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LIU, J.

Supreme Court Docket No. _____

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

PETITION FOR REVIEW

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I. QUESTIONS PRESENTED

1. When a trustor appoints a third person as trustee of a revocable trust, can remainder beneficiaries seek relief after the trust becomes irrevocable for misconduct by the trustee during the period of revocability.

2. Whether the Court of Appeal failed to determine whether substantial evidence existed to support the Trial Court's findings of capacity and whether certain property was held in a Decedent's Trust.

II. PRELIMINARY STATEMENT OF WHY REVIEW IS NECESSARY

Statutory grounds for review exist under California Rules of Court, Rule 8.500(b), in that the published opinion of the Fourth Appellate District of the Court of Appeal (the "Opinion") expressly declined to follow existing California case law which was precisely on point with the facts and law of the case. Prior to the Court of Appeal review, both sides assumed that Petitioners had standing to bring their petition pursuant to *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, but the Court of Appeal decided on its own not to follow the only controlling case and to initiate its attack on the rights of beneficiaries to recover for trustee misconduct. There is now a split of authority in appellate courts and the Supreme Court has not issued

any prior opinions on the subject. Review by the Supreme Court is necessary to ensure uniformity in an important area of trust law.

The Opinion eliminates one of the methods for protecting elders in California from abuse. Californians increasingly make use of revocable trusts to hold their assets, to avoid the necessity of costly and time-consuming conservatorships and probates. While trusts make testamentary dispositions of property like a will, unlike a will, trusts create the possibility that a person other than the trustor may become the trustee while the trust is still revocable and gain immediate control over the trust assets. Revocable trusts are thus both a powerful tool for ensuring that wealth is preserved and passed on, but can also be abused as a tool to empower an individual to wrongfully take control of a vulnerable elder's assets, and use them for his own gain, often without the knowledge of the elder's family and heirs.

While the savings that trusts provide by avoiding court proceedings are beneficial, the opportunity for misconduct by a non-settlor trustee is facilitated. When a person has wrongfully taken control of an incapacitated person's wealth by becoming a trustee, and has taken actions without obtaining the settlor's consent, holding that individual accountable as a fiduciary under the trust instrument and Trust Law (Division 9 of the Probate Code § 15000 *et* seq.) is an efficient, effective and necessary legal remedy for the protection of elders in this state.

Here, certain beneficiaries of a family trust, Christine Giraldin, Patricia Gray, Michael Giraldin and Philip Giraldin[1] (collectively "Petitioners") sought to have its Trustee, Timothy Giraldin ("Tim"), held accountable for breaches of trust during Trustor William Giraldin's ("Bill") lifetime, including a four million dollar investment in a startup company in which Tim had a substantial interest. If Bill had directed Tim to take the actions in question, the beneficiaries would have been prevented from making these claims. However, after a lengthy trial, substantial evidence showed Bill did not have capacity to understand the documents he signed, which were offered by Tim as "written directions" pursuant to the applicable terms of the Trust. The Trial Court found that Tim used the Trust for his own benefit, and without Bill's consent, which resulted in a loss of more than four million dollars, approximately two-thirds of the Trust estate. The Trustee's misconduct effectively destroyed Bill's estate plan to benefit his wife and then all of his children equally. The Opinion reversed all orders of the Trial Court based on its holding that beneficiaries have no standing to hold a trustee accountable for periods during the trustor's lifetime when the trust is revocable.

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[1] Philip Giraldin passed away after the Trial Court's order and is no longer a party,

Tim violated numerous codified fiduciary duties by acting in his own interest rather than Bill's. Tim was granted power over Bill's property when he accepted his position as Trustee, but California law has always tempered this power with requirements as to how the trustee must act. Thus, by using a trust and appointing someone else as trustee, Bill could avoid the cost and embarrassment of a conservatorship, but his intended beneficiaries still were protected from trustee misconduct.

The Opinion eliminates this protection. In the Opinion, the Court of Appeal expressly declined to follow an existing case, *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, a case from the First District of the Court of Appeal, which was factually and legally analogous to Petitioners' claims. *Evangelho* allowed the remainder beneficiaries, following the death of the trustor, to compel a trust accounting from a third party trustee during the trustor's lifetime, subject to the discretion of the trial court. The Opinion holds there is no standing to compel such an accounting no matter how egregious the circumstances of the Trustee's conduct were. As a result, there is now a conflict in authority in California law as to whether this additional protection for the elderly is still available for the only persons who are likely available to police this misconduct, the remainder beneficiaries.

III. BRIEF STATEMENT OF UNDERLYING FACTS

Petitioners are four of the nine natural or adopted children of Bill. Respondents Tim and Patrick Giraldin ("Patrick") are two of other children. In his career, Bill founded a Savings & Loan Association, which was ultimately acquired by Washington Mutual and resulted in Bill's acquisition of millions of dollars in Washington Mutual stock. Bill had always managed and controlled his and his family's financial affairs.

Bill executed the William A. Giraldin Trust which was originally executed by Bill as trustor and trustee on February 25, 1997, and amended four times ("the Initial Trust"). The Initial Trust and amendments were all prepared by Bill's long time estate planning attorney, Scott Richmond, Esq. ("Richmond"). Only two months after the fourth amendment was executed, Tim referred Bill to a new estate planning attorney, James Mellor, Esq. ("Mellor"), in October 2001, for whom Tim's wife had previously worked. Tim arranged for and attended meetings between Mellor, Bill and him to create a new trust which named Tim as Trustee.

On February 11, 2002, Bill executed an entirely new trust instrument (the "Trust"), prepared by Mellor, in place of the Initial Trust and amendments. Tim signed the Trust as the sole Trustee. The Trust departs from Bill's earlier estate plan by immediately appointing Tim as the sole Trustee, whereas Bill was the trustee of the Initial Trust (and amendments) followed by four of his children as successor co-trustees. Bill was the sole

beneficiary of the Trust during his lifetime and entitled to net income and principal of the entire Trust in his or the Trustee's discretion. During Bill's lifetime, he retained the right to add or remove property from the Trust; amend or revoke the Trust; appoint or remove a trustee; and direct and approve the Trustee's actions, including investment decisions. However, these rights could only be exercised by a signed writing by Bill delivered to the Trustee. After Bill's death, the remaining corpus was available for use by his surviving spouse, Mary, and then to be divided equally among all his children. Only after Bill's death did Petitioners learn of the existence of the Trust, even though several of his children had been aware of, and named as successor trustees, in the Initial Trust.

Immediately prior to Tim becoming Trustee, the Trust owned approximately $3.4 million of Washington Mutual common stock which constituted about 50% of the Trust corpus, with the remainder of the corpus in diversified investments such as energy stocks, government securities, and real estate limited partnerships, and approximately $1 million in real estate, including his residence and a cabin in Fresno County, California.

SafeTzone Technology Corporation ("SafeTzone"), was a start-up company partially owned and formerly controlled by Tim and Patrick. Immediately after Tim became Trustee in February 2002, he began the process of liquidating nearly all of the Trust's securities holdings and investing over $4 million in SafeTzone over a period of less than one and a

half years. The Trust's dependable, diversified investments, built up by Bill over many decades, were traded for an investment in a risky start-up venture, SafeTzone, that had only one other financial investor at the time and had lost millions of dollars since its inception. On May 23, 2008, Tim delinquently filed a verified First Account Current (the "Accounting"). In the Accounting it was disclosed that as of December 31, 2007, the SafeTZone investment was essentially worthless.

The Accounting also disclosed numerous disbursements or loans to Tim and to select family members for which he had no explanation or backup. One disbursement was made in violation of a restraining order. None of the loans was memorialized in writing and no terms of the purported loans are disclosed by the Accounting. Tim stated in his testimony that all of these loans were made pursuant to oral instructions from Bill and that they were forgiven according to the terms of the Trust.

Finally, the Accounting shows a total of $4,050,000 invested in SafeTzone by the 2002 Trust between February 28, 2002 and May 6, 2003. A portion of the money received by SafeTzone from the Trust ($50,000) on the same day of the Trust's initial investment is characterized as a "loan," rather than an investment. There is no writing, however to substantiate the purported loan, there are no terms of the loan, and the Trust did not receive any SafeTzone stock or other consideration for the $50,000 given to

SafeTzone. The only possible conclusion is that the Trustee made a $50,000 oversight.

IV. PROCEDURAL HISTORY

On December 1, 2006 Petitioners (and Philip Giraldin) filed their Petition for 1) Removal of Trustee; 2) Suspension of Powers; 3) Appointment of Successor Trustee; 4) Compel Trustee to Report and Account; and 5) Attorneys' Fees against Tim (the "Petition"). On January 17, 2007, Tim filed his response to the Petition.

On January 18, 2007 Mary filed a spousal property petition (the "Spousal Property Petition"). On May 2, 2007, Petitioners filed their objection to the Spousal Property Petition.

On January 8, 2008, Petitioners filed an amended Petition (the "Amended Petition"). On February 4, 2008, the Court ordered that Tim file an accounting of the Trust on or before April 11, 2008. The Accounting was filed and served late, on May 23, 2008. On August 4, 2008, Petitioners filed their Objections to the Accounting.

Trial on the petitions and objections commenced on October 29, 2008 before Hon. David R. Chafee (hereinafter the "Trial Court"). A final statement of decision in favor of Petitioners was filed on December 19, 2008, as well as Orders on the Amended Petition and Settlement of the Accounting.

Tim filed a notice of appeal jointly with Mary and Patrick on March 10, 2009. The Notice of Appeal specifically stated that the order being appealed included the following:

i) the December 19, 2008 Order Settling First Account Current and Report of Trustee and for Its Settlement;

ii) the December 19, 2008 Order on Amended Petition for 1) Removal of Trustee; 2) Suspension of Powers; 3) Appointment of Successor Trustee; 4) To Compel Trustee to Report and Account; 5) For Attorneys' Fees; and 6) For Recovery of Trust Property; and

iii) the December 19, 2008 Order on the Spousal Property Petition. [*Id.*].

Mary and Tim filed their respective Opening Briefs on February 3, 2010. Petitioners filed their combined Respondents' Brief on July 19, 2010. Tim and Mary filed their respective Reply Briefs on October 8, 2010. On March 7, 2011, the Court of Appeal issued an order requesting further briefing from the parties relating to the issue of standing. Petitioners filed their Supplemental Brief in Response to the March 7, 2011 Order on April 6, 2011. Tim filed a Supplemental Brief on April 26, 2011, and Petitioners filed a Reply Supplemental Brief on May 6, 2011. On June 2, 2011, Petitioners filed a Letter Brief in Response to the Court's March 7, 2011 Order. The parties presented oral argument on September 21, 2011, and on September 26, 2011 the Court of Appeal issued its Opinion, which reversed the orders of the Trial Court.

Petitioners did not file a petition for re-hearing with the appellate court because no grounds for such a petition existed under Rule 8.500.

V. REVIEW IS NECESSARY TO PREVENT A SPLIT IN AUTHORITY AMONG CALIFORNIA COURTS AS TO REMEDIES AVAILABLE TO BENEFICIARIES FOR BREACH OF TRUST

A. The Court of Appeal Expressly Declined to Follow *Evangelho v. Presoto* and the Facts of the Instant Case were Wholly Consistent with that Case

In its Opinion, the Court of Appeal acknowledged that the Trial Court had ruled in accordance with the case of *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615 ("*Evangelho*"), but expressly held it found *Evangelho* "unpersuasive, and decline[d] to follow it." (Opinion, pg. 20). *Evangelho* was factually and legally analogous to Petitioners' claims, and should have been followed by the Court of Appeal. In addition, Petitioners' claims are even stronger than those in *Evangelho* because as an added element, the Trial Court considered and found that Bill lacked capacity.

In *Evangelho,* a woman, Joan Evangelho, created a revocable trust. *Evangelho*, 67 Cal.App.4th at 618. The case concerned the actions of defendant Presoto as trustee of the trust. Among the assets of the trust was a PaineWebber brokerage account which at the time the trust was created had a value of approximately $450,000, but at the time of decedent's death the account was worth approximately $132,000. *Id.* at 619. Following decedent's death, the petitioners then filed a petition under Probate Code § 17200(b)(7) to "compel trustee to account to beneficiaries and to compel

redress of breach of trust." *Id.* This petition sought an accounting from the date the trust was created. *Id.* Presoto relied on Probate Code § 15800 to assert that the beneficiaries could not compel an accounting for any time when the trust was revocable. *Id.* at 623.

The *Evangelho* court held that the clear import of Probate Code §§ 15800 and 16069[2] was to postpone the enjoyment of rights under the trust law by contingent beneficiaries while the settlor could revoke or modify the trust. *Id.* at 623-24. However, "when the person holding the power to revoke dies, the rights of contingent beneficiaries are no longer contingent. Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under division 9, the trust law." *Id.* at 624.

Evangelho also considered the overall purpose of the legislature in enacting these sections and found "the actual words of the code sections and the Law Revision Commission reveal the will of the Legislature to be that only decedent as settlor could compel an accounting while she was alive and competent. But once decedent died, the right to compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id.* As to the specific remedies available to the beneficiaries, *Evangelho* holds that "regarding the scope of the accounting, the code sections grant broad equitable powers for the protection of beneficiaries. The matter of determining the appropriate equitable relief to

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[2] When *Evangelho* was decided, the present text of Probate Code §16069(a) - "in the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked" was included in Probate Code §16064(b). See *Evangelho*, 617 Cal.App.4th at 623, fn. 6. This language was moved to section 16069 *unchanged* in the 2010 revisions to the Probate Code.

be granted to a beneficiary is generally left to the good judgment of the trial court." (citing *Rivero v. Thomas* (1948) 86 Cal.App.2d 225, 238.) *Id.* Therefore, "[the trustee's] conduct can be attacked for fraud or bad faith and an accounting compelled for improper acts which had been hidden from the ultimate beneficiaries." *Evangelho*, 67 Cal.App at 624.

Under *Evangelho*, the rights of the beneficiaries to enforce an accounting were "postponed," which is distinct from saying they do not exist. "When the person holding the power to revoke dies, the rights of contingent beneficiaries are no longer contingent. Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under division 9, the trust law." *Evangelho,* 67 Cal.App at 624. "Once the decedent died, the right to compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id.*

Petitioners, like the beneficiaries in *Evangelho*, properly brought a petition compelling Timothy to account for the Trust from the date of its creation (February 11, 2002), through the date of Bill's death, May 5, 2005, which was granted. This order is the same as the order in *Evangelho* as it requires an accounting for the period of revocability after the trust become irrevocable. The Opinion holds that there is no such right, no standing and no recourse for the misconduct revealed by the court-ordered accounting.

B. The Holdings of *Evangelho* Have Not Been Controverted by Subsequent Decision as Argued by the Court Of Appeal

The Court of Appeal endeavored to support its disregard of *Evangelho* in light of several subsequent California appellate court

decisions on points of law relating to revocable trusts and the Probate Code. However, none of these decisions expressly or impliedly disapprove of the result in *Evangelho.* One case cited in the Court of Appeal's Opinion, *Johnson v. Kotcyk* (1999) 76 Cal.App.4th 83, does not affect the *Evangelho* decision, and in fact is logically consistent. In *Johnson*, a beneficiary of a trust sought accountings while the settlor of the revocable trust was still alive, but subject to a conservatorship. The beneficiary argued that Probate Code section 15800 did not apply as the trustor of the trust could no longer revoke it as she had become incompetent. The *Johnson* court disagreed and relied upon Probate Code § 2580 to determine that the conservator, in conjunction with the probate court, was the person holding the power to modify or revoke the trust instrument, and was competent to do so. As the rights still were held by a living trustor pursuant to section 15800, the remainder beneficiary had no ability to compel an accounting. Thus, the holdings of *Johnson and Evangelho* are entirely consistent. During the lifetime of the settlor, the remaining beneficiaries have no standing to seek an accounting (*Johnson*), but they do have standing to do so at the discretion of the trial court after the settlor dies (*Evangelho*). Petitioners do not assert that they could have compelled an accounting from the Trustee while Bill was alive, even if he was incompetent. When Bill died, however, the Trust became irrevocable and all the postponed rights under the Trust became actionable by the now vested beneficiaries.

Similarly to *Johnson*, the Court of Appeal stated that one of its reasons for not following *Evangelho* was a subsequent Supreme Court opinion, *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, based upon language in that case which affirmed that a "settlor with revocation power 'retains the power and control of the trustee and can with a stroke of

the pen divest the beneficiaries of their interest." *Steinhart* at 1320. The Court of Appeal specifically referenced its belief that *Evangelho* "did not have the benefit of the Supreme Court's opinion in *Steinhart* [citation omitted] with its clear explanation of the nature of a revocable trust, to aid in its interpretation of Probate Code Section 15800." *Steinhart*, however, concerned an entirely different subject matter, namely an appeal of an assessment of property tax and specifically when a change in ownership of real property occurred for purposes of Proposition 13. *Steinhart,* 47 Cal.4th at 1303.

The point of law referenced in *Steinhart* on which the Court of Appeal relied, that a settlor of a revocable trust can divest beneficiaries of their interest, is law that was well established in 1998 when *Evangelho* was decided and indeed for many decades prior. In fact, the citation in question actually cites to cases from 1923 and 1948 for this proposition. *Id.* at 1319-1320. *Steinhart* does not introduce any new law or concepts which alter the result in *Evangelho*. Petitioners do not dispute that they could have been divested of their beneficial interest during Bill's lifetime and while he was competent. They were not divested. All petitions in this case occurred following Bill's death. Petitioners sought redress for Tim's actions that were made while Bill lacked capacity, for which he did not have Bill's consent and which were egregious breaches of the Trust.

The probate statutes referenced in the Opinion, Probate Code §§ 15800 and 16069 similarly did not change the applicable law between *Evangelho* and *Steinhart*. Section 15800 has continuously provided that Tim's duties were owed to Bill "during the time the trust was revocable." The critical language in Probate Code § 16069(a), which was formerly § 16064(b) in 1998 when *Evangelho* was decided, did not change, except

for the number of the statute. These Probate Code sections which pertain to rights and duties in the period while the Trust is revocable, alternate in their description of the applicable period. One (section 15800) "during" and the other [16069 and previously 16064(b)] saying "for." *Evangelho* which relied upon both sections, used the two words interchangeably. *Evangelho, 67* Cal.App.4th at 623. This is not inconsistent with the ordinary definitions ascribed those words as synonyms of "while." The Court of Appeal in its Opinion improperly relied on the difference in the word used without regard to the synonymous definitions. (Opinion, at page 22.) As *Evangelho* was not overruled or superseded, it should have been binding upon the result in this case.

C. The Opinion is Based in Large Part on an Incorrect Conflation of Two Different Sections of the Trust

The Trust contains two sets of provisions concerning the Trustor's rights to direct the actions of the Trustee. Section 2.6 provides that the Trustor reserved the "right to direct and approve the Trustee's actions, including the Trustee's investments decisions." Section 2.6 provides that the Trustor's approval of the Trustee's actions shall be binding upon all other beneficiaries. Section 2.8 provides that the Trustor may exercise the rights reserved in Section 2.6 "only by a signed writing delivered to the Trustee." Section 3.1 of the Trust concerns distributions of income and principal to Bill by the Trustee and states "during my lifetime, the Trustee shall distribute to me that amount of net income and principal as I direct" and by contrast "Also, the Trustee is authorized to distribute to me that

amount of net income and principal, up to the whole of the trust estate, as the Trustee deems appropriate in the exercise of his or her discretion, using my accustomed manner of living as a guide and without regard to my other sources of support. The Trustee shall exercise this discretion in a liberal manner, and the rights of remainder beneficiaries shall be of no importance."

The Court of Appeal improperly conflated these two sections of the Trust, which have entirely different purposes. In the Opinion, the Court of Appeal gave a hypothetical example of a trustor who requests money to take his mistress on a six-month cruise around the world. (Opinion, p. 21). This scenario would fall squarely under Section 3.1 of the Trust as a direct distribution to the Trustor or for his health, support and maintenance. It is patently obvious that this section exists to allow the Trustor to have whatever he wants during his lifetime and no one can challenge the Trustee for accommodating that.

The issue the Court of Appeal was charged with deciding, however, was not a distribution for Bill's benefit. Instead, the issue was whether the Trustee's actions or investment decisions were approved or directed by a signed writing delivered to the Trustee as required by Section 2.6. The Court of Appeal simply ignored that this case involved signed writings offered by the Trustee and the Trial Court's findings that the Trustor had insufficient capacity to understand the writings he signed. The writings

were a Gift Acknowledgment that primarily dealt with a gift to a child, and other corporate documents which were prepared by the corporation which were neither approvals nor directions to the Trustee. The Trial Court found that the Trustor lacked capacity to understand these documents as written directions and that finding was supported by substantial evidence that was ignored by the Court of Appeal.

The Trust language requiring written directions simply follows comparable language in Probate Code section 16001 which provides in pertinent part that "the trustee of a revocable trust shall follow any *written* direction acceptable to the trustee given from time to time (1) by the person then having the power to revoke the trust or the part thereof with respect to which the direction is given . . . ." (Emphasis added.)

Under Section 2.6, Bill could only direct the investments of the Trust and actions of Tim as Trustee by signed instructions delivered to Tim. No written instructions were provided with respect to the SafeTzone investment or the hundreds of thousands of dollars in loans and other payments to Tim and Patrick, as required by the Trust language.

The Opinion contains reckless dicta by ignoring the difference between trust corpus simply given to the Trustor for his benefit as opposed to Trust corpus invested by the Trustee in violation of numerous codified fiduciary duties without specifically understood written directions authorizing or approving those investments. The Court of Appeal's

cavalier hypothetical of allowing the Trustor to go around the world with his mistress blatantly ignores the real protection provided by the Trust which would prohibit the Trustee from self-dealing unless he had written directions so authorizing him. This isn't a joke; the Court of Appeal allowed Tim Giraldin to confiscate his father's hard-earned wealth for his own selfish purposes in defiance of the Trial Court's findings based on substantial evidence.

VI. REVIEW IS NECESSARY TO PROTECT THE ELDERLY

The financial vulnerability of the elderly is perhaps best summarized in an alert on the FBI's website entitled "Fraud Target: Senior Citizens" which states the following:

> - Senior citizens are most likely to have a "nest egg," to own their home, and/or to have excellent credit—all of which make them attractive to con artists.
>
> - People who grew up in the 1930s, 1940s, and 1950s were generally raised to be polite and trusting. Con artists exploit these traits, knowing that it is difficult or impossible for these individuals to say "no" or just hang up the telephone.
>
> - Older Americans are less likely to report a fraud because they don't know who to report it to, are too ashamed at having been scammed, or don't know they have been scammed. Elderly victims may not report crimes, for example, because they are concerned that relatives may think the victims no longer have the mental capacity to take care of their own financial affairs.
>
> - When an elderly victim does report the crime, they often make poor witnesses. Con artists know the effects of age on memory, and they are counting on elderly victims not being able to supply enough detailed information to investigators. In addition, the victims' realization that they

> have been swindled may take weeks—or more likely, months—after contact with the fraudster. This extended time frame makes it even more difficult to remember details from the events.

Many Californians now use revocable trusts instead of wills for their estate planning. It allows them to avoid both conservatorships and probates. The avoidance of conservatorships by the use of a revocable trust, however, allows a third person to control the trust assets without court supervision. If that person has diminished capacity, there is greater potential for abuse. The remedy eliminated by the Opinion is a necessary alternative for protecting elder's rights. Other actions, namely conservatorships or actions for elder abuse, are not always practical alternatives.

This action concerns a trustee who committed numerous and large scale breaches of trust in a situation in which he gained control of the assets of Bill, after Bill had grown frail and vulnerable. Through the ability to compel an accounting, Petitioners, Bill's children, were able to demonstrate to a court that the Trustee had acted in his own interest and taken advantage of his elderly father. If beneficiaries of a revocable trust did not have the rights set forth in *Evangelho*, a trustee could take $4,000,000 for his own use the day before the person who had the power to revoke the trust died and the remainder beneficiaries would be left with no recourse to learn about the theft or recover that money. The Probate Code and *Evangelho* do not allow such an unjust outcome.

The Opinion allows a miscreant trustee to use a simple self-serving declaration that "this is what the trustor wanted" as an absolute defense. Without the legal protection that a trustee be accountable where it is shown the trustor lacked capacity to direct the trustee, and the action was not in the trustor's interest, elders will be at risk and their desire to transfer wealth according to their estate plans will not be respected. The Opinion makes it impossible for the beneficiaries of the Trust to recover damages against the Trustee, even where there is demonstrable misconduct ostensibly because the beneficiaries' interest could have, but did not, disappear.

A. A Breach of Trust Action Maintained by Beneficiaries is a Necessary Remedy as Alternative Causes of Actions for Elder Abuse, an Action by the Personal Representative or a Conservatorship can be Ineffective, Inefficient or Unnecessarily Hard on a Senior Citizen

While there are several legal proceedings which are similar to an action for breach of trust when a trustee takes advantage of an elder, none are satisfactory replacements.

1. Conservatorship

A conservatorship can be a tremendously difficult decision for a family. It puts the elder squarely in the middle of litigation to prove that they lack capacity, and subjects them to interviews, investigations and court appearances. A conservatorship can also be a source of embarrassment for the elder when their capacity is publicly questioned. Conservatorships are extreme proceedings which are only warranted in

extreme situations. A significant purpose of a trust is to allow a third party trustee or a successor trustee to take over without the necessity of a conservatorship. There is no public policy served by requiring remainder beneficiaries to institute a conservatorship in order to protect their parents from financial abuse.

2. Elder Abuse

While a cause of action for Elder Abuse does survive the death of the elder, there are several reasons why it is not adequate as an exclusive remedy when a decedent's assets were mismanaged in a trust by a third party trustee. Jury trials are allowed for elder abuse causes of action, but are not permitted for probate and trust cases. (Probate Code §§ 825 and 17006). The Legislature determined that the emotional content of probate and trust matters would be better handled by judges rather than juries. Jury trials are more expensive than bench trials, and they require considerably more additional judicial resources. Thus, as a practical matter, eliminating standing for remainder beneficiaries for relief for breaches of trust pursuant to the Probate Code forces those parties into much more expensive, time consuming and uncertain litigation.

The purpose of the Elder Abuse Act (Welf. & Inst. Code, § 15600 et seq..) is to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33. Thus the purpose of the Elder Abuse Act is enhanced by having additional remedies for remainder beneficiaries when a third party becomes a trustee of a revocable trust and takes advantage of an incapacitated trustor.

3. Action by Personal Representative.

The Opinion states that an action against Tim could have been maintained by the personal representative. In this case, as in most cases, the culpable Trustee during the Trustor's lifetime is also the designated personal representative. In practice, this would mean that the remainder beneficiaries, in addition to their action for breach of trust, would need to take an additional step and expend additional judicial resources by litigating with the named personal representative as to who should be named personal representative. Then, assuming they prevail in the initial litigation, the remainder beneficiaries would have to undertake a second litigation as personal representatives to remedy the alleged wrongdoing. This extra litigation serves no judicial purpose, yet this is what the Opinion seeks to require.

B. Substantial Evidence Supported the Trial Court's Finding that Bill Lacked Capacity and that Tim Acted Without Bill's Written Consent as Required by the Trust

In reviewing the sufficiency of the evidence, the Court of Appeal's review begins and ends with a determination whether any substantial evidence exists, contradicted or uncontradicted, which will support the trier of fact's conclusion. *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229. The Trial Court decided, after nine days of trial, that Bill lacked the necessary capacity to understand the purported written directions required

by the Trust in order to exonerate Tim from his duties as Trustee. Substantial evidence supported this finding.

Instead of analyzing the substantial evidence supporting the Trial Court's finding, the Court of Appeal offered its own summary of evidence to support its finding that Bill should have been allowed to do whatever he wanted to do, thereby supporting the Court of Appeal's view eliminating essential protections provided by the Trust and existing probate law.

1. Substantial Evidence Showed That Bill Lacked Capacity to Understand the Documents in Question

The Opinion is silent with regard to the substantial evidence that supported the Trial Court's finding that Bill lacked sufficient capacity to understand the proffered "written directions" which was the central issue in the Trial Court. There is overwhelming evidence to support this finding which includes:

1. Testimony of a geriatric psychiatrist that he was incapable of understanding that the documents he signed were written directions to the trustee;

2. Videos of Bill provided by Respondents which demonstrate his lack of capacity to understand the transactions he was allegedly being requested to approve;

3. Bill relinquished control of his finances after a lifetime of maintaining control and then allowed one son to take control of all of his finances at the time of the execution of the new Trust;

4. Bill switched from his longstanding estate planning attorney whom he had retained for many years to an attorney obtained by Tim;

5. The new attorney acknowledged that at the time of executing the Trust naming Tim as Trustee, Bill could not determine the size of his estate or the assets therein without extensive assistance from Tim and the new attorney.

6. The investment decision made no sense for an elderly person whose wealth had been obtained from years as a head of savings and loan associations.

All of the evidence summarized above provides more than substantial evidence that Bill lacked the capacity to understand the complex, misleading and incorrect documents he signed. Tim relied on a "Gift Acknowledgment Form" (the "Gift Form"), dated the same day that the Trust was created, February 11, 2002, as a written direction to invest in SafeTzone. The Gift Form, however, is a misleading document and does not, by its terms, authorize the investment in SafeTzone. The title and the first three paragraphs of the document relate solely to a gift of $150,000 to Thomas Giraldin. Bill also executed a thirty page summary of proposed

investment terms. As demonstrated in testimony at trial, the term sheet was materially inaccurate and according to its terms, Bill would not have receive the amount of shares to which he was entitled.

Bill did not provide any written instructions to Tim to authorize the hundreds of thousands of dollars in loans and other payments to Tim, Patrick and others. Tim testified at trial that all of the instructions he received were oral. Neither Tim nor Patrick could even explain the purposes of the loans that were made to them by the Trust.

California law explicitly states, "When mental weakness, even though not amounting to absolute disqualification, is associated with inadequacy of consideration, undue influence or a mistaken impression as to the nature and effect of the instrument, the conjunction of any one of these elements is sufficient ground for cancellation." *Shaffer v. Security Trust & Savings Bank* (1935) 4 Cal.App.2d 707, 712. See California Civil Code § 39; see also, Probate Code § 810(c).

The Trial Court found, based upon substantial evidence, that Bill did not direct Tim to make the investment in SafeTZone. The Opinion simply ignores the substantial evidence which supports the Trial Court's finding in order to make their holding on standing more palatable. In fact, the Opinion disingenuously ignores the evidence relied upon by the Trial Court and instead creates its own misleading record which was not the basis for the Trial Court's decision.

C. The Opinion Places California at Odds with the Nationally Prevailing Trust Law

A treatise summarizing the law of trusts in the United States provides an effective synopsis of the rights of beneficiaries:

> Consistent with the rule that the duties of a trustee of a revocable trust are owed exclusively to the settlor, at least while the settlor has capacity, the rights of non-settlor beneficiaries of a revocable trust generally are subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime. After the settlor's death, of course, the trustee is accountable to the trust's other beneficiaries for its administration of the trust after the settlor's death. Further, many courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct.

Bogert's Trusts And Trustees, § 964.

Since completed in 2001, 23 states have enacted the Uniform Trust Code ("UTC"), wherein the comments provide guidance on when beneficiaries of a revocable trust may recover against the trustee for periods when the trust was revocable. The comments to Section 603 of the UTC state:

> Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. *However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as*

> *approval of the action by a successor trustee.* For the requirements of a consent, see Section 1009. (emphasis added).
>
> Section 1009 of the UTC provides:
>
> A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:
> (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
> (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach of the UTC provides.

Under *Evangelho*, California case law is in harmony with the UTC and the laws of numerous other jurisdictions. If the Opinion is preserved, California law will fall behind the national standard for protecting its elderly from misconduct. In a state where a substantial and growing portion of the population is elderly, it would be wrong for California to be behind the prevailing view of necessary protections for its senior citizens.

VII. THE APPELLATE COURT DID NOT FOLLOW A SUBSTANTIAL EVIDENCE STANDARD IN REVERSING AN ORDER PERTAINING TO MARY'S SPOUSAL PETITION

The Opinion also reversed the Trial Court's order denying Mary's Spousal Property Petition on the tangential basis that two pieces of real property at issue were not held in the Trust. It ignored, however, that these properties were transferred into the Initial Trust only four months prior to the creation of the Trust, which shows the obvious intent of the Trustor that the properties were to be included as Trust assets. It was only Tim's

failure, along with the inaction of the attorney obtained by Tim, that accounted for the failure to deed the properties from the Initial Trust to the Trust. This is precisely the type of situation anticipated by *Estate of Heggstad* (1993) 16 Cal.App.4th 943 at 951-952, which allows parties to avoid probate for properties which were intended to be trust assets but had not been transferred to the Trust.

VIII. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of the Appellate Court's published Opinion.

Respectfully submitted,

Dated: November 1, 2011

FREEMAN, FREEMAN & SMILEY, LLP

By: _____

STEPHEN M. LOWE
Attorneys for Petitioners
CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRALDIN, Plaintiffs and Respondents

1528071.4

CERTIFICATE OF WORD COUNT

The undersigned states that the word count for the Petition for Review of Petitioners Christine Giraldin, Patricia Gray and Michael Giraldin, exclusive of tables, cover information, excluded attachments and this certificate, according to Microsoft Word 2010 is 6,876.

Dated: November 1, 2011

FREEMAN, FREEMAN & SMILEY, LLP

By: 

STEPHEN M. LOWE
Attorneys for Petitioners
CHRISTINE GIRALDIN,
PATRICIA GRAY,
AND MICHAEL GIRALDIN,
Plaintiffs and Respondents

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Freeman, Freeman & Smiley, LLP, 3415 South Sepulveda Boulevard, Suite 1200, Los Angeles, California 90034.

On November 2, 2011, I served the within document described as: PETITION FOR REVIEW, as follows:

[X] BY MAIL: By placing the document listed above in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth on the attached Service List.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 2, 2011, at Los Angeles, California.

Clare Gard

Clare Gard

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COPY

CERTIFIED FOR PUBLICATION

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)

OPINION

Appeal from orders 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 Giraldin.

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

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

This appeal involves a family. While it might not rise to the level of King Lear, it's about as tragic as families can get when all they are fighting about is money. We address two consolidated disputes. Appellant Timothy Giraldin (Tim),[1] challenges two orders entered against him in his capacity as trustee of a family trust established by his father, for breaches of his fiduciary duties occurring largely, if not exclusively, during the period when the trust remained revocable. Tim's mother, Mary Giraldin (Mary), challenges an order refusing to confirm her community property share of the property found to be held in the trust. All of the orders were entered in favor of a group comprised of some of Tim's siblings and Mary's children, acting in their capacities as beneficiaries of the family trust. We reverse all the orders.

From the time Tim was appointed trustee in February of 2002, until the death of his father, trust settlor William Giraldin (Bill) in May of 2005, Bill retained the right to revoke the trust. As a result, Tim's duties as trustee were owed solely to Bill during that period, *and not to the trust beneficiaries*. Thus respondents, as beneficiaries, lack standing to complain of any alleged breaches of those duties occurring prior to Bill's death. Moreover, the beneficiaries have no right to compel an accounting of the trustee's actions for the period in which the trust remained revocable (Prob. Code, § 16069, subd. (a); formerly Prob. Code, § 16064, subd. (b)), and thus also lack standing to seek such relief for the period prior to Bill's death. Because the judgment entered in favor of respondents in this case stemmed primarily (if not exclusively) from events occurring before Bill's death, and from Tim's alleged breach of duties owed to them as trust beneficiaries, it must be reversed. On remand, respondents can seek a new accounting against Tim if they choose, and can pursue whatever claims for breach of fiduciary duty they might have, but confined solely to the period in which the trust had become irrevocable in the wake of Bill's death.

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1 Because many of the parties in this case share the same last name, we refer to each by their first name, for the sake of clarity. No disrespect is intended.

Mary, Bill's widow, filed a spousal property petition challenging the inclusion of her share of community property in the family trust, which she contended had been prepared by Bill without her knowledge or consent. The trial court found that although all of the property in the trust was community property, Mary had waived her right to challenge the inclusion of her share by "elect[ing] to accept [trust] benefits." On appeal, Mary challenges the order only to the extent it determines she waived her interests in the residence she and Bill occupied at the time of his death – commonly referred to as "the Lakeshore property" – and in a vacation property referred to as the "Lake Hume Cabin." Mary contends, correctly, that there is insufficient evidence to establish Bill actually conveyed either property into the trust prior to his death, and thus no basis to conclude *her community interest* in the two properties was ever made subject to the trust provisions. And because Mary's shares of these two properties was never made subject to the trust, the court erred in concluding Mary had waived her ownership of those shares simply by accepting benefits from the trust. On remand, the probate court is directed to enter a new order, confirming that Mary retains her community share of both the Lakeshore property and the Lake Hume cabin.

FACTS

Bill and Mary were married in 1959. When they married, Bill had four children and Mary had three. Bill adopted Mary's three children. Together, Bill and Mary had twin sons, Patrick and Tim, born in 1964. Bill started a savings and loan, Mission Savings, in the 1950's, which was apparently a very lucrative move. Mission Savings was acquired by another institution, which was, in turn, acquired by Washington Mutual (WaMu.) Bill was also, by all accounts, a savvy investor during his life.

However, in late 2001, Bill contemplated making a substantial, and perhaps less savvy, investment. In August or September of that year, he began expressing an interest in investing $4 million, which was roughly two-thirds of his fortune, in a company called SafeTzone Technologies Corporation (SafeTzone), which had been

started some years earlier by his son, Patrick, Tim's twin brother.[2] At the time of Bill's contemplated investment, Tim had also become a part owner of the company, which employed both Tim and Patrick.

However, Tim did not negotiate the contemplated investment with Bill. Instead, Tim set up a lunch meeting to allow Bill to discuss the matter with Regan Kelly, SafeTzone's general counsel. Kelly testified that his primary goal at the lunch meeting was to make sure Bill "understands this is an early stage company" and "to be sure that he understood the nature of what he was thinking about in terms of getting into a company like SafeTzone."[3] Although Tim was also at the lunch (along with Mary, Patrick and another SafeTzone executive), he did not participate in the discussion about Bill's contemplated investment.

Also in late 2001, Bill decided to revoke his estate plan (established in 1997) and create a new one. Rather than employ the same attorney who had drafted his earlier trust, Bill decided to find a new attorney to draft the new one. In October of 2001, Tim referred Bill to an attorney with whom Tim's wife had been previously employed.[4]

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2 SafeTzone marketed a GPS-like system which allowed people to keep track of each other's locations within a large defined area – such as an amusement park. The company marketed its system to not only amusement parks, but also ski resorts and cruise ships. Patrick had developed the idea, and Bill had provided financial support for the endeavor from the beginning – including paying living expenses for Patrick and his family so Patrick could devote full time to launching the company.

3 Unfortunately, the record contains no evidence of what was actually discussed at that meeting, since the court sustained hearsay objections to every question designed to elicit that information, including "[d]id you discuss with him what you needed the money for?"and "[w]hat information did you impart to Mr. Giraldin at this meeting?" With respect to the latter question, respondents' counsel stated they were objecting to anything "other than documents" as hearsay. Tim's counsel pointed out to the court that the information he sought to elicit was "not offered for the truth," but to no avail. The court sustained similar hearsay objections to essentially every attempt made to introduce evidence of the several discussions between Bill and Kelly concerning the SafeTzone investment, including: "Did Bill indicate he was not in agreement with any of the provisions of this agreement?" and "what kinds of things did he ask you about?" The court even went so far as to sustain a hearsay objection to an inquiry about *which particular baseball team* Kelly happened to have chatted with Bill about. Clearly, however, none of those questions were intended to establish the *truth* of any statement made by either Bill or Kelly, but only to establish *the fact of what was said*, as a means of demonstrating Bill's level of comprehension about the deal. Such evidence does not violate the hearsay rule. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is *offered to prove the truth of the matter stated*." (Evid. Code, § 1200, subd. (a), italics added.)

4 The record contains no clear explanation for Bill's decision not to rely upon his long time estate planning attorney for the drafting of his new estate plan, but the parties actually seem to agree about his motivations.

With the assistance of that new attorney, Bill revoked his 1997 trust and established a new revocable family trust, The William A. Giraldin Trust, dated February 11, 2002 (the family trust.) The attorney testified Bill had expressed a clear intention to "essentially gut" the 1997 trust, and "set up a new estate plan." The attorney worked with Bill directly in drafting the trust, and went so far as to ask Tim to leave an early meeting, so he and Bill could continue to discuss the trust details alone.

Although Bill himself had acted as trustee of the 1997 trust, he designated Tim to act as the initial trustee of the new family trust. The terms of the family trust specify that Bill was to be its sole beneficiary during his lifetime, and that he retained certain "reserved" rights, including the rights to amend or revoke the trust, to add or remove property from the Trust; to remove the trustee, and to direct and approve the trustee's actions, including any investment decisions. The trust document provided that Bill could exercise those "reserved rights" only in writing.

However, the trust document also states, in a separate provision, that "During [Bill's] lifetime, the Trustee shall distribute to [Bill] that amount of net income and principal as [Bill] direct[s]" and that provision *does not* specify that such directions must be in writing. Moreover, In the event Bill was declared to be incapacitated, the trustee was instructed to distribute the amount of net income and principal deemed by the trustee to be appropriate to support Bill's "accustomed manner of living," and to be liberal in making that determination with the understanding that "the rights of remainder beneficiaries *shall be of no importance.*"[5] (Italics added.)

Tim testified that Bill was "unhappy" with his existing estate plan and felt the attorney "was not listening to him," and while respondents purport to deride that explanation, theirs is essentially the same. According to respondents, "[t]he true reason, provided by the totality of the evidence, is that Tim's company was in trouble, and Tim needed Four Million Dollars infused into the company, and [Bill's] longstanding estate planning attorney[]was unlikely to cooperate in allowing [Bill] to do that." In other words, the respondents also believe the problem was that the prior attorney was uninterested in doing what Bill wanted.

5 The remainder beneficiaries were Mary, who was entitled to the benefits of the family trust during her lifetime, and all nine children, who would share equally in whatever remained after both Bill and Mary were deceased.

In a section of the trust entitled "The Protection Provided the Trustees," the trust document also specifies that "[d]uring [Bill's] lifetime, the trustee shall have no duty to provide any information regarding the trust to anyone other than [Bill.]" And after Bill's death, if Mary survived him, the trustee "shall have no duty to disclose to any beneficiary other than [Mary] the existence of this trust or any information about its terms or administration, except as required by law." The document also specified Bill specifically "waive[d] all statutory requirements . . . that the Trustee . . . render a report or account to the beneficiaries of the trust."

The trust instrument also specifies that Bill "[did] not want the Trustee to be personally liable for his or her good faith efforts in administering the trust estate," and provides that "[t]he discretionary powers granted to the Trustee under this Trust Agreement shall be absolute. This means that the Trustee can act arbitrarily, so long as he or she does not act in bad faith, and that no requirement of reasonableness shall apply to the exercise of his or her absolute discretion." Bill expressly "waive[d] the requirement that the Trustee's conduct at all times must satisfy the standard of judgment and care exercised by a reasonable, prudent person. In particular, the decision of the Trustee as to the distributions to be made to beneficiaries under the distribution standards provided in this Trust Agreement shall be conclusive on all persons."[6]

When the family trust was first established in February of 2002, it contained no assets. Instead, the trust instrument signed by Bill simply reflected that he "had transferred and delivered to the Trustee the property described in Schedule 1, attached." The version of Schedule 1 attached to the signed trust instrument was, in turn, blank. According to the attorney who drafted the family trust, no version of Schedule 1 was ever completed, approved by Bill, or added to the trust by amendment.

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6 The attorney who drafted the trust testified this was not his standard provision, and had been drafted specially for this family trust because of Bill's concern "that other folks might challenge some of the Trustee's actions."

Bill also executed a new will at the same time he established the family trust. That will provides, in pertinent part, that Bill intends thereby "to provide for the disposition of all the property, wherever located, I own at my death, including my separate property and *my share of all community property, if any, held with my wife.*" (Italics added.) The will names Tim as executor of Bill's estate, and provides that the entire residue of Bill's estate, including "my interest in my residences," is given to the trustee of the family trust.[7]

Meanwhile, in January of 2002, just *prior to* the establishment of the new family trust, Bill actually signed the initial two-page term sheet detailing his planned $4 million investment in SafeTzone. That document was prepared by SafeTzone's outside counsel, and was signed by Bill in a meeting with Kelly, SafeTzone's general counsel.

On February 11, 2002, the day he executed the family trust document, Bill also signed a written "Gift Acknowledgement Form," which confirmed the terms of a $150,000 gift to Bill's son, Thomas Giraldin, including the fact that Tim Giraldin had funded part of the initial $100,000 payment of the gift with his own funds, and was entitled to be reimbursed by Bill for that portion. The document went on to reference Bill's commitment to the SafeTzone investment, stating that "after the trust has been set up William A. Giraldin and Timothy W. Giraldin will begin the process of selling stock and converting assets to fulfill the investment into SafeTzone Technologies corporation of $4 million dollars [*sic*]."

Bill then executed a revised term sheet for the SafeTzone investment on February 15, 2002, just a few days after he executed the family trust. And on February 22, 2002, Bill signed a "call for investment" document prepared by SafeTzone's counsel, authorizing the withdrawal of funds from accounts held "in my name or in the name of

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7 Although Bill's will was not identified as an exhibit admitted into evidence at the hearing, it was incorporated into Mary's verified spousal property petition. Consequently, it was properly before the court, and is included in our record on appeal.

my trust" in the amount of $1.6 million, in "furtherance of my agreement to invest in SafeTzone . . . ." In that same document, Bill expressly authorized "the execution of the reasonable transactions necessary to effect [his] desire to invest this amount."

Finally, in April of 2002, Bill signed a formal, and rather lengthy, subscription agreement documenting the details of his investment in SafeTzone.

Bill funded his SafeTzone investment with six payments, of various amounts, beginning on February 28, 2002, and ending in May of 2003. According to Tim's uncontradicted testimony, Bill personally obtained cashier's checks for each of the payments to SafeTzone, drawn on his personal account, after personally deciding what assets should be liquidated and which should be borrowed against, to obtain the investment funds. Although the assets relied upon include those held in a WM Financial Services account which was ultimately placed in the name of the family trust (it's not clear exactly when that occurred), Tim stated that it was Bill, and not he, who personally instructed WM Financial with respect to those assets.

The documents in our record also support Tim's contention, at least as to the first three payments to SafeTzone, dated February 28, March 4, and May 28, 2002, and totaling $1,650,000. Each of those payments was made from a "market rate" account held jointly in the names of Bill and Tim, and not paid from any accounts held in the name of the family trust.

As the investment was funded, SafeTzone issued stock directly to Bill, in proportion to the amount of the funds paid. It was only after the investment was fully funded that the SafeTzone stock was transferred into the name of the family trust.

Unfortunately, the SafeTzone investment went badly, and by the time Bill died in May of 2005, the family trust's stake in the company was worth relatively little. In the wake of that loss, four of Bill's and Mary's seven older children, Patricia Gray, Christine Giraldin, Mike Giraldin and Philip Giraldin (respondents), chose to sue Tim in his capacity as trustee of the family trust, alleging he violated certain fiduciary duties

"owed to Trust beneficiaries." Respondents' stated purpose in doing so was to seek redress for Tim's acts which "effectively [took] his father's life savings for his and his twin brother's benefits and deprived his father's other seven children of benefit from the Trust."

Thus, in December of 2006, respondents filed their initial petition, which sought to remove Tim as trustee of the family trust, and to compel him to account for his actions during the period of his trusteeship. In their amended petition, filed in January of 2008, respondents also alleged Tim should be surcharged for violation of fiduciary duties including his duty to "diversify investments of trust," his duty to administer the trust "solely in the interest of the beneficiaries," his duty to "deal impartially with beneficiaries," his duty to "avoid conflict of interest," and his duty to "make trust property productive," by allowing the trust's funds to be used for the SafeTzone investment.

Respondents also alleged Tim violated his fiduciary duties when he made improper loans of trust funds to both himself and Patrick during Bill's lifetime, plus one additional loan of trust funds alleged to have been made to each himself and Patrick shortly after Bill's death. Respondents' amended petition sought not only an order removing Tim as trustee of the family trust, and an accounting of the period of his trusteeship, but also an order surcharging him for the losses suffered by the family trust as a result of his fiduciary breaches.

Respondents never claimed Bill did not intend to make the investment in SafeTzone. To the contrary, they essentially concede he did.[8] Instead, their goal was, in

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[8] Respondent Philip Giraldin testified about Bill wearing a jacket embroidered with the SafeTzone logo. According to Philip, when Bill was asked how one got such a jacket, Bill responded "you have to invest a shit load of money into the company." Moreover, in their brief, respondents take pains to make clear that "[t]he issue before the court . . . was not [Bill's] stated intent but, rather, was whether [Bill] had sufficient capacity to understand . . . ." However, at no point did respondents ever allege that Tim engaged in misrepresentations or any conduct amounting to elder abuse in his dealings with Bill, or that he was guilty of subjecting Bill to undue influence. Nor did any respondent ever claim Bill was legally incompetent to handle his own financial affairs during his lifetime.

effect to undo the investment, on the ground that Tim – as trustee of Bill's revocable family trust – owed them a legal obligation to either dissuade Bill from making the unwise investment or preclude him from relying upon any assets held by the family trust as a means of funding it.

In January of 2007, the month after respondents filed their initial petition against Tim, Mary filed her own petition to confirm her community interest in (1) the Lakeshore property; (2) the Lake Hume cabin; and (3) all of the assets "placed in the William A Giraldin trust . . . ." In support of her petition, Mary declared that at the time of her marriage to Bill, he had a negative net worth, and he acquired all of his wealth during their marriage. She acknowledged he had received an inheritance of approximately $90,000 during the marriage, but claimed he did not maintain it separately. She stated that the Lake Hume cabin, acquired in 1971, was held in Bill's name alone, and that the Lakeshore property was held in the name of Bill's 1997 trust.

Respondents objected to Mary's petition, asserting that all of the property she sought to claim an interest in was held in the trust, and that Mary herself had acknowledged she "relies on the Trust as her only support." Respondents claimed Mary "has affirmed and acquiesced to the existence and terms of the Trust by accepting distributions from the Trust." They further asserted that "Mary cannot accept the full benefits from the Trust as she has been doing and, at the same time, disavow the Trust by claiming an interest in half of the Trust property."

The court held a trial in October and November of 2008. Tim's position was that he never wanted to be trustee of the family trust, but had been persuaded by Bill to accept the role because Bill believed Tim would do the best job of taking care of Mary when Bill died. Tim stated that although he signed the trust instrument, he never read it, a contention the court expressly found to be true.[9]

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9 The statement of decision includes a finding that "Tim did not read the trust and made no attempt to follow its provisions."

Tim claimed that he had been told his duties as trustee would not "kick in' until Bill died, and until that time, Tim viewed his role as simply that of a son, doing the things his father asked him to do. The attorney who drafted the family trust acknowledged that he never went over the details of the trust with Tim, but did explain to Tim his duties generally and about being a trustee in general. He stated that Tim "clearly understood that he was going to be working at the suggestions and directions of his father with respect to decisions."

As to the loans to family members, Tim testified all were made pursuant to Bill's oral instructions. Having never read the trust document, Tim was unaware of any obligation to document Bill's instructions in writing, but he claimed he never took any action with respect to trust property except in accordance with Bill's wishes. And according to the terms of the family trust, all outstanding loans made by Bill to any of his children, either before or after the effective date of the trust, *and whether or not documented in writing*, were deemed forgiven upon his death.

Tim also said the investment in SafeTzone had been entirely Bill's idea, and he had done nothing to induce it. The attorney who drafted the family trust testified that Bill had told him the SafeTzone investment was "a done deal" prior to execution of the family trust, and also that Bill had chosen to enter into the SafeTzone deal personally, rather than through the trust, to protect Tim from any conflict of interest claims.

In December of 2008, after conducting a trial, the probate court ruled against both Tim and Mary. With respect to Tim, the court's statement of decision reflected that when Tim "directed and facilitated" the transfer of funds from the trust to SafeTzone, he "elected to serve his own interests and the interests of his business, SafeTzone, to the detriment of the Trust and Bill." In doing so, Tim violated his fiduciary duty to not "take part in any transaction in which the trustee has an interest adverse to the beneficiary."

As the court saw it, "[a]s of February 11, 2002, the relationship between William Giraldin and Tim Giraldin changed as a matter of law and fact. [¶] By executing the trust document, Tim Giraldin was committed to a course of conduct as a fiduciary that required absolute and unequivocal fidelity. The conflict in the roles as between Tim Giraldin, as the trustee of the William Giraldin Trust, and Tim Giraldin, as an officer, director, significant shareholder in the proposed investment, SafeTzone, cannot be more clear."[10] Moreover, the court reasoned it was *irrelevant* whether Bill actually wanted to make the SafeTzone investment, even assuming he was competent to do so, because that desire *"was not properly documented, as required by the terms of the trust document."* (Italics added.)

The court also found that by facilitating the SafeTzone investment, and by making distributions of cash, characterized as "gifts" or "loans," to some beneficiaries, and not others, Tim violated his duty to "deal impartially" with all trust beneficiaries. Tim was also found to have breached his duty to "take and keep control of and to preserve the trust property" because he failed to consider "the interests of the remainder beneficiaries of the trust" when he "invest[ed] and disburse[d] Trust funds." Tim was also found to have violated his duty to preserve trust property "by indiscriminately transferring Trust funds into his personal account, by commingling his personal funds with Trust funds, and by making numerous, unsupported disbursements of Trust funds." And the court found that Tim violated his duty to "diversify the investments of the trust," and to make the trust property "productive."

With respect to Tim's disbursement of trust funds other than in connection with the SafeTzone investment, the court specifically faulted Tim for making disbursements which "either conflict with the backup documentation provided by Tim,

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10 Of course, if Bill actually wanted to invest in SafeTzone, and particularly if he made the decision to do so, and settled on the terms of the deal, *prior* to creation of the trust, then Tim's fiduciary obligations to Bill were never in conflict with his role as a principal of SafeTzone.

are unsupported by appropriate backup documentation or were otherwise improper," including "[p]urported distributions to Mary in the amount of $155,443.67";[11] a "purported distribution to Mary in violation of a Restraining Order dated January 18, 2007, in the amount of $9,341.97"; "purported disbursements for purported Trust expenses in the amount of $67,500.00"; "[p]urported loans to Tim, Pat[rick] and their brother, Thomas Giraldin, in the amount of $308,200.00"; and "[p]urported distributions *to Bill* in the amount of $85,134.27." (Italics added.)

The court explained that "Bill did not direct or authorize the foregoing, purported disbursements, distributions and loans by the Trust *in a manner required by the Trust and the Probate Code*. . . . [and there was] no evidence *of a written direction* by Bill delivered to the Trustee to authorize any of these transactions by the Trust or to relieve Tim of any of the statutory trustee duties."[12]

The court "further [found] that Bill lacked mental capacity to understand that certain documents proffered by Tim were written directions to the Trustee to authorize any of these transactions by the Trust or to relieve Tim of any of the statutory trustee duties." Moreover, the court concluded "Bill was not sufficiently mentally competent in late 2001 and thereafter to either analyze the benefits and risks of an investment in SafeTzone . . . or to authorize and direct Tim to make such an

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11 In her own testimony, Mary acknowledged receipt of the funds from the family trust, which were used, among other things, to pay $100,000 in taxes in 2005.

12 The court's decision does not, however, fault Tim for loans totaling $101,000 to respondent Philip Giraldin, in July of 2004, or a loan of $22,000 to respondent Michael Giraldin in November of 2004. As to his loan, Philip testified that he and Tim were "working on some financials" at Philip's office because Philip's business was having a "cash flow crisis." When Tim determined that Philip "needed help," he told him "Dad will loan it to you." Philip claimed that "the next thing I know, my mother is calling me and saying, Daddy wants to give you $100,000." Philip explained that he went to Bill to thank him, and "[Bill] didn't really have much of an idea about it." However, Mary insisted that Philip keep the money because "this is what Dad wants. He wants to give some money to the kids." As to Michael's loan, he testified that he got the funds because in 2004, he was "having my pool renovated and contractors suggested . . . the plumbing should be redone." He called Mary to ask "if it would be possible to have that done." Michael also spoke with Tim, who he understood was "handling their affairs." Neither Philip nor Michael returned the funds loaned to them, despite their insistence that Tim, Patrick and Thomas be required to do so.

investment."[13] In the court's view, none of the writings executed by Bill in conjunction with the SafeTzone investment were sufficient to qualify as "written directions" to Tim to facilitate that investment, "even if Bill were sufficiently mentally competent to make such directions, which he was not."[14]

The court rejected Tim's defenses to liability, including his assertion he was protected by the provision in the family trust which relieved him of liability for acts done in good faith. The court did not expressly find that Tim acted in bad faith, merely noting that Tim's conduct "militate[d] against a finding of good faith." However, the court did expressly conclude it would be "inconsistent to permit Tim to avail himself of the protections of the Trust for good faith conduct when Tim admittedly did not read or attempt to follow the provisions of the Trust."[15]

The court also rejected Tim's assertion respondents' claims were barred by the doctrine of laches and the statue of limitations, finding "insufficient evidence that any of the [respondents] had knowledge of Tim's breaches of trust and fiduciary duty until

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13 As Tim asserts in his appeal, however, the court sustained hearsay objections to almost every attempt by Tim to introduce evidence designed to establish Bill did understand the nature and risks of the SafeTzone investment. In essence, the court completely precluded Tim from offering any evidence of what was said either to or by Bill in relation to this investment. That was error, given respondents' (ultimately successful) contention that Bill lacked the capacity to appreciate the risks of the investment. Tim was entitled to elicit testimony which established *the fact of what was said* in conversations with Bill, as a means of demonstrating Bill's level of comprehension.

14 Both Tim and respondents offered the testimony of an expert witness on the issue of Bill's mental capacity toward the end of his life. Neither expert had ever met Bill, and both based their opinions on medical records, and on the reported observations of family members and third parties. Tim's expert concluded it was "extremely unlikely" that Bill suffered any "lack of legal capacity" in the latter stage of his life. Respondents' expert testified that Bill was likely suffering from "mild" cognitive impairment, related to "Parkinsonian type syndrome," in and after 2001, but could not say that the impairment meant that his decisions were not "the product of his free will." Respondents' expert agreed that persons with Parkinsonian syndrome often had "fluctuations" in cognitive abilities, and "variable performance" at different times. Respondents' expert also opined that "the evidence does not permit a clear assessment of whether [Bill] absolutely lacked competence or whether he actively retained competence, but there's evidence for compromise of these other capacities that would have affected those issues."

15 Of course, it is no more "inconsistent" to permit Tim to avail himself of the family trust's *protections* merely because he didn't read the document than it is to hold him responsible for the *obligations it imposes on him* under those circumstances. Tim is either bound by the trust provisions, or he is not – the court cannot pick and choose which provisions apply to Tim any more than it would presumably allow Tim to do so. Additionally, Tim's failure to read the trust document cannot be used to establish his lack of good faith. It's merely negligent, and the family trust reflects that Bill expressly "waive[d] the requirement that the Trustee's conduct at all times must satisfy the standard of judgment and care exercised by a reasonable, prudent person."

after Bill's death."[16] The court further noted that "[p]rior to Bill's death, [respondents] did not have any right to an accounting of the Trust's activities from Tim. *[Respondents'] interest in the Trust and rights against the trustee did not vest until Bill's death, at which time the Trust became irrevocable.*" (Italics added.)

Based upon these findings, the court determined Tim should be surcharged in the amount of $4,376,044 for the SafeTzone investment, and surcharged in the amount of $625,619 for the other "unsupported disbursements, distributions and loans of Trust funds . . . ." The court also determined that Patrick Giraldin must return the $155,000 loaned to him by the family trust, on the ground he "acted in collusion" with Tim in the disbursement of those funds, and that Thomas Giraldin must return $75,000.[17] On the other hand, the court did not fault either respondents Philip or Michael for their acceptance of loans in 2004, and they were not required to reimburse the family trust for the funds they admittedly received.

However, while the court's statement of decision included specific findings that Tim had violated duties owed to respondents, its formal order specified that the entire surcharge amount of $4,376,044.00 was based on Tim's "breach of the Trust and breach of fiduciary duties *owed to Decedent William A. Giraldin* pursuant to Probate Code section 16440."

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16 The evidence of respondents' knowledge included respondent Christine Giraldin's testimony that Bill called her sometime in early 2002, complaining that Tim and Patrick were "doing something" with his WaMu stock. Christine shared her concerns with respondent Patricia Giraldin. Patricia said that although she was "concerned," she "did nothing" other than ask Bill about it. According to Patricia, Bill told her "everything was fine." She did nothing further because "it was totally out of my hands." Philip Giraldin acknowledged that he was aware Bill was making a very large contribution to SafeTzone in 2002, although he stated he was told it was a "loan," with stock in the company being given to Bill as collateral, and the amount was $3 million. Moreover, Philip testified that while he "questioned Dad's ability to make such a decision on his own," he did not make any effort to discuss that concern with Bill, because "it's not my money." Philip stated he and Bill "never discussed [Bill's] financial stuff."

17 In its oral comments, which were incorporated into its statement of decision, the court stated it was ordering Thomas to return $75,000. However, that requirement is not reflected in the formal order issued by the court.

On the same day the court issued its order resolving respondents' petition against Tim, it also issued a separate order "settling the first account current and report of trustee," in which it surcharged Tim $675,619. It's unclear what this second surcharged amount refers to, and whether it is duplicative of any amounts surcharged against Tim in the first order.

With respect to Mary's petition, the court first found that all of the assets owned by Bill and Mary at the time of Bill's death were community assets, including the Lakeshore Property and the Lake Hume cabin. The court implicitly found that all of those assets, including the real properties, were held by the family trust, noting that Mary had not only accepted the benefits of the family trust but "resided in real property of the Trust," without making any claim for her community share of those trust assets. The court opined that Mary's decision to assert her community property interest in the assets held in the trust was "made not with her own interests in mind, but to benefit, or some would say to save, her son, the trustee, Tim Giraldin." The court then determined that "Mary, through her acceptance of the Trust distributions after Bill's death, made an election to accept the Trust as the vehicle to be utilized in asset management and support for the balance of her life" and that "Mary's conduct is totally inconsistent with a disavowment of the Trust in favor of her community property rights." The court concluded that the doctrine of spousal election applied to Mary, and that Mary "elected to receive her benefits as a beneficiary of the Trust, rather than pursue her community property rights to the assets of the trust."

I

We first address the orders entered against Tim. In his opening brief, Tim raised four issues: (1) that the court prejudicially erred by sustaining numerous hearsay objections to evidence offered to demonstrate Bill's mental capacity and understanding of the SafeTzone investment in 2002, and not to establish the truth of the matter stated; (2) that the evidence was insufficient to establish that Tim ever agreed to act as trustee of the

family trust during Bill's lifetime; (3) that because Bill's decision and commitment to invest in SafeTzone predated the creation of the trust, Tim could not be held liable for facilitating that decision after the trust was created; and (4) that the court erred in determining respondents' claims were not barred by either the statue of limitations pertaining to breaches of fiduciary duty or by the doctrine of laches.

Tim's brief does note – in the course of his argument about the court's erroneous application of the hearsay rule – that his duties as trustee were owed to Bill alone, and "respondents have no independent standing to complain," citing Probate Code section 15800, but he did not develop this contention into a full blown argument. Respondents, in turn, ignored the contention, but then defended Tim's contentions about the statue of limitations and laches by arguing they could not be penalized for their delay in asserting claims, because they "had *no standing* to bring any action *until after [Bill] died*." (Italics added.)

Finding the issue of standing more compelling than the parties apparently did, we asked for additional briefing on the question of whether respondents have standing to maintain claims for breach of fiduciary duty and to seek an accounting against Tim based upon his actions as trustee during the period prior to Bill's death. "A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. (*Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 71.) Standing goes to the existence of a cause of action (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, 862, p. 320), and the lack of standing may be raised *at any time* in the proceedings. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361." (*Apartment Assoc. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128; see also *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438 ["[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding."].)

We begin with the basic rule that "'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 a 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) 72 Cal.App.4th 111, 124-125 [minority shareholder lacked standing to bring claim in individual capacity for breach of duty owed to corporation].)

In this case, the family trust was revocable by Bill during his lifetime, and thus Tim's duties as trustee were owed solely to Bill, as settlor, and not to respondents. Probate Code section 15800 sets forth the rule: "Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, *during the time that a trust is revocable and the person holding the power to revoke the trust is competent*: [¶] (a) The person holding the power to revoke, *and not the beneficiary*, has the rights afforded beneficiaries under this division. [¶] (b) *The duties of the trustee are owed to the person holding the power to revoke.*"[18] (Italics added.)

Thus, as explained by our Supreme Court, "'[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, italics added; see also *Arluk Medical Center Industrial Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324, 1331-

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18 While respondents claimed, and the court found, that Bill suffered from a degree of diminished capacity toward the end of his life which precluded him from "analyz[ing] the risks or benefits of an investment in SafeTzone," no one ever claimed Bill lacked sufficient competency to exercise his power to revoke the family trust, which is quite a different thing. (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722 [explaining differences between testamentary capacity and capacity to enter into contracts of varying complexity].) Indeed, it would be inconsistent for respondents to claim, on the one hand, that Bill had sufficient capacity to *establish* the family trust in early 2002 (i.e., at the very time they asserted he *lacked capacity* to enter into the SafeTzone investment) – which they implicitly did by seeking to enforce their rights as beneficiaries thereunder – while on the other hand maintaining he would have lacked capacity to *revoke* the trust at that same time. And respondents never claimed, let alone proved, that Bill *further declined* to the point where he could be said to have lost capacity to revoke the family trust at some later time. In the absence of proof to the contrary, the law presumes Bill retained the capacity to revoke the family trust. (Prob. Code, § 810.)

1332 ['a settlor with the power to revoke a living trust effectively retains full ownership and control over any property transferred to that 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; see also *Security First Nat. Bank v. Wellslager* (1948) 88 Cal.App.2d 210, 214 [settlor with revocation power 'retain[s] the power and control of the trust estate and [can] with a stroke of the pen . . . divest[ ] the beneficiaries of their interest'].)" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1320-1321 (*Steinhart*); see also *Zanelli v. McGrath, supra,* 166 Cal.App.4th at p. 633 [statutes "recognize that when property is held in [a revocable] trust, the settlor and lifetime beneficiary '"has the equivalent of full ownership of the property"' [citation."].)

Thus, during Bill's lifetime, Tim's duties as trustee were owed solely to Bill – the settlor with the power to revoke – and not to respondents. Instead, respondents occupied a position analogous to heirs named in a will. (*Empire Properties v. County of Los Angeles* (1996) 44 Cal.App.4th 781, 788, ["Revocable living trusts are merely a substitute for a will."].) And just as a will "'"speaks" only as of the date of the testator's death [citation]' [citation]" (*Estate of Gallio* (1995) 33 Cal.App.4th 592, 598), a revocable trust confers enforceable property interests to the beneficiaries only at the time it becomes irrevocable. Prior to that time, those beneficiaries have no *rights* to the trust property, and thus *no say* in how it is managed.

Respondents rely upon *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615 (*Evangelho*) for the proposition that the beneficiaries of a revocable trust *develop* standing to pursue claims against the trustee, for actions taken while the trust was revocable, as soon as the trust becomes irrevocable. This is essentially the position taken by the probate court in its statement of decision: "[Respondents'] interest in the Trust and rights against the trustee did not vest until Bill's death, at which time the Trust became irrevocable."

However, we find *Evangelho* unpersuasive, and decline to follow it. We first note the *Evangelho* court did not have the benefit of the Supreme Court's opinion in *Steinhart, supra*, with its clear explanation of the special nature of a revocable trust, to aid in its interpretation of Probate Code section 15800. Absent that resource, the court relied solely on a portion of the Law Revision Commission comment, which states "This section has the effect of *postponing the enjoyment of rights of beneficiaries of revocable trusts* until the death or incompetence of the settlor or other person holding the power to revoke the trust." (Cal. Law Revision Com. com., reprinted at 54 West's Ann. Prob. Code (1991 ed.) foll. § 15800, p. 64, italics added.) The *Evangelho* court reasoned that under this rule, the beneficiaries' rights, "which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights [when the holder dies] . . . ." (*Evangelho, supra,* 67 Cal.App.4th at p. 624.)

However, in reaching that conclusion, the *Evangelho* court seemingly conflated the notion of "enjoyment" of rights, which means to possess or have the benefit of them,[19] with the notion of "utilizing" or enforcing those rights. If a beneficiary doesn't "enjoy" any rights during a certain period, it means he or she doesn't *have any*. It's not a matter of *when* the rights – or any corresponding duties of the trustee – can be enforced, it's a matter of whether they exist at all. And if they don't, there is nothing which can later "mature" into an enforceable right.

By its terms, Probate Code section 15800 does not merely postpone the beneficiary's ability to *enforce* rights during the period of time in which a trust is revocable; instead, it provides that during that revocable period, the beneficiary has none. Specifically, it states that while the trust remains revocable, the rights which would

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19 Webster's 3d New Internat. Dict. (1981) p. 754; see also *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 517 ["Beginning in the 1800's, American courts began to recognize a number of 'abutter's rights' *enjoyed by property owners* along public roads. (Italics added.)"]; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383, ["[T]he rule of reasonable use as enjoined by . . . the Constitution applies to *all water rights enjoyed or asserted* in this state . . . ." (Italics added.)]

otherwise belong to the beneficiary *belong instead* to the person who holds the power to revoke. And if that isn't clear enough, the statute then specifies that the trustee's duties are specifically "owed to the person holding the power to revoke." (Prob. Code, § 15800, subd. (b).) That means those duties are not owed to the beneficiaries.

And if the trustee's duties are not owed to the beneficiaries at the time of the acts in question, the death of the settlor cannot make them *retroactively* owed to the beneficiaries. To rule otherwise would put the trustee in an impossible position: while the settlor is alive, he is obligated to do what the settlor wants, even if it harms the expectations of the beneficiaries, but once the settlor dies, the trustee would have to answer for allowing the interests of those same beneficiaries to be diminished by conduct during the settlor's lifetime. For example, if the settlor of a revocable trust learned he had a terminal disease, and was going to die within six months, he might decide that his last wish was to take his mistress on a deluxe, six-month cruise around the world – dissipating most of the assets held in his trust. The trustee, whose duties are owed to the settlor at that point, would have no basis to deny that last wish. However, if the trustee's duties were deemed to be retroactively owed to the trust beneficiaries – say, the settlor's widow and children – as soon as the settlor breathes his last breath on a beach in Bali, the trustee would find himself *liable* for having failed to sufficiently preserve *their interests* in the trust corpus prior to the settlor's death. In other words, the trustee's act, which was not a breach of any duty owed by the trustee when he committed it, would suddenly be transformed into a breach of a different duty that only came into existence when the settlor died. That is not – and cannot be – the law.

The *Evangelho* court also relied upon the language of former Probate Code section 16064 (now Prob. Code, § 16069) to support its conclusion that the rights of beneficiaries are merely *postponed* until the death of the settlor. Again, we must disagree. In fact, in our view, the statute supports the conclusion beneficiaries lack standing – ever – to assert claims based upon conduct occurring during the settlor's

lifetime. Probate Code section 16069 provides: "The trustee is not required to account to a beneficiary . . . in any of the following circumstances: [¶] (a) In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked." This language does not merely delay *the timing* of an accounting sought by a beneficiary, as the *Evangelho* court seemed to assume – if that were the intent, it would say "[t]he trustee is not required to report information or account . . . *during* the period in which the trust may be revoked." Instead, the statue expressly relieves the trustee of any duty to account to the trust beneficiaries "*for the period* when the trust may be revoked." (*Ibid.*, italics added.) As such, what Probate Code section 16069 does is confirm that the trustee of a revocable trust need not answer to the trust beneficiaries, at all, for his alleged acts or omissions in the period in which the trust remained revocable.

Consequently, we conclude that respondents, in their capacities as beneficiaries of the family trust, lack standing to pursue claims against Tim for the period prior to Bill's death.

II

Respondents also assert, in the alternative, that even if they lack standing to pursue claims in their own right, they had standing to enforce the duties owed by Tim *to Bill*. However, respondents do not explain why that would be, and we conclude there are several problems with the assertion. First, we note that respondents never *alleged* in their petition that they were acting on Bill's behalf, and never made any attempt to establish either that they were legally entitled to proceed as successors in interest to Bill's own claims, or that they were the most appropriate people to do so.[20]

20 For example, we note that while four of Bill's children opted to assert claims against Tim for breach of fiduciary duty, four others (including Tim's twin, Patrick) did not. Who is to say *they* weren't more closely aligned with Bill's true interests?

Generally, a claim belonging to a decedent which survives his death "may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." A "successor in interest" can be the heir of decedent's estate or a person who "steps into [the decedent's] position" for purposes of a particular claim. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 905 [grandson who received grandmother's interest in bank account under terms of her trust was her successor in interest for purposes of pursuing a claim against the bank relating to the account].)

In this case, respondents were not actually Bill's "heirs" – the only "heir" named in his will was the trustee of the family trust – nor could they credibly claim to have "step[ped] into his position" for purposes of enforcing the duties owed by Tim *to him* during his lifetime. Respondents were simply remainder beneficiaries of Bill's family trust, and as revealed by the claims they actually asserted in this case, their interests were frankly in conflict with Bill's during the period in which the trust remained revocable. Indeed, one of the troubling aspects of respondents' attempt to claim standing based upon Tim's alleged breach of duties *owed to Bill*, is that respondents don't seem to recognize that *those duties* – which existed during the period the trust was revocable and Bill retained the express power to direct Tim's activities – were fundamentally inconsistent with the duties they would have us ascribe to Tim. Specifically, respondents' petition sought to hold Tim responsible for breaches of duties "owed to trust beneficiaries," such as the duty to "administer the trust solely in the interest of the beneficiaries"; the duty "to diversify investments"; the duty to "deal impartially with beneficiaries"; and the duty "to make trust property productive." Each of those alleged "duties" was actually inconsistent with Tim's obligation, during Bill's lifetime, to administer the trust solely for Bill's benefit and pursuant to Bill's direction.

Whereas Bill's interest during his lifetime was to preserve his options to do whatever he pleased with the trust corpus during his lifetime – including both the option of preserving it for his family members and the option of spending it unwisely and

making risky investments – respondents' interests were best served by restricting Bill to only the first option, and implicitly requiring Tim to take steps to impose that restriction. Promoting those interests is essentially what respondents' petition sought to accomplish, and it was reflected in the court's statement of decision, which was largely based on the conclusion Bill lacked sufficient capacity to decide what should be done with trust assets, and thus should not have been allowed to retain control. That was not a claim Bill himself could have brought. "Stop me before I do something I'll regret" is not a recognized cause of action, even against the trustee of one's revocable trust.

Moreover, we note that although the court's order granting respondents' petition actually recites that Tim was surcharged based upon his "breach of the Trust and breach of fiduciary duties *owed to Decedent William Giraldin*," (italics added) its statement of decision made clear that the duties Tim was found to have breached were those same ones recited in respondents' petition, each of which was relied upon as a basis for faulting Tim because he allowed Bill to do *what he wanted.*

By facilitating Bill's investment in SafeTzone, Tim was found to have breached his duty "to administer the trust solely in the interest of the beneficiaries"; his duty "to deal impartially with beneficiaries"; his duty to "preserve the trust property"; his duty "to make trust property productive"; and his duty to "diversify the investment of the trust." But Tim breached none of those duties vis-à-vis Bill, by allowing the trust money to be used as Bill wanted.

And of course, respondents concede the SafeTzone investment was one that Bill himself wanted to make. They make no claim that Bill's free will was overcome by some wrongful conduct of Tim's. Respondents' position, which was adopted by the court in its statement of decision, was that Bill's "desire, even if competently formulated," was an insufficient basis to relieve Tim of liability for allowing Bill to tap into trust assets to fund the investment. But if the claim were being asserted by Bill himself, that competently formed desire clearly would be a sufficient basis to relieve Tim

of liability. If Bill wanted to make that investment, and the assets in the family trust remained, in legal effect, Bill's own, then Bill himself would not have been aggrieved by Tim's mere cooperation with his plan.[21] Clearly, respondents' claim was not made on Bill's behalf.

Further, even if we assume Bill did suffer from some degree of diminished capacity, we cannot discern how Tim, acting in his capacity as trustee of Bill's family trust, would owe Bill any duty to either diagnose that problem or take action to restrict Bill's financial dealings as a result of it. The fact is that until such time as Bill was adjudicated legally incompetent to handle his own affairs, or until he self-imposed some formal restrictions on his ability to handle his assets (such as by making his trust irrevocable), Bill remained legally entitled to do what he wanted with the trust assets – which were effectively his own property – including doing financially risky or downright stupid things. No one – including Tim – had the authority to stop him. Thus, in the absence of an adjudication of Bill's incompetency, we cannot discern any legal basis on which Bill might have justified holding Tim liable for carrying out Bill's own wishes with regard to the assets in the family trust – even if those wishes appeared to be objectively unreasonable.[22]

Stated another way, we can discern no reason why Tim's *role as trustee* of Bill's family trust imposed a special obligation on him to question Bill's competency or capacity to make decisions, or to question the wisdom of the decisions Bill chose to make. By agreeing to act as trustee, Tim was not agreeing to assume the role of Bill's de-

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21 When the court explained that Bill's desires were, in effect, irrelevant, it went on to explain that it was proper to surcharge Tim in any case, based on his failure to ensure that Bill's desires were "properly documented, as required by the terms of the trust document." But if Bill's desires, competently formulated, were actually carried out by Tim, then *Bill himself* could never establish that *he* had been damaged simply because Tim failed to document Bill's desires. The lack of documentation, in and of itself, is not a cause of action.

22 Generally, if a person has not been adjudicated incompetent, his lack of capacity to enter into a particular contract is grounds to *rescind* the contract. (Civ. Code, § 39.) It is not grounds for assessing damages against those who deal with the incapacitated person. In this case, it does not appear respondents made any effort to rescind the SafeTzone investment on Bill's behalf.

facto conservator – and certainly Bill could not fault him for failing to act in that capacity. Indeed, imposing such a duty on the trustee of a revocable trust would create a conflict between the trustee and settlor, and in effect obligate the trustee to second-guess every decision the settlor makes with respect to trust assets, and then to evaluate whether those which appear fiscally unsound might be the product of an unsound *mind*.

And of course, determining whether a person's mind is so unsound as to interfere with his capacity to make particular decisions and enter into particular contracts is a seriously complicated business. (See Prob. Code, §§ 810-812.)[23] We consequently

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23 Probate Code section 810 provides: "(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that *all persons have the capacity to make decisions and to be responsible for their acts or decisions*. [¶] (b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions. [¶] (c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." (Italics added.)
Probate Code section 811 sets out the findings necessary to support a conclusion of lack of capacity, as follows: "(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and *evidence of a correlation between the deficit or deficits and the decision or acts in question:* [¶] (1) Alertness and attention, including, but not limited to, the following: [¶] (A) Level of arousal or consciousness. [¶] (B) Orientation to time, place, person, and situation. [¶] (C) Ability to attend and concentrate. [¶] (2) Information processing, including, but not limited to, the following: [¶] (A) Short- and long-term memory, including immediate recall. [¶] (B) Ability to understand or communicate with others, either verbally or otherwise. [¶] (C) Recognition of familiar objects and familiar persons. [¶] (D) Ability to understand and appreciate quantities. [¶] (E) Ability to reason using abstract concepts. [¶] (F) Ability to plan, organize, and carry out actions in one's own rational self-interest. [¶] (G) Ability to reason logically. [¶] (3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: [¶] (A) Severely disorganized thinking. [¶] (B) Hallucinations. [¶] (C) Delusions. [¶] (D) Uncontrollable, repetitive, or intrusive thoughts. (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, *that is inappropriate in degree to the individual's circumstances.*
(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions *with regard to the type of act or decision in question.*
(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment." (Italics added.)
Probate Code section 812 provides: "Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: [¶] (a) The rights, duties, and responsibilities created by, or affected by the decision. [¶] (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision. [¶] (c) The significant risks, benefits, and reasonable alternatives involved in the decision."

conclude that Tim owed Bill no special duty, in his capacity of trustee of the family trust, to *recognize* that Bill lacked capacity to enter into the SafeTzone investment agreement, and to consequently refuse to comply with Bill's desire to consummate that agreement. By attempting to assert such a claim, respondents were seeking to vindicate their own interests, as beneficiaries of the family trust, in preserving the trust corpus and not allowing it to be dissipated by unduly risky investments. They were not asserting the breach of any duty Tim owed to Bill.

Finally, we note that the relief sought by respondents in this case demonstrates that the interests they sought to vindicate were actually their own, not Bill's. For example, respondents sought to have Tim surcharged for trust expenditures which were not properly documented in accordance with the requirements of the trust, including "loans" and other disbursements of trust funds made to various family members. But respondents sought to hold Tim responsible only for "loaning" trust money to himself and to other siblings who were not within the respondent group – while ignoring the similar "loans" made to respondents Philip and Michael during the same period. If respondents were really concerned about *Bill's interests*, they would have been forced to acknowledge that the undocumented loans of trust funds made to Philip and Michael in 2004 were just as problematic as the other "loans" authorized by Tim. But they did not. Respondents complained only about Tim's disbursement of "loans" *to others*. Moreover, respondents even sought to surcharge Tim for disbursements made *to Bill himself*. Again, if respondents had really been standing in Bill's shoes, they could not have successfully complained of funds paid *to Bill* – whether those payments were documented or not. But respondents' goal in asserting that claim was to vindicate their own financial interests, as beneficiaries of the family trust, not to seek compensation for wrongs done to Bill.

Respondents contend that our failure to accord them standing in this case amounts to a sub rosa determination that the trustee of a revocable trust, such as Tim in

this case, could breach any number of the statutory duties imposed on trustees during the settlor's lifetime, and need never answer to anyone for it. The claim is a red herring.

Most of the abstract trustee duties respondents cite – e.g., the duties to "preserve trust assets," to "diversify investments"; to "deal impartially with beneficiaries"; and to "make trust property productive" – presuppose the trustee has the *power to control* what happens to trust assets. But that is not true in the case of a trust in which the settlor has retained the power to revoke. In such a case, the settlor has also retained the power to decide what is done with trust assets during his lifetime, and the trustee is obligated to do what the settlor wants. If the settlor holding the power to revoke his trust elects to spend half of the trust corpus on the purchase of a home for only one of his five children – all of whom would otherwise benefit equally under the terms of the trust – the trustee does not breach any duty to "deal impartially with beneficiaries" by allowing him to do so. If the settlor elects to bet the entire corpus on a horse race, the trustee does not breach any duty to "diversify investments" by allowing that to happen. In these cases, the trustee's duty to act in accordance with the settlor's instructions takes precedence over any abstract statutory obligation to do something different.

Of course, what the trustee *cannot do* is dispose of trust assets in a manner inconsistent with the settlor's wishes. If, as respondents posited at oral argument, Tim had taken money from the family trust without Bill's authorization just days before Bill died, so that Bill himself had no opportunity to do anything about it, there would still be a remedy. The representative of Bill's estate would have the right to pursue an appropriate claim for recovery of those funds on behalf of the estate. (Code Civ. Proc., § 377.20, subd. (a) ["Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period."].) And even assuming the representative of Bill's estate was Tim himself, who might be expected to have little enthusiasm for bringing such a claim, respondents, or any other "interested person," would have the right to petition for Tim's

removal in favor of an impartial special administrator who could then pursue whatever appropriate claims *Bill* might have had against Tim. (Prob. Code, § 8500.)

In this case, however, as we have already explained, respondents were not purporting to pursue Bill's claims, or to seek redress for alleged wrongs done to him. Instead, they were seeking to vindicate their own distinct interests, by claiming Tim had breached duties allegedly owed *to them* during the period prior to Bill's death. We hold merely that Tim owed them no such duties, and thus respondents lacked standing to assert *those claims*. We express no opinion on the merit of any theoretical claims that might have been asserted on Bill's behalf. None were.

Because respondents lacked standing to pursue claims against Tim for breach of fiduciary duty, or to seek an accounting of the trust, for the period prior to Bill's death, the orders entered against Tim in this case must be reversed.

We acknowledge that some of the surcharges ordered against Tim may actually stem, at least in part, from actions he took in the wake of Bill's death – a time when respondents would have had standing to question them. Unfortunately, we cannot discern with any accuracy which ones those might be, since neither the parties nor the trial court made any attempt to segregate the claims against Tim with that issue in mind.[24] We thus reverse the orders without prejudice to respondents' right to seek a new accounting pertaining solely to the period after Bill's death, and we express no opinion on the merits of such a claim.

III

We now turn to Mary's appeal. Mary's opening brief challenged the court's determination she had "elected" to accept the benefits of the family trust, and thereby forfeited her community property interest in the Lakeshore property and the Lake

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24 Because the issue of respondents' standing to maintain any claims relating to the period before Bill died is one this court raised on its own motion, after the parties had briefed the appeal, the parties' briefs make no effort to segregate the claims against Tim with that issue in mind, nor do they tailor any of their substantive arguments to focus on any of Tim's alleged acts for the period after Bill's death.

Hume cabin, on two grounds. First, Mary asserted that because there was no provision in the family trust which explicitly required her to make such an election – and such an election would not be necessary to effectuate Bill's estate plan – she was legally entitled to retain both her community property and any benefits received under the trust.

And second, Mary argued there was insufficient evidence in the record to establish that Bill had ever attempted to transfer ownership of either the Lakeshore property or the Lake Hume cabin to the family trust during his lifetime. Specifically, Mary cited undisputed evidence that no property had been identified on the version of "Schedule 1" – the purported list of assets "initially" transferred to the trust – which was incorporated into the family trust when Bill signed it, and that no other version of Schedule 1 had ever been completed. Thus, Mary asserted Schedule 1 was ineffective as a means of evidencing the transfer of property into the family trust, and she contended there was also no evidence establishing that Bill had otherwise transferred ownership of the properties into the trust prior to his death. Mary argued that since Bill never purported to transfer her community share of the properties into the trust, there was no basis for concluding her retention of that share was inconsistent with her receipt of trust benefits.

Respondents countered Mary's factual assertion concerning Schedule 1 by simply claiming that both "the Lakeshore Property and the Hume Lake Cabin . . . were clearly identified on Schedule 1 of the trust." Because we were unable to reconcile that claim with the undisputed evidence Mary cited, we invited respondents to provide us with a comprehensive recitation, including citations to the record, of the evidence they believed established that the disputed properties had been transferred to the family trust. Respondents complied.

IV

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 interest in the deceased husband's share given her by the will. (*Estate of Wolfe* (1957) 48 Cal.2d 570, 574-575; *Estate of Gilmore* (1889) 81 Cal. 240.) [¶] However, if the will *expressly requires the widow to elect* between the provisions for her benefit and her community property rights (*Estate of Dunphy* (1905) 147 Cal. 95, 103-104; *Estate of Klingenberg* (1949) 94 Cal.App.2d 240, 244) *or if the testator 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 remaining property *would thwart the testamentary intent* (*Estate of Wolfe, supra*, 48 Cal.2d at p. 574; *Estate of Orwitz* (1964) 229 Cal.App.2d 767, 769; *Estate of Roach* (1959) 176 Cal.App.2d 547, 553) the wife cannot take both her community property interest and the property given her by the will but must elect between them. Identical principles may require such an election by a surviving husband between his community property rights and the provisions for his benefit in the will of his deceased wife, whose testamentary power over community property is likewise applicable to only a one-half interest." (*Estate of Murphy, supra,* 15 Cal.3d at pp. 912-913, italics added.)

"The word 'election' in this context means '. . . the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases when there is a *clear* intention of the person from whom he derives one, that he should

not enjoy both.' (*Morrison v. Bowman* (1865) 29 Cal. 337, 347; italics supplied.)" (*Estate of Webb* (1977) 76 Cal.App.3d 169, 173.)

In this case, of course, Bill did not purport to dispose of Mary's community property *in his will*. To the contrary, Bill explicitly eschewed any such intent, by specifying that "[u]nder this Will I intend to provide for the disposition of all the property, wherever located, I own at my death, including my separate property and *my share* of all community property, if any, held with my wife." The will goes on to provide that Bill gives all "*my interest* in the residue of my estate," including "*my interest in my residences*, to [the family trust.]" (Italics added.) Moreover, Bill's will did not contain any provision requiring Mary to elect between her community property and taking a share of his estate. Consequently, nothing in Bill's will obligated Mary to choose between sharing in Bill's estate or retaining her share of the community property.

Although both sides seem to assume that the doctrine of spousal election would also control Mary's rights to object to Bill's unauthorized disposition of her share of community property by way of a revocable inter vivos trust (as opposed to by will or testamentary trust), we are not so sure. Probate Code section 5020 provides: "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 (1) *is not effective as to the nonconsenting spouse's interest in the property* and (2) does not affect the nonconsenting spouse's disposition on death of the nonconsenting spouse's interest in the community property by will, intestate succession, or nonprobate transfer." (Italics added.) Probate Code section 5021 requires the court to set aside such a transfer as to the interest of the nonconsenting spouse.

But as neither side has raised that issue, we will simply presume for purposes of this analysis that Mary could be required to forfeit her interest in community property, simply because Bill had purported to unilaterally transfer the entirety of that

property into a trust which became irrevocable – and thus effective to transfer ownership of the property – upon his death.

So the question becomes, "Did Bill do that?" Respondents cite various pieces of evidence they contend establish Bill's intention to transfer the Lakeshore property and the Lake Hume cabin to the family trust. But of course, Bill's mere intention to transfer ownership of real properties would not be sufficient to make that happen. The statute of frauds (Civ. Code, § 1624) requires transfers of real property to be memorialized in a writing, signed by the party to be charged. The rule applies to transfers of real property into a trust. (*Estate of Heggstad* (1993) 16 Cal.App.4th 943, 949.)[25]

With that in mind we consider whether any of the evidence cited by respondents qualifies as a sufficient written memorialization of Bill's transfer of these properties into the family trust. Respondents begin with the fact that Bill had originally transferred the Lakeshore property to his 1997 revocable trust. However, Bill's express *revocation* of that 1997 trust means we cannot consider its content as evidence of Bill's intentions thereafter.

Respondents next claim Bill's intention to transfer the properties into the family trust is evidenced by the terms of his written revocation of the 1997 trust. According to respondents, Bill's revocation of the trust included instructions that Tim should transfer title of all properties owned by that earlier trust *to the new family trust.* This is simply not true. What Bill's revocation document actually said was that Tim was appointed trustee of the earlier trust, "for the sole and exclusive purpose of liquidating any assets that may be vested in the name of the Trust." Tim was then "directed to deliver forthwith the entire corpus of the trust estate . . . *to William A. Giraldin.*" Indeed,

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25 Nor does it help respondents to claim that the failure to formally effectuate the transfer was Tim's fault. They have not explained how Tim would have an enforceable duty to transfer Bill's real property into the family trust, but even if he did, we cannot envision how *Tim's negligence* in failing to transfer the property into the family trust would lead to a determination that *Mary* had forfeited her interest therein.

nothing in the revocation of Bill's earlier trust expressed his intention that ownership of the Lakeshore property be transferred to the family trust.

With respect to Schedule 1 of the family trust, respondents simply ignore the fact the version actually incorporated into the trust is blank. Instead, they rely upon a different version of Schedule 1, which Bill's trust attorney was apparently working on *after* Bill signed the family trust document. That *later version* of Schedule 1 lists numerous assets, including both the Lakeshore property and the Lake Hume cabin. However, the evidence is undisputed that Bill never reviewed or approved that version of Schedule 1, and it was never formally added to the family trust by amendment. Consequently, respondents' favored version of Schedule 1 does not qualify as evidence *that Bill* ever transferred ownership of any property into the family trust.

Respondents next rely upon the terms of the family trust itself, which they claim specifically reference the Lakeshore property as being subject to its provisions. Again, respondents are incorrect. The family trust does include a provision defining "residence" as "that dwelling or dwellings, as the case may be, in which I normally lived prior to my death." And while that definition would *include* the Lakeshore property, where Bill and Mary resided *at the time of* Bill's death, it would also include every residence Bill had ever lived in. It does not qualify as a specific reference to the Lakeshore property. More significantly, the provision is merely a definition, and does not reflect any intention to *transfer ownership* of any residence to the family trust.

Finally, respondents cite Article 22 of the family trust, entitled "Residence Provisions" which requires the trustee to "permit [Mary] to live in and occupy the Residences during her lifetime." However, by its terms, the provision applies only to "any residences held under the terms of this Trust Agreement." But since there is nothing in this provision which purports to provide that any properties *are in fact* held under the terms of the trust, it is nugatory as evidence that ownership of either the Lakeshore property or the Lake Hume cabin was transferred into the trust during Bill's lifetime.

Nor does the "Residence Provisions" article require that Bill have transferred any residential properties into the trust during his life, in order to be effective. The fact is that Bill's *own share* in the residential properties he owned at his death would be transferred to the trust by operation of Bill's will. Thus, if Bill did not otherwise purport to transfer the entirety of those properties into the family trust during his lifetime – and we find no evidence that he did – the trust provisions would still be operative to guarantee Mary's right to continue living in the home she shared with Bill, and to preclude the trustee of the family trust from seeking to partition and sell that asset during her lifetime. (Code Civ. Proc., §§ 872.810, 872.820; *LEG Investments v. Boxler* (2010) 183 Cal.App.4th 484, 493 ["A co-owner of property has an absolute right to partition unless barred by a valid waiver."].)

Based upon all of the foregoing, we agree with Mary's contention there is insufficient evidence in the record to establish that ownership of either the Lakeshore property or the Lake Hume cabin was ever transferred into the family trust during Bill's lifetime. It consequently follows that the properties became subject to the trust's terms only upon Bill's death, by operation of his will.

Since Bill's will transferred only *his own community share* of those properties, Mary's share of those properties was never made subject to the family trust. Thus, there was no inconsistency between Mary's retention of her community share of the properties, and her acceptance of benefits under the terms of the trust. The court erred in concluding that Mary was forced to "elect," and had forfeited her interest in the community property by accepting trust benefits.

V

Respondents' last contention is that Mary is bound by the court's ruling against her, even if erroneous, because she failed to appeal from a November 2, 2009 order, now purportedly "final," which determined that title to the Lakeshore property is "vested in the name of Linda Rogers, Temporary Trustee of the William A. Giraldin

Family Trust . . . ."[26] We find the contention, which is essentially unsupported by any authority or analysis, wholly unpersuasive.

The order relied upon by respondents, arises out of their petition, filed in May of 2009 (five months after issuance of the orders challenged in this appeal and after this appeal had been filed), to "correct the title" to the Lakeshore property, which was then held "in the name of 'William A. Giraldin, Trustee of the William A. Giraldin Trust, dated February 25, 1997.'" Respondents claimed in their petition that Bill had legally transferred title to the Lakeshore property into the family trust by virtue of its inclusion on a list of property "added . . . to Schedule 1 *prior to execution of the Trust*." (Italics added.)

Linda Rogers, the temporary trustee of the family trust, filed a response to the petition, in which she took pains to correct some of the information offered by respondents in support of their petition. She explained to the court that her counsel had contacted the attorney who drafted the family trust, and he confirmed that no version of Schedule 1, listing any property "initially transferred" to the family trust, had ever been completed. She also pointed out that the version of Schedule 1 relied upon by respondents reflected *on its face* that it had been prepared *after* the date the family trust became effective.

Having brought those facts to the court's attention, Rogers candidly admitted she would prefer that title to the Lakeshore property be transferred to the family trust, and asserted that such an order could be justified as the natural result of the prior court orders now under consideration in this appeal, rather than on the basis of any evidence submitted by respondents in support of their petition.

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26 Respondents asked us to take judicial notice of the court's November 2, 2009 order, and both Tim and Mary opposed that request, but requested in the alternative that if this court did take judicial notice of the order, we also take judicial notice of the respondents' petition seeking the order, the response to the petition filed by the family trust's temporarty trustee, and the reporter's transcript of the hearing on the petition. Respondents later filed their own additional request that we take judicial notice of their petition. We grant all the requests.

At the hearing, the court explicitly rejected respondents' effort to demonstrate that Bill had actually *transferred title* of the property into the family trust by including it on a Schedule 1 list of assets, while adopting Rogers' position that the transfer of title could be justified based solely on the earlier court orders: "I do agree with [Rogers] that the court's already found it to be part of this trust . . . so the court's going to find that the real property belongs to the 2002 trust and not to the 1998 [*sic*] trust."[27]

Although respondents seem to believe that the November 2, 2009 order, would be entitled to preclusive effect in connection with this appeal, the opposite is true. "The general rule is that '"'[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal *and issuance of the remittitur*' [citation], *thereby divesting the trial court of jurisdiction over anything affecting the judgment.* [Citations.]"' [Citations.]" (*People v. Superior Court (Gregory)* (2005) 129 Cal.App.4th 324, 329, second italics added.)

"'[T]he perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . . .' ([Code Civ. Proc.,] § 916, subd. (a).) The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it." (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 937-938.) "Whether a matter is 'embraced' in or 'affected' by a judgment within the meaning of [Code of Civil Procedure] section 916 depends upon whether postjudgment trial court

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27 Undeterred by the temporary trustee's clear explanation of why the Schedule 1 document relied upon by respondents was insufficient to demonstrate any transfer of properties to the family trust, they simply renewed that claim in this appeal. That is disappointing.

proceedings on the particular matter would have any impact on the 'effectiveness' of the appeal. If so, the proceedings are stayed; if not, the proceedings are permitted." (*Ibid.*)

The effect of Tim's and Mary's appeals in this case was to stay proceedings in the probate court on matters embraced by or affected by the orders appealed from, and to deprive the court of jurisdiction to make orders affecting those appeals. Consequently, the November 2, 2009, order had no effect.

DISPOSITION

The orders filed December 19, 2008, granting respondents' petition to remove Tim Giraldin as trustee of the family trust, to surcharge him, and to require him to account to trust beneficiaries, and settling trustee's first account, are reversed. Respondents lacked standing to request such relief based upon Tim's alleged acts or omissions during the period when the family trust remained revocable. This reversal is without prejudice to respondents' right to seek a new accounting pertaining solely to the period after Bill Giraldin's death, and we express no opinion on the merits of such a claim.

The court's order denying Mary's spousal property petition is likewise reversed, and the court is directed on remand to enter a new order limiting its finding of Mary's waiver of her community property rights to assets *other than* the Lakeshore

property and the Lake Hume cabin, and confirming that Mary at all times retained her community property interest in those properties.

Tim and Mary are entitled to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.

The Law Of Trusts And Trustees § 964

Bogert's Trusts And Trustees
Current through the 2011 Update
Alan Newmana49, George Gleason Bogerta50, George Taylor Bogerta51, Amy Morris Hessa52
Chapter 46. Accounting and Compensation

§ 964. Revocable trusts—The trustee's duties to furnish information and to account1

West's Key Number Digest

West's Key Number Digest, Trusts ⚷289
West's Key Number Digest, Trusts ⚷291
West's Key Number Digest, Trusts ⚷366

In recent years, revocable trusts2 have become increasingly popular as will substitutes that can avoid estate administration upon the settlor's death and the need for a conservatorship if the settlor should become incapacitated.3 The settlor of a typical revocable trust retains the power to revoke the trust and regain its assets, or to amend its terms, and thereby terminate the interests of other beneficiaries of the trust. Usually, the power of revocation is held by the settlor personally, rather than in a fiduciary capacity, and is thus exercisable without restriction or limitation. Having such a power therefore is, in substance, the functional equivalent of outright ownership of the trust assets.4 Similarly, the holder of a presently exercisable general power of appointment, or a power of withdrawal that is not subject to a standard,5 has unilateral, unrestricted access to trust assets subject to the power, and thus also has the functional equivalent of outright ownership of those assets.6 As a result, the holder of such a power is, with respect to the assets subject to the power, in the same position as if the holder were the settlor of a revocable trust of those assets, and is treated as such under both the Third Restatement of Trusts7 and the widely adopted Uniform Trust Code.8

With respect to the threshold question of whether a trust is revocable, at common law, a trust was not revocable unless the settlor reserved a power of revocation in the terms of the trust.9 Given the popularity of revocable trusts as will substitutes and the frequency with which such trusts are drafted by nonprofessionals, the Uniform Trust Code reverses the common law rule: under it, a trust is revocable unless expressly made irrevocable by its terms.10 If the terms of a trust condition the settlor's ability to revoke it on the consent of the trustee or a person holding an adverse interest, the trust will not be treated as a revocable trust under the UTC.11 If a trust has multiple settlors, and the terms of the trust do not provide otherwise,12 generally each settlor may revoke the trust as to the property of the trust attributable to that settlor's contributions.13 In most jurisdictions, a revocable trust does not lose its status as such if the settlor loses the capacity to revoke the trust.14

Given that a settlor's power of revocation is the equivalent of ownership of the assets subject to the power, the duties of a trustee of a revocable trust are owed exclusively to the settlor,15 and the trustee cannot be held liable for conduct knowingly approved by a competent settlor that otherwise would be actionable.16 As a result, at least while the settlor is competent, the trustee of a revocable trust, while clearly subject to normal fiduciary duties to the settlor,17 is not accountable to, and is under no duty to provide information about the trust to, non-settlor beneficiaries.18 This rule is codified in jurisdictions that have enacted the Uniform Trust Code19 and in a number of non-UTC jurisdictions.20

Connecticut, however, appears to be an exception. Its trust accounting statute,21 which authorizes any beneficiary of an inter vivos trust to petition for an accounting, has been held to apply to revocable as well as irrevocable inter vivos trusts.22

If the settlor of a revocable trust becomes incapacitated, the trustee is accountable to the settlor's representative.23 More difficult is the question of whether the trustee also is accountable to other beneficiaries of the trust during the settlor's incapacity.24 There is a significant split among jurisdictions that have addressed the question by statute. As originally promulgated, the Uniform Trust Code provided that the trustee's duties were owed exclusively to the settlor only if the settlor had capacity to revoke the trust.25 If the settlor lost capacity, the UTC's default rule26 was that "the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813."27 This position of the UTC was not well received. Of the first 23 jurisdictions to have enacted the UTC, only seven have adopted its rule that the trustee of a revocable trust owes duties to beneficiaries other than the settlor while the settlor lacks capacity.28 As a result, the UTC's 2004 amendments included one that bracketed the capacity limitation on the rule that the duties of the trustee of a revocable trust are owed exclusively to the settlor.29 The accompanying comment notes that enacting jurisdictions are free to strike the incapacity limitation on the section's general rule, in which case the trustee's duties would be owed exclusively to the settlor regardless of whether the settlor had capacity to revoke the trust.30 As

mentioned, most jurisdictions that have adopted the UTC have taken that approach.
Consistent with the rule that the duties of a trustee of a revocable trust are owed exclusively to the settlor, at least while the settlor has capacity,31 the rights of non-settlor beneficiaries of a revocable trust generally are subject to the control of the settlor.32 Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime.33 After the settlor's death, of course, the trustee is accountable to the trust's other beneficiaries for its administration of the trust after the settlor's death.34 Further, many courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct.35

Footnotes

a49 Professor of Law, The University of Akron School of Law, and member of the Bar in Oklahoma.

a50 Late James Parker Hall Professor of Law, University of Chicago Law School, and member of the Bar in New York and Illinois.

a51 Retired from the Chicago Bar.

a52 UTK Distinguished Service Professor; Waller, Lansden, Dortch & Davis and Williford Gragg Distinguished Professor of Law, University of Tennessee College of Law; and member of the Bar in Virginia and Tennessee.

1 Restatement Third, Trusts § 74; Restatement Second, Trusts § 216.

2 See §§ 1061 to 1079, *infra*.

3 See generally Restatement Third, Trusts § 25.

4 See Restatement Third, Trusts § 74. See also Restatement Third, Trusts § 56, comment b (stating, in explaining the rule that the creditors of non-settlor beneficiaries of a revocable trust cannot reach their interests in the trust while it is revocable by its settlor, that such beneficiaries are treated for many purposes of substance (as distinguished from form or procedure), "*as if* they had no existing property interests (that is, their rights may be treated like the bare expectancies of will beneficiaries) so long as the power to revoke exists." (emphasis in original)). For a recent case employing a similar analysis in holding that a husband's beneficial interest in his living mother's revocable trust was not to be taken into account in dividing the marital property of the husband and his wife in their divorce proceeding, see In re Marriage of Githens, 227 Or. App. 73, 204 P.3d 835 (2009), review denied, 347 Or. 42, 217 P.3d 688 (2009).

5 An unrestricted power of withdrawal is the equivalent of a power of revocation, as to the amount subject to withdrawal, but a power of withdrawal the exercise of which is subject to a standard, whether or not ascertainable relating to health, education, maintenance, or support, is not. See Restatement Third, Trusts § 74, comment a.

6 See Restatement Third, Trusts § 74. At common law, the holder of a presently exercisable, but unexercised, general power of appointment was treated as not having a sufficient property interest in the assets subject to the power to warrant the holder's creditors being able to reach the assets. See, e.g., Irwin Union Bank & Trust Co. v. Long, 160 Ind. App. 509, 312 N.E.2d 908 (1974). The common law rule was reflected in Restatement Second, Property: Donative Transfers § 13.2, which also noted that the rule had been reversed by statute in several states. Given that such a power is an ownership equivalent power, the new Restatement rejects the common law rule. Restatement Third, Property: Wills & Other Donative Transfers § 22.3(a) (Tentative Draft No. 5, 2006).
For a case declining to decide whether an unrestricted power to withdraw necessarily includes a power to amend in all cases as a matter of law, see In re Cable Family Trust Dated June 10, 1987, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 108 (2010).

7 Restatement Third, Trusts § 74.

8 See Unif. Trust Code § 603(b). UTC jurisdictions include: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming. For citations, see notes 3 to 25, § 973, *infra*.
The UTC provides a limited exception to that treatment in the creditors' rights context. To facilitate estate and gift tax planning with so-called "Crummey" and "5x5" powers, the UTC treats the holder of a power of withdrawal over trust property that lapses or is released or waived "as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986..." Unif. Trust Code § 505(b)(2).

9 See Restatement Second, Trusts § 330.

10 Unif. Trust Code § 602(a). By statute in several non-UTC states, trusts also are revocable unless expressly made irrevocable in the trust terms. See, e.g., Cal. Prob. Code § 15400; Iowa Code Ann. § 633A.3102; Mont. Code Ann. § 72-33-401; Okla. Stat. Ann. tit. 60, § 175.41; Tex. Prop. Code Ann. § 112.051(a). Under the Third Restatement of Trusts, if the settlor has not expressly addressed the question of revocability, it is one of interpretation. Restatement Third, Trusts § 63.
In Georgia, the traditional common law rule that a trust is irrevocable unless the settlor has expressly reserved the power to revoke has been codified. Ga. Code Ann. § 53-12-40(a).

11 Unif. Trust Code § 103(14). If the settlor's power of revocation applies only to a portion of the trust, only that portion should be treated as a revocable trust. See Restatement Third, Trusts § 74, comment h.

12 The surviving settlor of a joint revocable trust, the terms of which included contradictory language as to whether the surviving settlor could revoke it, was allowed to revoke the trust. Langer v. Pender, 2009 ND 51, 764 N.W.2d 159 (N.D. 2009).

13 See Unif. Trust Code § 602; Restatement Third, Trusts § 63, comment k. If the co-settlors of a trust are spouses and the trust includes community property, either spouse may revoke the trust, but both must act to amend its terms. Unif. Trust Code § 602; Restatement Third, Trusts § 63, comment k.
After their divorce, husband and wife created a joint revocable trust of which they served as cotrustees, naming their children as beneficiaries. Husband's father transferred real estate to the trust, which husband, as trustee, subsequently transferred to himself. Wife's motion for summary judgment challenging the transfer was granted. Husband's argument that the transfer was valid, which was based on trust provisions granting the trustees power to dispose of trust assets and each trustee the power to act independently of the other, was characterized by the court as "preposterous" and "totally absurd." Husband's alternative argument on appeal, that the transfer was valid under a trust provision granting the settlors the power to add or withdraw assets from the trust at any time, was not raised with the lower court and was therefore waived. Sredniawa v. Sredniawa, 2006-Ohio-1597, 2006 WL 832449 (Ohio Ct. App. 8th Dist. Cuyahoga County 2006).
Husband and wife created a joint revocable trust, the sole asset of which was their home, naming their children as remainder beneficiaries. After wife's death, husband remarried and, as trustee of the trust, conveyed the home to himself and his second wife as joint tenants with rights of survivorship. After husband's death, the children challenged the conveyance. A trust provision stated that the co-settlors reserved the power to revoke the trust and that "[t]he sale or disposition by us of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust." Relying on the quoted language, the court held that the surviving co-trustee had the same power to convey the trust assets as did the co-trustees and that, because after wife's death husband was the sole present beneficiary of the trust, the conveyance did not violate his fiduciary duty. Matter of Estate of West, 948 P.2d 351 (Utah 1997).

14 See Unif. Trust Code §§ 103, comment, and 602, comment; Restatement Third, Trusts § 63, comment l; Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (2d Dist. 1999) (appointment of conservator for settlor did not convert a revocable trust into an irrevocable one; conservator could revoke); Matter of Roberts' Estate, 99 Ill. App. 3d 993, 55 Ill. Dec. 294, 426 N.E.2d 269 (5th Dist. 1981) (trustee ordered to account to the settlor's conservator); In re Elsie B, 265 A.D.2d 146, 707 N.Y.S.2d 695 (3d Dep't 2000) (settlor's guardian allowed to modify trust terms); Matter of Bo, 365 N.W.2d 847 (N.D. 1985) (settlor's conservator did not have the power to revoke settlor's revocable trust); Matter of Mosteller, 719 A.2d 1067 (Pa. Super. Ct. 1998) (incapacitated settlor's attorney-in-fact had the power to revoke settlor's revocable trust); Kline By and Through Kline v. Utah Dept. of Health, 776 P.2d 57 (Utah Ct. App. 1989) (incapacitated settlor's attorney-in-fact did not have power to revoke settlor's revocable trust).
Cf. Manning v. Glens Falls Nat. Bank and Trust Co., 265 A.D.2d 743, 697 N.Y.S.2d 203 (3d Dep't 1999) (by its express terms, revocable trust became irrevocable upon settlor's admission as a permanent or chronic care resident or patient to a skilled nursing or residential care facility).
Contra In re Guardianship of Lee, 1999 OK CIV APP 50, 982 P.2d 539 (Div. 3 1999).

15 See, e.g., Unif. Trust Code § 603(a).

16 See Unif. Trust Code § 808(a) ("[w]hile a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust").
A settlor who provided written directions to the trustee of her revocable trust to retain stock she had conveyed to the trust could not pursue a claim against the trustee that its doing so was a breach of its duty under the prudent investor rule. McGinley v. Bank of America, N.A., 279 Kan. 426, 109 P.3d 1146 (2005).
Settlor who directed the trustee's imprudent investments could not hold the trustee accountable for them. Lawrence v. First Nat. Bank & Trust Co. of Kalamazoo, 266 Mich. 199, 253 N.W. 267 (1934).

17 Trustee of revocable trust invested trust assets in a common trust fund that restricted withdrawals. When settlor requested funds, trustee did not inform her of common trust fund withdrawal restrictions, but suggested that she borrow from the bank in order to take advantage of a differential in interest rates. The trial court's directed verdict for trustee in settlor's subsequent suit for breach was reversed, the appellate court holding that trustee's failure to disclose the nature of the restrictions on withdrawal upon settlor's request for funds raised an issue of fact as to whether trustee breached its duty to deal fairly with settlor and to communicate to her all material facts related to its dealings with her. Shannon v. Frost Nat. Bank of San Antonio, 533 S.W.2d 389

(Tex. Civ. App. San Antonio 1975), writ refused n.r.e., (June 9, 1976).

18 The Restatement goes further:

[A]s long as the settlor has capacity to understand and evaluate information provided by the trustee regarding the administration of the trust, the trustee of a revocable trust is not to provide reports or accountings or other information concerning the terms or administration of the trust to other beneficiaries without authorization either by the settlor or in the terms of the trust or a statute.

Restatement Third, Trusts § 74, comment e.

Cf. JP Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697 (Ky. 2009). Settlor of revocable trust, who was 93 years old and in declining health, revoked trust that was to benefit charities upon her death and executed a new trust instrument that increased the gift to her unrelated caretaker, who "suggested and contacted [the new attorney] for the purpose of reviewing and revising the estate plan," from $20,000 to $500,000 and named the drafting attorney sole trustee. Settlor died shortly thereafter. Acting on the advice of counsel, the trustee of the revoked trust notified the charities of the revocation and that the revocation may have been the product of undue influence. After the contest the charities filed was settled for $1.875 million, the drafting attorney/new trustee sued the former trustee for breach of duty in disclosing what was alleged to be confidential information about the revoked trust to its remainder beneficiaries. The Kentucky Supreme Court, in reversing the Court of Appeals, held that the former trustee's statutory duty, which was not limited to irrevocable trusts, to keep beneficiaries reasonably informed of the trust and its administration included the duty to notify the former beneficiaries of the trust's revocation. Following the decision in Longmeyer, the Kentucky statute on the duty of the trustee to inform and account to beneficiaries (Ky. Rev. Stat. Ann. § 386.715) was amended by the inclusion of new subsection 386.715(4): "While a trust is revocable by the settlor and, in the reasonable belief of the trustee, the settlor has capacity to revoke the trust, the trustee's duties under this section extend only to the settlor."

19 See Unif. Trust Code § 603(a). In North Dakota, a UTC jurisdiction, under a narrow exception to the rule, the trustee of a revocable trust must also provide information about the trust "[t]o a qualified beneficiary when the qualified beneficiary is required by law or regulation to provide that information to determine eligibility for [public welfare] benefits or to verify continued eligibility for [public welfare] benefits under title 50." N.D. Cent. Code § 59-16-1(1)(c).

Husband and wife created revocable trusts of which they and their children were beneficiaries. Relying on Alabama's version of UTC § 603(a), the Alabama Supreme Court ordered claims of children, asserted during settlors' lifetimes, against trustee and its agents for breach of fiduciary duty, to be dismissed for lack of standing. Ex parte Synovus Trust Co., 41 So. 3d 70 (Ala. 2009).

20 See, e.g., Cal. Prob. Code §§ 15800 and 16064; Iowa Code Ann. §§ 633A.3103 and 633A.4213(4); Ky. Rev. Stat. Ann. § 386.715(4); La. Rev. Stat. Ann. § 9:2088; Mont. Code Ann. § 72-33-701; S.D. Codified Laws § 55-2-14.

21 Conn. Gen. Stat. Ann. § 45a-175(c)(1).

22 In re Reisman (Conn. Prob. Ct. 1995), in Conn. L. Trib. (Jan. 22, 1996). In Reisman, the settlor had been judicially determined to be incapacitated.

23 Under the Uniform Trust Code, an attorney-in-fact (if authorized by the terms of the trust or power of attorney), or a conservator or guardian (if authorized by the court), may exercise the revocation, amendment, and distribution powers of a settlor of a revocable trust. Unif. Trust Code § 602(e) and (f). A conservator of a settlor who is concerned about possible abuse by the trustee may petition the court to revoke the trust, remove the trustee, or order the trustee to comply with the trust's terms. Unif. Trust Code § 602, comment. An attorney-in-fact, conservator, or guardian, as representative of an incapacitated settlor under Unif. Trust Code § 303, may receive notices and provide binding consents on behalf of the settlor. Unif. Trust Code § 602, comment.

Settlor's voluntary guardian brought an accounting action against trustee of settlor's revocable trust after settlor had become incapacitated. Plaintiff, who also was personal representative of settlor's estate following her death, was allowed to pursue the claim following settlor's death because the trust instrument listed as one of its two purposes the payment of settlor's debts at time of death and her estate claims and expenses. As a result, her estate was an intended beneficiary of the trust and its personal representatative had standing to call for an accounting. Carvel v. Godley, 939 So. 2d 204 (Fla. Dist. Ct. App. 4th Dist. 2006).

Litigation between settlor's two co-conservators, one of whom was trustee of her revocable trust, was resolved by an order determining that the trustee had breached her fiduciary duty and removing the trustee. In re Conservatorship of Estate of Loyd, 868 So. 2d 363 (Miss. Ct. App. 2003).

Upon the settlor's incapacity, her niece, who was appointed guardian of her person, had the duty to provide for her care and to evaluate all relevant circumstances related to her health and finances. Given that settlor had provided for a successor trustee of her revocable trust, who was also her attorney-in-fact, the niece's petition for appointment as guardian of settlor's property had been denied. The niece's subsequent action for an accounting was granted. While the trustee's status as sole trustee and attorney-in-fact obviated the need to appoint a guardian of the settlor's property, the court noted that the niece "does not herein seek the power to manage [the settlor's] trust or financial affairs as a guardian of property ... Rather, she seeks only information to exercise those particular, limited powers conferred upon her in the guardianship order ... Relegating petitioner to making demands of respondent for payment of expenses, without any information as to her financial circumstances, is untenable." In re Mary XX., 33 A.D.3d 1066, 822 N.Y.S.2d 659 (3d Dep't 2006).

24 The UPC's trust reporting statute does not distinguish between revocable and irrevocable trusts and does not address the incapacity issue. Unif. Probate Code § 7-303. Under a separate UPC provision, the holder of a power of revocation is deemed to

act for beneficiaries whose interests are subject to the power. Unif. Probate Code § 1-108. Section 1-108 also does not address the possibility of the power holder being incapacitated.
Under the Third Restatement of Trusts, if the settlor is incapacitated, "the other beneficiaries are ordinarily entitled to exercise, on their own behalf, the usual rights of trust beneficiaries, and the trustee is ordinarily under a duty to provide them with accountings and other information concerning the trust and its administration ..." Restatement Third, Trusts § 74, comment e.
In accordance with the terms of the trust, the settlor was replaced as trustee when two doctors opined that she was mentally incompetent to handle her financial affairs. Although California statutes provided that while the settlor is competent, the duties of the trustee of a revocable trust are owed exclusively to the settlor, the successor trustee was not under a duty to inform a remainder beneficiary about the trust. The doctors' letters did not establish that the settlor, who was presumed competent, was incapacitated. Beauclair v. Hurdle, 2004 WL 2005732 (Cal. App. 2d Dist. 2004), unpublished/noncitable, (Sept. 9, 2004).
After a conservator was appointed for the settlor of a revocable trust, a remainder beneficiary petitioned for an accounting. The appellate court affirmed the trial court's dismissal of the petition. After stating that "the trustee of a revocable trust generally has no duty to report or account to the trust beneficiaries," it held that the trust remained revocable after the appointment of a conservator for settlor, since the conservator succeeded to the power to revoke. The court also noted that the conservator had to account for all of settlor's estate, including the trust, and that the conservator could compel an accounting by the trustee if the conservator was concerned about the trustee's administration of the trust. Johnson v. Kotyck, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (2d Dist. 1999).
Under a Connecticut statute the court held applicable to revocable as well as irrevocable trusts, settlor's nephew, who was a beneficiary of settlor's revocable trust and conservator of settlor's person, successfully petitioned the probate court for an accounting and copy of the trust instrument. The trustees' arguments that plaintiff's interest in the trust was a mere expectancy and insufficient to constitute plaintiff a "beneficiary" under the statute, and that the settlor's privacy dictated not providing information about the trust to the settlor's nephew, were rejected. In re Reisman (Conn. Prob. Ct. 1995), in Conn. L. Trib. (Jan. 22, 1996).
For a case decided under Florida law before its enactment, with modifications, of the Uniform Trust Code, in which a trustee was held accountable to a nonsettlor beneficiary of a revocable trust during the settlor's incapacity, see Williams v. Northern Trust Bank of Florida/Sarasota, 819 F. Supp. 1042 (M.D. Fla. 1993).
In Missouri, the trustee's duty to report only to the settlor applies only while the settlor has capacity, but capacity is presumed "until either the settlor is adjudicated totally incapacitated or disabled or the trustee has received an affidavit of incapacity." Mo. Ann. Stat. § 456.6-603.

25 Unif. Trust Code § 603(a) (2000).

26 Given that Unif. Trust Code § 603 "may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights [to information, if the settlor is incapacitated], even to the point of directing the trustee not to inform them of the existence of the trust." Unif. Trust Code § 603, comment.

27 Unif. Trust Code § 603, comment.

28 Arkansas (Ark. Code Ann. § 28-73-603(a)); Missouri (Mo. Ann. Stat. § 456.6-603(1)); New Hampshire (N.H. Rev. Stat. Ann. § 564-B:6-603(a)); New Mexico (N.M. Stat. Ann. § 46A-6-603(A)); Tennessee (Tenn. Code Ann. § 35-15-603(a)); Utah (Utah Code Ann. § 75-7-606(1)); and Wyoming (Wyo. Stat. Ann. § 4-10-603(a)).
Similarly, in California, the rule that the duties of a trustee of a revocable trust are owed only to the settlor does not apply if the settlor is incompetent. Cal. Prob. Code §§ 15800 and 15802.
In Michigan, if the trustee reasonably believes the settlor is incapacitated, the trustee is to keep the settlor's designated agent informed about the trust. If there is no such agent, or the sole agent is a trustee, the trustee's reporting duty is owed to other beneficiaries. Mich. Comp. Laws Ann. § 700.7603.
In the District of Columbia, the trustee's duties are owed exclusively to the settlor while the trust is revocable, but while the settlor lacks capacity, "a beneficiary shall have the right to enforce the settlor's intent to benefit the beneficiary during the settlor's incapacity." D.C. Code § 19-1306.03.
In jurisdictions in which the default rule is that the trustee of a revocable trust owes duties only to the settlor, even during the settlor's incapacity, the settlor, of course, may override the default rule in the terms of the trust. See, e.g., Unif. Trust Code § 105. If, for example, the terms of a trust provide for the trustee to make distributions to one or more beneficiaries other than the settlor if the settlor becomes incapacitated, the settlor presumably has expressed the intent that the trustee's duties also are to be owed to those other beneficiaries during the settlor's incapacity.

29 Unif. Trust Code § 603(a) (2004).

30 Unif. Trust Code § 603(a), comment. In explanation, the comment notes the desire to treat revocable trusts similarly to wills and the issue of how to determine the settlor's capacity, or lack thereof, if the trustee's duties are owed to other beneficiaries if the settlor becomes incapacitated. That issue has been addressed by Missouri's version of the UTC, which provides, in relevant part:
'hile a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.
settlor is presumed to have capacity for the purposes of subsection 1 of this section until either the settlor is adjudicated totally

incapacitated or disabled or the trustee has received an affidavit of incapacity ...
this section, an "affidavit of incapacity" means a written certificate furnished by at least one licensed medical doctor that states that the settlor lacks capacity to revoke the trust.
Ann. Stat. § 456.6-603.

31 If a settlor of a revocable trust becomes incapacitated and the trust's terms provide for other persons to be current beneficiaries of the trust in that circumstance, arguably the trustee's duties also are owed to the non-settlor current beneficiaries during the settlor's lifetime, even in a jurisdiction that has adopted a statute limiting the trustee's duties during the settlor's lifetime to the settlor, regardless of whether the settlor has capacity. A rationale for that rule is that a revocable trust is a will substitute and devisees under the will of a living testator are owed no duties even if a testator lacks capacity. See Unif. Trust Code § 603, comment (addressing the rights of non-settlor beneficiaries to information about the trust during the settlor's incapacity). If the trust terms name someone other than the settlor as a current beneficiary of the trust, the settlor is using the trust for purposes other than a substitute for a will and arguably has thereby expressed the intent that such other beneficiaries have enforceable interests if the settlor becomes incapacitated.

32 See Unif. Trust Code §§ 603(a), comment ("the settlor has control over whether to take action against a trustee for breach of trust."), and 808(a) ("[w]hile a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust"); Unif. Probate Code §§ 1-108 ("the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power"), and 1-403 ("An order binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power").
As noted by the Third Restatement of Trusts, "competent settlors of revocable trusts can properly bring or prevent suits to surcharge trustees, may remove, replace, or add trustees, and are entitled to receive from trustees all of the information and accountings to which trust beneficiaries are entitled ..." Restatement Third, Trusts § 74, comment e. Similarly, under the Second Restatement of Trusts, "[w]here the settlor reserves power to revoke the trust, his consent to a breach of trust precludes the beneficiaries of the trust from holding the trustee liable for a breach of trust." Restatement Second, Trusts § 216, comment i.
Consent of non-settlor beneficiary of revocable trust was not required to amendment of trust instrument by conservator for settlor/protected person. In re Conservatorship of Didier, 2010 SD 56, 784 N.W.2d 486 (S.D. 2010).

33 Two settlors created revocable trusts. The terms of each trust provided that after settlor's death, the trust assets would be distributed to the other settlor, and that if the other settlor was not then living, the trust assets would be distributed to plaintiff. After death of settlor of the first trust, plaintiff brought a probate court action alleging an agreement between the two settlors that the survivor would not revoke or amend his trust, and seeking an order to that effect. Given that the surviving settlor was competent and had the power to revoke his trust, the court, relying on Cal. Prob. Code § 15800, held that the probate court lacked jurisdiction to hear the claim. Johnson v. Tate, 215 Cal. App. 3d 1282, 264 Cal. Rptr. 68 (2d Dist. 1989).
Remainder beneficiaries lacked standing to sue the trustee of a revocable trust for breach of duty during the settlor's lifetime. Hoelscher v. Sandage, 462 N.W.2d 289 (Iowa Ct. App. 1990).
Settlor of a revocable trust amended trust instrument to change remainder beneficiary to son-in-law and to eliminate interest of charitable remainder beneficiary. Following settlor's death, charity intervened in trustee's suit for determination of beneficiaries of trust, alleging settlor lacked capacity, son-in-law exercised undue influence over settlor, and trustee had breached its duty to charity in allowing settlor to make gifts from trust assets to son-in-law. After determining settlor had capacity, the court held trustee's duties were owed only to settlor. Stanton v. Wells Fargo Bank Montana, N.A., 2007 MT 22, 335 Mont. 384, 394–395, 152 P.3d 115, 122 (2007).
Remainder beneficiaries, whose interests were eliminated when the settlor amended the terms of a revocable trust, challenged the validity of the amendment by alleging settlor lacked capacity and acted under undue influence. In upholding the lower court's granting of successor trustee's motion to dismiss, the Nevada Supreme Court held that remainder beneficiaries of a revocable trust have only contingent interests that do not vest until the settlor's death, and thus do not have standing to challenge the trust during the settlor's life. Linthicum v. Rudi, 122 Nev. 1452, 148 P.3d 746 (2006).
The settlor's knowing approval of trustee conduct that otherwise would constitute a breach of its duty of undivided loyalty estopped the settlor and other beneficiaries from pursuing a breach of duty claim against the trustee. City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674, 157 A.L.R. 1424 (1943).
Decedent and his wife created a joint revocable trust of which they served as cotrustees. Children of the decedent from a prior marriage were remainder beneficiaries. Following decedent's death, children objected to surviving spouse/trustee's accountings, including one for the period from creation of trust until decedent's death. The court held that children, "having no pecuniary interest in the revocable trust until decedent's death, lack[ed] standing to object to the account ..." In re Malasky, 290 A.D.2d 631, 736 N.Y.S.2d 151 (3d Dep't 2002).
Appellate court upheld trial court determination that, where settlor of revocable inter vivos trust provided in the trust document for settlement of accounts by agreement with current beneficiary and agreed in a trust amendment to dispense with accounting by trustee, remainder beneficiaries were entitled to an accounting only from the date of settlor's death. Appellate court reasoned that "[t]he grantor of such an inter vivos trust may provide that the trustee shall be excused from accounting to anyone but the grantor for acts of the trustee performed during his lifetime." Andrews v. Trustco Bank, 289 A.D.2d 910, 735 N.Y.S.2d 640 (3d Dep't

2001).
Remainder beneficiaries of a revocable trust could not sue the trustee after the settlor's death with respect to conduct of the trustee before the settlor's death. Lewis v. Star Bank, N.A., Butler Cty., 90 Ohio App. 3d 709, 630 N.E.2d 418 (12th Dist. Butler County 1993).
The settlor of a revocable trust sold stock to a cotrustee. After the settlor's death, a remainder beneficiary's suit against the buyer/co-trustee was dismissed for lack of standing. Moon v. Lesikar, 230 S.W.3d 800 (Tex. App. Houston 14th Dist. 2007).
Remainder beneficiary of revocable trust could not demand accounting from trustee. Settlor had specifically instructed trustee not to provide information to beneficiary and a Utah statute provided that holder of a power of revocation is deemed to act for beneficiaries to the extent their interests are subject to the power. Montrone v. Valley Bank and Trust Co., 875 P.2d 557 (Utah Ct. App. 1994).

34 See, e.g., Shriners Hospitals for Crippled Children v. Smith, 238 Va. 708, 385 S.E.2d 617 (1989).

35 After settlor's death, remainder beneficiaries were allowed to pursue an accounting for periods before settlor's death where there was evidence trustee moved trust funds to a joint account between settlor and trustee, used funds from the joint account for personal expenses, and wrote checks on a trust account after she ceased to be trustee. Evangelho v. Presoto, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1st Dist. 1998).
The terms of a revocable trust provided for its assets to be poured over to personal representatives of settlor's estate for distribution under settlor's will and for trustees to provide final accounting to personal representatives. The two co-trustees were two of the three co-personal representatives of settlor's estate. Devisees under settlor's will filed an action against trustees in the civil division of the trial court for, among other things, a final accounting of their administration of the trust. The appellate court held will devisees were required to pursue their claims in the probate proceeding, as trustees' duties were not owed directly to them, but to the personal representatives. It noted that it was not required to address how the probate court should handle the devisees' claims, given that two of the trustees were co-personal representatives of the estate, but discussed alternatives. Reardon v. Riggs Nat. Bank, 677 A.2d 1032 (D.C. 1996).
After settlor's death, remainder beneficiaries had standing to bring an action asserting self-dealing by trustee during settlor's lifetime. "[O]nce the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary." The appellate court remanded the case for a determination of whether settlor was competent when she consented to the challenged transaction. Brundage v. Bank of America, 996 So. 2d 877 (Fla. Dist. Ct. App. 4th Dist. 2008).
After settlor's death, remainder beneficiaries were held, under New York law, to have standing "to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument." Siegel v. Novak, 920 So. 2d 89 (Fla. Dist. Ct. App. 4th Dist. 2006).
Personal representative of settlor's estate had standing to compel trustees of settlor's revocable trust to account because a Fla. Stat. Ann. § 733.707(3), mandates payment of estate expenses by a revocable trust when estate's funds are insufficient, and because trust's terms provided that a purpose of the trust was to pay settlor's funeral expenses and debts, and the expenses of administering her estate. Carvel v. Godley, 939 So. 2d 204 (Fla. Dist. Ct. App. 4th Dist. 2006).
After settlor's death, a remainder beneficiary successfully pursued accounting action against trustee, who also was a remainder beneficiary, for his administration of the trust before and after settlor's death. Davis v. Davis, 889 N.E.2d 374 (Ind. Ct. App. 2008).
The terms of settlor's revocable trust provided that if she became incapacitated, the trustees were to provide for her support. Upon settlor's incapacity, husband served as successor trustee, admitted settlor to a nursing home to which he agreed to be jointly and severally responsible for settlor's expenses, and spent more than $200,000 of trust funds on settlor's medical and nursing home expenses. Following settlor's death, her son, a remainder beneficiary of the trust, petitioned for removal of the trustee and an accounting. A Minnesota statute prohibited husband, as trustee, from exercising his discretion to make distributions in discharge of his legal obligation to support settlor. While husband/trustee's trust expenditures to pay for settlor's medical and nursing home costs were thus not proper, the trust instrument included an exculpatory clause which the court held applied to protect him from liability for the breach. In re Margolis Revocable Trust, 765 N.W.2d 919 (Minn. Ct. App. 2009).
After settlor, who was suffering from Parkinson's disease and displaying symptoms of Alzheimer's disease, moved in with his sister, on whom he relied entirely for his day to day care, he changed the terms of his trust and named his sister sole beneficiary and successor trustee. Following his death, his daughter-in-law brought an action seeking a declaration that the changes to the trust's terms were invalid because of the sister's use of fraud, duress, and undue influence. The appellate court held that a confidential relationship existed between settlor and his sister which shifted the burden to his sister to show the absence of deception and undue influence, and that she had not met that burden. The jury's verdict for plaintiff and the lower court's imposition of a constructive trust were affirmed. Oakes v. Muka, 69 A.D.3d 1139, 893 N.Y.S.2d 677 (3d Dep't 2010), appeal dismissed, 15 N.Y.3d 867, 2010 WL 4067130 (2010).
Remainder beneficiaries were able to bring a claim against trustee of revocable trust after settlor's death for disbursements that allegedly were improperly made to settlor after she had become incapacitated, or that were made to her as a result of requests she made while under undue influence. The court acknowledged the difficult situation of a trustee of a revocable trust whose settlor arguably lacks capacity:
[T]he possibility that the settlor of a revocable trust could attempt to withdraw funds from the trust after having become

incompetent or subject to undue influence puts that trustee in a difficult position. If the instrument is valid and the trustee refuses to allow the withdrawal, the trustee is in breach of contract with the settlor. If, on the other hand, the instrument is invalid, the trustee runs a serious risk of breaching its duty to the beneficiaries of the trust if the funds are released.

Cloud v. U. S. Nat. Bank of Oregon, 280 Or. 83, 570 P.2d 350, 6 A.L.R.4th 1185 (1977). (For a case in which a trustee refused to cooperate with an attempted revocation of a joint revocable trust by its co-settlors, on the ground that they lacked capacity, see In re Fellman, 412 Pa. Super. 577, 604 A.2d 263, 265 (1992).).

After settlor was declared incapacitated, his attorney-in-fact notified trustee that he was revoking the trust. The trustee, believing attorney-in-fact did not have the power to revoke the trust, did not treat the trust as terminated. After settlor's death, the attorney-in-fact successfully challenged trustee's accounting for the period after the revocation of the trust, which the court held was valid. Matter of Mosteller, 719 A.2d 1067 (Pa. Super. Ct. 1998).

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