LIU, J.



SUPREME COURT DOCKET NO. S197694

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

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

*Defendants and Appellants,*

vs.

CHRISTINE GIRALDIN, PATRICIA GRAY, AND MICHAEL GIRLADIN,

*Plaintiffs and Respondents.*

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

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# ANSWER TO PETITION FOR REVIEW

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

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5120 Campus Drive
Newport Beach, CA 92660
Rkeys@bidnakeys.com
Hbidna@bidnakeys.com
Attorneys for Appellant,
Timothy Giraldin

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## Introduction

The petition for review should be denied. First and foremost, the petition does not demonstrate the existence of the factors to be considered under CRC Rule 8.500(b). Secondly, but of equal importance, Petitioners have no vested rights in the William Giraldin Trust. They are contingent remaindermen who not ever have a right to receive anything under the terms of the trust.

## Facts

The facts are accurately stated in the Court of Appeal's decision. Bill Giraldin was the settlor of the William Giraldin Trust. Tim Giraldin was the trustee of the trust. The trust was fully revocable until Bill's death. Petitioners are contingent remaindermen named in the trust instrument, who have no rights to take anything under the trust until two events occur: 1. Bill dies (which happened) and 2. Bill's wife Mary, the principal beneficiary of the trust, dies (which has not happened). The actions which are the subject of Petitioner's request for review by this Court all arise from Tim's acts as trustee during Bill's lifetime, when the trust was fully revocable, and relate either to Bill's investment in SafeTzone or his gifts/loans to certain of his children.

Although Petitioners argue (at page 27 of their brief) that the Court of Appeal ignored certain facts as found by the trial court, Petitioners admit that they did not seek to bring any alleged omission or misstatement of an issue or fact to the attention of the Court of Appeal in petition for rehearing. Thus, for purposes of this petition, this Court should accept the facts as recited by the Court of Appeal . CRC Rule 8.500(c)(2). The petition argues that the trial

court made various findings regarding various wrongs Tim committed. However, Petitioners ignore the fact that the Court of Appeal found that nearly all of those findings were the result of erroneous evidentiary rulings by the trial court. *See*, Opinion at page 4, fn 3 and page 14, fn 13. Accordingly they are entitled to no weight (presumably the Court of Appeal views the erroneous evidentiary as alternative grounds for reversal of the judgment).

**Review Is Not Necessary to Secure Uniformity of Decision or to Settle an Important Question of Law.**

The specific holding by the Court of Appeal is that during Bill's lifetime, Tim, as trustee, owed fiduciary duties solely to Bill, and owed no duties to Petitioners as "beneficiaries" of the Giraldin Trust. Because the *only* claims that Petitioners asserted at trial were based on the theory that Tim did owe duties directly to Petitioners, Petitioners' asserted claims failed as a matter of law. The decision carefully analyzes the claims Petitioners pleaded and the theories they asserted at trial. Based on that analysis the Court of Appeal noted that Petitioners' asserted only claims based on duties Tim allegedly owed to them and did not assert, or seek to assert, any claims on Bill's behalf or any claim based on any duty owed by Tim to Bill. As such, this case is factually distinguishable from *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, in which the claims that were asserted allegedly belonged to the prior trustor, to whom the trustee did owe a duty. Moreover, the actual holding in *Evangelho* from which the appeal arose dealt with an order requiring the trustee to account for her dealings with respect to a joint bank account she held with the deceased, which was an asset held outside the trust. *Evangelho* specifically noted that the order directing an accounting with respect to such

bank account was the only part of the trial court's order that was appealable, and that the order requiring the trustee to account for the trust (but not awarding any damages or surcharge based on such accounting) was not appealable. 67 Cal.App.4th at 622 (citing Probate Code § 1304, which provides that an order compelling an accounting is not appealable). This case and the holding of *Evangelho* are not inconsistent because the facts are materially different. As such, the Court of Appeal properly found that Evangelho did not apply.

The fact that the Court of Appeal declined to follow certain statements by the Court in *Evangelho* does not mean that there is not uniformity of decision on the issue of whether the trustee of a revocable trust owes a "duty" to a residual beneficiary or that an important question of law is unsettled. As the well reasoned opinion of the Court of Appeal in this case points out, the duties of the trustee of a revocable trust, as well as the rights of a beneficiary of a revocable trust, *are defined by statute*, specifically Probate Code §§ 15800 and 16069. Indeed, in California, the "right" of inheritance is strictly statutory. *In re Darling's Estate* (1916) 173 Cal. 221, 223.

As the Court of Appeal points out, *Evangelho* simply misread Section 16069 (formerly Section 16064). Section 15800 clearly and unequivocally provides that a trustee's duties are owed solely to "the person holding the power to revoke the trust." Section 16069 provides that a trustee owes no duty to account to a "beneficiary" of a revocable trust "**for** the period when the trust may be revoked." Thus, the Legislature has declared that a trustee of a revocable trust owes no duty to a "beneficiary" (such as Petitioners) while the trustor is alive and in a position to revoke the trust, and further that such a

trustee never has a duty to account to a "beneficiary" (such as Petitioners) for any period when the trust could be revoked (i.e. prior to the death or incapacity of the trustor). Given the clear pronouncement of the statutes in question, the law is not unsettled.

As the Court of Appeal further pointed out, *Evangelho* was decided before *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83 and *Steinhart v. County of Los Angeles* (2010). *Johnson* holds that the right to an accounting of a revocable trust belongs exclusively to the person holding the power to revoke, and that a contingent beneficiary, such as Petitioners, have no right to an accounting, even following the appointment of a conservator for the settlor. *Johnson* was decided *twelve years ago* (and one year after *Evangelho)* and is entirely consistent with the Court of Appeal's decision in this case. *Steinhart* holds that property held in a revocable trust is deemed property of the settlor, and any interest the "beneficiaries" of such trust may have is "merely potential." Such holding effectively rejects the basic theory upon which Petitioners base their claims which, is that by virtue of their status as beneficiaries of a revocable trust they are "entitled" to have some say regarding the assets held in the trust.

Moreover, it does not appear that Evangelho has ever been cited in any reported (or unreported) opinion for the proposition that the beneficiaries of a revocable trust have standing to sue a former trustee for actions taken while the trust was revocable. Indeed, with the exception of *Johnson*, the present case appears to be the only appellate level case decided since 1998 that has even addressed the issue of whether a beneficiary of a revocable trust has standing to complain of anything a former trustee did. Accordingly, it is

difficult to perceive that the issue presented is properly considered an important question of unsettled law. In fact, it does not seem to rise to the level of a question of law. It is more a question of fact on which the above-noted statutes operate.

**Under the Peculiar Facts of this Case, the Petitioners Are Not Fully Vested Beneficiaries - They Are to this Day Contingent Remaindermen, Who May *Never* Become Vested.**

Under the terms of the trust instrument *none* of the Petitioners are "vested beneficiaries," and it is possible that none of them ever will become vested or entitled to receive anything under the trust. The trust instrument (trial exhibit 67 included in Appellant's Supplemental Appendix of Exhibits, at page 95) provides in Article 4 (page 101) that upon Bill's death, the corpus of the trust is to be divided into two trusts - a "QTIP trust" (a qualified terminal interest trust designed to postpone payment of estate taxes) and a "Bypass Trust." Bill's wife, Mary, is the primary beneficiary of both subtrusts. Articles 7 and 9 provide for the administration of such subtrusts. Pursuant to Article 7.3, the entire corpus of the QTIP Trust is available to Mary to pay for "health, education, maintenance and support." Article 9.1 provides that the entire corpus of the Bypass Trust is likewise available to Mary to allow her to enjoy her "accustomed standard of living." No beneficiary other than Mary has any rights whatsoever to income or principal from either the QTIP Trust or the Bypass Trust while Mary is alive. Thus, it is entirely possible that the corpus of the trust will be exhausted by Mary, in which case Petitioners would stand to receive nothing. Given this potential outcome for Petitioners, it is

difficult to see why or on what basis they would have a right to sue a former trustee for harm to their non-existent interests.[1]

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

Mary is still alive. The result of the provisions of Article 4 is that as of the time of trial *none* of the Petitioners were vested beneficiaries under the Trust. They had no rights to receive anything from the trust and thus had no legal entitlements to enforce or protect. Moreover, it is possible that *none* of the Petitioners will *ever* be vested, because it is possible that none of the Petitioners will out live Mary. In fact, one of the original petitioners in the trial court, Philip Giraldin, died shortly after trial and while the appeal was pending. Had Philip been the only petitioner, his death would have created the anomalous situation of a judgment having been entered in favor of a person who never had a vested interest in the trust and who never had any right to anything.

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

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

**Review Is Not Necessary to "Protect the Elderly."**

As the Court of Appeal points out, the Legislature has enacted an entire statutory scheme to preserve any claims that a deceased settlor/trustor may have had against his or her trustee. A claim for breach of fiduciary duty is a claim that sounds in tort. *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708 As with other tort claims, assuming the statute of limitations has not run, such claim "survives" the death of the settlor and is vested in, and may be asserted by, his or her personal representative (or if there is no personal representative, then by his or her successor in interest). C.C.P. §§ 377.20 and 377.30 Thus, contrary to Petitioners' argument, an adequate remedy for any breach of trust by the trustee of a revocable trust exists.

Additionally, C.C.P. §§ 377.20 and 377.30 run contrary to the position asserted by Petitioners that merely because they are beneficiaries of the Trust, they necessarily would succeed to any claim Bill may have had. As this Court explained in *Steinhart*, property held in a revocable trust is and remains property of the settlor. A tort committed against the settlor of a trust, whether related to the trust or not, belongs to *the settlor* - because it is the settlor who has been harmed (in the case of a breach of fiduciary duty causing monetary damages, it is the settlor who has lost money, not "the trust"). The tort claim survives the death of the settlor and, pursuant to C.C.P. § 377.30, may be

commenced by the decedent's personal representative, or if there is no personal representative, then by the decedent's "successor in interest." C.C.P. §§ 377.10 and 377.11 define "successor in interest" to be (1) where the decedent died testate, the beneficiary(ies) named in the decedent's *will* who by terms of the will succeed to such cause of action and (2) where the decedent died intestate, to the decedent's heirs at law under Probate Code §§ 6401 and 6402. In other words, a settlor of trust who dies holding a claim for breach of fiduciary duty against the trustee of his/her revocable trust may direct by *will* to whom the chose in action passes. Thus, depending upon the precise estate plan of such settlor, the claim against the fiduciary may be devised to one or more specific beneficiaries by will (which could name the settlor's trust as a beneficiary of the will). However, the analysis will always be fact specific - and the terms of the settlor's will control the disposition of the chose in action. Merely because a person is a beneficiary of a trust, it does not necessarily follow that the specific trust or any beneficiary of such trust is a successor in interest as defined by the Code of Civil Procedure.

Giving "beneficiaries" of a revocable trust a direct right of action against the trustee is entirely inconsistent with Sections 377.20 and 377.30. There can only be <u>one</u> holder of the settlor's claim - otherwise both the personal representative of the settlor's estate and the trust beneficiaries could sue a trustee in different lawsuits, in different counties, possibly even in different states. Such result is clearly not what the legislature intended.

Petitioners themselves acknowledge that there are several alternative remedies to address a breach of fiduciary duty viz-a-viz the settlor, including an action for statutory elder abuse which may be brought by a number of

persons in accordance with Welf. & Inst. C. § 15657.3.[2] Petitioners' comments about the inefficiency of a conservatorship proceeding ring particularly hollow. In point of fact, Petitioners were aware for several years prior to Bill's death that Bill had made a substantial investment in SafeTzone. Yet, none of them asked Bill anything about it or took any steps to ensure that Bill's rights were "protected." Instead, they waited until after Bill died to raise any complaint. (Opinion at page 15, fn 16)

**The Decision Is Not "At Odds" with Nationally Prevailing Trust Law.**

Petitioners ask this Court to accept review of this case because, according to Petitioners, the Court of Appeal decision is "at odds" with "nationally prevailing trust law." Specifically, Petitioners argue that the decision is not in accord with the provisions of the Uniform Trust Code, which Petitioners note has been adopted in *twenty three* states. However, as the very authority Petitioners cite for the proposition that "many courts" allow claims similar to those petitioners allege points out, California *has not adopted the Uniform Trust Code* so Petitioners authorities are inapposite. Bogert's Trusts and Trustees, § 964, fn 20.

In point of fact, as discussed above, the California Legislature has enacted specific provisions in the Probate Code and the Code of Civil Procedure addressing the issues of duty and standing. Those provisions cannot

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[2] Presumably Petitioners could have, but chose not to, bring a claim for statutory elder abuse in this case. No doubt Petitioners did not bring such a claim out of concern they would run afoul of the "no contest" clause in the trust instrument.

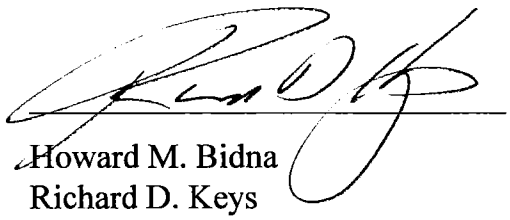
be supplanted by case law that is contrary to the Legislature's directives concerning the rights a beneficiary of revocable trust may have or to whom a chose in action passes.

## Conclusion

For the following reasons, it is respectfully requested that the petition for review be denied.

DATE: November 23, 2011

BIDNA & KEYS, APLC

By: 

Howard M. Bidna
Richard D. Keys
Attorneys for Appellant
Timothy Giraldin

## CERTIFICATE UNDER RULE 8.204(c)

The undersigned certifies that according to the word count feature of the word processor program by which this brief was prepared, this brief contains 3,042 words, exclusive of the matters that may be omitted under CRC Rule 8.204(c).

DATED: November 23, 2011

Bidna & Keys, APLC

By: _____
Richard D. Keys

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 5120 Campus Drive, Newport Beach, CA 92660. On November 23, 2011, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW**

[X] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

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[X] BY MAIL

[ ] *I deposited such envelope in the mail at Newport Beach, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of 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 Newport Beach, 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.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 23, 2011, at Newport Beach, California

Kristi Lothian

SERVICE LIST

Clerk of the Court of the
Fourth District Court of Appeal
Third Division
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Clerk of the Court of the
Superior Court of California
Lamoreaux Justice Center
341 The City Drive
Orange, CA 92868

Stephen M. Lowe, Esq.
FREEMAN, FREEMAN & SMILEY
3415 Sepulveda Blvd., Penthouse #1200
Los Angeles, CA 90034-6060
Tel: 310-255-6100
Fax: 310-391-4042
Attorneys for Respondents,
Christine Giraldin, Patricia Gray and
Michael Giraldin

ROSS LAW GROUP, APC
Mark A. Ross, Esq.
1901 Newport Blvd., Suite 284
Costa Mesa, CA 92627
Tel: 949-631-3374
Fax: 714-540-9575
Attorneys for Petitioner and Appellant,
Mary Giraldin