of this opinion we need not characterize the distributions, e.g., as either gifts, loans, or, as the plaintiffs have argued, outright raids on the trust's assets.⁵)

The SafeTzone investment went badly. When William died in May 2005 the trust's stake in the company was worth very little. Plaintiffs filed a petition in December 2006 to remove Timothy as trustee and compel an accounting; in an amended petition filed in January 2008 they also sought to surcharge Timothy for losses to the trust as a result of alleged violations of his fiduciary duties during his trusteeship, most notably of course, the SafeTzone loss. The case went to trial, including a petition from William's widow Mary to confirm her community property interest in two homes, Lakeshore and Lake Hume. The trial court found William lacked the mental capacity to undertake the SafeTzone investment or understand certain documents he had signed. The court entered an order surcharging Timothy about \$4.3 million for the SafeTzone investment and another \$625,000 for various undocumented disbursements from the trust. The court also declared William's widow had elected to choose the benefits of the trust over her community property rights, and in that regard ruled the Lakeshore and Lake Hume

⁴ The basic idea was a system which would allow parents to know where their children were in a space like an amusement park or cruise liner.

⁵ There was testimony from James Mellor, the attorney William used for his 2002 estate plan, that William wanted to give away money but call it loans which would be forgiven at death, so as to avoid gift taxes.

properties were part of the trust, i.e., Mary was going to lose out with the rest of the beneficiaries of the trust. Both Timothy and Mary then appealed.

THE LITIGATION

In our previous opinion, we decided two issues: One was straightforward and legal – standing. How could the plaintiffs be aggrieved about what William did with *his* assets during *his* lifetime? The other was highly factual, and factually sharp-edged as the proverbial serpent’s tooth. The plaintiffs claimed their mother voluntarily relinquished her community property rights in favor of what she would receive under the trust, and those rights included her community interests in two houses known as Lakeshore and Lake Hume which plaintiffs argued were part of the trust corpus.

On the first issue, we decided the *plaintiffs* had no standing to complain about anything Timothy did as trustee during William’s lifetime because Timothy’s duties as trustee were owed solely to William, not to plaintiffs. That lack of standing obviated the great bulk any claims the plaintiffs had against Timothy, because most of what the plaintiffs have claimed as malfeasance – certainly the investment in SafeTzone – was done during William’s lifetime and ostensibly at his direction.⁶

As to the more serpentine issue, after wading through the minutiae of whether the Lakeshore and Lake Hume properties were in, or out, of the trust, we concluded both properties were *outside* the trust, and therefore Mary retained her community interest in those properties.

The Supreme Court granted review on the *sole* issue of standing resulting in *Estate of Giralдин, supra*, 55 Cal.4th 1058. It is important to understand precisely what the Supreme Court did, and did not, hold there.

⁶ We noted, however, that the record made it impossible to separate those surcharges based on actions Timothy took after William’s death from those actions taken before, hence on remand the plaintiffs would retain the right to seek a new accounting based on actions post-death. We affirm that right in this opinion.

The Supreme Court *agreed* with us that during the time the settlor of a revocable trust is alive, the trustee (who is more often than not the settlor himself or herself) need only account to the settlor – not to any beneficiaries who might have an interest in the remainder of the trust. (*Estate of Giralдин, supra*, 55 Cal.4th at p. 1062.) However, the Supreme Court disagreed with us on the issue of whether beneficiaries still have *standing, after* the settlor’s death, to bring the trustee to account for violations of his duties to the settlor during the settlor’s life. The high court illustrated its point with the hypothetical of a trustee who takes trust money “unbeknownst to and against the wishes of the settlor” – and the quoted words are extremely important for this case – and dissipates trust funds on a six-month cruise around the world. (*Id.* at p. 1071.) That is remediable by the beneficiaries, even after the settlor’s death. Trustees are not allowed to “loot a revocable trust against the settlor’s wishes without the beneficiaries’ having recourse after the settlor has died.” (*Ibid.*) Having decided the standing issue, the Supreme Court then returned the case to this court with directions to decide the remaining issues.

DISCUSSION

A. *Issues Decided in Wake of the Supreme Court’s decision*

The first thing we note is that the Supreme Court did nothing about our determination that Mary’s community property interests in Lakeshore and Lake Hume remain intact. That determination is now final. Whatever else comes of the case on remand, Mary gets to keep her community interest in those two properties. (See *Howard v. Babcock* (1993) 6 Cal.4th 409, 426, fn. 9 [“Our grant of review was limited to the question whether article X of the partnership agreement is void, and our reversal only affects the judgment of the Court of Appeal to the extent that court’s orders were based on the conclusion that article X of the partnership agreement is void.”].)

Second, two of the five issues raised in Timothy’s opening brief are logically subsumed by the Supreme Court’s holding on the standing issue. Those are

Timothy's argument four, that the plaintiffs are barred by laches or the statutes of limitation, and Timothy's argument five, that Probate Code section 16460 bars their claims.

The statute of limitations for claims against trustees for breach of trust is set out in Probate Code section 16460, and it is three years. (See generally *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853.) The Supreme Court's opinion makes it clear the plaintiffs *couldn't* have brought an action prior to William's May 2005 death, so their December 2006 action is easily timely. Moreover, since Timothy never provided any accountings until the litigation began, the time lapse between May 2005 and December 2006 can hardly suggest the plaintiffs sat on their rights as a matter of law, since the basic theory of the statutory scheme is that the statute of limitations begins to run from the time an accounting is rendered which "adequately discloses" the existence of a claim. And here the plaintiffs did not receive any accounting until well into the litigation.

B. *The Hearsay Issue*

1. *Sustained Hearsay Objections*

The surcharge order was based on the trial judge's determination that by 2001 William lacked the mental capacity to authorize the SafeTzone investment or any other transaction Timothy undertook with regard to the trust.

The opening brief asserts that no less than 50 times the trial judge sustained hearsay objections to evidence proffered by Timothy. The figure may or may not be accurate, since it is not supported by record references, but we can say, based on the record references the brief does provide, that the trial court excluded nine areas of evidence, all relevant as to either William's mental ability, intent in making his estate plan, or both:

(1) William's widow, Mary, was not allowed to testify to her conversations with William about the decision to fund SafeTzone or why he changed estate planning attorneys in 2001-2002.

(2) Dr. John Moutsatson, one of William's neighbors, was not allowed to testify about what William told him about the SafeTzone investment.

(3) SafeTzone's attorney, Regan Kelly, was not allowed to testify whether he had suggested William obtain independent advice regarding the investment in SafeTzone. Nor was Kelly allowed to testify about what he and William discussed when William signed an agreement which committed William to invest \$4 million in SafeTzone, or about what William said regarding the investment generally.

(4) Timothy was not allowed to testify about what William said regarding Timothy's going to work for SafeTzone or what Timothy and William had discussed about SafeTzone's funding needs.

(5) Tom Giralдин was not allowed to testify to what William said, even about topics other than SafeTzone, such as the size of a house Tom was appraising, William's ability to give directions to his doctor's office, or William's awareness of his surroundings when Tom and his wife answered the door and William was there. Tom wasn't even allowed to testify about William calling him to tell him about a television program on SafeTzone or what William said when he discussed the investment with SafeTzone's attorney.

(6) Patti, one of William's daughters (and one of the plaintiffs) was not allowed to testify to a falling out that resulted in Mary slapping Patti's husband, or about Patti's discussions of the incident with William.

(7) William's son (and Timothy's twin brother) Patrick was not allowed to testify to conversations he had with William about what William thought of the SafeTzone investment.

(8) Brian Germane, who was married to one of William's granddaughters, could not testify about William's ability to recall the exact amount of money that William had loaned Brian.

(9) Michael Watson, a friend of William's at the church both attended for 10 years up through 2004, was not allowed to testify about the details of any conversation with William.

Most of the excluded testimony went directly to William's *intent* to dispose of the great bulk of his estate via the SafeTzone investment. (See items (1) through (4), part of (5), (6), (7) and possibly (9).) In the wake of the Supreme Court's opinion in *Estate of Giralдин*, however, intent is indispensable, ironically enough, to the *plaintiff's* case. When the case was first tried, plaintiffs' theory was that Timothy had a duty *to them* during William's life to safeguard the trust corpus. As *Estate of Giralдин* now makes clear, the plaintiffs only have standing to assert violations, prior to William's death, of Timothy's duty *to William*. And that issue self-evidently cannot be decided without evidence of William's intent and mental state toward the SafeTzone investment. (See *Young v. McCoy* (2007) 147 Cal.App.4th 1078, 1087 ["But whether a trustee exercises her discretion appropriately or abusively is measured by how this exercise conforms to the trustor's intent."].) In that sense, the wheel has come full circle: *Estate of Giralдин's* point was that a trustee cannot do things with trust property "unbeknownst to and against the wishes of the settlor." The issue is now precisely what *were* William's wishes.

There is no question that out-of-court statements by a decedent bearing on his or her intent to make an investment or a transfer of money are not precluded under the hearsay rule. (*Whitlow v. Durst* (1942) 20 Cal.2d 523, 524 ["When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving."]; *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326, 331-334 [evidence that decedent had belief he had been "tricked" was admissible, though of course such

evidence was inadmissible to show he really had been tricked].⁷⁾ Significantly, the *Truckenmiller* case makes it clear that a statement of belief on the part of a decedent comes within Evidence Code section 1250's state of mind exception to the hearsay rule.⁸

The same may be said for such excluded evidence as related to William's mental state. (See items (5) (partly) and (8) and (9).) Evidence of mental competency is within the state of mind exception to the hearsay rule, as shown by *Estate of Russell* (1922) 189 Cal. 759. Mental competence was squarely at issue there, where a testator developed the belief that the woman he had regarded as his daughter for 42 years actually wasn't. Specifically, after suffering a stroke, he told the story of finding the mother of that daughter – his first wife – in bed with another man when his daughter was about three and one-half years old. (See *id.* at pp. 764-766, 770.) He didn't include the daughter in his will, but she successfully contested it using the evidence of the story about finding the first wife in bed with another man. And the judgment in her favor was upheld by our Supreme Court as against a challenge that the evidence admitted to show his incompetency should not have been admitted.

⁷ *Truckenmiller* is a fine example of judicial parsing. An old widower was apparently caught in flagrante delicto by a woman's husband, and thereafter claimed he had been "tricked" into putting a certain duplex into joint tenancy with the woman. (*Truckenmiller, supra*, 97 Cal.App.3d at pp. 329-330.) After his death, the administrator of his estate sought to set aside the gift of the interest in the duplex on the theory of undue influence exerted on the widower by the lady and her husband. The administrator lost, and claimed it was error for the trial judge to have excluded testimony the widower told two people before his death he had been so "tricked." While the appellate court affirmed, the court was careful to note that the widower's statement he *believed* had he had been tricked was admissible to show what he believed but not, of course, to show he *actually* had been tricked. (See *id.* at pp. 333-334 ["The declarations by Mr. Truckenmiller contained both admissible evidence of his state of mind at the time he made the gift (a belief that he had been 'tricked'), and inadmissible hearsay statements (Mr. Wells caught him in bed with Mrs. Wells and that they 'tricked' him). Under such circumstances Evidence Code section 355 authorized the trial court to exclude the inadmissible hearsay, and admit evidence of decedent's state of mind for that limited purpose."].) Despite the admissibility of the statement to show state of mind, the administrator lost the case because the error was not prejudicial, because in *Truckenmiller* showing state of mind was not enough; the administrator needed to show the donees had *in fact* tricked the widower. (*Id.* at p. 334.)

⁸ As illustrated by this passage: "An out-of-court declaration of the then existing state of mind of declarant or of his state of mind at any other time is admissible to prove the existence of the past state of mind so long as: the declarant is unavailable, there are no circumstances indicating a lack of trustworthiness in the statements, the state of mind is an issue in the case, and the declaration is not used to prove directly or circumstantially declarant's acts or conduct in conformity with that past state of mind, or to prove the fact remembered or believed in the declaration. (Evid. Code, §§ 1250-1252; Jefferson, Cal. Evidence Benchbook (1972) State of Mind or Physical Sensation, § 14.3, p. 178.)" (*Id.* at pp. 331-332, fn. omitted.)

The court reasoned that given there was no evidence to show the incident about finding the first wife in bed with another man was actually true, and the fact paternity had been undisputed for some 42 years, it followed the evidence of his telling people the story was evidence of, at best, a false belief, and at worst an “insane delusion.” (*Estate of Russell, supra*, 189 Cal. at pp. 770-771.) In any event, it was not error to admit the evidence strictly to show the decedent’s state of mind, i.e., his belief in something between a mere falsity and a full-fledged delusion.⁹

The question arises as to whether, statutorily, the excluded testimony outlined above should have been admitted under (1) Evidence Code section 1250’s “state of mind exception,”¹⁰ (2) Evidence Code sections 1260 and 1261’s allowance of certain decedent testimony concerning wills and estates,¹¹ or (3) both. The plaintiffs contend the

⁹ We note in *Estate of Russell* another close analysis of the hearsay rule, adumbrating what *Truckenmiller* would later say (and already quoted in footnote 7 above): “Evidence that the testator, in his later years, told this story to several persons was competent for the purpose of proving that he then believed such to be the fact, but it is pure hearsay and wholly valueless for the purpose of proving that such an incident had *in fact* occurred.” (*Id.* at pp. 770-771, italics added.)

¹⁰ “(a) Subject to Section 1252, evidence of a statement of the declarant’s then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

“(1) The evidence is offered to prove the declarant’s state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

“(2) The evidence is offered to prove or explain acts or conduct of the declarant.

“(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.”

¹¹ “(a) Except as provided in subdivision (b), evidence of any of the following statements made by a declarant who is unavailable as a witness is not made inadmissible by the hearsay rule:

“(1) That the declarant has or has not made a will or established or amended a revocable trust.

“(2) That the declarant has or has not revoked his or her will, revocable trust, or an amendment to a revocable trust.

“(3) That identifies the declarant’s will, revocable trust, or an amendment to a revocable trust.

“(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances that indicate its lack of trustworthiness.”

The text of Evidence Code section 1261:

“(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear.

“(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.”

excluded testimony – going to a claim against the trustee of a trust as distinct from the existence of a will or a claim against an estate as such – doesn’t quite fit the language of either section 1260 or 1261 of the Evidence Code. Perhaps it doesn’t. Given *Truckenmiller*, however, we may certainly say the evidence should have been admitted under section 1250, and that is sufficient.

C. *The Two Remaining Issues*

Finally, Timothy’s opening brief presents two fact-based arguments: Argument two, that because William told Timothy he would not be the trustee until William’s death, Timothy could not be liable for violating duties as trustee; and argument three, that because William formed the decision to invest in SafeTzone prior to the formation of the trust, Timothy cannot be held liable for the trust’s investment in SafeTzone.

It is immediately apparent that both arguments are heavily factual, and both depend on what the trial court may yet find as regards William’s intent and mental competency when it hears the excluded evidence bearing on William’s intent and competency previously excluded – *and* evaluates that evidence in light of *Estate of Giralдин*. In that regard, both arguments also go to an issue not previously in focus until the Supreme Court’s opinion, namely the precise nature of William’s intent *and* Timothy’s duties *to William*, as distinct from the remainder beneficiaries of the trust. It is premature for us now to address these arguments.¹²

Both sections were enacted in 1965 in conjunction with the repeal of the old “dead man statute” (former Code Civ. Proc., § 1880, subd. (3)), which previously hadn’t allowed any testimony about any fact occurring before the decedent’s death. (See Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1995 ed.) foll. § 1261, pp. 308-309.)

¹² Even though this case is being reversed for retrial, Code of Civil Procedure section 43 does not apply to Timothy’s arguments two and three because those arguments do not raise unalloyed “questions of law necessary to the final determination of the case.” Moreover, on remand this case may involve issues hardly touched on in the briefing. The core issue that will govern remand as framed by the high court in *Estate of Giralдин* – the duty of a trustee to a living sole beneficiary of an inter vivos trust who has *not* been declared mentally incompetent – poses some questions on the very frontiers of trust administration law. After all, the trustees of most living trusts are the beneficiaries themselves, and they are liable to do some very strange things with their assets. We decline to address such exotic and factually intense issues until we are presented with a fully developed record on them.

DISPOSITION

The surcharge order is reversed, and that matter remanded for further proceedings consistent with this opinion. Mary will recover her costs on appeal if she has not already done so. Because our decision is interlocutory as regards the plaintiffs' claims against Timothy, we do not award appellate costs to either the plaintiffs or Timothy now, but accord the trial judge discretion to award the appellate costs of this proceeding to the party who prevails at the conclusion of the litigation. (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1401.)

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.