Filed 9/26/11

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) O P I N I O N

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

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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.

they might have, but confined solely to the period in which the trust had become irrevocable in the wake of Bill's death.

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

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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.)

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]

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

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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. 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.

liberal in making that determination with the understanding that "the rights of remainder beneficiaries *shall be of no importance*."[5] (Italics added.)

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,

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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.

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."

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.

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*]."

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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.

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 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 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."

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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.

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]

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.

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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."

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

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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.

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, 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]

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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.

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 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

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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."

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 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

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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."

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.

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."

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.)

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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

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, 1331-1332 ['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

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(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.)

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

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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*

"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 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

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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.)]

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]

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

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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?

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

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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.

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-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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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.

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

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

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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."

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 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

[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.

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

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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.

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, 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

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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.

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.

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*

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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.

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 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.