

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,

S197694

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 97694; 2011 CA S. Ct. Briefs LEXIS 1677

November 3, 2011

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

Petition for Appeal

COUNSEL: [*1] FREEMAN, FREEMAN & SMILEY, LLP, Stephen M. Lowe, Esq., SBN 45534, Thomas C. Aikin, Esq., SBN 241411, Los Angeles, California, Attorneys for Petitioners, CHRISTINE GIRALDIN, PATRICIA GRAY AND MICHAEL GIRALDIN, Plaintiffs and Respondents.

TITLE: Petition for Review

TEXT: I. QUESTIONS PRESENTED

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

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

II. PRELIMINARY STATEMENT OF WHY REVIEW IS NECESSARY

Statutory grounds for review exist under *California Rules of Court, Rule 8.500(b)*, in that the published opinion of the Fourth Appellate District of the Court of Appeal (the "Opinion") expressly declined to follow existing California case law which was precisely on point with the facts and law of the case. Prior to the Court of Appeal review, both sides assumed that Petitioners had standing to bring their [*2] petition pursuant to *Evangelho v. Presoto (1998) 67 Cal.App.4th 615*, but the Court of Appeal decided on its own not to follow the only controlling case and to initiate its attack on the rights of beneficiaries to recover for trustee misconduct. There is now a split of authority in appellate

courts and the Supreme Court has not issued any prior opinions on the subject. Review by the Supreme Court is necessary to ensure uniformity in an important area of trust law.

The Opinion eliminates one of the methods for protecting elders in California from abuse. Californians increasingly make use of revocable trusts to hold their assets, to avoid the necessity of costly and time-consuming conservatorships and probates. While trusts make testamentary dispositions of property like a will, unlike a will, trusts create the possibility that a person other than the trustor may become the trustee while the trust is still revocable and gain immediate control over the trust assets. Revocable trusts are thus both a powerful tool for ensuring that wealth is preserved and passed on, but can also be abused as a tool to empower an individual to wrongfully take control of a vulnerable elder's [*3] assets, and use them for his own gain, often without the knowledge of the elder's family and heirs.

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

Here, certain beneficiaries of a family trust, Christine Giralдин, Patricia Gray, Michael Giralдин and Philip Giralдин n1 (collectively "Petitioners") sought to have its Trustee, Timothy Giralдин ("Tim"), held accountable for breaches of trust during Trustor William Giralдин's ("Bill") lifetime, including a four million dollar investment in a startup company in which Tim had a substantial interest. If Bill had directed Tim to take the actions in question, the beneficiaries would have been prevented from making these claims. However, [*4] after a lengthy trial, substantial evidence showed Bill did not have capacity to understand the documents he signed, which were offered by Tim as "written directions" pursuant to the applicable terms of the Trust. The Trial Court found that Tim used the Trust for his own benefit, and without Bill's consent, which resulted in a loss of more than four million dollars, approximately two-thirds of the Trust estate. The Trustee's misconduct effectively destroyed Bill's estate plan to benefit his wife and then all of his children equally. The Opinion reversed all orders of the Trial Court based on its holding that beneficiaries have no standing to hold a trustee accountable for periods during the trustor's lifetime when the trust is revocable.

n1 Philip Giralдин passed away after the Trial Court's order and is no longer a party.

Tim violated numerous codified fiduciary duties by acting in his own interest rather than Bill's. Tim was granted power over Bill's property when he accepted his position as Trustee, but [*5] California law has always tempered this power with requirements as to how the trustee must act. Thus, by using a trust and appointing someone else as trustee, Bill could avoid the cost and embarrassment of a conservatorship, but his intended beneficiaries still were protected from trustee misconduct.

The Opinion eliminates this protection. In the Opinion, the Court of Appeal expressly declined to follow an existing case, *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, a case from the First District of the Court of Appeal, which was factually and legally analogous to Petitioners' claims. *Evangelho* allowed the remainder beneficiaries, following the death of the trustor, to compel a trust accounting from a third party trustee during the trustor's lifetime, subject to the discretion of the trial court. The Opinion holds there is no standing to compel such an accounting no matter how egregious the circumstances of the Trustee's conduct were. As a result, there is now a conflict in authority in California law as to whether this additional protection for the elderly is still available for the only persons who are likely available to police this misconduct, the remainder [*6] beneficiaries.

III. BRIEF STATEMENT OF UNDERLYING FACTS

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

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

On February 11, 2002, Bill executed an entirely new trust instrument (the "Trust"), [*7] prepared by Mellor, in place of the Initial Trust and amendments. Tim signed the Trust as the sole Trustee. The Trust departs from Bill's earlier estate plan by immediately appointing Tim as the sole Trustee, whereas Bill was the trustee of the Initial Trust (and amendments) followed by four of his children as successor co-trustees. Bill was the sole beneficiary of the Trust during his lifetime and entitled to net income and principal of the entire Trust in his or the Trustee's discretion. During Bill's lifetime, he retained the right to add or remove property from the Trust; amend or revoke the Trust; appoint or remove a trustee; and direct and approve the Trustee's actions, including investment decisions. However, these rights could only be exercised by a signed writing by Bill delivered to the Trustee. After Bill's death, the remaining corpus was available for use by his surviving spouse, Mary, and then to be divided equally among all his children. Only after Bill's death did Petitioners learn of the existence of the Trust, even though several of his children had been aware of, and named as successor trustees, in the Initial Trust.

Immediately prior to Tim becoming Trustee, the [*8] Trust owned approximately \$ 3.4 million of Washington Mutual common stock which constituted about 50% of the Trust corpus, with the remainder of the corpus in diversified investments such as energy stocks, government securities, and real estate limited partnerships, and approximately \$ 1 million in real estate, including his residence and a cabin in Fresno County, California.

SafeTzone Technology Corporation ("SafeTzone"), was a start-up company partially owned and formerly controlled by Tim and Patrick. Immediately after Tim became Trustee in February 2002, he began the process of liquidating nearly all of the Trust's securities holdings and investing over \$ 4 million in SafeTzone over a period of less than one and a half years. The Trust's dependable, diversified investments, built up by Bill over many decades, were traded for an investment in a risky start-up venture, SafeTzone, that had only one other financial investor at the time and had lost millions of dollars since its inception. On May 23, 2008, Tim delinquenty filed a verified First Account Current (the "Accounting"). In the Accounting it was disclosed that as of December 31, 2007, the SafeTzone investment was essentially [*9] worthless.

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

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

IV. PROCEDURAL HISTORY

On December 1, 2006 Petitioners (and Philip Giralдин) filed their [*10] Petition for 1) Removal of Trustee; 2) Suspension of Powers; 3) Appointment of Successor Trustee; 4) Compel Trustee to Report and Account; and 5) Attorneys' Fees against Tim (the "Petition"). On January 17, 2007, Tim filed his response to the Petition.

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

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

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

Tim filed a notice of appeal jointly with Mary and Patrick on March 10, 2009. The Notice of Appeal specifically stated that the order being appealed [*11] included the following:

- i) the December 19, 2008 Order Settling First Account Current and Report of Trustee and for Its Settlement;
- ii) the December 19, 2008 Order on Amended Petition for 1) Removal of Trustee; 2) Suspension of Powers; 3) Appointment of Successor Trustee; 4) To Compel Trustee to Report and Account; 5) For Attorneys' Fees; and 6) For Recovery of Trust Property; and
- iii) the December 19, 2008 Order on the Spousal Property Petition. [*Id.*].

Mary and Tim filed their respective Opening Briefs on February 3, 2010. Petitioners filed their combined Respondents' Brief on July 19, 2010. Tim and Mary filed their respective Reply Briefs on October 8, 2010. On March 7, 2011, the Court of Appeal issued an order requesting further briefing from the parties relating to the issue of standing. Petitioners filed their Supplemental Brief in Response to the March 7, 2011 Order on April 6, 2011. Tim filed a Supplemental Brief on April 26, 2011, and Petitioners filed a Reply Supplemental Brief on May 6, 2011. On June 2, 2011, Petitioners filed a Letter Brief in Response to the Court's March 7, 2011 Order. The parties presented oral argument on September 21, 2011, and [*12] on September 26, 2011 the Court of Appeal issued its Opinion, which reversed the orders of the Trial Court.

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

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

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

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

In *Evangelho*, a woman, Joan [*13] Evangelho, created a revocable trust. *Evangelho*, 67 Cal.App.4th at 618. The case concerned the actions of defendant Presoto as trustee of the trust. Among the assets of the trust was a PaineWebber brokerage account which at the time the trust was created had a value of approximately \$ 450,000, but at the time of decedent's death the account was worth approximately \$ 132,000. *Id.* at 619. Following decedent's death, the petitioners then filed a petition under *Probate Code* § 17200(b)(7) to "compel trustee to account to beneficiaries and to compel redress of breach of trust." *Id.* This petition sought an accounting from the date the trust was created. *Id.* Presoto relied on *Probate Code* § 15800 to assert that the beneficiaries could not compel an accounting for any time when the trust was revocable. *Id.* at 623.

The *Evangelho* court held that the clear import of *Probate Code* §§ 15800 and 16069 n2 was to postpone the enjoyment of rights under the trust law by contingent beneficiaries while the settlor could revoke or modify the trust. *Id.* at 623-24. However, "when the person holding the power to revoke dies, [*14] the rights of contingent beneficiaries are no longer contingent. Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under division 9, the trust law." *Id.* at 624.

n2 When *Evangelho* was decided, the present text of *Probate Code* § 16069(a) - "in the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked" was included in *Probate Code* § 16064(b). See *Evangelho*, 617 Cal.App.4th at 623, fn. 6. This language was moved to section 16069 unchanged in the 2010 revisions to the Probate Code.

Evangelho also considered the overall purpose of the legislature in enacting these sections and found "the actual words of the code sections and the Law Revision Commission reveal the will of the Legislature to be that only decedent as settlor could compel an accounting while she was alive and competent. But once decedent died, the right to [*15] compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id.* As to the specific remedies available to the beneficiaries, *Evangelho* holds that "regarding the scope of the accounting, the code sections grant broad equitable powers for the protection of beneficiaries. The matter of determining the appropriate equitable relief to be granted to a beneficiary is generally left to the good judgment of the trial court." (citing *Rivero v. Thomas* (1948) 86 Cal.App.2d 225, 238.) *Id.* Therefore, "[the trustee's] conduct can be attacked for fraud or bad faith and an accounting compelled for improper acts which had been hidden from the ultimate beneficiaries." *Evangelho*, 67 Cal.App. at 624.

Under *Evangelho*, the rights of the beneficiaries to enforce an accounting were "postponed," which is distinct from saying they do not exist. "When the person holding the power to revoke dies, the rights of contingent beneficiaries are no longer contingent. Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under division 9, the trust law." *Evangelho*, 67 Cal.App. at 624. [*16] "Once the decedent died, the right to compel the accounting set out in the code sections passed to the respondents as beneficiaries." *Id.*

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

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

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

appellate court decisions on points of law relating to revocable trusts and the Probate Code. However, none of these decisions expressly or impliedly disapprove of the result in *Evangelho*. One case cited in the Court of Appeal's Opinion, *Johnson v. Koteyk* (1999) 76 Cal.App.4th 83, [*17] does not affect the *Evangelho* decision, and in fact is logically consistent. In *Johnson*, a beneficiary of a trust sought accountings while the settlor of the revocable trust was still alive, but subject to a conservatorship. The beneficiary argued that *Probate Code section 15800* did not apply as the trustor of the trust could no longer revoke it as she had become incompetent. The *Johnson* court disagreed and relied upon *Probate Code § 2580* to determine that the conservator, in conjunction with the probate court, was the person holding the power to modify or revoke the trust instrument, and was competent to do so. As the rights still were held by a living trustor pursuant to section 15800, the remainder beneficiary had no ability to compel an accounting. Thus, the holdings of *Johnson* and *Evangelho* are entirely consistent. During the lifetime of the settlor, the remaining beneficiaries have no standing to seek an accounting (*Johnson*), but they do have standing to do so at the discretion of the trial court after the settlor dies (*Evangelho*). Petitioners do not assert that they could have compelled an accounting from the Trustee while Bill was alive, even if he [*18] was incompetent. When Bill died, however, the Trust became irrevocable and all the postponed rights under the Trust became actionable by the now vested beneficiaries.

Similarly to *Johnson*, the Court of Appeal stated that one of its reasons for not following *Evangelho* was a subsequent Supreme Court opinion, *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, based upon language in that case which affirmed that a "settlor with revocation power 'retains the power and control of the trustee and can with a stroke of the pen divest the beneficiaries of their interest.'" *Steinhart* at 1320. The Court of Appeal specifically referenced its belief that *Evangelho* "did not have the benefit of the Supreme Court's opinion in *Steinhart* [citation omitted] with its clear explanation of the nature of a revocable trust, to aid in its interpretation of *Probate Code Section 15800*." *Steinhart*, however, concerned an entirely different subject matter, namely an appeal of an assessment of property tax and specifically when a change in ownership of real property occurred for purposes of Proposition 13. *Steinhart*, 47 Cal.4th at 1303.

The point [*19] of law referenced in *Steinhart* on which the Court of Appeal relied, that a settlor of a revocable trust can divest beneficiaries of their interest, is law that was well established in 1998 when *Evangelho* was decided and indeed for many decades prior. In fact, the citation in question actually cites to cases from 1923 and 1948 for this proposition. *Id.* at 1319-1320. *Steinhart* does not introduce any new law or concepts which alter the result in *Evangelho*. Petitioners do not dispute that they could have been divested of their beneficial interest during Bill's lifetime and while he was competent. They were not divested. All petitions in this case occurred following Bill's death. Petitioners sought redress for Tim's actions that were made while Bill lacked capacity, for which he did not have Bill's consent and which were egregious breaches of the Trust.

The probate statutes referenced in the Opinion, *Probate Code §§ 15800* and *16069* similarly did not change the applicable law between *Evangelho* and *Steinhart*. Section 15800 has continuously provided that Tim's duties were owed to Bill "during the time the trust was revocable." The critical language [*20] in *Probate Code § 16069(a)*, which was formerly § 16064(b) in 1998 when *Evangelho* was decided, did not change, except for the number of the statute. These Probate Code sections which pertain to rights and duties in the period while the Trust is revocable, alternate in their description of the applicable period. One (section 15800) "during" and the other [16069 and previously 16064(b)] saying "for." *Evangelho* which relied upon both sections, used the two words interchangeably. *Evangelho*, 67 Cal.App.4th at 623. This is not inconsistent with the ordinary definitions ascribed those words as synonyms of "while." The Court of Appeal in its Opinion improperly relied on the difference in the word used without regard to the synonymous definitions. (Opinion, at page 22.) As *Evangelho* was not overruled or superseded, it should have been binding upon the result in this case.

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

The Trust contains two sets of provisions concerning the Trustor's rights to direct the actions of the Trustee. Section 2.6 provides that the Trustor reserved the "right to direct [*21] and approve the Trustee's actions, including the Trustee's investments decisions." Section 2.6 provides that the Trustor's approval of the Trustee's actions shall be

binding upon all other beneficiaries. Section 2.8 provides that the Trustor may exercise the rights reserved in Section 2.6 "only by a signed writing delivered to the Trustee." Section 3.1 of the Trust concerns distributions of income and principal to Bill by the Trustee and states "during my lifetime, the Trustee shall distribute to me that amount of net income and principal as I direct" and by contrast "Also, the Trustee is authorized to distribute to me that amount of net income and principal, up to the whole of the trust estate, as the Trustee deems appropriate in the exercise of his or her discretion, using my accustomed manner of living as a guide and without regard to my other sources of support. The Trustee shall exercise this discretion in a liberal manner, and the rights of remainder beneficiaries shall be of no importance."

The Court of Appeal improperly conflated these two sections of the Trust, which have entirely different purposes. In the Opinion, the Court of Appeal gave a hypothetical example of a trustor [*22] who requests money to take his mistress on a six-month cruise around the world. (Opinion, p. 21). This scenario would fall squarely under Section 3.1 of the Trust as a direct distribution to the Trustor or for his health, support and maintenance. It is patently obvious that this section exists to allow the Trustor to have whatever he wants during his lifetime and no one can challenge the Trustee for accommodating that.

The issue the Court of Appeal was charged with deciding, however, was not a distribution for Bill's benefit. Instead, the issue was whether the Trustee's actions or investment decisions were approved or directed by a signed writing delivered to the Trustee as required by Section 2.6. The Court of Appeal simply ignored that this case involved signed writings offered by the Trustee and the Trial Court's findings that the Trustor had insufficient capacity to understand the writings he signed. The writings were a Gift Acknowledgment that primarily dealt with a gift to a child, and other corporate documents which were prepared by the corporation which were neither approvals nor directions to the Trustee. The Trial Court found that the Trustor lacked capacity to understand [*23] these documents as written directions and that finding was supported by substantial evidence that was ignored by the Court of Appeal.

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

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

The Opinion contains reckless dicta by ignoring the difference between trust corpus simply given to the Trustor for his benefit as opposed to Trust corpus invested by the Trustee in violation of numerous codified fiduciary duties without specifically understood written directions authorizing [*24] or approving those investments. The Court of Appeal's cavalier hypothetical of allowing the Trustor to go around the world with his mistress blatantly ignores the real protection provided by the Trust which would prohibit the Trustee from self-dealing unless he had written directions so authorizing him. This isn't a joke; the Court of Appeal allowed Tim Giralдин to confiscate his father's hard-earned wealth for his own selfish purposes in defiance of the Trial Court's findings based on substantial evidence.

VI. REVIEW IS NECESSARY TO PROTECT THE ELDERLY

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

- Senior citizens are most likely to have a "nest egg," to own their home, and/or to have excellent credit-all of which make them attractive to con artists.
- People who grew up in the 1930s, 1940s, and 1950s were generally raised to be polite and trusting.

Con artists exploit these traits, knowing that it is difficult or impossible for these individuals to say "no" or just hang up the telephone.

- Older Americans are less likely to report a [*25] fraud because they don't know who to report it to, are too ashamed at having been scammed, or don't know they have been scammed. Elderly victims may not report crimes, for example, because they are concerned that relatives may think the victims no longer have the mental capacity to take care of their own financial affairs.

- When an elderly victim does report the crime, they often make poor witnesses. Con artists know the effects of age on memory, and they are counting on elderly victims not being able to supply enough detailed information to investigators. In addition, the victims' realization that they have been swindled may take weeks-or more likely, months-after contact with the fraudster. This extended time frame makes it even more difficult to remember details from the events.

Many Californians now use revocable trusts instead of wills for their estate planning. It allows them to avoid both conservatorships and probates. The avoidance of conservatorships by the use of a revocable trust, however, allows a third person to control the trust assets without court supervision. If that person has diminished capacity, there is greater potential for abuse. The remedy eliminated by [*26] the Opinion is a necessary alternative for protecting elder's rights. Other actions, namely conservatorships or actions for elder abuse, are not always practical alternatives.

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

The Opinion allows a miscreant trustee to use a simple self-serving declaration that "this is what the trustor wanted" as an absolute defense. Without the legal protection that a trustee be accountable where it is shown the trustor lacked [*27] capacity to direct the trustee, and the action was not in the trustor's interest, elders will be at risk and their desire to transfer wealth according to their estate plans will not be respected. The Opinion makes it impossible for the beneficiaries of the Trust to recover damages against the Trustee, even where there is demonstrable misconduct ostensibly because the beneficiaries' interest could have, but did not, disappear.

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

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

1. Conservatorship

A conservatorship can be a tremendously difficult decision for a family. It puts the elder squarely in the middle of litigation to prove that they lack capacity, and subjects them to interviews, investigations and court appearances. A conservatorship can also be a source of embarrassment for the [*28] elder when their capacity is publicly questioned. Conservatorships are extreme proceedings which are only warranted in extreme situations. A significant purpose of a trust is to allow a third party trustee or a successor trustee to take over without the necessity of a conservatorship. There is no public policy served by requiring remainder beneficiaries to institute a conservatorship in order to protect their parents from financial abuse.

2. Elder Abuse

While a cause of action for Elder Abuse does survive the death of the elder, there are several reasons why it is not adequate as an exclusive remedy when a decedent's assets were mismanaged in a trust by a third party trustee. Jury trials are allowed for elder abuse causes of action, but are not permitted for probate and trust cases. (*Probate Code* §§ 825 and 17006). The Legislature determined that the emotional content of probate and trust matters would be better handled by judges rather than juries. Jury trials are more expensive than bench trials, and they require considerably more additional judicial resources. Thus, as a practical matter, eliminating standing for remainder beneficiaries for relief for breaches of trust pursuant [*29] to the Probate Code forces those parties into much more expensive, time consuming and uncertain litigation.

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

3. Action by Personal Representative.

The Opinion states that an action against Tim could have been maintained by the personal representative. In this case, as in most cases, the culpable Trustee during the Trustor's lifetime is also the designated personal representative. In practice, this would mean that the remainder beneficiaries, in addition to their action for breach of trust, would need to take an additional step and expend additional judicial resources by litigating with the named personal representative as to who should be named personal representative. Then, assuming they prevail [*30] in the initial litigation, the remainder beneficiaries would have to undertake a second litigation as personal representatives to remedy the alleged wrongdoing. This extra litigation serves no judicial purpose, yet this is what the Opinion seeks to require.

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

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

Instead of analyzing the substantial evidence supporting the Trial Court's finding, the Court of Appeal offered its own summary of evidence to support its finding that Bill should [*31] have been allowed to do whatever he wanted to do, thereby supporting the Court of Appeal's view eliminating essential protections provided by the Trust and existing probate law.

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

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

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

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

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

4. Bill switched from his longstanding estate planning attorney whom he had retained for many years to [*32] an attorney obtained by Tim;

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

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

All of the evidence summarized above provides more than substantial evidence that Bill lacked the capacity to understand the complex, misleading and incorrect documents he signed. Tim relied on a "Gift Acknowledgment Form" (the "Gift Form"), dated the same day that the Trust was created, February 11, 2002, as a written direction to invest in SafeTzone. The Gift Form, however, is a misleading document and does not, by its terms, authorize the investment in SafeTzone. The title and the first three paragraphs of the document relate solely to a gift of \$ 150,000 to Thomas Giraldin. Bill also executed a thirty page summary of proposed investment terms. As demonstrated in testimony at trial, the term sheet was materially inaccurate and according to its terms, Bill would not have receive the [*33] amount of shares to which he was entitled.

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

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

The Trial Court found, based upon substantial evidence, that Bill did not direct Tim to make the investment in SafeTZone. The Opinion simply ignores the substantial evidence which supports the Trial Court's finding in order to make their holding on standing more palatable. In fact, the Opinion disingenuously ignores the evidence [*34] relied upon by the Trial Court and instead creates its own misleading record which was not the basis for the Trial Court's decision.

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

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

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

Bogert's Trusts And Trustees, § 964.

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

Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. *However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee.* For the requirements of a consent, see Section 1009. (emphasis added).

Section 1009 of the UTC provides:

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction [*36] constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach of the UTC provides.

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

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

The Opinion also reversed the Trial Court's order denying Mary's Spousal Property Petition on the tangential basis that two pieces of real property at issue were not held in the Trust. It ignored, however, that these properties were transferred into the Initial Trust only four months [*37] prior to the creation of the Trust, which shows the obvious intent of the Trustor that the properties were to be included as Trust assets. It was only Tim's failure, along with the inaction of the attorney obtained by Tim, that accounted for the failure to deed the properties from the Initial Trust to the Trust. This is precisely the type of situation anticipated by *Estate of Heggstad (1993) 16 Cal.App.4th 943 at 951-952*, which allows parties to avoid probate for properties which were intended to be trust assets but had not been transferred to the Trust.

VIII. CONCLUSION

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

Dated: November 1, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned states that the word count for the Petition for Review of Petitioners Christine Giralдин, Patricia Gray and Michael Giralдин, exclusive [*38] of tables, cover information, excluded attachments and this certificate, according to Microsoft Word 2010 is 6,876.

Dated: November 1, 2011

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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

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

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully [*39] prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

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

/s/ Clare Gard
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[SEE OPINION IN ORIGINAL]