Supreme Court Docket No. S197694

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTATE OF WILLIAM A. GIRALDIN, DECEASED

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

SUPREME COURT
FILED

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After a Decision By the Court of Appeal,
Fourth Appellate District, Division Three
Case No. G041811

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

Petitioners' Opening Brief on the Merits (the "Opening Brief") established that the Probate Code and case law repeatedly provide remedies so that beneficiaries can recover for breaches of fiduciary duty by a trustee. The Answer Brief (the "Answer") of Timothy Giraldin ("Respondent" or "Tim") relies heavily on the mistaken arguments of the Court of Appeal Opinion (the "Opinion"), essentially anchors his argument to the ambiguous use of the word "for" in a single Probate Code section and ignores all of the other Probate Code provisions that explicitly or implicitly provide direct remedies for injured beneficiaries. This Reply Brief will primarily deal with the new arguments raised in the Answer since the arguments stated in the Opinion were fully discussed in the Opening Brief.

Tim argues that contingent remainder beneficiaries can never sue a trustee for a breach of fiduciary duty owed to the settlor or for losses sustained by the trust during the period of revocability. Tim asserts that: (1) only the settlor's personal representative or successor in interest has the statutory right to sue on such a claim; (2) remainder beneficiaries cannot have standing because no duties are owed to them during the settlor's lifetime; and (3) contingent remainder beneficiaries, like Petitioners, have no standing even after the settlor dies and the trust becomes irrevocable because they are not "vested." None of these arguments is supported by the law or common sense.

California's trust law recognizes that the injuries caused by a malfeasant trustee while the settlor is alive are borne by the trust and its beneficiaries after the settlor dies. All of the rights and duties under the Probate Code that benefit the settlor during his lifetime vest in the trust beneficiaries upon the settlor's death when the trust becomes irrevocable. Among these rights is the right to seek redress for a trustee's breach of fiduciary duty. No statute limits this right to certain beneficiaries or certain

time periods. The Probate Code gives a beneficiary the right to sue a malfeasant trustee directly after the trust becomes irrevocable. This right includes pursuit of claims that arose while the settlor was alive and the trust was revocable.

Nothing in the law requires appointment of a disinterested personal representative or trustee to recover losses to the trust arising from the period of revocability, and there is no reason to establish such a requirement. In almost all cases the designated personal representative would be the same person who was the breaching trustee. Therefore, it would be necessary to have two separate trials to prove the same trustee misconduct – the first trial to appoint a disinterested representative in place of the malfeasant trustee based on the trustee's misconduct and the second trial again to prove the trustee's misconduct and determine an appropriate surcharge. The Legislature could not have intended a procedure that would require the beneficiaries to prove their case twice, and none of the law cited by Tim or the Court of Appeal supports this requirement.

The Probate Code explicitly and implicitly gives beneficiaries standing to pursue the trustee for wrongs committed before and after the trust becomes irrevocable. The Legislature would not have required the settlor's consent or written direction to relieve the trustee of liability for a breach of trust if a beneficiary was not permitted to enforce the failure to fulfill either of those requirements. Nothing in the Probate Code distinguishes between "vested" and "contingent" beneficiaries in conferring rights to petition the court to redress trustee misconduct. This is a distinction manufactured by Tim without any authority.

Petitioners respectfully request that this Court reverse the Court of Appeal's decision and affirm all orders of the trial court.

II. RESPONSE TO TIM'S VERSION OF THE FACTS

The primary factual issue before the trial court, which is glossed over in the Opinion and Tim's version of the facts, was whether there were written directions from Bill Giraldin ("Bill") to Tim, as trustee of the Trust, to invest $4 million in SafeTzone and make various loans from the Trust. Bill's written directions were required by the Trust. Tim admitted that the directions to make loans were oral and he was unable to present any writing sufficient to satisfy the terms of the Trust as to the SafeTzone investment. The trial court thus found that Bill did not give his written direction and, moreover, that he was mentally incapable of giving such a direction.

Tim defers to the Opinion's recitation of purported facts the Court of Appeal gleaned from the record of the trial court. Answer, p. 3 – 4. The Opinion's version of events, and Tim's reliance upon it, is inappropriate given the Court of Appeal's failure to examine the record in deference to the trial court's findings. Tim argues that there is "no evidence that suggests that the [facts in the Opinion] are not true." Answer, p. 3. However, the Opinion's facts, to the extent they conflict or disregard the trial court's findings, are irrelevant. The Court of Appeal did not apply the "substantial evidence" standard and, contrary to Tim's reading of the Opinion, did not reverse the trial court's decision on evidentiary grounds. Answer, p. 4. The Opinion's selection of facts was merely designed to make the Court of Appeal's erroneous legal holding on the issue of standing more palatable.

Under the substantial evidence standard, "a reviewing court is without power to substitute its deductions for those of the trial court." *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874. If there is substantial evidence, "it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." *Id.* Here, the Court of Appeal apparently chose to

believe Tim's version of the facts about Bill's desire to spend his fortune on a risky start-up venture in a final, bold exercise of his free will and control over his family's finances. But the trial court found differently. The trial court found that Bill was incapable of making such a decision and, in any event, did not exercise any such decision in writing, as required by the Trust. There is substantial evidence in the record to support these findings. The Court of Appeal substitutes its conclusions of the evidence for the trial court's, which it could not have done if it had applied the "substantial evidence" standard (as it should have done).

Tim also erroneously states that "the Court of Appeal has determined that the trial court's 'findings' are flawed and its decision must be reversed under any circumstances." Answer, p. 4. According to Tim, the Court of Appeal determined that the trial court's findings were based on "material errors of law" by sustaining certain hearsay objections. *Id.* However, the Court of Appeal's disagreement with the trial court's hearsay rulings is dicta in a footnote of the Opinion. Opinion, p. 4, fn.3. The Court of Appeal did not hold that the trial court's exclusion of evidence was "material" and did not apply the "abuse of discretion" standard (*People v. Rowland* (1992) 4 Cal.4th 238, 264) or the "harmless error" test (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119). By not applying these well-established standards of appellate review, the Court of Appeal evidently declined to reverse on evidentiary grounds.

III. LEGAL ARGUMENT

A. The Probate Code Gives Remainder Beneficiaries Standing to Remedy a Trustee's Wrongs Committed During the Period of Revocability.

Tim's legal argument rests on the flawed premise that the right to seek relief for injury to a revocable trust never passes to the beneficiaries because the trustee's duties were owed solely to the settlor during the period of revocability. This is not how the Probate Code is designed. The "right to relief in court" is conferred upon beneficiaries by statute, and is necessary to enforce a third party trustee's fiduciary duties. An injury to an inter vivos trust caused by a malfeasant trustee may survive the settlor and be borne by the beneficiaries. Neither the Court of Appeal nor Tim argue that the beneficiaries are not injured when a third party trustee loots a trust during the period of revocability. The Probate Code gives the beneficiaries the right to redress that injury, even though the cause of that injury stems from a time when the trustee's duties were owed exclusively to the settlor.

At the outset of his legal argument, Tim relies on the Opinion's view that "the right to seek relief for a breach of duty belongs to the person to whom, the duty is owed." Answer, p. 5; Opinion, p. 18. However, the cases cited by the Court of Appeal (and Tim) for this proposition – *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282 and *Nelson v. Anderson* (1999) 74 Cal.App.4th 111 – are inapposite. Both cases involve "derivative" lawsuits by shareholders of a corporation, an area of law markedly distinct from trust law. The shareholder in a derivative suit must sue in the name of the corporation. *Vega, supra*, at 297.

In trust law, on the other hand, a beneficiary's standing to sue the trustee directly is expressly conferred by Probate Code §§ 17200(a) (*id.* at

691 – 692) and 16420.[1] *In re Estate of Bowles* (2008) 169 Cal.App.4th 684, 691 [holding that a third party who participates in a breach of trust with the trustee is liable to the beneficiaries, not the trustee.] A "beneficiary's cause of action is independent and not derivative through the trustee . . .." *Id.* at 694. Thus, the Court of Appeal's and Tim's reliance on the law of shareholder derivative actions is misplaced. Instead, the appropriate authority for a trust beneficiary's standing is found in the Probate Code.

Probate Code § 15801 is superfluous, unless a beneficiary has the right to challenge whether informed consent was given by the settlor. Petitioners do not argue that the Probate Code §§ 15800 and 15801 are "inconsistent." Answer, p. 7. Rather, the inclusion of the consent provision in Section 15801 augments Section 15800. If a beneficiary is unable to challenge that competent consent was given by the settlor for a third party trustee's action, there is no reason for Section 15801. In other words, if the validity of the settlor's consent could never be challenged by a beneficiary, there would be no reason to require consent in the first place.

Tim totally fails to address the purpose of the exculpation of liability for a trustee in Probate Code § 16462 when the trustee obtains a written direction from the settlor. This exculpation would not be necessary if the trustee could not be held liable to a beneficiary. In fact, Section 16462 expressly states that the trustee "is not liable to a *beneficiary*" (emphasis

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[1] This, of course, does not mean that the damages awarded in a surcharge action redound to the benefit of the complaining beneficiaries, personally. As in a shareholder derivative suit, the damages in a surcharge action are recoverable by the trust, not the individual beneficiaries. Thus, as was ordered in this case, the remedies provided in Probate Code §§ 16420 and 17200, and the ultimate award, if any, benefit the trust and all of its beneficiaries. The trial court's order removing and surcharging Tim requires that the surcharged amount is "returned to the Trust forthwith." (Appellant Appendix ("AA"), Volume 2, Exhibit 18, p. 2, ll. 19 – 20.) The trial court did not order that the surcharge amount is distributable directly to the Petitioners.

added) if a written direction is obtained. It does not say that the trustee avoids liability to the settlor's personal representative or any other potentially interested party. Obviously, there has to be some liability from which the trustee is being exculpated, and that liability is to the beneficiary.

During the lifetime of the person holding the power to revoke (i.e., the settlor), the trustee's duties are owed only to that person. Probate Code § 15800. The dispute at issue, however, concerns the rights of remainder beneficiaries to redress breaches of those duties *after* the settlor dies. Tim does not cite any authority for the statement that "the trust conveys to beneficiaries only the . . . rights which the trust instruments directs be conveyed." Answer, p. 20, fn.4. Tim also does not cite any authority for his assertion that "there can only be one holder of the settlor's claims." Answer, p. 20. Beneficiaries are also granted rights by the Probate Code to sue a malfeasant trustee. Probate Code section 15800 may curtail a beneficiary's right to pursue remedies for breach of trust during the period of revocability, but the exception that is created is not absolute and does not expressly or impliedly prevent a beneficiary from suing a trustee for breaches of fiduciary duty owed to the settlor.

Tim also misunderstands, or obfuscates, the significance of Probate Code § 850. Under Section 850, a remainder beneficiary has standing to pursue claims that arose when duties were owed exclusively to the settlor and the beneficiary had no interest in the trust. The holding in *Estate of Young* (2008) 160 Cal.App.4th 62 demonstrates that a suit may be maintained under Section 850 to recover property that was wrongfully taken from the trust by undue influence on the settlor. The personal representative in *Estate of Young* did not derive his standing from Code of Civil Procedure § 377.30, as Tim argues. Answer, p. 17. That statute is not even mentioned in the decision. Section 850(a)(3)(B) conferred standing on the decedent's personal representative in *Estate of Young*. That section also

authorizes any "interested person," including the beneficiaries (vested or contingent), to pursue such claims. *See* Prob. C. §§ 24 (defining "beneficiary"), 48 (defining "interested person"). Section 850 illustrates that a remainder beneficiary may pursue claims on behalf of the trust for losses that occurred during the settlor's lifetime while the trust was revocable. In this case, for instance, Petitioners alleged pursuant to Section 850 that Patrick Giraldin, Tim's brother, should return assets he received from the Trust when Tim was trustee and the trial court so ordered. Thus, Tim's argument that remainder beneficiaries can never have standing to remedy a breach of duty owed to the settlor is belied by express provisions of the Probate Code.

Tim also defers to the Opinion's argument that Petitioners never sought to assert any of Bill's rights. Actually, as the Opinion points out, the trial court's statement of decision indicates that Tim's surcharge was based on his breach of fiduciary duties to the Trust and *Bill*. Opinion, p. 15. The surcharge redounds to the benefit of the Trust, and all its beneficiaries, not only Petitioners personally. AA, p. 279.

Tim claims that an action for elder abuse is a "preferred remedy" for an action against a malfeasant trustee because of the availability of attorneys' fees recovery. Answer, p. 21. This is not a reason to deny standing to remainder beneficiaries to sue for breach of trust. As previously argued, beneficiaries can prefer to have their matter adjudicated by a probate court judge rather than undertaking a civil litigation, including the potential complexity and expense of a jury trial for elder abuse. An elder abuse action is not and cannot be the only remedy available to a beneficiary. Moreover, Tim apparently forgets that the trial court in this case ordered the Trust to pay Petitioners' attorneys' and expert fees based on the "common fund doctrine." *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 - 36; *see also Hutchinson v. Gertsch* (1979) 97 Cal.App.3d 605, 613 - 617;

Copley v. Copley (1981) 126 Cal.App.3d 248, 293 - 294; and, *Estate of Gump* (1982) 128 Cal.App.3d 111, 118 – 119. Thus, an avenue for recoupment of attorneys' fees is also available to the complaining beneficiaries in a suit against the trustee for breach of fiduciary duty.

B. A Remainder Beneficiary's Standing to Sue a Third Party Trustee for Conduct During the Period of Revocability s Not in Conflict, and is Actually Consistent with, the Code of Civil Procedure.

Tim argues that the legislature has "enacted an entire statutory scheme" governing the survival of claims brought by or against a decedent and that a beneficiary's standing to pursue a third party trustee for misconduct during the period of revocability somehow conflicts with that scheme. Answer, p. 18. Tim's argument is based on the misconception that the Code of Civil Procedure is the exclusive grant of authority to persons entitled to sue a third party trustee to remedy breaches of duty owed to the settlor.

Code of Civil Procedure section 377.30 authorizes decedent's personal representative or successor in interest to bring an action, but does not exclude beneficiaries from doing so. To the contrary, C.C.P. section 377.30 is expressly subject to the law set forth in the Probate Code, including any rights of standing afforded to beneficiaries. Its provisions are "subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code." The legislature thus recognized in enacting C.C.P. § 377.30 that the Probate Code governs the rights of trust beneficiaries. Probate Code section 7001 provides that "the decedent's property is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors and other persons as provided by law." The right of a beneficiary "as provided

by law" to sue a trustee to redress a breach of trust is set forth in Probate Code §§ 16420 and 17200. (As already pointed out by Petitioners, Probate Code § 15800 does not abrogate that right after a trust becomes irrevocable, even as to conduct committed during the period of revocability.) A remainder beneficiary's standing under the Probate Code is not excluded by, and is in fact consistent with, the Code of Civil Procedure.

Tim concedes that a trustee who acts without the settlor's consent is exposed to liability "to someone," but says that "someone" is the settlor only. Answer, p. 8. Tim argues that the "settlor's death certainly cannot after the fact impose on the trustee a duty that he or she never assumed or owed." Answer, p. 11. These arguments miss the point. There is no debate that the trustee's duties are owed only to the settlor during the settlor's lifetime, and there should be no debate that those duties are owed to the remainder beneficiaries after the settlor dies. A trustee like Tim, who fails to follow (or even read) the trust, violates numerous codified fiduciary duties and cannot prove that the settlor, like Bill, consented to these breaches, must be held accountable by those with the greatest interest in seeking redress – the remainder beneficiaries. Suit by a personal representative is not required.

C. Whether a Remainder Beneficiary's Interest in the Trust is "Vested" or "Contingent" Has No Bearing on the Remainder Beneficiary's Right to Compel an Accounting After the Trust Becomes Irrevocable.

Tim argues that Petitioners are "contingent remainder beneficiaries" who have no right to an accounting of the Trust whatsoever, even for the period after Bill's death, until their interest in the Trust is fully "vested" upon the death of Mary, the current lifetime beneficiary. Answer, pp. 22 – 24. This argument is a "red herring" and flawed for several reasons.

First, whether Petitioners are "vested" or "contingent" remainder beneficiaries is irrelevant to their standing to seek information about the Trust's administration and an accounting for the period after the Trust became irrevocable. Probate Code section 24 defines "beneficiary" of a trust: "a person who has any present or future interest, *vested or contingent*." (Emphasis added.) Statutes requiring a trustee to report information about administration of a trust use the term "beneficiary" to describe those persons entitled to such information. For instance, Probate Code § 16060 states that "[t]he trustee has a duty to keep *the beneficiaries* of the trust reasonably informed of the trust and its administration" (emphasis added.) Probate Code section 16061 provides in pertinent part that "on reasonable request by a *beneficiary*, the trustee shall report to the *beneficiary* by providing requested information to the *beneficiary* . . ." (emphasis added.) These statutes do not distinguish between vested or contingent remainder beneficiaries with regard to the trustee's duty to report information.

Further, a remainder beneficiary's status as vested or contingent does not limit the remainder beneficiary's right to petition the court for an order compelling the trustee to report information and/or provide an accounting. Probate Code section 17200(a) states that a "*beneficiary* may petition the court . . . concerning the internal affairs of the trust . . .." (Emphasis added.) Section 17200(a) does not exclude contingent remainder beneficiaries from this right to seek redress. Under Probate Code §§ 17200(b)(7)(B) and (C), "[p]roceedings concerning the internal affairs of a trust" include proceedings to compel the trustee to report information and account to the beneficiary. Thus, even a contingent remainder beneficiary may petition the court for an order compelling the trustee to account. *See Esslinger v. Cummins* (2007) 144 Cal.App.4th 517.

In *Esslinger*, *supra*, at 521, the trustee asserted that a remainder beneficiary of the trust lacked standing to seek an accounting under Probate Code § 16062(a). After conceding that a remainder beneficiary is not entitled to an accounting as a matter of right under Probate Code § 16062(a), the Court held that Section 17200(b)(7) nonetheless gives the remainder beneficiary a right to petition the probate court to compel an accounting from the trustee. *Id.* at 523 – 528. The probate court has discretion to order the accounting. *Id.*

The Court in *Esslinger* correctly observed the following regarding the probate court's authority to protect trust beneficiaries by ordering an accounting:

> "The Trustee's construction of Probate Code sections 16062 and 17200, subdivision (b)(7) . . . impairs a beneficiary's ability to protect his or her interest in the trust. Under the Trustee's interpretation, any beneficiary – including current, income beneficiaries – would be able to receive an accounting only once a year, on the termination of the trust, or on a change of trustee. Except in those three situations, under the Trustee's theory the probate court would be powerless to grant a current beneficiary's petition to compel a trustee to account – even if an accounting were needed urgently to protect a trust." (*Id.* at 527.)

If, after a trust becomes irrevocable, the current income beneficiary (who may also be the trustee) squanders the principal and income of the trust in violation of the trust's provisions, the remainder beneficiaries may compel an accounting to protect their interests in the trust. They do not need to wait until the lifetime beneficiary dies before they have standing to seek an accounting.

Tim cites to no legal authority supporting the proposition that Petitioners are not entitled to an accounting under any circumstances during Mary's lifetime because their interests in the Trust are contingent, not "vested," and are therefore "non-existent." Answer, pp. 22 – 24. This

distinction is irrelevant because a remainder beneficiary's right to compel an accounting is triggered by the trust becoming irrevocable, not whether the remainder beneficiary's interest in the trust has vested or is no longer contingent. For example, Probate Code section 16069 carves out an exception to the duty to report information and account "[i]n the case of a *beneficiary* of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked." (Emphasis added.) Once the trust is irrevocable, this exception no longer applies. Section 16069 does not state that the exception continues to apply to a remainder beneficiary's whose interest is contingent.

Tim argues that the courts failure in *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615 to distinguish between a settlor who acts as trustee and a settlor who appoints a third party to act as trustee somehow illustrates the fallacy of the opinion because the settlor acting as trustee could never owe an obligation to himself to account. Petitioners agree that a settlor of a revocable trust who acts as trustee need not account to remainder beneficiaries. The reason is because the trustee implicitly *consents* to his own actions as trustee under Probate Code § 15800. *Evangelho* did not concern a settlor who was also trustee, so it had no reason to address that situation.

Petitioners are only entitled to receive the benefits of the Trust after Mary's death. Mary is only entitled to the principal of the Trust under limited circumstances (e.g., distributions from the QTIP Trust, under Article 7.3 of the Trust, that are "reasonably necessary for [her] health, education, maintenance and support"). Petitioners have an interest in preserving that Trust principal by, if necessary, petitioning the probate court to compel the trustee to distribute principal only under the limited circumstances delineated by the Trust. Even though Petitioners' right to

receive the benefits is delayed, they always have an interest in seeing that the terms of the Trust are followed after the Trust becomes irrevocable.

The death of a remainder beneficiary, like Philip Giraldin in this case, is also irrelevant. Answer, p. 24. To say that Philip "*never had* an interest in the trust" because he died before Mary is a misnomer. *Id.* A contingent remainder beneficiary's death before the contingency occurs does not mean that the rights tied to that beneficiary's interest vanish. Typically, as in this case, the children of the deceased remainder beneficiary may step into beneficiary's shoes and acquire those rights, or, in other cases, those rights are conferred on the beneficiary's estate or whichever other beneficiary becomes entitled to the deceased remainder beneficiary's share of the trust.

Tim's newly minted argument about "contingent remainder" beneficiaries is also totally inapplicable in the context of this case. Tim never raised this argument at any time during the proceedings before the trial court or in his briefing to the Court of Appeal. It must be emphasized that Tim *stipulated* to prepare an accounting and filed a petition for its approval. A party who expressly agrees to an action taken by the trial court cannot challenge that action on appeal. *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779 [where defendant/appellant agreed to the trial court's action and then tried to object to that same action on appeal]. Tim stipulated to an order requiring him to file an accounting for the Trust covering time periods when Bill was alive, and the Trust was revocable, and after his death, when the Trust became irrevocable. As such, Tim waived any argument that Petitioners are not entitled to any

accounting until Mary dies.[2] Tim cannot now argue that the trial court was in error for ordering a Trust accounting that Tim agreed to provide.

Tim is also estopped from asserting Petitioners' standing to request an accounting under the "invited error" doctrine. Assuming, *arguendo*, the trial court erred in ordering an accounting, which it did not, Tim cannot complain on appeal about an error he personally invited. One whose conduct induces or invites the commission of error by the trial court is estopped from asserting it as a grounds for reversal. *Norgart v. Upjohn* Co. (1999) 21 Cal.4th 383, 403 ["[t]he 'doctrine of invited error' is an 'application of the estoppel principle': 'where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal."] Given that Tim entered into a stipulation to prepare an accounting of the Trust covering the period of revocability and filed a petition for its approval, he cannot now complain that he could not have been ordered to file an accounting in the first place.

Finally, even the Court of Appeal recognized 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 [Petitioners] would have had standing to question them." Opinion, p. 29. The Court of Appeal reversed the trial court's orders "without prejudice to [Petitioners] right to seek a new accounting pertaining only to the period after Bill's death . . .." *Id.* Thus even the Court of Appeal found that an accounting is required for the period while Petitioners are "contingent remainder" beneficiaries.

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[2] More importantly, by stipulating to an order to provide an accounting covering the period of revocability, Tim waived an argument that Petitioners lack standing to compel an accounting for that time period. The Court of Appeal ignored this critical fact in its analysis.

D. No Greater Burden is Placed on Third Party Trustees Because Remainder Beneficiaries of an Irrevocable Trust Can Petition the Probate Court to Remedy Breaches of Trust Owed to the Settlor.

Tim echoes the Court of Appeal by arguing that allowing remainder beneficiaries to petition for an accounting covering the period of revocability would place a trustee in "an untenable conflict" between the duties owed exclusively to the settlor and potential liability to remainder beneficiaries. Answer, p. 12; Opinion, p. 21. Tim argues that a contingent beneficiary should not have a right to "second guess the trustee's fidelity to the settlor . . ." or else there could be a "significant effect on the entire professional trustee industry." Answer, p. 12. Tim does not explain how the professional trustee industry would be detrimentally effected and, in any event, this argument is misplaced.

In reality, no greater burden or conflicting fiduciary obligation is placed on a third party trustee by making him accountable to remainder beneficiaries for breaches of fiduciary duty during the period of revocability. Both before and after the death of the settlor, the trustee in any event is required to follow the trust and abide by the same trustee duties in the Probate Code (e.g., the duty of loyalty, to avoid conflicts of interest, to make trust property productive, etc.) Probate Code §§ 16000 – 16014. While the settlor is alive, the third party trustee also must follow written directions of the settlor and obtain the settlor's consent, in writing to be prudent, for any actions that are inconsistent with the terms of the trust or codified fiduciary duties. Probate Code §§ 15801, 16001. A third party trustee who follows these rules avoids liability, whether the complaining party is the settlor or a remainder beneficiary. Probate Code § 16462. A conscientious and prudent trustee, as opposed to one who never reads the

trust and breaches numerous fiduciary duties, like Tim, would obtain a written consent or direction.

The fact that the trustee could be sued in different lawsuits is not a legitimate reason to deny standing to remainder beneficiaries. Answer, p. 20. The burden on the trustee is no greater than any other defendant who is sued by multiple plaintiffs in multiple actions. Moreover, the argument that the trustee could be sued in different jurisdictions concerning similar acts is not possible under California law.[3]

E. The Trust Does Not Waive the Beneficiaries' Rights to an Accounting and Reports from the Trustee Where They Are "Required by Law" or "Court Order."

Tim argues that the express terms of the Trust waive any requirement for an accounting or reports by the Trustee to Petitioners during or after Bill's lifetime. This argument ignores critical caveats to the Trust's provisions. While Mary is alive, the trustee is only required to provide information about the Trust to Mary, "except as required by law." (Trial Ex. 67, p. 17, ¶ 15.5; *see* Answer, p. 14.) The trustee is not required to report or account to the beneficiaries, "except pursuant to court order." (Id. at p. 18, ¶ 15.6; *see* Answer, p. 15.) Here, Tim *stipulated* to an order to prepare and file an accounting of the Trust, covering periods both before and after Bill died and the Trust became irrevocable. Tim never challenged Petitioners' right to an accounting based on a lack of standing before he agreed to provide an accounting. Thus, in this case, the waivers in the

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[3] Under Probate Code section 17005, the proper county for commencement of a proceeding in the case of a living trust is "the county where the principal place of administration of the trust is located." thus the argument raised by Tim of multiple lawsuits in multiple counties and states is not possible.

Trust are irrelevant because Tim agreed and was ordered to file an accounting. Furthermore, Tim was "required by law" to account to Petitioners because, whether or not he stipulated to prepare an accounting, the probate court is empowered to order an accounting pursuant to the petition of remainder beneficiaries after a trust becomes irrevocable.

F. Tim's Attempt to Distinguish the Common Law and Law of Other Jurisdictions Is Unavailing.

The Opening Brief provided numerous out of state opinions, statements from treatises as well as the Uniform Trust Code to demonstrate how others have resolved the question before this court. While Tim seeks unsuccessfully to distinguish all of those references, it is noteworthy that Tim did not cite a single out of state opinion, treatise or Uniform Trust Code provision in support of his position.

Tim argues that the Restatement does not "specifically address" when or whether the trustee of a revocable trust may be liable to beneficiaries. Answer, p. 15. However, the Restatement provides, at § 74, comment b, that a trustee is not liable to beneficiaries if the trustee complies with a settlor's direction. Section 74, comment c, of the Restatement cautions a trustee to obtain the settlor's written direction or authorization to support the trustee's defense in the event of a surcharge action. The implication of the Restatement's comments is that a trustee is liable to a beneficiary for taking actions that were in violation of the trust or his/her fiduciary duties, even when the trust was revocable, unless the trustee was following the direction of the settlor. Tim does not dispute this natural implication.

Tim argues that Petitioners' citation to Bogert, *The Law of Trusts and Trustees*, § 964, is "misleading." Tim totally ignores the findings of the trial court regarding Bill's incapacity and argues that there is no

"allegation" that Bill had lost capacity or was unduly influenced. Tim also incredibly states that "it is a fact that Bill directed Tim's actions." Answer, p. 16. Not according to the trial court, who, supported by substantial evidence, found that Bill was *incapable* of directing Tim's actions as trustee.

Tim argues that the common law is not binding or persuasive because "in California the 'right' of inheritance is 'strictly statutory.'" Answer, p. 16, citing *In re Darling's Estate* (1916) 173 Cal. 221, 223. This argument is irrelevant, as we are not dealing with the right to inheritance, we are dealing with the right of trust beneficiaries to seek redress for breaches of trust. As discussed in the Opening Brief, the court is required to interpret statutes consistent with the common law, rather than in derogation of it, whenever possible. *Dry Creek Valley Ass'n, Inc. v. Board of Sup'rs of Sonoma County* (1977) 67 Cal.App.3d 839, 844; *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676. The common law on the issues addressed herein is highly persuasive authority.

Tim cites *Davis v. Davis* (2008) N.E.2d 374 for the proposition that the beneficiary's right to remove the trustee in that case for actions occurring while the settlor was still alive and the sole beneficiary was "based on a unique specific state statute[s]." Answer, p. 16. In *Davis*, a remainder beneficiary filed a petition against the trustee for accounting and removal after the settlor's death related to misconduct of the trustee during the settlor's lifetime. *Id.* at 376 – 378. The Indiana Court of Appeal held that the trial court abused its discretion by not removing the trustee for egregious breaches of fiduciary duties. *Id.* at 385. The Indiana statutes are similar to California's statutes. Indiana defines "beneficiary" as an "income beneficiary" and "remainder beneficiary," similar to California's definition of "beneficiary" which includes those with a "present" or "future" interest. See Indiana Code 30-2-14-2, compared with Cal. Probate

Code § 24. The Indiana codification of a trustee's fiduciary duties are also similar to California's statutes, providing that a trustee must first abide by the trust instrument and, unless the terms of the trust provide otherwise, abide by various duties to preserve trust property, make trust property productive, avoid commingling, etc. See Indiana Code 30-4-3-6, compared with Cal. Probate Code §§ 16000 – 16016. Thus, the *Davis* holding that the trustee could be removed by a remainder beneficiary for actions taken while the settlor was still alive was not based on a "unique" statute that differs from California's statutes.

Tim argues that citations to the Uniform Trust Code ("UTC") are "completely out of place" because Probate Code §§ 15800, 15801 and 16069 are somehow contrary to the provisions of the UTC. Answer, p. 16. Tim makes no attempt to explain how these California statutes are "contrary" to the UTC. Petitioners point out in the Opening Brief that these California statutes are *consistent* with the UTC; rather, it is the *Giraldin* Opinion that is contrary to the law in California and as expressed in the UTC.

Tim also tries to distinguish the Florida cases cited by Petitioners. Tim argues that Florida law "differs from California law," but fails to explain how the laws are different. Answer, p. 16. Tim also argues that two cases cited by Petitioners, *Smith v. Bank of Clearwater* (1985) 479 So.2d 755 and *Siegel v. Novak* (2006) 920 So.2d 89 (decided under New York law), are distinguishable from the issues before this Court. Tim is incorrect.

Tim argues that *Smith* involved the claim by a remainder beneficiary of an irrevocable testamentary trust, but fails to explain how this purported distinction is relevant. In *Smith*, the decedent had a general power of appointment over assets in a testamentary trust that had been created by decedent's husband's will. Only if decedent did not exercise the power of

appointment would plaintiff have received anything under the trust. In her will, the decedent exercised the power of appointment and gave half of the trust's assets to plaintiff. The plaintiff in that case did not even take under the terms of the trust, but the court nonetheless held that the plaintiff could sue to recover the loss of value to the trust, because half of those funds were intended for plaintiff. *Smith*, *supra*, at 756 – 757. Even though the petitioner's interests in *Smith* were subject to a power of appointment, he was still entitled to an accounting covering the period before the power of appointment was exercised.

Tim argues that, in *Siegel*, *supra*, the court relied on a New York statute that "specifically gave contingent beneficiaries standing to seek an accounting of a revocable trust." Answer, p. 17; emphasis removed. Tim erroneously cites to page "97" of the opinion, which contains no substantive text. And no such statute is cited in the opinion. The New York statute provides that "a person interested," which includes a "any person entitled or allegedly entitled to share as a beneficiary in the estate," may file a petition to compel an accounting. *Id.* at 96. It was New York *courts* (not specific statutes) that held an expansive view of standing, even for those beneficiaries with remote interests. *Id.* at 95.

IV. CONCLUSION

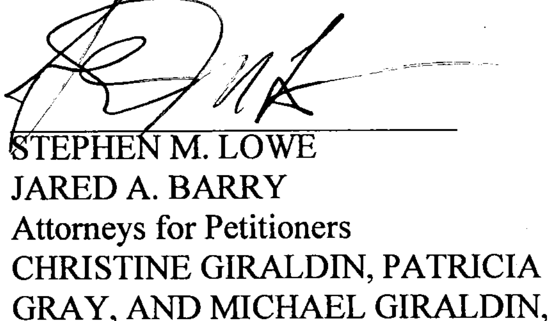
The beneficiaries of a trust are the persons who will seek remedies for abuses by a trustee who fails to follow the terms of the trust and probate law. Tim seeks to impose a variety of non-statutory barriers to disallow injured beneficiaries from seeking the assistance of the court. While it is inherently logical to delay those remedies while the settlor is alive it is equally logical to allow the designated beneficiaries to pursue their remedies after the settlor has died. In the

instant action, the trustee directed $4 million dollars into his own start-up company, provided personal loans to his favored siblings and failed properly to account for numerous financial transactions while acting as trustee. While Tim argued that he was immune from liability because he had written consent or directions, the trial court supported by substantial evidence, found that he had neither. The Court of Appeal, found *sua sponte* that children of the decedent do not have standing to seek certain probate court remedies for abuses by a third party trustee despite clear statutory and case law holding otherwise. For the protection of senior citizens and their designated beneficiaries throughout the State of California, this court should affirm that remainder beneficiaries have standing to seek probate court relief after a trust becomes irrevocable if a trustee has breached his fiduciary duties during the period that the trust was revocable.[4]

Respectfully submitted,

Dated: April 11, 2012

FREEMAN, FREEMAN & SMILEY, LLP



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[4] These problems are ongoing. See Los Angeles Times, April 9, 2012, "Widow with Dementia gave $600,000 to Kabbalah Centre charity." A copy of the article is attached for the Court's convenience.

CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Rule 8.204(C) of the California Rules of Court, Petitioners' Reply Brief is produced using 13-point Times Roman type, including footnotes, and contains 6,781 words. I relied upon the word count of our firm's computer program to prepare this brief.

Dated: April 11, 2012

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

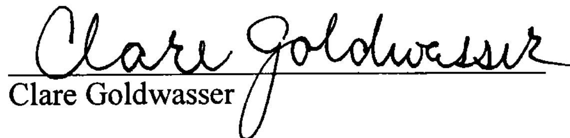
At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1888 Century Park East, Suite 1900, Los Angeles, California 90067.

On April 11, 2012, I served true copies of the following document(s) described as **PETITIONERS' REPLY BRIEF** on the interested parties in this action indicted on the attached Service List.

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

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

Executed on April 11, 2012, at Los Angeles, California.



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Widow with dementia gave $600,000 to Kabbalah Centre charity

She also borrowed millions to build a home in Beverly Hills. Her financial advisor, a key figure in the oversight of Kabbalah Centre finances, has been instrumental in those expenditures, public records and interviews show.

By Harriet Ryan, Los Angeles Times

April 9, 2012

Susan Strong Davis, an 87-year-old widow, spends the day inside her Palos Verdes Estates home, tended round-the-clock by nurse's aides. For company, relatives say, she has her dog, the television and, on increasingly rare occasions, memories of the glamorous socialite's life she once lived.

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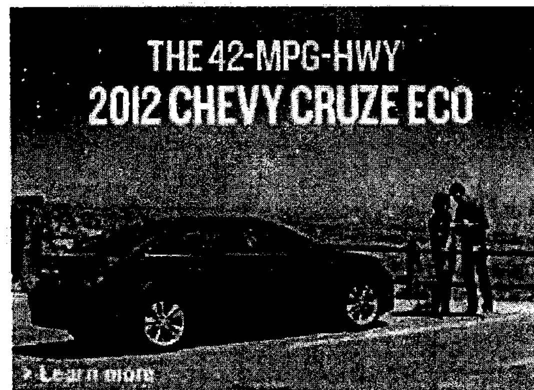

"She definitely has some sort of dementia," said Viki Brushwood, a niece who visited from Texas in December. "I don't know if it's Alzheimer's or what. She is somebody who is not making decisions anymore."

But decisions involving large amounts of money are being made in Davis' name. In recent years, she has borrowed millions to build a four-bedroom house in Beverly Hills featuring three fireplaces and a pool, according to property records, court filings and interviews. She has also given at least $600,000 to a charity to which relatives say she has no ties and which is run by the controversial Kabbalah Centre, the Westside spiritual organization now under investigation by the Internal Revenue Service.

Public records and interviews show Davis' longtime financial advisor, John E. Larkin, has been instrumental in these expenditures. A veteran entertainment industry money manager, Larkin has been a devout student of the Kabbalah Centre's brand of Jewish mysticism for nearly a decade and is a key figure in the oversight of its substantial financial assets. He was handling his elderly client's personal finances when she made the donation. And Davis' Beverly Hills home is being built on a lot Larkin previously owned and sold to her at a substantial personal profit.

Larkin, 64, did not return messages seeking comment. Although the IRS' criminal division has been investigating the center and its controlling family, the Bergs, for tax evasion for more than a year, Larkin has not been identified as a subject of that probe and has not been accused of any crime in handling Davis' money.

Davis has no children, and her siblings are dead. Those relatives still in touch with her — three nieces — said they visit at most once a year. Neither they nor seven other family members contacted were aware of her donations to the Kabbalah Centre or of the home under construction in Beverly Hills.

Bunny Sumner, an 89-year-old niece who lives in Carlsbad, said that when she visited Davis two years ago she was "well into" dementia.

"She wasn't a bit well," Sumner recalled. "We just talked about old times."

The daughter of Frank R. Strong, a pioneering real estate mogul who made a fortune subdividing Southern California scrubland, Davis grew up in a turreted mansion in La Cañada Flintridge. Her family's dinner parties and vacations were detailed on the society pages. She became a professional ice skater, touring in the chorus line of Sonja Henie's ice revue. She married three times, including a 1951 union with British actor Richard Stapley that put her on the Hollywood party circuit. Her last husband, Frank Davis, died in a car crash in the 1980s.

"She was a free spirit before it was a free spirit time. [A] very Katharine Hepburn-ish type but only better looking," said nephew Thomas H. Dutton of Lodi.

Davis' lifestyle was underwritten in part by a trust fund set up upon her mother's 1962 death and supervised by a Los Angeles probate court. By 1981, the original trustees had died or become too ill to serve. At Davis' request, the court appointed Larkin one of two co-trustees. How he and the heiress had become acquainted is unclear.

Larkin operated a financial advising business in Sherman Oaks, and he had built up a clientele of TV executives, athletes and actors that eventually included the likes of Ricardo Montalban and Candice Bergen.

The court approved Davis' choice of Larkin and a second trustee, George W. Dickinson, a real estate developer who had known Davis for decades. The men took control of the trust, a portfolio of stocks, oil rights and other assets valued in a court filing last year at just under $11 million.

Over the next two decades, Davis signed off on their pay and put Larkin in charge of her personal finances as well, according to court filings. Within a two-year period a decade ago, their compensation doubled to $100,000 a year, probate records show. Since 2002, the trust has paid Larkin and Dickinson a combined $900,000.

Larkin's intense involvement in the Kabbalah Centre began in the early 2000s, a period in which Madonna's devotion piqued the interest of many in Hollywood. Raised Roman Catholic, Larkin became close to founders Philip and Karen Berg. He converted to Judaism and took a top center official, Orly "Esther" Sibilia, as his fourth wife in a 2006 ceremony performed by the Bergs' son Yehuda. The couple bought a $2-million home on the Beverly Hills block where the Bergs and their sons live in side-by-side homes.

The family put Larkin in charge of an auditing committee that oversees center finances, and according to a suit pending against him and the center by a former member, he also managed personal investments for Philip Berg and his celebrity followers.

In 2006, a center charity, Spirituality for Kids, attached a list of the previous year's major contributors to a publicly filed tax return. Madonna, who has served as the organization's board chair, gave generously as did local billionaires Stewart and Lynda Resnick. The biggest donor of all, however, was Susan Davis, whose tax-exempt contribution was listed at $600,000. The address listed for her was Larkin's office.

Relatives said that when they visited Davis in the mid-2000s she was lucid. They said she never mentioned kabbalah or Spirituality for Kids. Her family was nominally Protestant, but she had never demonstrated an interest in religion, relatives said.

"I never heard of her going to church," said Karen Molinare, a niece who lives in San Diego. "She's been known to go to a wedding and not show up at the ceremony, just the reception."

It is not clear what instructions Davis might have given Larkin about the donation. While Larkin was an almost daily presence at the Kabbalah Centre, former employees and members said they never saw her at center classes, religious services or other events.

Whether Davis made other donations is not known. Spirituality for Kids did not disclose its contributors before or after that year, and the center has never made public its donors. Through a spokesman, the center declined to answer questions about Larkin, Davis or her donations.

Spirituality for Kids' finances are a subject of the federal probe. The nonprofit shuttered its domestic programs last year, citing budget problems.

In 2009, a period in which Davis' relatives say her memory was failing, Larkin sold her the vacant lot he owned near the Kabbalah Centre's Robertson Boulevard headquarters for $1.4 million. Although it was one of the worst real estate markets in memory, the sale price for the land on South LaPeer Drive was $300,000 more than Larkin had paid for it in 2004, according to assessment records.

To facilitate the sale and construction of a home on the site, Davis has borrowed $2.65 million from the trust, according to property records and court filings. The trustees had informed the probate court of potential conflicts of interest in the past, including Larkin's handling of Davis' personal affairs. But their annual reports to the judge did not disclose Larkin's role in the home sale.

"The judge has nothing to say about it. It's not trust business," said Alan L. Rosen, a Westlake Village attorney who filed the trustee accountings.

Experts consulted by The Times disagreed, saying the real estate deal appeared to be a conflict of interest that called for a judge's review. Under the state probate code, a transaction "by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duty."

Arnold Gold, a retired L.A. County Superior Court judge, said a judge could determine whether such a transaction was legal only if trustees brought it to the court's attention.

"It's a conflict of interest. In my opinion, he should have disclosed the entire aspect of the loan, not only that she was borrowing it for a house but that he was the seller," Gold said.

The trustees' filings state that the loans to Davis were "to help with costs on her new home." Davis has lived for three decades in her large Palos Verdes Estates home overlooking the ocean, surrounded by a flower garden and decorated with mementos from her ice skating career. The Beverly Hills house sits on an alley next to a defunct car dealership. It is a block from Larkin's own home and in an area convenient for Kabbalah Centre followers who want to be within walking distance of their synagogue because of the Sabbath prohibition on driving.

In a brief phone interview, Larkin's co-trustee, Dickinson, who is 85, said he hadn't had contact with Davis in "a couple of years."

"Most of the paperwork is handled by Mr. Larkin," Dickinson said. He said he was unaware of Larkin's role in the transaction but didn't see it as his concern.

"I'm a trustee, not a guardian. She can give it all to the dog and cat hospital if she wants," he said before hanging up.

Rosen, the trustees' lawyer, said, "If Ms. Davis has a problem, I suppose she could complain about it." Asked whether dementia might prevent such a complaint, he said he had no information about her health and hadn't seen her in "many, many years."

"I know nothing about the woman," he said.

Despite $1.2 million advanced for construction by Davis' trust, the Beverly Hills home sits half-finished because of what the contractor said were his client's "cash-flow" problems. Ron Kolodziej of Niagara Construction said he had never met Davis and dealt exclusively with Larkin. He said four months ago, Larkin told him that the owner wasn't going to move into the home and that it would be sold instead. To make it more attractive in the heavily Orthodox Jewish neighborhood, he said, Larkin directed him to install a kosher kitchen.

One recent morning, a home health aide who answered the door at Davis' Palos Verdes Estates residence said Davis was in bed and unable to talk to a reporter. Asked whether Davis might be available by phone, the aide shook her head.

"She is not allowed to use the phone," the aide said. "She has a trustee that takes care of that sort of thing."

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