Balistreri & Haggerty

Just recently, the first joined others in the appellate courts concerning modification of trusts. Pursuant to Probate Code Section 15402, the language appears to be quite clear and concise as follows:

> "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

The appellate courts however have felt and put forth a much more complicated, intricate and varied interpretation of these same words.

The Third and Fifth: *Pena v. Dey* (2019) 39 Cal.App.5th 546, and *King v. Lynch* (2012) 204 Cal.App.4th 1186, have interpreted a restrictive approach, limiting amendment to the method set forth in the instrument, without regard to an explicit statement that the manner outlined is exclusive of the statutory text.

The Fourth: *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003, has provided a permissive approach allowing statutory application of requirements as well as those outline in the trust text without a clear exclusive intent for the text of the trust to outline the only method of modification thereafter allowed.

The fourth now under *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, has now joined the Third and Fifth in a restrictive approach.

Mary Balistreri made a trust with her husband in 2017. It outlined a method of modification, etc. as follows: "[a]ny amendment, revocation, or termination . . . shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee." Thereafter Mary and her husband executed an amendment to their trust the day before her husband died absent a notary.

Mary attempted to confirm the validity of the amendment through petition thereafter to which her stepson opposed. Both trial court and appellate (First) court found the amendment to be invalid. They both similarly enough reasoned that when a trust instrument specifies how the trust is to be modified, that method must be used to amend the trust. Any specified procedure is mandatory regardless of whether: (1) the method of amendment is exclusive or permissive; and (2) the trust provides identical or different methods of amendment and revocation.

An interesting legal quandry lay afoot. It may not seem so, but it still does. The restrictive approach has not been ordained where we practice, but it seems to be the prevailing one. Restrictive approaches favor the learned, the lawyer, but not necessarily everyone else. I for one am in favor of the permissive approach. There is already enough in contract and its related laws that far removed from common sense and more engineered to engendering the overinvolvement of lawyers where common sense should prevail and leave the real issues to those that have committed their lives to fixing.

Probate Code § 16061.8

The change thereto clarifies an ambiguity and further enforces its original intent. The original notice holds all. A subsequent notice of change of trustee or change in power of appointment is NOT a loophole for further trust contest after the original SOL has been extinguished pursuant to Probate Code § 16061.7.

Probate Code § 13550

The application of debts unto property should only apply to separate and the ½ of the community property inherited by a spouse, but not the true joint tenancy property, which would allow for the creditor to not have an inherited outlet for recovery.

Breslin v. Breslin, 62 Cal. App. 5th 801 (2nd Dist.)

The one sentence summary: if you are ordered to mediation in probate court, do not participate, and mediation settles the dispute, you may have just forfeited your right to an evidentiary hearing and to contest the settlement.

1. What happens when the court directs mediation?
2. What forfeiture of rights may come from settlement at mediation?
3. Can the court order mediation over objection?
4. What are the required contents of a Breslin notice?
5. What qualifies participation to avoid risk of forfeiture of rights?
6. What is the public policy in resolving issues without trial, but then still given parties the ability to bring them to trial?
7. Is there an opportunity to grab non-participating parties shares in mediation? Is there a duty to advise clients of such?

Giraldin and King v. Johnston

A Trustee *de son tort* has a duty to account for the period prior to the death or incompetency of the grantor. Essentially if you act like a trustee or even an agent under a power of attorney you may be treated as one pursuant to *King v. Johnston* (2009) 178 Cal.App.4th 1488, 1504-1506

Taking that understanding, under *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1069 [150 Cal.Rptr.3d 205, 213, 290 P.3d 199, 205] the limitation of Probate Code § 17200 are lifted allowing for accounting etc. prior to the date of death or incompetency when the trustee is not the grantor.

Further discussion in *Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135.

If it walks like a duck and quacks like a duck, it is a duck and the duck must eventually account!

West's Annotated California Codes
Probate Code (Refs & Annos)
Division 9. Trust Law (Refs & Annos)
Part 2. Creation, Validity, Modification, and Termination of Trusts (Refs & Annos)
Chapter 3. Modification and Termination of Trusts (Refs & Annos)

West's Ann.Cal.Prob.Code § 15402

§ 15402. Modification of trust

Currentness

Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 15402 continues Section 15402 of the repealed Probate Code without change. This section codifies the general rule that a power of revocation implies the power of modification. See Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n, 147 Cal.App.2d 776, 781-82, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 331 comment g (1957). An unrestricted power to modify may also include the power to revoke a trust. See Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n, supra, at 784; Restatement (Second) of Trusts § 331 comment h (1957). See also Sections 15600 (trustee's acceptance of modification of trust), 15601 (trustee's rejection of modification of trust).

Background on Section 15402 of Repealed Code

Section 15402 was a new provision added by 1986 Cal.Stat. ch. 820 § 40. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (18)

West's Ann. Cal. Prob. Code § 15402, CA PROBATE § 15402
Current with all laws through Ch. 997 of 2022 Reg.Sess.

Notes Of Decisions (18)

Provisions in trust agreement

When a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58

A trustor may bind himself or herself to a specific method of amendment of a trust by including that specific method in the trust agreement. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58

When the trust instrument specifies how the trust is to be modified, that method must be used to amend the trust. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58

Court of Appeal would deem trustee's appeal challenging trial court's judgment finding trust amendments invalid to be taken in trustee's individual capacity as a beneficiary, and thus would not dismiss trustee's appeal based on trustee's limited authority under the trust instrument. King v. Lynch (App. 5 Dist. 2012) 139 Cal.Rptr.3d 553, 204 Cal.App.4th 1186 , review denied. Appeal and Error 141

Under a trust providing that it "may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee," an amendment signed only by one settlor was not effective, even though the other settlor was incompetent to execute a trust amendment, where the competent settlor failed to apply the trust instrument's remedy of appointing a conservator or guardian for the incompetent settlor. King v. Lynch (App. 5 Dist. 2012) 139 Cal.Rptr.3d 553, 204 Cal.App.4th 1186 , review denied. Trusts 58

Under the statute providing that a settlor may modify a trust by the procedure for revocation unless the trust instrument provides otherwise, the qualification "unless the trust instrument provides otherwise" indicates that if any modification method is specified in the trust, that method must be used to amend the trust. King v. Lynch (App. 5 Dist. 2012) 139 Cal.Rptr.3d 553, 204 Cal.App.4th 1186 , review denied. Trusts 58

The statute providing that a settlor may modify a trust by the procedure for revocation unless the trust instrument provides otherwise did not apply to a trust providing that it "may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee," since the trust instrument provided otherwise for modification. King v. Lynch (App. 5 Dist. 2012) 139 Cal.Rptr.3d 553, 204 Cal.App.4th 1186 , review denied. Trusts 58

Surviving trustor lacked power to amend or modify the trust instrument created by husband and herself, though the instrument gave trustor right to withdraw assets from one of the two trusts, given that the instrument stated in unambiguous terms that "on the death of either trustor the trusts created by this declaration shall become irrevocable and not subject to amendment or modification." Crook v. Contreras (App. 6 Dist. 2002) 116 Cal.Rptr.2d 319, 95 Cal.App.4th 1194 , rehearing denied, review denied. Trusts 58

Inter vivos trust provisions requiring trustor to notify trustee regarding trust amendment, and delaying amendment's effectiveness are enforceable, and trustors are bound to follow those provisions in order to make effective amendments to

trust; trustor may bind him or herself to specific method of modification or amendment of trust by including that specific method in trust agreement. Conservatorship of Irvine (App. 4 Dist. 1995) 47 Cal.Rptr.2d 587, 40 Cal.App.4th 1334 . Trusts 58

Trustee removal notice executed when trustor was incompetent or unduly influenced was void and, thus, trustee of inter vivos trust remained unchanged and subsequent amendment to trust was ineffective due to failure of trustor to deliver signed written amendment by certified mail to trustee, as required under terms of trust; service of amendment upon purported successor trustees was invalid. Conservatorship of Irvine (App. 4 Dist. 1995) 47 Cal.Rptr.2d 587, 40 Cal.App.4th 1334 . Trusts 58 ; Trusts 167

Revocation in whole or in part

A revocable trust may be revoked, in whole or in part, (1) by the method provided for in the trust instrument, or (2) by a writing, other than a will, signed by the settlor or person holding the power of revocation; either method may be used unless the trust instrument explicitly makes its method of revocation exclusive. Pena v. Dey (App. 3 Dist. 2019) 252 Cal.Rptr.3d 265 . Trusts 59(4)

Modifications, generally

When the trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58 ; Trusts 59(4)

If a revocable trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. Pena v. Dey (App. 3 Dist. 2019) 252 Cal.Rptr.3d 265 . Trusts 58

Settlors

Settlor's modification of trust agreement respecting successor trustee and beneficiary list was valid, where procedure for modification in trust agreement was not explicitly or implicitly exclusive, so that statutory procedure applied, and trust was validly modified under that procedure by settlor's delivery of signed modification to herself as trustee. Haggerty v. Thornton (App. 4 Dist. 2021) 284 Cal.Rptr.3d 32 , review granted 287 Cal.Rptr.3d 721, 500 P.3d 994 . Trusts 58

The statute governing modification of a revocable trust recognizes a trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement. Pena v. Dey (App. 3 Dist. 2019) 252 Cal.Rptr.3d 265 . Trusts 58

Invalid amendment

When trust specifies method of amendment, that method must be followed for amendment to be effective. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58

Amendment to trust which was accepted and adopted by co-trustors but not notarized was invalid under trust provision stating that "Any amendment, revocation, or termination" was to be made "by written instrument signed, with signature acknowledged by a notary public," even though provision did not explicitly state it was the exclusive method for amending the trust and co-trustors were also the trustees. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Trusts 58

Preservation of issues

Co-trustor failed in trial court to raise argument that trust's requirement that any amendment be notarized was a mere "procedural formality" that she and other co-trustor had the power to waive when they drafted and executed the amendment, and thus argument was forfeited on appeal; while in the trial court, co-trustor argued the notary requirement served no purpose, she did not assert that she and the other co-trustor were free to waive the requirement. Balistreri v. Balistreri (App. 1 Dist. 2022) 290 Cal.Rptr.3d 630 , review granted 293 Cal.Rptr.3d 597, 509 P.3d 954 . Appeal and Error 170(1)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Haggerty v. Thornton, Cal.App. 4 Dist., September 16, 2021

39 Cal.App.5th 546
Court of Appeal, Third District, California.

Margaret PENA, as Trustee, etc., Plaintiff and Respondent,
v.
Grey DEY, Defendant and Appellant.

C083266
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Filed 08/30/2019

Synopsis
Background: Trustee petitioned for instructions as to the validity of settlor's handwritten interlineations on trust document, which interlineations purported to make settlor's friend beneficiary of trust. Trustee thereafter moved for summary judgment, asserting that interlineations did not amount to a valid amendment to trust as a matter of law. The Superior Court, Sacramento County, No. 34201500178593, Steven M. Gevercer, J., granted motion. Friend appealed.

Holdings: The Court of Appeal, Hoch, J., held that:

[1] settlor's handwritten interlineations did not satisfy trust's amendment provision, which required amendments to be signed by settlor, and thus interlineations did not effectively amend trust, and

[2] settlor did not effectively sign handwritten interlineations by signing note he attached to trust documents he sent to his attorney.

Affirmed.

West Headnotes (10)

[1] Judgment Nature of summary judgment

228 Judgment
228V On Motion or Summary Proceeding
228k178 Nature of summary judgment

The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.

[2] Appeal and Error De novo review

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)13 Summary Judgment
30k3554 De novo review

On appeal from the entry of summary judgment, an appellate court reviews the record and the determination of the trial court de novo.

[3] Appeal and Error Statutory or legislative law
Appeal and Error Construction, interpretation, and application in general
Appeal and Error Particular Cases and Contracts

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)2 Particular Subjects of Review in General
30k3169 Construction, Interpretation, or Application of Law
30k3173 Statutory or legislative law
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3765 Contracts
30k3767 Construction, interpretation, and application in general
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)22 Substantive Matters
30k3765 Contracts

30k3768Particular Cases and Contracts
30k3768(1)In general

The de novo standard of review applies to questions of statutory construction and to the interpretation of written instruments, including a trust instrument, unless the interpretation depends on the competence or credibility of extrinsic evidence or a conflict in that evidence.

2 Cases that cite this headnote

[4] Trusts Mode of revocation

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(4)Mode of revocation

A revocable trust may be revoked, in whole or in part, (1) by the method provided for in the trust instrument, or (2) by a writing, other than a will, signed by the settlor or person holding the power of revocation; either method may be used unless the trust instrument explicitly makes its method of revocation exclusive. Cal. Prob. Code §§ 15401(a), 15402.

3 Cases that cite this headnote

[5] Trusts Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

If a revocable trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. Cal. Prob. Code §§ 15401(a), 15402.

[6] Trusts Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Where a revocable trust instrument does specify how the trust is to be modified, that method must be used to amend the trust. Cal. Prob. Code §§ 15401(a), 15402.

[7] Trusts Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

The statute governing modification of a revocable trust recognizes a trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement. Cal. Prob. Code § 15402.

1 Case that cites this headnote

[8] Trusts Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Settlor's handwritten interlineations on revocable trust instrument, which interlineations purported to make settlor's friend beneficiary of trust, did not satisfy trust's amendment provision, which provided that amendment to trust "shall be made by written instrument signed by the settlor and delivered to the trustee[,]" and thus interlineations did not effectively amend trust, although interlineations constituted written instrument separate from trust instrument and were delivered to trustee, as settlor was also trustee, and thus delivered interlineations to himself when he made them,

where settlor did not sign interlineations, but instead sent them to his attorney to have them formalized into amendment to trust and prepared for his signature. Cal. Prob. Code §§ 15401(a), 15402.

4 Cases that cite this headnote

[9] **Trusts**Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Settlor did not effectively sign handwritten interlineations to revocable trust instrument, which signature was required to satisfy trust's amendment provision, by signing note he attached to trust documents he sent to his attorney; note was not part of written instrument comprised of interlineations such that signature on note effectively signed interlineations, but was instead separate writing that simply identified enclosed documents, which settlor sent to attorney to allow attorney to prepare formal amendment to trust for his signature.

1 Case that cites this headnote

[10] **Trusts**Application of general rules of construction

390Trusts
390IIConstruction and Operation
390II(A)In General
390k112Application of general rules of construction

While a court must construe a trust instrument, where possible, to give effect to the intent of the settlor, that intent must be ascertained from the whole of the trust instrument, not just separate parts of it.

Witkin Library Reference: 13 Witkin, Summary of Cal. Law (11th ed. 2017) Trusts, § 229 [Power To Modify.]

1 Case that cites this headnote

****266** APPEAL from a judgment of the Superior Court of Sacramento County, Steven M. Gevercer, Judge. Affirmed. (Super. Ct. No. 34201500178593)

Attorneys and Law Firms

Law Office of Dewey V. Harpainter, Dewey V. Harpainter and Nathan R. Harpainter, Auburn, for Defendant and Appellant.

F.S. Ricky Maveety for Petitioner and Respondent.

Opinion

HOCH, J.

***548** In this case, we must determine whether James Robert Anderson, settlor and trustee of the James Robert Anderson Revocable Trust (the trust), validly amended the trust when he made handwritten interlineations to one of the operative trust documents, specifically the First Amendment to the trust (First Amendment), making Grey Dey a beneficiary. After making the interlineations, Anderson sent both the ****267** original trust instrument and the interlineated First Amendment to his attorney to have the new disposition of his trust estate formalized in a second amendment to the trust. Anderson died before the formal amendment was prepared for his signature.

Margaret Pena, successor trustee, petitioned the trial court for instructions as to the validity of the interlineations. She thereafter moved for summary judgment, asserting the interlineations did not amount to a valid amendment to the trust as a matter of law. The trial court granted the motion and entered judgment in Pena's favor. Dey appeals.

We conclude the interlineations did not validly amend the trust because the trust specifically requires amendments "be made by written instrument *signed by the settlor* and delivered to the trustee." (Italics added.) While the law considers the interlineations a separate written instrument, and while there ***549** can be no doubt Anderson delivered them to himself as trustee, he did not sign them. Instead, he sent them to his attorney to have them formalized into a second amendment to the trust and prepared for his

signature, evidencing his intent to sign the changes to his trust at a later date. We also reject Dey's argument that Anderson effectively signed the interlineations by attaching a Post-it® note to the documents he sent to his attorney, on which he stated: "Hi Scott, [¶] Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." We cannot conclude these lines on the note were part of the written instrument comprised of the interlineations to the First Amendment to the trust such that the signature on the note effectively signed the interlineations. Instead, Anderson signed a separate note indicating what the enclosed documents were. While there is no dispute in this case that Anderson intended Dey to receive a portion of his trust estate, there is also no genuine dispute that Anderson intended to sign this and other changes to his trust when formalized by his attorney. Unfortunately, he died before that could be accomplished. We must therefore affirm the summary judgment entered in this case.

FACTS

In 2004, Anderson executed the trust at issue in this appeal. He was designated both settlor and trustee. Paragraph 3.1 of the trust provides: "Power of Revocation and Amendment. This trust may be amended, revoked, or terminated by the settlor, in whole or in part, at any time during his lifetime. After the settlor's death, this trust shall be irrevocable and not subject to amendment." Paragraph 3.2 provides: "Method of Revocation or Amendment. Any amendment, revocation, or termination of this trust shall be made by written instrument signed by the settlor and delivered to the trustee. An exercise of the power of amendment substantially affecting the duties, rights, and liabilities of the trustee shall be effective only if agreed to by the trustee in writing."

In 2008, Anderson executed the First Amendment to the trust in compliance with the foregoing method of amendment. We need not set forth the contents of this amendment in any detail. It will suffice to note the amendment added paragraph 5.5, dividing the remainder of the trust estate into shares of various percentages for 15 named beneficiaries.

Anderson was diagnosed with abdominal cancer in 2010. While he recovered from that bout with the disease, he was diagnosed with brain cancer the following year. Dey moved in with Anderson in November 2011 and cared for him until his death in May 2014. Dey and Anderson had been friends since 2006. Anderson, a successful ****268** artist and art teacher, was also Dey's mentor in the art world. The two became close during 2010 and throughout Anderson's battle with cancer.

***550** In February 2014, Anderson called an attorney, Michael S. Shuttleworth, who had represented Anderson in another matter, seeking his assistance in making changes to his estate planning documents. Because Shuttleworth was not the attorney who drafted the 2004 trust instrument or the 2008 First Amendment, he asked Anderson to send copies of these documents to his office and "put in writing the proposed changes he was considering."

Around this time, Anderson made the interlineations at issue in this appeal. Eleven of the 15 shares provided for in paragraph 5.5 of the First Amendment were crossed out. The first four shares remained, but these beneficiaries' respective percentages of the remainder (49 percent) of the trust estate were changed to 7 percent. Dey and two other individuals were listed in the margin as also receiving "7% of 49%," i.e., 7 percent of the remainder of the trust estate. Also in the margin, Anderson wrote, "51% to 3 organizations ~ See beneficiary list."

Shuttleworth received the trust instrument and interlineated First Amendment to the trust in March 2014. As mentioned, attached to these documents was a Post-it® note, on which Anderson wrote: "Hi Scott, [¶] Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." An initial draft of a second amendment to the trust was prepared by Shuttleworth's staff. However, Shuttleworth's review of that draft caused him to call Anderson the following month seeking clarification as to some of the requested changes. Anderson was out of town and said he would get back to Shuttleworth the following week.

Anderson was admitted to the hospital the same day as this phone call. He died May 24, 2014. A final draft of the second amendment to the trust was never finalized or signed by Anderson.

DISCUSSION

I

Summary Judgment Principles

We begin by summarizing several principles that govern

the grant and review of summary judgment motions under section 437c of the Code of Civil Procedure.

[1]"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (***551** *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Id.* at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.) This burden "remains with the party moving for summary judgment." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003, 4 Cal.Rptr.3d 103, 75 P.3d 30 (*Kahn*).) The moving party also "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he [or she] carries [the] burden of production, ... the opposing party is then subjected to a burden of production ... to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

[2] [3]On appeal from the entry of summary judgment, "[w]e review the record and the determination of the trial court de ***269** novo." (*Kahn*, *supra*, 31 Cal.4th at p. 1003, 4 Cal.Rptr.3d 103, 75 P.3d 30.) And, of course, the de novo standard of review also applies to questions of statutory construction (*County of Los Angeles v. American Contractors Indemnity Co.* (2011) 198 Cal.App.4th 175, 178, 129 Cal.Rptr.3d 563) and to the interpretation of written instruments, including a trust instrument, unless the interpretation depends on the competence or credibility of extrinsic evidence or a conflict in that evidence (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-453, 24 Cal.Rptr.2d 507).

II

Analysis

Dey contends the trial court erred in concluding Anderson's interlineations did not validly amend the trust. He argues the interlineations manifest an unambiguous intent to amend and, either standing alone or in conjunction with the Post-it® note attached to the trust documents Anderson sent to his attorney, effectively amended the trust as a matter of law. We are not persuaded.

"Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." (Prob. Code, § 15402.)[1] The Probate Code sets out the following procedure for revocation: "A trust that is revocable by the settlor or any other person may be revoked in whole or in part by any of the following methods: [¶] (1) By compliance with any method of revocation provided in the trust instrument. [¶] (2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. If the ***552** trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph." (§ 15401, subd. (a).)

[1] Undesignated statutory references are to the Probate Code.

[4] [5] [6] [7]Under these provisions, a revocable trust may be revoked, in whole or in part, (1) by the method provided for in the trust instrument, or (2) by a writing, other than a will, signed by the settlor or person holding the power of revocation; either method may be used unless the trust instrument explicitly makes its method of revocation exclusive. (*King v. Lynch* (2012) 204 Cal.App.4th 1186, 1192, 139 Cal.Rptr.3d 553.) The same procedure applies to modifications, "unless the trust instrument provides otherwise." (*Id.* at pp. 1190, 1192, 139 Cal.Rptr.3d 553.) "Thus, if the trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. In that case, the trust instrument does not *provide otherwise.*" (*Id.* at p. 1192, 139 Cal.Rptr.3d 553.) Where, however, the trust instrument does specify how the trust is to be modified, as in this case, "that method must be used to amend the trust. As noted by the court in *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1344 [47 Cal.Rptr.2d 587], ... 'section 15402 recognizes a trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement.' " (*King*, *supra*, 204 Cal.App.4th at p. 1193, 139 Cal.Rptr.3d 553.)

[8]Here, the trust instrument provides any amendment to the trust "shall be made by written instrument signed by the settlor and delivered to the trustee." We must therefore determine whether the interlineations Anderson made to the First ***270** Amendment to the trust satisfy this method of amendment.

Beginning with the "written instrument" language, we find *Cory v. Toscano* (2009) 174 Cal.App.4th 1039, 94 Cal.Rptr.3d 841 (*Cory*) to be instructive. There, certain interlineations to a trust document reduced a beneficiary's share of a trust asset. That beneficiary proposed to challenge the interlineations as an ineffective amendment to the trust and sought an advance ruling as to whether or not such a challenge would constitute a challenge to the trust itself, and thereby violate the trust's no contest clause. (*Id.* at p. 1041, 94 Cal.Rptr.3d 841.) Without determining whether or not the interlineations constituted an effective amendment to the trust, our colleagues at the Fifth Appellate District held the proposed challenge to the interlineations was not a challenge to the trust instrument, i.e., the instrument containing the no contest clause, and therefore would not violate that clause. (*Id.* at pp. 1044-1046, 94 Cal.Rptr.3d 841.) Rejecting the argument that "the handwriting is physically part of the Trust instrument and has no meaning without incorporating the relevant Trust provisions," the court explained, "the handwritten notations on the Trust were made after the Trust was executed" and therefore "are not part of the original ***553** Trust instrument and thus are not part of the instrument containing the no contest clause." (*Id.* at p. 1045, 94 Cal.Rptr.3d 841.) The court continued: "Moreover, the handwritten interlineations meet the definition of an 'instrument.' They are a 'writing that designates a beneficiary or makes a donative transfer of property.' [Citation.] The fact that this writing is physically part of, and must be read in the context of, the original Trust instrument does not change its status as an instrument 'other than the instrument containing the no contest clause.' [Citation.]" (*Ibid.*)

We agree with this analysis. While we are not called upon to determine the precise issue addressed in *Cory*, *supra*, 174 Cal.App.4th at page 1045, 94 Cal.Rptr.3d 841, we similarly conclude the interlineations in this case constitute a written instrument separate from the trust instrument. We also have no difficulty concluding the interlineations were "delivered to the trustee," as required by the trust's amendment provision. As both settlor and trustee, Anderson delivered the interlineations to himself when he made them. (See, e.g., *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888, 26 Cal.Rptr.3d 143 (*Gardenhire*) [settlor-trustee's execution of a will effectively revoking her trust was sufficient to provide herself with notice of intent to revoke].) The problem is Anderson did not sign the interlineations. Because the trust's amendment provision requires an amendment be "signed by the settlor," we must conclude the interlineations did not effectively amend the trust.

Nevertheless, relying on two holographic will cases, Estate of Archer (1987) 193 Cal.App.3d 238 [239 Cal. Rptr. 137] and Estate of Finkler (1935) 3 Cal.2d 584 [46 P.2d 149], Dey argues Anderson validly adopted his 2008 signature on the First Amendment to the trust when he made the interlineations to that document in 2014. Not so. These cases support the proposition that handwritten interlineations made to a holographic will or codicil after that instrument was signed, when made with testamentary intent, become part of that will or codicil and adopt the original date and signature. (Estate of Archer, supra, 193 Cal.App.3d at p. 244; Estate of Finkler, supra, 3 Cal.2d at pp. 600–601; see also Estate of Dumas (1949) 34 Cal.2d 406, 411 [210 P.2d 697] ["additions or alterations may be made in a holographic will if done in the testator's handwriting, without the necessity ****271** of resigning and redating"].) Dey cites no authority, nor have we found any on our own, applying these holographic will principles outside of that specific context, let alone the context of an attempted amendment to a trust.

Such authority does not exist for good reason. In the context of a holographic will, "the signature and the material provisions [of which] are in the handwriting of the testator" (§ 6111, subd. (a)), subsequently added handwritten interlineations become part of that signed holographic will. The holographic will and handwritten interlineations become a single testamentary ***554** document, the whole of which is to be judged under section 6111. (See *Estate of Archer*, *supra*, 193 Cal.App.3d at p. 243, 239 Cal.Rptr. 137 [rejecting the argument that handwritten additions to a holographic will must be formally integrated or incorporated by reference in the will in order to adopt the will's original signature, noting, "integration and incorporation apply only to *separate writings*"].) In contrast, as we have explained, handwritten interlineations on a trust document are a separate writing regardless of the fact that "this writing is physically part of, and must be read in the context of, the original Trust instrument." (*Cory*, *supra*, 174 Cal.App.4th at p. 1045, 94 Cal.Rptr.3d 841.) The trust instrument in this case requires such an amendatory writing to be signed by the settlor. This signature requirement would be rendered nugatory if the settlor could simply adopt the signature on the original trust instrument.

[9]We are also unpersuaded by Dey's argument that the Post-it® note Anderson attached to the 2004 and 2008 trust documents he sent to his attorney supplies the missing signature. That note stated: "Hi Scott, [¶] Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." We cannot conclude these lines on the note were part of the written instrument comprised of the interlineations such that the signature on the note

effectively signed the interlineations. Instead, the Post-it® note is a separate writing that simply identifies the enclosed documents. Indeed, Anderson sent these documents, along with the interlineations, to his attorney to allow Shuttleworth to prepare a formal second amendment to the trust for his signature, as contemplated by the amendment provision in the trust. If Anderson intended the interlineations and signature on the Post-it® note to amend the trust by themselves, there would have been no need to have Shuttleworth prepare the amendment for his signature.

Finally, Dey's reliance on *Gardenhire*, *supra*, 127 Cal.App.4th 882, 26 Cal.Rptr.3d 143 and *Fleishman v. Blechman* (1957) 148 Cal.App.2d 88, 306 P.2d 548 (*Fleishman*) is misplaced. In *Gardenhire*, the trust instrument provided the settlor (Pulizevich) may revoke the trust by written notice signed by the settlor and delivered to the trustee (also Pulizevich). (*Gardenhire*, *supra*, at p. 886, 26 Cal.Rptr.3d 143.) As previously stated, section 15401, subdivision (a), provides that a revocable trust may be revoked either (1) by the method provided for in the trust instrument, or (2) by a writing, *other than a will*, signed by the settlor or person holding the power of revocation. The Sixth District Court of Appeal held Pulizevich revoked the trust by executing a will disposing of all of her real and personal property. The appellate court explained: "We agree with the trial court that because Pulizevich did not limit or qualify the term 'written notice,' she authorized revocation via *any* writing that unambiguously manifested her intent to revoke, including a will. We find significant support for such broad latitude in the fact that she named herself the trustee. The trust allowed Pulizevich to revoke simply ****272** by giving herself written notice of her intent to do so. Since she could not be mistaken about her own intent no ***555** matter how she chose to manifest it in writing, the broad, unqualified language of the trust reasonably implies that she did not intend to restrict the form of written notice or the nature of the documents used to provide it. Rather, any writing that unambiguously manifested her intent would do." (*Id.* at p. 888, 26 Cal.Rptr.3d 143.)

Unlike *Gardenhire*, where the written instrument manifesting the settlor's intent to revoke the trust (i.e., the will) was signed by the settlor, here, the interlineations made to the First Amendment to the trust were not signed. Even more inapposite is *Fleishman*, *supra*, 148 Cal.App.2d 88, 306 P.2d 548, where the Second District Court of Appeal held the settlor effectively revoked a trust by filing a lawsuit against the trustees in which he claimed the trust property in its entirety. (*Id.* at p. 95, 306 P.2d 548.) The revocation question in that case was governed by former section 2280 of the Civil Code, providing: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." (Stats. 1986, ch. 820, § 7, p. 2730; see Prob. Code, §§ 15000, 15401, 15410.) The court explained: "We think that any writing which clearly manifests an intention of the trustor to revoke is a sufficient writing under this section. [Citation.] The complaint served this purpose." (*Ibid.*) Thus, the trust at issue in *Fleishman* did not require a *signed* writing to revoke the trust; here, Anderson's trust explicitly provided any amendment to the trust "shall be made by written instrument *signed by the settlor* and delivered to the trustee." (Italics added.) As we have explained, Anderson did not sign the interlineations he made to the trust documents.

[10]In sum, the undisputed evidence establishes Anderson made interlineations to the First Amendment to the trust and sent this document, along with the original trust instrument, to his attorney with the intent to have the interlineated changes incorporated into a second amendment to the trust, which he intended to sign upon the completion of that document. Unfortunately, he died before that could be accomplished. While we must construe a trust instrument, where possible, to give effect to the intent of the settlor, that intent "must be ascertained from the whole of the trust instrument, not just separate parts of it." (*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 168, 11 Cal.Rptr.2d 448.) Dey asks us to give effect to the intent expressed in the interlineations. However, the manifest intent expressed in the trust instrument itself, stated explicitly in its amendment provision, is that a written instrument must be signed in order to constitute a valid amendment to the trust. Because Anderson did not sign the interlineations, they did not effectively amend the trust.

***556** DISPOSITION

The summary judgment in favor of respondent, Margaret Pena, as successor trustee of the James Robert Anderson Revocable Trust, is affirmed. Respondent Margaret Pena, as successor trustee of the James Robert Anderson Revocable Trust is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Murray, Acting P. J., and Duarte, J., concurred.

All Citations

39 Cal.App.5th 546, 252 Cal.Rptr.3d 265, 19 Cal. Daily Op. Serv. 8801, 2019 Daily Journal D.A.R. 8543

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204 Cal.App.4th 1186
Court of Appeal, Fifth District, California.

Judith E. KING et al., Plaintiffs and Respondents,
v.
David Eric LYNCH, Individually and as Trustee, etc., Defendant and Appellant.

No. F062232.
|
April 10, 2012.
|
Review Denied June 27, 2012.

Synopsis

Background: Trust beneficiaries petitioned to determine the construction of the trust and the validity of certain trust amendments. The Superior Court, Tulare County, No. 45273, Lloyd L. Hicks, J., granted petition. Trustee appealed.

Holdings: The Court of Appeal, Levy, Acting P.J., held that:

[1] trust could not be amended by the procedure for revocation, and

[2] amendment signed by the only competent settlor did not satisfy amendment provision of trust instrument.

Affirmed.

Detjen, J., filed dissenting opinion.

West Headnotes (4)

[1] **Trusts** Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

The statute providing that a settlor may modify a trust by the procedure for revocation unless the trust instrument provides otherwise did not apply to a trust providing that it "may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee," since the trust instrument provided otherwise for modification. West's Ann.Cal.Prob.Code §§ 15401, 15402.

See Cal. Jur. 3d, Trusts, § 307; Cal. Civil Practice (Thomson Reuters 2011) Probate and Trust Proceedings, § 24:123; Cal. Transactions Forms, Estate Planning, §§ 13:12, 13:42 (Thomson Reuters 2011); 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 197.

14 Cases that cite this headnote

[2] **Trusts** Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Under the statute providing that a settlor may modify a trust by the procedure for revocation unless the trust instrument provides otherwise, the qualification "unless the trust instrument provides otherwise" indicates that if any modification method is specified in the trust, that method must be used to amend the trust. West's Ann.Cal.Prob.Code § 15402.

15 Cases that cite this headnote

[3] **Trusts** Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts

390k58Modification

Under a trust providing that it "may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee," an amendment signed only by one settlor was not effective, even though the other settlor was incompetent to execute a trust amendment, where the competent settlor failed to apply the trust instrument's remedy of appointing a conservator or guardian for the incompetent settlor.

15 Cases that cite this headnote

[4] Appeal and Error Representative or official capacity

30Appeal and Error
30IVRight of Review
30IV(A)Persons Entitled
30k137Parties of Record
30k141Representative or official capacity

Court of Appeal would deem trustee's appeal challenging trial court's judgment finding trust amendments invalid to be taken in trustee's individual capacity as a beneficiary, and thus would not dismiss trustee's appeal based on trustee's limited authority under the trust instrument.

2 Cases that cite this headnote

Attorneys and Law Firms

****554** Law Office of William A. Romaine, Visalia, and William A. Romaine for Defendant and Appellant.

Barry W. Pruett for Plaintiffs and Respondents.

OPINION

LEVY, Acting P.J.

***1188** This is an appeal from an order granting a petition to determine the construction of a trust and the validity of certain trust amendments. We conclude that the trial court correctly construed the trust and found that the amendments to the trust were invalid. Accordingly, the order will be affirmed.

BACKGROUND

In July 2004, Zoel Night Lynch and Edna Mae Lynch, a married couple, created a revocable trust.[1] The trust designated the settlors, Zoel and Edna, as initial trustees of the trust. The trust provided that during the lifetime of the settlors, the income and principal of the trust would be used for the support of the settlors.

1 This case involves a number of members of the Lynch family. For convenience and clarity we will refer to individuals by their first names after the initial use of their full names.

Article "FOURTH" of the trust concerned modification and revocation. That article provided, with omissions not pertinent to this appeal, the following:

"During the joint lifetimes of the Settlors, this Trust may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee, and with respect to separately owned property by an instrument in writing signed by the Settlor who contributed that property to the Trust, delivered to the Trustee.

****555 *1189** "During the joint lifetimes of the Settlors, this Trust may be revoked, in whole or in part, with respect to jointly owned property by an instrument in writing signed by either Settlor and delivered to the Trustee and the other Settlor, and with respect to separately owned property by an instrument in writing signed by the Settlor who contributed that property to the Trust, delivered to the Trustee....

"The first Settlor to die shall be called the 'Deceased Spouse' and the living Settlor shall be called the

> 'Surviving Spouse.' The Surviving Spouse shall have the powers to amend or revoke this Trust in whole or in part.... [¶] ... [¶]
>
> "The powers of the Settlors to revoke or amend this instrument are personal to Settlors and shall not be exercisable in Settlors' behalf by any conservator, guardian or other fiduciary, except that revocation or amendment may be authorized, after notice to the Trustee, by the court that appointed the conservator, guardian or other fiduciary."

Zoel and Edna had five children, David Eric Lynch, Nancy Street, Mary Jo Tirman, Judith E. King, and Thomas Francis Lynch. Thomas predeceased his parents leaving two daughters surviving, Sandra Lynch and Susan Lynch.

The original trust provided that after the death of Zoel and Edna, Nancy, Mary, Judith, and David were each to receive a distribution of $100,000 from the trust, and Sandra and Susan were each to receive $50,000. The remainder of the trust was to be given to David. The trust established David as successor trustee upon the death of the last settlor.

In 2005 and 2006, Zoel and Edna executed three amendments to the trust. The net result of these amendments was to bequeath four parcels of real estate to David. Both of the settlors signed these amendments and their validity is not questioned in the present proceeding.

Later in 2006, Edna suffered a severe brain injury that left her incompetent to handle her own affairs, although it does not appear that she was adjudicated incompetent.

After Edna's injury, Zoel executed three further amendments to the trust, which are designated the fourth, fifth, and sixth amendments. The fourth amendment modified the trustee designation, noting that Edna was no longer able to serve and appointed Zoel as sole trustee. The fifth amendment reduced all monetary bequests by half, so that the four children were allocated $50,000 each and Sandra and Susan were allocated $25,000 each. The sixth amendment further reduced the monetary bequests, allocating $10,000 each ***1190** for the children and $5,000 each for Sandra and Susan. Each of the amendments left intact the bequest of real estate to David and the designation of David as the remainder beneficiary.

Zoel died on January 18, 2010, and Edna died on August 10, 2010. By letter from David's attorney dated October 27, 2010, the trustee gave notice concerning the administration of the trust, pursuant to Probate Code section 16061.7.[2] On February 15, 2011, Nancy, Mary, Judith, Sandra, and Susan filed the present proceeding, causing it to be served upon David. David responded to the petition as trustee of the trust "in accordance with the authority granted to him" under the trust.

[2] All further section references are to the Probate Code unless otherwise noted.

Following a hearing, the trial court granted the petition and entered an order finding that the fourth, fifth, and sixth amendments to the trust were invalid and without effect on the ground that these ****556** amendments were signed by only one of the settlors in contravention of the express terms of the trust. The court confirmed that under the operative terms of the trust, real estate was to be distributed to David, $100,000 each was to be distributed to David, Nancy, Mary, and Judith, and $50,000 each was to be distributed to Sandra and Susan, with David receiving any remainder. David appealed. The remaining beneficiaries have appeared jointly as respondents. In the discussion that follows, we will refer to David as appellant and Nancy, Mary, Judith, Sandra, and Susan, collectively, as respondents.

DISCUSSION

In general, a revocable trust can be revoked, in whole or in part, in any manner provided in the trust instrument. (§ 15401, subd. (a)(1).) In addition, the trust may be revoked by a writing, other than a will, signed by the trustor and delivered to the trustee, unless the method of revocation provided in the trust instrument is explicitly exclusive. (§ 15401, subd. (a)(2).)

Under section 15402, unless the trust instrument provides otherwise, a revocable trust may be modified by the procedure for revocation. This appeal involves the construction of this section.

The trust provides that, during the joint lifetimes of the settlors, the trust may be amended by a writing signed by both settlors and delivered to the trustee. Appellant contends that this provision is not expressly or impliedly exclusive and therefore Zoel alone could amend the trust by the revocation procedures set forth in section 15401. This analysis requires concluding that, ***1191** under sections 15401 and 15402, no distinction exists between trust amendment provisions and trust revocation provisions. However, the genesis and language of section

15402 belie this result.

Sections 15401 and 15402 were enacted in 1986 and became operative in 1987. (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 960, fn. 2 [18 Cal.Rptr.3d 27] (*Huscher*).) Before that date, trust revocation was governed by former Civil Code former section 2280. (*Huscher, supra,* 121 Cal.App.4th at p. 961, 18 Cal.Rptr.3d 27.) However, no statute specifically addressed trust modifications. Rather, courts held that, in general, a power of revocation implied the power of modification. (*Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 781–782 [305 P.2d 979].)

Civil Code former section 2280, as amended in 1931, provided, in part: " 'Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee.' " (*Huscher, supra,* 121 Cal.App.4th at p. 963, 18 Cal.Rptr.3d 27.) Thus, revocability was the norm unless the trust declared itself to be irrevocable. (*Ibid.*) In contrast, before 1931, a trust could be revoked only if the trust instrument said so and only then by following the revocation method that was specified in the trust. (*Huscher, supra,* 121 Cal.App.4th at pp. 962–963, 18 Cal.Rptr.3d 27.)

Over the years, the courts analyzed Civil Code former section 2280 in various contexts. The court in *Huscher* reviewed this history and noted that some courts had appeared to find that the statutory revocation method prevailed (*Fernald v. Lawsten* (1938) 26 Cal.App.2d 552 [79 P.2d 742]), while others had appeared to hold that the revocation method set forth in the trust prevailed (*Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300 [106 Cal.Rptr. 321] (*Rosenauer*); *Hibernia Bk. v. Wells Fargo Bank* (1977) 66 Cal.App.3d 399, [136 Cal.Rptr. 60] (*Hibernia*)). The *Huscher* court was presented with a trust that was created ****557** before 1987 and thus the case was governed by the repealed Civil Code former section 2280, not Probate Code sections 15401 and 15402. (*Huscher, supra,* 121 Cal.App.4th at p. 961, 18 Cal.Rptr.3d 27.) Based on its review, the *Huscher* court determined that the true meaning of Civil Code former section 2280 had been obscured. The court then proceeded to distill these cases and concluded that if the trust contained a revocation procedure that was either explicitly exclusive or implicitly exclusive, i.e., sufficiently detailed or specific to be considered exclusive, then the trustor was required to use that method to revoke the trust. However, if the trust's revocation procedure was not explicitly or implicitly exclusive, then the trustor could use either that method or the Civil Code section 2280 method to revoke the trust. (*Huscher, supra,* 121 Cal.App.4th at p. 970, 18 Cal.Rptr.3d 27.) Since trust modifications were not governed by a separate statute, *Huscher* applied the rules governing trust revocation to trust modifications.

***1192** Before the Legislature enacted section 15401, the proposed legislation was analyzed by the California Law Revision Commission. Based on the *Rosenauer* and *Hibernia* courts' apparent findings that a trust's revocation method must prevail, the Law Revision Commission characterized section 15401 as a compromise position. According to the Law Revision Commission, section 15401 would make available the statutory method of revoking the trust except where the trust instrument explicitly made exclusive the method of revocation specified in the trust. (Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) pp. 1270–1271.) Thus, with respect to revocation, the Legislature adopted the essence of the *Huscher* court's analysis.

The language of section 15401, subdivision (a), confirms this conclusion. That section provides:

> "(a) A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods:
>
> "(1) By compliance with any method of revocation provided in the trust instrument.
>
> "(2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. *If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.*" (Italics added.)

[1] Relying on *Huscher,* appellant argues that, because the trust did not explicitly make the method of modification exclusive, Zoel had the power to modify the trust by the procedure for revocation, i.e., one signature was sufficient to amend the trust. However, *Huscher* was applying the pre-1986 law. At that time, there was no statute addressing modification. Rather, the rules on revocation were applied to modification by implication. Under current law, trust modification is governed by section 15402. Accordingly, *Huscher* does not provide authority for appellant's position.

Section 15402 states: "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." Thus, if the trust instrument is silent on modification, the trust may be modified in the same

manner in which it could be revoked, either statutorily or as provided in the trust instrument. In that case, the trust instrument does not *provide otherwise.* Here, however, the trust instrument specifies how the trust is to be modified. Therefore, we must interpret the phrase "[u]nless the trust instrument provides otherwise" in this context.

****558 *1193** In construing section 15402, we begin with its plain language, affording the words their ordinary and usual meaning. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 251 [85 Cal.Rptr.3d 466, 195 P.3d 1049].) The words the Legislature chose to enact are the most reliable indicator of its intent. (*Ibid.*) At the same time, we do not interpret the statute in a manner that renders any language mere surplusage. The words must be construed in context and in light of the nature and purpose of the statute. (*Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1390–1391, 74 Cal.Rptr.2d 721.) Further, we will apply common sense to the language at issue and interpret the statute to make it workable and reasonable. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122 [29 Cal.Rptr.3d 262, 112 P.3d 647].)

[2] The qualification "unless the trust instrument provides otherwise" indicates that if any modification method is specified in the trust, that method must be used to amend the trust. As noted by the court in *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1344, 47 Cal.Rptr.2d 587 "section 15402 recognizes a trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement."

Before 1986, courts applied the rules governing trust revocations to trust modifications. However, when the Legislature enacted sections 15401 and 15402, it differentiated between trust revocations and modifications. This indicates that the Legislature no longer intended the same rules to apply to both revocation and modification.

If we were to adopt appellant's position and hold that a trust may be modified by the revocation procedures set forth in section 15401 unless the trust explicitly provides that the stated modification method is exclusive, section 15402 would become surplusage. Rather than enacting section 15402, the Legislature could have combined revocation and modification into one statute. Moreover, as is evident from section 15401, the Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a limitation on modifications in section 15402.[3]

3 The dissent relies on the California Law Revision Commission comments regarding trust *revocation* under section 15401. The dissent then assumes that the Legislature intended the same rules to apply to trust modification under section 15402, despite the Legislature's use of different statutory language. The dissent further relies on the *Huscher* court's observation that "Under the current law, the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive .... "' (*Huscher, supra,* 121 Cal.App.4th at p. 967, 18 Cal.Rptr.3d 27.) However, this conclusion is dicta and is not supported by an analysis of section 15402. Accordingly, it is not persuasive. In fact, the *Huscher* court acknowledges that its holding is only important to trusts created before July 1, 1987. (*Huscher, supra,* 121 Cal.App.4th at p. 961, fn. 4, 18 Cal.Rptr.3d 27.)

[3] [4] ***1194** Therefore, in this case, to be effective, the amendments needed to be signed by both Zoel and Edna.[4] The trust specified a modification method and thus, under section 15402 the trust could only be amended in that manner. The settlors bound themselves to a specific method of modification. If we were to hold otherwise, ****559** especially where, as here, the amendment provision is more restrictive than the revocation provision, we would cause the amendment provision to become superfluous and would thereby thwart the settlors' intent.[5]

4 We recognize that, due to Edna's incompetence, Edna could not execute a trust amendment. However, as recited above, the trust instrument provided a remedy for this situation. If a conservator or guardian had been appointed for Edna, the court that appointed the guardian or conservator could have authorized a trust amendment.

5 Respondents have filed a motion to dismiss this appeal, based on arguments concerning the limited authority of appellant as trustee under the trust instrument. By previous order, this court deferred that motion pending consideration of the appeal on its merits. As respondents acknowledge in their brief, the Court of Appeal has discretion to treat the appeal as having been taken in the appellant's individual capacity, where the trustee also has a beneficial interest in the trust. (See *Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 254, [43 Cal.Rptr.2d 407].) That is the case here. Accordingly, we deny the motion to dismiss the appeal and deem appellant to be proceeding in his individual capacity as a beneficiary of the trust.

DISPOSITION

The motion to dismiss the appeal is denied. The order is affirmed. Costs on appeal are awarded to respondents.

Dawson, J., concurred.

DETJEN, J. (Dissenting)

I respectfully dissent.

The majority holds that under Probate Code section 15402, if a trust instrument states any method for modification of a trust, that method is the exclusive method by which the trust may be amended.[1] Because I conclude that section 15402 permits modification by the method established in section 15401, subdivision (a)(2), unless that method is explicitly excluded by the terms of the trust, I respectfully disagree with the majority.

[1] All further statutory references are to the Probate Code unless otherwise noted.

If there had been a statute governing modification of trusts in existence prior to the 1987 revision of the Probate Code, an interpretation such as the majority's interpretation of section 15402 would have some support in case law. (See *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300, 301, 304 [106 Cal.Rptr. 321]; see also ***1195** *Hibernia Bk. v. Wells Fargo Bank* (1977) 66 Cal.App.3d 399, 404, 136 Cal.Rptr. 60.)[2] Sections 15401 and 15402 were not enacted, however, to reflect that case law. They were enacted in response to a perceived need to move away from such a restrictive interpretation.

[2] "Not until Probate Code sections 15401 and 15402 were enacted did the Legislature provide a statutory procedure for modifying a trust. Even so, cases interpreting [Civil Code former] section 2280 recognized that the right to revoke included an implied right to modify. Accordingly, cases concerning trust revocation procedures apply with equal force in the trust modification context. [Citation.]" (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962, fn. 5 [18 Cal.Rptr.3d 27] (*Huscher*).)

In 1985, the California Law Revision Commission (Commission) looked toward submitting a number of recommendations to the Legislature regarding the law of probate. (See Ann. Rep. (Mar. 1985) 18 Cal. Law Revision Com. Rep. (1986) p. 3.) During 1986, the Commission devoted its further attention to the preparation of a new Probate Code for introduction at the 1987 legislative session. (See Ann. Rep. (Dec. 1985) 18 Cal. Law Revision Com. Rep., *supra,* p. 203.) In the area of modification and revocation of trusts, the proposed law (enacted in section 15401) retained the rule that "a trust [was] revocable unless it [was] made irrevocable by the trust instrument," and made "clear that a revocable trust may be revoked in the manner provided by statute ..., unless a manner specified in the trust [was] made exclusive." (Selected ****560** 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., *supra,* at p. 1213.) The Commission wanted the trust to be a "flexible mechanism." (*Id.* at p. 1268.) "Even the [trust] drafter's best efforts may not provide the appropriate degree of flexibility, and some persons who draft trust instruments do not have the expertise needed to fashion an instrument that responds to the changing needs, values, and circumstances of the settlor and the beneficiaries.... Restrictive features of a trust may come to be viewed as too restraining in the face of the interest in free alienability of property." (*Ibid.,* fn. omitted.)

The Commission recognized the prior case law that "where the trust instrument prescribes a method of revocation, the prescribed procedure must be followed rather than the statutory method." (Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., *supra,* at p. 1270.) The Commission balanced two competing interests: "This rule has been defended on the grounds that the settlor may wish to establish a more complicated manner of revocation than that provided by statute where there is a concern about 'future senility or future undue influence while in a weakened condition.' [Fn. omitted.] On the other hand, the case-law rule may be criticized as defeating the clear intention of the settlor who attempts to revoke a revocable trust by the statutory method, in circumstances that do not involve undue influence or a lack of capacity. In fact, the settlor may have forgotten about the method provided in the trust, or may not be aware of the case-law rule." (*Id.* at pp. 1270–1271.)

***1196** To allow a settlor the power to "establish a more protective revocation scheme, but also honor[ ] the settlor's intention where the intent to make the scheme exclusive is not expressed in the trust instrument," the Commission adopted "a compromise position ... [making] available the statutory method of revoking by delivery of

a written instrument to the trustee during the settlor's lifetime except where the trust instrument explicitly makes exclusive the method of revocation specified in the trust." (Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., *supra,* at p. 1271.) Thus, the 1987 adoption of section 15401 in the terms proposed by the Commission reflected a clear legislative choice to change the existing law in favor of permitting greater flexibility for the settlor, and rejecting the rule that the majority here asserts, which would designate a method of modification as exclusive simply because it has been set forth in the trust instrument.

As previously noted, prior to 1987, modification of a trust was viewed as merely one aspect of the more inclusive power to revoke a trust. (See *Huscher, supra,* 121 Cal.App.4th at p. 962, fn. 5, 18 Cal.Rptr.3d 27.) In recommending the 1987 revisions to the law of trusts, however, the Commission set forth explicitly the nature of the implied power of modification: "Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. omitted.] The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust." (Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., *supra,* p. 1271.)

In summary, section 15401 was written specifically to change the restrictive rule adopted in *Rosenauer v. Title Ins. & Trust Co., supra,* 30 Cal.App.3d at page 304, 106 Cal.Rptr. 321. (Cal. Law. Revision Com. com., 54 West's Ann. Prob.Code (1991 ed.) foll. § 15401, p. 571.) And section 15402 was added, not to establish a different rule from section 15401, as the majority asserts ****561** (maj. opn. at pp. 557–558), but in order to adopt the same flexible rule for modifications as for revocations unless "bar [red]" by "a contrary provision in the trust" (Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., *supra,* p. 1271) or, in the language of statute, "[u]nless the trust instrument provides otherwise." (§ 15402.) Section 15401 replaced former Civil Code section 2280. Section 15402 did not replace another statute, since the power to modify was only an implied power not found in a separate statute prior to the 1987 revisions. Nothing in the Commission's comments on sections 15401 and 15402 supports the position that, even though *Rosenauer v. Title Ins. & Trust Co., supra,* 30 Cal.App.3d at page 304, 106 Cal.Rptr. 321, should not apply to revocations (§ 15401), it should, as the majority asserts, apply to modifications under section 15402.

***1197** The *Huscher* court reached this same conclusion and rejected the conclusion reached by the majority in the present case. (See *Huscher, supra,* 121 Cal.App.4th at p. 967, 18 Cal.Rptr.3d 27.) As the majority notes, the *Huscher* court was examining a trust instrument that was signed in 1983, when Civil Code former section 2280 was in effect. (*Huscher, supra,* 121 Cal.App.4th at p. 959, 18 Cal.Rptr.3d 27.) In its analysis on the issue of the law of trust modifications, however, *Huscher* examined both former Civil Code section 2280 and the current law, section 15402. (See *Huscher, supra,* 121 Cal.App.4th at pp. 960–963, 18 Cal.Rptr.3d 27.) *Huscher* reviewed the decision in *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1344–1345, 47 Cal.Rptr.2d 587 (*Irvine*), a case that did apply section 15402. The position taken by the majority in the present case was one of the propositions offered by *Irvine.*[3] *Huscher* did not, however, conclude that such a proposition was consistent with the language of section 15402. Instead, *Huscher* specifically stated, in reference to section 15402, "Under the current law, the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive." (*Huscher, supra,* 121 Cal.App.4th at p. 967, 18 Cal.Rptr.3d 27.)

[3] "*Irvine* ... [offered] a farrago of seemingly inconsistent propositions: ... (2) if a trust instrument provides a method of revocation or modification, that method thereby becomes exclusive...." (*Huscher, supra,* 121 Cal.App.4th at p. 966, 18 Cal.Rptr.3d 27.)

The trust instrument in *Huscher* provided that the trustor " 'may at any time amend any of the terms of [the] trust by an instrument in writing signed by the Trustor and the Trustee.' " (*Huscher, supra,* 121 Cal.App.4th at p. 972, 18 Cal.Rptr.3d 27.) The *Huscher* court found that this provision did not provide explicit exclusivity, that is, the language did not expressly preclude the settlor from using alternate statutory methods to modify the trust instrument. (*Ibid.*)[4] The modification provision in the present case is similarly non-exclusive.[5]

[4] It similarly found the language was not implicitly exclusive, an issue that existed under former Civil Code section 2280 but that does not exist under the *Huscher* court's interpretation of section 15402. (See *Huscher, supra,* 121 Cal.App.4th at pp. 968, 972, 18 Cal.Rptr.3d 27.)

[5] The language in this trust is: "[T]his Trust may be amended, in whole or in part, with respect to jointly owned property by an instrument in writing signed by both Settlors and delivered to the Trustee, and with respect to separately owned property by an instrument in writing signed by the Settlor who contributed that

property to the Trust, delivered to the Trustee."

In *Masry v. Masry* (2008) 166 Cal.App.4th 738 [82 Cal.Rptr.3d 915] (*Masry*), ****562** the court addressed a trust revocation that was executed in compliance with section 15401, subdivision (a)(2), but not in compliance with the method provided in the trust instrument. The *Masry* court cited to the point made in *Huscher* that " 'a modification method is explicitly exclusive when the trust instrument directly and unambiguously states that the procedure is the exclusive one' " and concluded that such reasoning applied to revocation. ***1198** *Masry, supra,* 166 Cal.App.4th at p. 742, 82 Cal.Rptr.3d 915.) The *Masry* court found no explicit exclusivity in the following trust provision: " 'Each of the Trustors hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Trustor and to the Trustee.' " (*Id.* at p. 740, 82 Cal.Rptr.3d 915.)

Just as in *Huscher* and *Masry,* the amendment language used here in article "FOURTH" of the trust instrument did not explicitly exclude use of the alternative statutory method for modification or revision. I am, therefore, of the opinion that Zoel Night Lynch was permitted to "modify the trust by the procedure for revocation" (§ 15402) in accordance with section 15401, subdivision (a)(2) and that the fourth, fifth, and sixth amendments to the trust instrument were validly executed and effective in modifying the trust instrument in accordance with the terms of the amendments.

All Citations

204 Cal.App.4th 1186, 139 Cal.Rptr.3d 553, 12 Cal. Daily Op. Serv. 3904, 2012 Daily Journal D.A.R. 4516

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KeyCite Yellow Flag - Negative Treatment
Review Granted, see Cal. Rules of Court 8.1105 and 8.1115 (and Comment on rule 8.1115(e)(3)) Haggerty v. Thornton, Cal., December 22, 2021

68 Cal.App.5th 1003
Review granted. See Cal. Rules of Court 8.1105 and 8.1115
(and corresponding Comment, par. 2, concerning rule 8.1115(e)(3))
Court of Appeal, Fourth District, Division 1, California.

Brianna McKee HAGGERTY, Plaintiff and Appellant,
v.
Nancy F. THORNTON et al., Defendants and Respondents.

D078049
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Filed 09/16/2021

Synopsis
Background: Purported successor trustee/beneficiary of trust created by her aunt filed petition in Probate Court to determine validity of amendments to trust agreement relating to successor trustee and beneficiary list. The Superior Court, San Diego County, No. 37-2019-00028694-PR-TR-CTL, Julia Craig Kelety, J., ruled that rust agreement was validly amended, thereby excluding purported successor trustee/beneficiary from distribution. Purported successor trustee/beneficiary appealed.

[Holding:] The Court of Appeal, Guerrero, J., held that settlor's modification of trust agreement was valid.

Affirmed.

West Headnotes (8)

[1] Appeal and Error Statutory or legislative law

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)2Particular Subjects of Review in General
30k3169Construction, Interpretation, or Application of Law
30k3173Statutory or legislative law

Meaning and construction of a statute is a question of law, which the Court of Appeal decides independently.

[2] Statutes Intent

361Statutes
361IIIConstruction
361III(A)In General
361k1071Intent
361k1072In general

Goal of statutory construction is to ascertain and effectuate legislative intent.

[3] Statutes Language and intent, will, purpose, or policy

361Statutes
361IIIConstruction
361III(A)In General
361k1078Language
361k1080Language and intent, will, purpose, or policy

Ordinarily, the words of the statute provide the most reliable indication of legislative intent.

[4] Statutes Construing together; harmony
Statutes Similar or Related Statutes

361Statutes
361IIIConstruction
361III(E)Statute as a Whole; Relation of Parts to

Whole and to One Another
361k1155Construing together; harmony
361Statutes
361IIIConstruction
361III(G)Other Law, Construction with Reference to
361k1210Other Statutes
361k1216Similar or Related Statutes
361k1216(1)In general

When statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.

[5] **Statutes**History of statute
StatutesLegislative History

361Statutes
361IIIConstruction
361III(F)Extrinsic Aids to Construction
361k1182Contemporary and Historical Circumstances
361k1184History of statute
361Statutes
361IIIConstruction
361III(H)Legislative History
361k1241In general

Both legislative history of statute and wider historical circumstances of its enactment may be considered in ascertaining legislative intent.

[6] **Trusts**Application of general rules of construction

390Trusts
390IIConstruction and Operation
390II(A)In General
390k112Application of general rules of construction

Primary duty of court in construing trust is to give effect to settlor's intentions.

1 Case that cites this headnote

[7] **Appeal and Error**Property in General

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)22Substantive Matters
30k3736Property in General
30k3737In general

Where interpretation of trust instrument does not depend on disputed extrinsic evidence, Court of Appeal considers issue de novo.

[8] **Trusts**Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Settlor's modification of trust agreement respecting successor trustee and beneficiary list was valid, where procedure for modification in trust agreement was not explicitly or implicitly exclusive, so that statutory procedure applied, and trust was validly modified under that procedure by settlor's delivery of signed modification to herself as trustee. Cal. Prob. Code §§ 15401, 15402.

1 Case that cites this headnote

****33** APPEAL from an order of the Superior Court of San Diego County, Julia C. Kelety, Judge. Affirmed. (Super. Ct. No. 37-2019-00028694-PR-TR-CTL)

Attorneys and Law Firms

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No appearance for Defendants and Respondents San Diego Humane Society, Nancy F. Thornton, Jill Bousman, George Bousman, Jack Hebert, Larry Guentherman, Gail Spielman and Dean Spielman.

Opinion

GUERRERO, J.

***1006** Brianna McKee Haggerty appeals an order of the probate court finding that a trust agreement was validly amended, ****34** thereby excluding her from distribution. Haggerty's aunt, Jeane M. Bertsch, created the trust in 2015. The trust agreement included the following reservation of rights: "The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." Bertsch drafted the disputed amendment in 2018. She signed the amendment and sent it to her former attorney, but she did not have it notarized.

After Bertsch's death, Haggerty argued that the 2018 amendment was invalid because it was not "acknowledged" as described in the trust agreement. The beneficiaries under the 2018 amendment responded that the amendment was "acknowledged" within the meaning of the trust agreement and, in any event, the method for amendment described in the trust agreement was not exclusive. The probate court found that the amendment was valid. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As noted, Bertsch created the trust at issue in 2015. The trust agreement provided that Bertsch "reserves the following rights, each of which may be exercised whenever and as often as [she] may wish: [¶] A. Amend or Revoke. The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." (Boldface omitted.) The agreement nominated Nancy Thornton as trustee in the event of Bertsch's death, resignation, or incapacity.

The next year, Bertsch drafted a first amendment to the trust agreement. This 2016 amendment provided that Haggerty would become trustee in the event of Bertsch's death. The amendment also made changes to the beneficiaries of the trust, including a residual distribution to Haggerty. Bertsch signed the amendment, and it was apparently witnessed by a notary public in Illinois. Above the notary's signature, the document stated, "This instrument was acknowledged before me on 10-25-16, by JEANE M. BERTSCH." (Boldface omitted.) The document did not include a notarial seal or stamp.

Bertsch subsequently drafted two handwritten documents, a 2017 beneficiary list and the disputed 2018 amendment. The 2017 beneficiary list did not include Haggerty, and it provided that any residual assets would be distributed to the Union of Concerned Scientists (UCS). It was not signed. The 2018 amendment revised the beneficiary instructions again. It provided that UCS would receive "one half (Two Million Dollars)" and several individuals ***1007** would receive "equal portions from the remainder half (Two Million Dollars)[.]" Haggerty was not included. Above her signature, Bertsch wrote, "I herewith instruct Patricia Galligan to place this document with her copy of the Trust. She can verify my handwriting." Galligan is Bertsch's former estate attorney.

Bertsch died in late 2018. Thornton filed a petition in the probate court to confirm her appointment as successor trustee. She contended the 2016 amendment, which named Haggerty as trustee in the event of Bertsch's death, had been revoked. But she believed the 2017 beneficiary list and 2018 amendments were valid.

Haggerty filed a competing petition to determine the validity of the 2016 amendment, the 2017 beneficiary list, and the 2018 amendment. She argued the trust agreement required that any amendment be acknowledged by a notary public or other specified person under the Civil Code. She maintained that the 2016 amendment had been validly acknowledged, but the 2017 beneficiary list and 2018 amendment had not. Haggerty requested ****35** a declaration to that effect, as well as an order recognizing that she was the successor trustee, not Thornton.

Haggerty also filed objections to Thornton's petition to confirm her appointment. Several beneficiaries filed their own objections to Haggerty's petition. At a hearing, the court requested supplemental briefing on the issue of whether the trust agreement allowed amendment in the manner attempted by the 2017 beneficiary list and 2018 amendment.

In her brief, Haggerty continued to argue that the trust agreement required acknowledgment under the Civil Code. Relying primarily on *King v. Lynch* (2012) 204

Cal.App.4th 1186, 139 Cal.Rptr.3d 553 (*King*), Haggerty reasoned that the trust agreement provided for a method of amendment, so that method must be followed in order to validly amend the agreement. Haggerty contended the 2016 amendment was valid, because it was acknowledged, but the 2017 beneficiary list and 2018 amendment were not.

Galligan responded that the trust agreement's use of the phrase " 'acknowledged instrument in writing' " was ambiguous. It could mean "expressly advis[ing] someone that the instrument amending the Trust was genuine or authentic," rather than imposing the Civil Code requirements for acknowledgment. Galligan argued that the court was required to consider extrinsic evidence of Bertsch's intent in using the phrase " 'acknowledged instrument' " to determine its meaning. Alternatively, Galligan contended the court could conclude the 2018 amendment was valid as a matter of law because the method of amendment specified in the trust agreement was not exclusive. ***1008** Galligan distinguished *King* and suggested it was wrongly decided. UCS and Racquel Kolsrud filed briefs advancing similar arguments.[1]

[1] Galligan's brief also asserted that the 2016 amendment had been expressly revoked. It stated that Bertsch told Galligan she had a dispute with Haggerty in late 2017 and Bertsch had "destroyed the [2016 a]mendment with the intent to revoke it. Neither the original nor any copy of the [2016 a]mendment was found among [Bertsch's] estate planning documents in her possession following her death and the original has never been found."

After a further hearing, which was not reported, the probate court denied Haggerty's petition. In a minute order, the court made the express finding that the 2018 amendment was a valid amendment to the trust agreement. Haggerty appeals.

DISCUSSION

[1] [2] [3] [4] [5]The Probate Code governs the revocation and modification of trusts, and subsequent statutory references are to that code. The parties dispute the meaning of its provisions. We consider the issue de novo. "The meaning and construction of a statute is a question of law, which we decide independently." (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 189, 195 Cal.Rptr.3d 220, 361 P.3d 319.) "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Ordinarily, the words of the statute provide the most reliable indication of legislative intent. [Citation.] When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. [Citations.] ' "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." ' " (****36** *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152, 69 Cal.Rptr.2d 329, 947 P.2d 291.)

Section 15401, subdivision (a) provides that a revocable trust may be revoked either (1) "[b]y compliance with any method of revocation provided in the trust instrument" or (2) "[b]y a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation." However, if the trust instrument "*explicitly* makes the method of revocation provided in the trust instrument the exclusive method of revocation," the method in the trust instrument must be used. (*Id.*, subd. (a)(2), italics added.)

Section 15401 changed the prior rule, which required that a trust instrument's method of revocation must be used if it was either explicitly or implicitly exclusive. (Cal. Law Revision Com. com., West's Ann. Prob. Code (2021 ed.) foll. § 15401; ***1009** *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 970, 18 Cal.Rptr.3d 27 (*Huscher*).) "[W]e presume the change made was to require a statement of explicit exclusivity and thereby avoid the problems of interpretation inherent in determining issues of implicit exclusivity." (*Huscher*, at p. 971, fn. 13, 18 Cal.Rptr.3d 27.)

Section 15402 governs modification. It states, "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." (§ 15402.) "This section codifies the general rule that a power of revocation implies the power of modification." (Cal. Law Revision Com. com., West's Ann. Prob. Code (2021 ed.) foll. § 15402.)

In this appeal, as in the probate court, the parties focus heavily on *King, supra*, 204 Cal.App.4th 1186, 139 Cal.Rptr.3d 553. In *King*, a married couple created a revocable trust. (*Id.* at p. 1188, 139 Cal.Rptr.3d 553.) For jointly owned property, the trust instrument described separate procedures for modification and revocation. The trust could be modified "by an instrument in writing signed by both Settlors and delivered to the Trustee[.]" (*Ibid.*) The trust could be revoked "by an instrument in writing signed by either Settlor and delivered to the

Trustee and the other Settlor[.]" (*Id.* at p. 1189, 139 Cal.Rptr.3d 553.) After one spouse suffered a serious injury, the other spouse executed several amendments to the trust, without the first spouse's signature. (*Ibid.*)

The majority opinion in *King* held that these amendments were invalid because they did not comply with the method of modification described in the trust instrument. (*King, supra*, 204 Cal.App.4th at p. 1194, 139 Cal.Rptr.3d 553.) The majority recognized that, under section 15401, a method for *revocation* must be explicitly exclusive to displace the statutory method. (*Id.* at p. 1192, 139 Cal.Rptr.3d 553.) But it held that, under section 15402, a trust instrument need only "provide[ ] otherwise" for its method of *modification* to be exclusive. (*Ibid.*) The *King* majority explained, "The qualification '[u]nless the trust instrument provides otherwise' indicates that if any modification method is specified in the trust, that method must be used to amend the trust." (*Id.* at p. 1193, 139 Cal.Rptr.3d 553.) Under prior law, "courts applied the rules governing trust revocations to trust modifications. However, when the Legislature enacted sections 15401 and 15402, it differentiated between trust revocations and modifications. This indicates that the Legislature no longer intended the same rules to apply to both revocation and modification." (*Ibid.*) To apply the same rules, the *King* majority believed, ****37** would leave section 15402 as mere surplusage. (*Ibid.*)

The *King* majority concluded, "The trust specified a modification method and thus, under section 15402 the trust could only be amended in that manner. The settlors bound themselves to a specific method of modification. ***1010** If we were to hold otherwise, especially where, as here, the amendment provision is more restrictive than the revocation provision, we would cause the amendment provision to become superfluous and would thereby thwart the settlors' intent." (*King, supra*, 204 Cal.App.4th at p. 1194, 139 Cal.Rptr.3d 553.)

One justice in *King* disagreed. The dissenting opinion believed that the new, higher standard for exclusivity for revocation also applied to modification. (*King, supra*, 204 Cal.App.4th at p. 1194, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.).) The dissent focused on the purpose of sections 15401 and 15402, which was to permit greater flexibility for the settlor of a revocable trust. (*Id.* at pp. 1195-1196, 139 Cal.Rptr.3d 553.) The dissent explained, "[T]he 1987 adoption of section 15401 in the terms proposed by the [California Law Revision Commission] reflected a clear legislative choice to change the existing law in favor of permitting greater flexibility for the settlor, and rejecting the rule that the majority here asserts, which would designate a method of modification as exclusive simply because it has been set forth in the trust instrument." (*Id.* at p. 1196, 139 Cal.Rptr.3d 553.) The dissent continued, "[P]rior to 1987, modification of a trust was viewed as merely one aspect of the more inclusive power to revoke a trust. [Citation.] In recommending the 1987 revisions to the law of trusts, however, the Commission set forth explicitly the nature of the implied power of modification: 'Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. omitted.] The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.' " (*Ibid.*)

"In summary, section 15401 was written specifically to change the restrictive rule adopted in [prior caselaw]. [Citation.] And section 15402 was added, not to establish a different rule from section 15401, as the majority asserts [*King, supra*, 204 Cal.App.4th] at pp. 1192-1193 [139 Cal.Rptr.3d 553] (maj. opn.), but in order to adopt the same flexible rule for modifications as for revocations unless 'bar[red]' by 'a contrary provision in the trust' [citation] or, in the language of statute, '[u]nless the trust instrument provides otherwise' (§ 15402).... Nothing in the Commission's comments on sections 15401 and 15402 supports the position that, even though [the prior rule] should not apply to revocations (§ 15401), it should, as the majority asserts, apply to modifications under section 15402." (*King*, at p. 1196, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.).)

The *King* dissent found support in *Huscher, supra*, 121 Cal.App.4th at pages 960 through 963, 18 Cal.Rptr.3d 27, which examined both current and prior law. (*King, supra*, 204 Cal.App.4th at p. 1197, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.).) "The trust instrument in *Huscher* provided that the trustor ' "may at any time amend any of the terms of [the] trust by an instrument in writing signed by the Trustor and the ***1011** Trustee." ' [Citation.] The *Huscher* court found that this provision did not provide explicit exclusivity, that is, the language did not expressly preclude the settlor from using alternate statutory methods to modify the trust instrument." (*Ibid.*) The dissent explained that *Huscher* was inconsistent with the interpretation of section 15402 advanced by the *King* majority: ****38** "Instead, *Huscher* specifically stated, in reference to section 15402, 'Under the current law, the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive.' " (*King*, at p. 1197, 139 Cal.Rptr.3d 553, quoting *Huscher*, at p. 967, 18 Cal.Rptr.3d 27.) (The *King* majority responded that the discussion of section 15402 in *Huscher* was dicta and

unpersuasive, see *King*, at p. 1193, fn. 3, 139 Cal.Rptr.3d 553.)

The *King* dissent concluded that the trust instrument at issue "did not explicitly exclude use of the alternative statutory method for modification or revision" so the statutory method was available. (*King, supra*, 204 Cal.App.4th at p. 1198, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.).) Because the amendments complied with the statute, they were valid modifications. (*Ibid.*)

We do not need to comment on *King*'s interpretation of its trust instrument. The language of that instrument differs significantly from the language of the trust agreement here. Nor do we need to consider whether *King* was ultimately correctly decided on its facts. But, as a general matter, we conclude the *King* dissent more accurately captures the meaning of section 15402 than the majority opinion. Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification. It recognizes the existing principle that "a power of revocation implies the power of modification." (Cal. Law Revision Com. com., West's Ann. Prob. Code, *supra*, foll. § 15402.) The method of modification is therefore the same as the method of revocation, "[u]nless the trust instrument provides otherwise," i.e., unless the trust instrument distinguishes between revocation and modification. (§ 15402.) The California Law Revision Commission made this point explicit: " 'Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. omitted.] The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.' " (*King, supra*, 204 Cal.App.4th at p. 1196, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.), quoting Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep. [1986] p. 1271.) Under this interpretation, section 15402 is not mere surplusage, as the *King* majority believed. As the California Law Revision Commission's comment explains, it codifies the existing rule that the power of revocation includes the power of modification, thus an available method of revocation is also an available method of modification—unless the trust instrument provides otherwise. (See Cal. Law Revision Com. com., West's Ann. Prob. Code, *supra*, foll. § 15402.)

***1012** [6] [7]With these principles in mind, we turn to the language of the trust agreement at issue here. "The primary duty of a court in construing a trust is to give effect to the settlor's intentions." (*Barefoot v. Jennings* (2020) 8 Cal.5th 822, 826, 257 Cal.Rptr.3d 629, 456 P.3d 447.) Where, as here, interpretation of the instrument does not depend on disputed extrinsic evidence, we consider the issue de novo. (*Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888, 26 Cal.Rptr.3d 143.)

[8]The language of Bertsch's trust agreement does not distinguish between revocation and modification. It reserves the following right to the settlor: "The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." Because the trust does not distinguish between revocation ****39** and modification, it does not "provide otherwise" than the general rule, and under section 15402 the trust may be modified by any valid method of revocation. Moreover, as a reservation of rights, it does not appear Bertsch intended to bind herself to the specific method described in the trust agreement, to the exclusion of other permissible methods. Because the method of revocation and modification described in the trust agreement is not explicitly exclusive (and no party argues otherwise), the statutory method of revocation was available under section 15401. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738, 742, 82 Cal.Rptr.3d 915 [reservation of rights not explicitly exclusive].) Bertsch complied with the statutory method by signing the 2018 amendment and delivering it to herself as trustee. It was therefore a valid modification of the trust agreement.[2]

[2] Again, we need not and do not consider the situation in *King*, where the trust instrument did distinguish between methods for revocation and modification and imposed an arguably more stringent requirement on modification. The circumstances here are materially different. This appeal is also distinguishable from *Pena v. Dey* (2019) 39 Cal.App.5th 546, 552, 252 Cal.Rptr.3d 265, where the court cited *King* and found that the method of amendment described in the trust instrument governed. The method of amendment described in the trust instrument was the same as the statutory method under the circumstances, so the issue was not clearly presented. (Compare *id.* at pp. 552, 551, 252 Cal.Rptr.3d 265 [amendment " 'shall be made by written instrument signed by the settlor and delivered to the trustee' "] with § 15401, subd. (a)(1) [revocation made "[b]y a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee"].) Haggerty's reliance on this court's opinion in *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 47 Cal.Rptr.2d 587 is likewise unpersuasive for the reasons discussed in *Huscher, supra*, 121 Cal.App.4th at pages 966 through 967 and footnote 13, 18 Cal.Rptr.3d 27.

Finally, in her opening brief, Haggerty requests that we find the 2016 amendment valid under the method of amendment specified in the trust agreement. It does not appear the probate court addressed this issue. Our

decision is without prejudice to whatever contentions the parties may make regarding that amendment.

***1013** DISPOSITION

The order is affirmed. The parties shall bear their own costs on appeal.

WE CONCUR:

McCONNELL, P. J.

DATO, J.

All Citations

68 Cal.App.5th 1003, 284 Cal.Rptr.3d 32, 21 Cal. Daily Op. Serv. 9455, 2021 Daily Journal D.A.R. 9785

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KeyCite Yellow Flag - Negative Treatment
Review Granted, see Cal. Rules of Court 8.1105 and 8.1115 (and Comment on rule 8.1115(e)(3)) Balistreri v. Balistreri, Cal., May 11, 2022

75 Cal.App.5th 511
Review granted. See Cal. Rules of Court 8.1105 and 8.1115
(and corresponding Comment, par. 2, concerning rule 8.1115(e)(3))
Court of Appeal, First District, Division 3, California.

Mary A. NIVALA BALISTRERI, as Trustee, etc., Plaintiff and Appellant,
v.
Sal J. BALISTRERI, Defendant and Respondent.

A162222
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Filed 2/24/2022

Synopsis
Background: Widow filed a petition in probate court seeking to construe family trust and confirm validity of trust amendment, alleging that, the day before her husband died, the two amended their revocable trust. The Superior Court, San Francisco County, No. PTR-20-303610, Ross C. Moody, J., denied widow's petition to construe the trust and confirm the validity of the amendment. Widow appealed.

[Holding:] The Court of Appeal, Rodríguez, J., held that trust amendment, which was accepted and adopted by co-trustors but not notarized, was invalid under trust provision requiring notarization.

Affirmed.

Tucher, P.J., concurred with opinion.

West Headnotes (14)

[1] **Appeal and Error**🔑Written documents or instruments in general
Appeal and Error🔑Statutory or legislative law
Appeal and Error🔑Property in General

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)2Particular Subjects of Review in General
30k3169Construction, Interpretation, or Application of Law
30k3171Written documents or instruments in general
30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)2Particular Subjects of Review in General
30k3169Construction, Interpretation, or Application of Law
30k3173Statutory or legislative law
30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)22Substantive Matters
30k3736Property in General
30k3737In general

The de novo standard of review applies to questions of statutory construction and to the interpretation of written instruments, including a trust instrument, unless the interpretation depends on the competence or credibility of extrinsic evidence or a conflict in that evidence.

[2] **Trusts**🔑Application of general rules of construction

390Trusts
390IIConstruction and Operation
390II(A)In General
390k112Application of general rules of construction

The paramount rule in construing a trust instrument is to determine intent from the instrument itself and in accordance with applicable law.

[3] **Trusts**🔑Mode of revocation

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(4)Mode of revocation

If trust instrument explicitly makes method of revocation provided in trust instrument exclusive method of revocation, that method must be used; to do so, trust must contain explicit statement that trust's revocation method is exclusive. Cal. Prob. Code § 15401(a)(2).

[4] **Trusts**Mode of revocation

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(4)Mode of revocation

Statutory provision stating that a trust may be revoked in "a writing, other than a will, signed by the settlor," and delivered to the trustee during the lifetime of the settlor, provides a default method of revocation where the trust is silent on revocation or does not explicitly provide the exclusive method. Cal. Prob. Code § 15401(a)(2).

[5] **Trusts**Modification
TrustsMode of revocation

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification
390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(4)Mode of revocation

When the trust instrument is silent on modification, the trust may be modified in the same manner in which it could be revoked, either statutorily or as provided in the trust instrument. Cal. Prob. Code § 15402.

1 Case that cites this headnote

[6] **Trusts**Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

When the trust instrument specifies how the trust is to be modified, that method must be used to amend the trust. Cal. Prob. Code § 15402.

1 Case that cites this headnote

[7] **Trusts**Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

A trustor may bind himself or herself to a specific method of amendment of a trust by including that specific method in the trust agreement. Cal. Prob. Code § 15402.

1 Case that cites this headnote

[8] **Trusts**Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

When a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid. Cal. Prob. Code § 15402.

In the absence of ambiguity, the plain meaning of the statutory language governs.

[9] **Trusts** Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

Amendment to trust which was accepted and adopted by co-trustors but not notarized was invalid under trust provision stating that "Any amendment, revocation, or termination" was to be made "by written instrument signed, with signature acknowledged by a notary public," even though provision did not explicitly state it was the exclusive method for amending the trust and co-trustors were also the trustees. Cal. Prob. Code §§ 15401(a)(2), 15402.

[10] **Constitutional Law** Judicial rewriting or revision

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)2Encroachment on Legislature
92k2472Making, Interpretation, and Application of Statutes
92k2474Judicial rewriting or revision

Court cannot rewrite statute, either by inserting or omitting language, to make it conform to presumed intent that is not expressed.

[11] **Statutes** Plain language; plain, ordinary, common, or literal meaning

361Statutes
361IIIConstruction
361III(C)Clarity and Ambiguity; Multiple Meanings
361k1107Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111Plain language; plain, ordinary, common, or literal meaning

[12] **Appeal and Error** Nature or Subject-Matter of Issues or Questions

30Appeal and Error
30VPresentation and Reservation in Lower Court of Grounds of Review
30V(A)Issues and Questions in Lower Court
30k170Nature or Subject-Matter of Issues or Questions
30k170(1)In general

Co-trustor failed in trial court to raise argument that trust's requirement that any amendment be notarized was a mere "procedural formality" that she and other co-trustor had the power to waive when they drafted and executed the amendment, and thus argument was forfeited on appeal; while in the trial court, co-trustor argued the notary requirement served no purpose, she did not assert that she and the other co-trustor were free to waive the requirement. Cal. Prob. Code §§ 15401(a)(2), 15402.

[13] **Trusts** Application of general rules of construction

390Trusts
390IIConstruction and Operation
390II(A)In General
390k112Application of general rules of construction

While appellate court must construe trust instrument, where possible, to give effect to intent of settlor, that intent must be ascertained from whole of trust instrument, not just separate parts of it.

[14] **Trusts** Modification

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k58Modification

When trust specifies method of amendment, that method must be followed for amendment to be effective. Cal. Prob. Code § 15402.

****631** Superior Court of San Francisco City and County, Hon. Ross C. Moody. (San Francisco City & County Super. Ct. No. PTR-20-303610)

Attorneys and Law Firms

Hartog, Baer & Hand, Ryan J. Szczepanik and Kevin P. O'Brien, for Plaintiff and Appellant.

Ragghianti Freitas, Paul B. Gruwell, for Defendant and Respondent.

Opinion

Rodríguez, J.

***514 **632** Mary A. Nivala Balistreri filed a petition in probate court alleging that, the day before her husband, Sal C. Balistreri, (decedent) died, the two amended their revocable trust. The probate court subsequently deemed the alleged amendment "null and void" and denied Mary's petition to construe the trust and confirm the validity of the amendment. The court concluded the claimed amendment was invalid under Probate Code section 15402[1] because the trust mandated that any amendment "shall be made by written instrument signed, with signature acknowledged by a notary public," and the amendment was not so acknowledged.

[1] Undesignated statutory references are to the Probate Code. We use family members' first names for convenience, intending no disrespect, and we recite only those facts necessary to resolve the issues on appeal.

Mary appeals. We affirm and hold that, when a trust specifies a method of amendment — regardless of whether the method of amendment is exclusive or permissive, and regardless of whether the trust provides for identical or different methods of amendment and revocation — section 15402 provides no basis for validating an amendment that was not executed in compliance with that method.

BACKGROUND

Mary and the decedent were married and had a daughter, Julia. The decedent also had children from prior marriages, including Sal and Christina.

In 2006, Mary and the decedent created a trust, which they restated, renamed, and amended in 2008. The documents restating, renaming, and amending the trust were notarized. In 2017, Mary and the decedent amended the trust a second time. That amendment was notarized too. On September 6, 2017, Mary and the decedent revoked the trust. Again, the revocation was notarized.

On that same date, Mary and the decedent created the Balistreri Family Trust (Trust), the trust at issue here. They named themselves trustors and trustees, and they placed community property located on 23rd Street in San Francisco (the property) in the Trust. Section 7.2.1 of the Trust provides that upon the decedent's death, the property "shall be distributed equally among" Julia, Sal, and Christina.

In section 5.2.1, a reservation of rights provision, Mary and the decedent agreed that the Trust "may be revoked or terminated, in whole or in part, by ***515** either of us as to any separate property of that trustor and as to any of our community property. During our joint lifetimes, this Trust may be modified and amended by either of us acting alone as to any separate property of that trustor, and by both of us acting jointly as to any of our community property." Section 5.2.4 mandates that "[a]ny amendment, revocation, or termination ... shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee."

Mary alleged that in February 2020, the decedent executed a document titled "First Amendment to Trust" (amendment) in his capacity as trustor. As relevant here, the amendment sought to strike section 7.2.1 — which would have distributed the property amongst Julia, Sal, and Christina upon the decedent's death — and states the property "shall remain in the trust." Mary and the decedent signed the amendment ****633** and "[a]ccepted and adopted" it as co-trustees. The amendment is not

notarized. The decedent died the next day.

Mary thereafter petitioned to construe the Trust and for an order confirming the validity of the amendment. Mary acknowledged the Trust imposed a notary requirement but argued the amendment was effective notwithstanding the "lack of notarization" because section 5.2.4 did not delineate an exclusive amendment procedure. Thus — according to Mary — the Trust could be amended using the revocation procedure described in section 15401, subdivision (a)(2). Mary also posited that "a notary public's acknowledgement may serve a useful purpose when a trust settlor delivers a signed document to a third-party trustee," but it serves "no purpose" when the trustors and trustees "are the same people."[2]

[2] In her opening brief, Mary argues "[t]here is no dispute" the "signatures on [the amendment] ... are authentic." At oral argument, however, Sal's counsel indicated a dispute had been raised below; Sal also uses the term "alleged" when describing the decedent's signatures on the amendment.

Sal responded to Mary's petition and filed a petition of his own, to invalidate the amendment. He asserted the decedent "allegedly executed" the amendment, which was prepared by Mary, and that the amendment was void as it was not executed by the "[d]ecedent in the manner and form required" by the Trust and section 15402. Sal also maintained the amendment was void for the additional reason that the decedent was delusional in the days preceding his death, and that Mary exerted undue influence on the decedent with the intent to undermine his "testamentary wishes as delineated" in the Trust. Mary objected to Sal's petition.

At the parties' request, the probate court decided the validity of the amendment before reaching other issues in the parties' petitions. Relying on ***516** section 15402 and case law interpreting that statute, the court concluded the amendment was "null and void" because the decedent's "signature was not acknowledged by a notary public as required under [s]ection 5.2.4" of the Trust. The court denied Mary's petition to construe the Trust and to confirm the validity of the amendment.

DISCUSSION

[1] [2]The de novo standard of review "applies to questions of statutory construction [citation] and to the interpretation of written instruments, including a trust instrument, unless the interpretation depends on the competence or credibility of extrinsic evidence or a conflict in that evidence." (*Pena v. Dey* (2019) 39 Cal.App.5th 546, 551, 252 Cal.Rptr.3d 265 (*Pena*); *Burch v. George* (1994) 7 Cal.4th 246, 254, 27 Cal.Rptr.2d 165, 866 P.2d 92.) "The paramount rule in construing [a trust] ... instrument is to determine intent from the instrument itself and in accordance with applicable law." (*Brown v. Labow* (2007) 157 Cal.App.4th 795, 812, 69 Cal.Rptr.3d 417.)

[3] [4]The Probate Code governs trust revocation and modification. Section 15401, subdivision (a) sets out two alternative methods for the *revocation* of a trust. Under the first method, a trust may be revoked by "compliance with any method of revocation provided in the trust instrument." (§ 15401, subd. (a)(1).) Under the second method, a trust may be revoked in "a writing, other than a will, signed by the settlor ... and delivered to the trustee during the lifetime of the settlor."[3] (*Id.*, ****634** subd. (a)(2).) But, if "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation," that method must be used. (*Ibid.*; *Pena*, *supra*, 39 Cal.App.5th at pp. 551, 552, 252 Cal.Rptr.3d 265.) To do so, the trust must contain "an explicit statement that the trust's revocation method is exclusive." (*Cundall v. Mitchell-Clyde* (2020) 51 Cal.App.5th 571, 581, 584, 265 Cal.Rptr.3d 254.) Thus, "section 15401, subdivision (a)(2) 'provides a default method of revocation where the trust is silent on revocation or does not explicitly provide the exclusive method.' " (*Id.* at p. 587, 265 Cal.Rptr.3d 254, italics omitted.)

[3] Section 15401, subdivision (b) imposes additional obligations with respect to community property. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738, 743, 82 Cal.Rptr.3d 915.) The terms "trustor" and "settlor" are interchangeable and synonymous. (See *In re Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1109 & fn. 2, 68 Cal.Rptr.2d 445.)

[5] [6] [7]Section 15402, by contrast, governs *modification* of a trust. It states: "[*u*]*nless the trust instrument provides otherwise*, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." (§ 15402, italics added.) Under section 15402, when "the trust instrument is silent on modification, the trust may be modified in the same manner in ***517** which it could be revoked, either statutorily or as provided in the trust instrument." (*King v. Lynch* (2012) 204 Cal.App.4th 1186, 1192, 139 Cal.Rptr.3d 553 (*King*).) When the trust instrument "*specifies* how the trust is to be modified," however, that "method must be used to amend the trust." (*Id.* at pp. 1192, 139 Cal.Rptr.3d 553, italics added, 1193,

139 Cal.Rptr.3d 553.) Section 15402 " 'recognizes a trustor may bind himself or herself to a specific method of ... amendment of a trust by including that specific method in the trust agreement.' " (*King*, at p. 1193, 139 Cal.Rptr.3d 553.)

[8]Thus, when a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid. (*Pena*, *supra*, 39 Cal.App.5th at p. 552, 252 Cal.Rptr.3d 265 [unsigned handwritten interlineation was invalid where trust provided "any amendment to the trust 'shall be made by written instrument signed by the settlor and delivered to the trustee' "]; *King*, *supra*, 204 Cal.App.4th at p. 1194, 139 Cal.Rptr.3d 553 ["to be effective," the trust could be amended only according to specified method]; *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 290–291, 294, 21 Cal.Rptr.3d 239 ["under the literal terms of the trust," trustors "had to write a memo to themselves (or its substantive equivalent) to amend the trust"]; *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1209, 116 Cal.Rptr.2d 319 [where trust "*expressly* deprived [the decedent] of the power to revoke, modify or amend," documents purporting to amend the trust were "invalid"]; *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1343–1345, 47 Cal.Rptr.2d 587 [amendment that did not comply with specified amendment procedure was "invalid"].)

Mary acknowledges section 15402 applies here. And, as she must, Mary concedes the Trust requires that an amendment "shall" be notarized and that the amendment here is not. But she argues it is of no moment, asserting she and the decedent were free to ignore the amendment procedure they included in the Trust in favor of the revocation procedure set forth in section 15401, subdivision (a)(2).

This argument was considered — and rejected — in *King*, *supra*, 204 Cal.App.4th 1186, 139 Cal.Rptr.3d 553. There, a married couple's revocable trust permitted ****635** revocation by an instrument in writing signed by either settlor, and modification as to community property by an instrument in writing signed by both settlors. (*Id.* at pp. 1188–1189, 1194, 139 Cal.Rptr.3d 553.) After one spouse was seriously injured, the other spouse executed several amendments to the trust pertaining to community property without the injured spouse's signature. (*Id.* at pp. 1189–1190, 139 Cal.Rptr.3d 553.) The majority in *King* reasoned that the "trust specified a modification method and thus, under section 15402 the trust could only be amended in that manner. The settlors bound themselves to a specific method of modification." (*Id.* at p. 1194, 139 Cal.Rptr.3d 553.) *King* held the purported amendments were invalid because they did not comply with the modification procedure described in the trust. (*Ibid.*)

***518** In urging *King* to conclude otherwise, the appellant argued the trust could be modified using the statutory revocation procedure "because the trust did not explicitly make the method of modification exclusive." (*King*, *supra*, 204 Cal.App.4th at p. 1192, 139 Cal.Rptr.3d 553.) The *King* majority disagreed. It held that when "the Legislature enacted sections 15401 and 15402, it differentiated between trust revocations and modifications. This indicates that the Legislature no longer intended the same rules to apply to both revocation and modification. [¶] If we were to adopt appellant's position and hold that a trust may be modified by the revocation procedures set forth in section 15401 unless the trust explicitly provides that the stated modification method is exclusive, section 15402 would become surplusage. Rather than enacting section 15402, the Legislature could have combined revocation and modification into one statute. Moreover, as is evident from section 15401, the Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a limitation on modifications in section 15402." (*Id.* at p. 1193, 139 Cal.Rptr.3d 553, fn.omitted.)

[9]We concur. As *King* correctly reasoned, section 15402 's "qualification '[u]nless the trust instrument provides otherwise' indicates that if *any modification method is specified* in the trust, that method must be used to amend the trust." (*King*, *supra*, 204 Cal.App.4th at p. 1193, 139 Cal.Rptr.3d 553, italics added.) Here, the Trust requires an amendment to be notarized. By including that " 'specific method of ... amendment' " in the Trust, Mary and the decedent expressed an intent to bind themselves to that method — indeed, a method they had repeatedly utilized in amending and revoking prior trusts — and they were not entitled to cast aside that procedure and amend the Trust using the revocation procedure set forth in section 15401, subdivision (a)(2). (*King*, at p. 1193, 139 Cal.Rptr.3d 553.)

Mary insists *King* is distinguishable because the revocation and modification procedures in the trust at issue in that case differed, whereas the revocation and modification procedures here are identical. To support this argument, Mary points to the last sentence of *King*, where the court noted "the amendment provision [was] more restrictive than the revocation provision," and that a contrary holding — e.g., that the amendments were effective — "would cause the amendment provision to become superfluous and would thereby thwart the settlors' intent." (*King*, *supra*, 204 Cal.App.4th at p. 1194,

139 Cal.Rptr.3d 553, fn. omitted.) Relying on this sentence, Mary urges us to limit *King* to situations where a trust imposes different procedural requirements for revocation and modification. We decline the invitation for several reasons.

636 [10]First, like *King*, the Trust *did* set forth different procedures for the revocation and amendment of trust provisions regarding community property. As both counsel acknowledged at oral argument, under sections 5.2.1 and 5.2.4, *either* trustor could revoke provisions regarding community property ***519 by acknowledged written instrument, but modification of provisions regarding community property required *both* trustors executing an acknowledged written instrument. Second, Mary's interpretation is belied by the plain language of section 15402. Had the Legislature intended for section 15402 to require an explicit statement of exclusivity for modification procedures, it could have so stated, as it did in section 15401. (*King*, *supra*, 204 Cal.App.4th at p. 1193, fn. 3, 139 Cal.Rptr.3d 553 [noting Legislature used "different statutory language" in section 15402].) Or it elsewise could have omitted the qualifying phrase, "[u]nless the trust instrument provides otherwise," from section 15402. It did neither. "We cannot ' "rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed." ' " (*Cahill Construction Co., Inc. v. Superior Court* (2021) 66 Cal.App.5th 777, 787, 281 Cal.Rptr.3d 373.)

We acknowledge that *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003, 284 Cal.Rptr.3d 32, review granted December 22, 2021, S271483 (*Haggerty*) — which was decided while this appeal was pending — reached a different result.[4] There, a reservation of rights provision provided that the settlor " 'may' " amend or revoke the trust " 'by an acknowledged instrument in writing.' " (*Id.* at p. 1006, 284 Cal.Rptr.3d 32.) The settlor drafted and signed an amendment but did not have the amendment notarized. (*Ibid.*) The settlor's niece argued the "amendment was invalid because it was not 'acknowledged' as described in the trust agreement." (*Ibid.*)

[4] Our high court granted review on the following issue: "Can a trust be modified according to the statutory procedures for revocation of a trust (Prob. Code, § 15401) if the trust instrument itself sets forth identical procedures for modification and revocation?" *Haggerty* may be cited for "persuasive value," and "for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, 20 Cal.Rptr. 321, 369 P.2d 937, to choose between sides of any such conflict." (*Haggerty v. Thornton*, 287 Cal.Rptr.3d 721, 500 P.3d 994 (2021); see also Cal. Rules of Court, rule 8.115(e) & Advisory Com. com.)

The *Haggerty* court disagreed. It concluded the settlor could amend the trust pursuant to the revocation procedure set forth in section 15401. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1012, 284 Cal.Rptr.3d 32, rev. granted.) *Haggerty* reasoned that because "the trust does not distinguish between revocation and modification, it does not 'provide otherwise' than the general rule, and under section 15402 the trust may be modified by any valid method of revocation. Moreover, as a reservation of rights, it does not appear [the settlor] intended to bind herself to the specific method described in the trust agreement, to the exclusion of other permissible methods. Because the method of revocation and modification described in the trust agreement is not explicitly exclusive (and no party argues otherwise), the statutory method of revocation was available under section 15401. [Citation.] [The settlor] complied with the ***520** statutory method by signing the ... amendment and delivering it to herself as trustee. It was therefore a valid modification of the trust agreement." (*Ibid.*)

Relying on the *King* dissent, *Haggerty* added that "[s]ection 15402 cannot be read ****637** in a vacuum. It does not establish an independent rule regarding modification. It recognizes the existing principle that 'a power of revocation implies the power of modification.' [Citation.] The method of modification is therefore the same as the method of revocation, '[u]nless the trust instrument provides otherwise,' i.e., unless the trust instrument distinguishes between revocation and modification. [Citation.] The California Law Revision Commission made this point explicit: ' "Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. omitted.] The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust." ' [Citations.] Under this interpretation, section 15402 is not mere surplusage .... As the California Law Revision Commission's comment explains, it codifies the existing rule that the power of revocation includes the power of modification, thus an available method of revocation is also an available method of modification—unless the trust instrument provides otherwise." (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1011, 284 Cal.Rptr.3d 32, rev. granted, citing *King*, *supra*, 204 Cal.App.4th at 1196, 139 Cal.Rptr.3d 553 (dis. opn. of Detjen, J.).)

While we have no quarrel with the general sentiment

expressed in *Haggerty* (and other cases) that the power to revoke a trust implies the power to modify it, we disagree with *Haggerty*'s conclusion that the phrase "[u]nless the trust instrument provides otherwise" in section 15402 means that unless the trust instrument *explicitly states that the provided for method of amendment is exclusive*, the statutory method of revocation may be used to modify. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1011, 284 Cal.Rptr.3d 32, rev. granted.) The most plain and straightforward reading of the qualifying phrase, "[u]nless the trust ... provides otherwise," in section 15402 is that when a trust provides for the use of a specific modification method, that method must be used. (*King*, *supra*, 204 Cal.App.4th at p. 1193, 139 Cal.Rptr.3d 553; Rest.2d, Trusts, § 331, com. d ["*Where method of modification specified*. If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, [settlor] can modify the trust only in that manner or under those circumstances."].)[5]

[5] The concurring opinion agrees the Trust "provides otherwise" within the meaning of section 15402; it reasons that the use of the word "shall" sufficiently specifies "an exclusive method of modification." (Conc. opn. of Tucher, P.J., pp. 1, 3.) In our view, it is enough for a trust to specify a procedure for modification — irrespective of whether it uses the words "may," "shall," or something else. In so doing, the trust has provided for a procedure other than the Legislature's fallback method (i.e., the revocation procedures in the trust and section 15401). (*King*, *supra*, 204 Cal.App.4th at p. 1193, 139 Cal.Rptr.3d 553.) In other words, the outcome should not turn on a trust's use of supposedly "mandatory" or "permissive" language. Sometimes language that appears mandatory is not; other times, of course, language that appears permissive is mandatory. (E.g., *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033, 1043–1044, 88 Cal.Rptr. 878 [concluding "may" in the trust at issue was mandatory rather than permissive].)

***521** [11]In light of our conclusion, Mary's exposition on the legislative history of sections 15401 and 15402 is unavailing. Mary has not persuasively argued either statute is ambiguous, and it is well settled that in the absence of ambiguity, the plain meaning of the statutory language governs. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 61, 92 Cal.Rptr.3d 279, 205 P.3d 201.) Moreover, having reviewed the legislative history surrounding the enactment ****638** of sections 15401 and 15402, including the Law Revision Commission's 1986 report regarding the legislative changes, we find nothing inconsistent with our construction of section 15402.

"Sections 15401 and 15402 were enacted in 1986 and became operative in 1987." (*King*, *supra*, 204 Cal.App.4th at p. 1191, 139 Cal.Rptr.3d 553.) Before that date, trust revocation was governed by a provision of the Civil Code, but "no statute specifically addressed trust modifications. Rather, courts held that, in general, a power of revocation implied the power of modification" and "applied the rules governing trust revocations to trust modifications." (*King*, at pp. 1191, 1193, 139 Cal.Rptr.3d 553.) To clarify the law of trusts, the California Law Revision Commission recommended reorganizing and consolidating "the scattered provisions of existing law." (See Recommendation Proposing the Trust Law (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) pp. 1201, 1205, 1222.)

In response to the Law Revision Commission's recommendation, the Legislature enacted Assembly Bill No. 2652 (1985–1986 Reg. Sess.), the bill that created sections 15401 and 15402. The Legislative Counsel's summary digest explained, as relevant here, that the bill "would provide that ... a trust is revocable by the settlor, in whole or in part, by compliance with any method of revocation provided in the trust instrument or by a writing (other than a will) signed by the settlor .... *It would also allow the modification of the trust, unless the instrument provides otherwise, by the same revised procedure for revocation if the trust is revocable by the settlor*." (Legis. Counsel's Dig., Assem. Bill No. 2652 (1985–1986 Reg. Sess.) as amended Mar. 31, 1986, Summary Dig., p. 3, italics added; *People v. Superior Court* (*Lavi*) (1993) 4 Cal.4th 1164, 1178, 17 Cal.Rptr.2d 815, 847 P.2d 1031 [Legislative Counsel's Digest is indicative of legislative intent].) The Law Revision Commission's 1986 report similarly summarized the proposed legislation: "Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, *barring a contrary provision in the trust*." ***522** (Recommendation Proposing the Trust Law, 18 Cal. Law Revision Com. Rep., *supra*, at p. 1271, fn.omitted & italics added.)

[12]Taken together, this legislative history does not conclusively resolve what was intended by the phrase, "[u]nless ... provides otherwise" in section 15402. *Haggerty* would read that phrase as incorporating a requirement — an explicit statement of exclusivity — that appears in section 15401, but nowhere in section 15402. Also relevant to the *Haggerty* court is whether the provided for procedures for amendment and revocation differ or are the same, and whether the procedures are exclusive or permissive. Like *King*, we conclude the simpler construction of section 15402 's text is preferable, especially because it does not infer requirements that do

not appear in the statutory language.[6]

[6] We do not find relevant or persuasive Mary's citations to cases construing section 15401 and to a predecessor statute that is silent on modification. (*Cundall v. Mitchell-Clyde*, *supra*, 51 Cal.App.5th at p. 587, 265 Cal.Rptr.3d 254 [the "validity of a purported trust *modification* ... is subject to a different statutory analysis" than revocation].) Mary also characterizes the notary requirement as a mere "procedural formality" that she and the decedent had the power "to waive when they drafted and executed" the amendment. "The argument is forfeited because [Mary] failed to raise it below." (*Blizzard Energy, Inc. v. Schaefers* (2021) 71 Cal.App.5th 832, 854, 286 Cal.Rptr.3d 658; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4, 50 Cal.Rptr.2d 242, 911 P.2d 429 [argument not raised below is "not cognizable"].) In the lower court, Mary argued the notary requirement served no purpose, but she did not assert — as she does here —that she and the decedent were "free to waive" the requirement.

****639** [13]Mary contends that by jointly executing the amendment, she and the decedent expressed their intent to change the disposition of the property, and she urges us to give effect to the intent expressed in the amendment. But we cannot view the amendment in isolation. While an appellate court "must construe a trust instrument, where possible, to give effect to the intent of the settlor, that intent 'must be ascertained from the whole of the trust instrument, not just separate parts of it.' " (*Pena*, *supra*, 39 Cal.App.5th at p. 555, 252 Cal.Rptr.3d 265; *Heaps v. Heaps*, *supra*, 124 Cal.App.4th at pp. 290–291, 21 Cal.Rptr.3d 239.) The intent expressed in the Trust, "stated explicitly in its amendment provision, is that a written instrument must be [acknowledged by a notary public] ... in order to constitute a valid amendment." (*Pena*, at p. 555, 252 Cal.Rptr.3d 265.) Because the amendment is not notarized, it is ineffective. (*Ibid*.)

[14]In sum, we hold that when a trust specifies a method of amendment, under section 15402, that method must be followed for the amendment to be effective.

DISPOSITION

The orders dated January 8 and February 9, 2021 are affirmed. Sal is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

I CONCUR:

Fujisaki, J.

TUCHER, P.J., Concurring:

***523** Like the majority, I would affirm on the basis that this trust instrument requires an amendment to be notarized, and the amendment here was not. (Maj. opn. *ante*, at p. 638.) The trust instrument sets forth the exclusive method for modifying the trust because it requires that "*[a]ny amendment*, revocation, or termination ... *shall* be made by written instrument signed, with signature acknowledged by notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee." (Italics added.) Because the proffered amendment was not acknowledged by a notary, it is not valid.

Nothing in Probate Code section 15401 or 15402 requires a different result. Under Probate Code section 15402, "[u]nless the trust instrument provides otherwise," the settlor of a revocable trust "may modify the trust by the procedure for revocation."[1] One procedure for revocation is set forth in section 15401, subdivision (a)(2) (the statutory revocation procedure), but that option was not available to the trustors here because this "trust instrument provides otherwise." (*Ibid*.) That is, the trust agreement sets forth a different procedure for amending the trust, *and* it does so in language that makes the specified method exclusive. That the trust agreement does not expressly state its method is exclusive is of no moment, as the requirement for express exclusivity appears only in section 15401, subdivision (a)(2), governing revocation.

[1] Unspecified statutory references are to the Probate Code. Section 15402 provides, in its entirety, "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

****640** Unlike the majority, I would stop there. I would not also decide that the same result obtains when a trust instrument sets forth a method for amending the trust in terms that are permissive, rather than mandatory. That issue is not presented by the facts of our case, and I'm not persuaded that the majority's resolution of it is correct.

My reservations arise primarily from what seems to me the most natural reading of the statutory phrase "[u]nless the trust instrument provides otherwise." (§ 15402.) This phrase qualifies the provision that immediately follows it,

that the settlor of a revocable trust "may modify the trust by the procedure for revocation." (§ 15402.) I read this sentence to mean that the settlor may modify the trust using any appropriate procedure for revocation "[u]nless the trust instrument" says that the settlor may not (i.e., "provides otherwise"). (§ 15402.) I can think of three ways a trust instrument could exclude use of the procedures for revocation. First, the trust instrument could state that no modification of the trust is allowed. Second, it could state, as the instrument before us does, that modification is allowed only if some other specific ***524** procedure is followed. And third, it could allow modification using permissive language but state that procedure(s) for revocation may not be used. If the trust does none of these things, then I don't see how it has "provide[d] otherwise." In particular, if a trust instrument sets forth a method for modification but does not explicitly or implicitly limit trustors to the use of this method, I don't think it has sufficiently negated the statutory provision granting the settlor authority to modify the trust using a procedure for revocation. In such circumstances (not before us), it seems to me that the settlor remains free to modify the trust using any procedure for revocation *or* any procedure for modification that the trust sets forth in permissive, but not mandatory, language.

This construction of section 15402 is not the one adopted by the majority in *King v. Lynch* (2012) 204 Cal.App.4th 1186, 139 Cal.Rptr.3d 553, which concluded a permissive, nonexclusive modification provision displaced the statutory revocation procedure. Nor is it identical to the construction in *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003, 284 Cal.Rptr.3d 32, review granted December 22, 2021, S271483, which held that any authorized method of revocation may be used to modify the trust unless the trust instrument distinguishes between revocation and modification. (*Id.* at pp. 1011–1012, 284 Cal.Rptr.3d 32.)

The construction I suggest does, however, provide a measure of continuity with case law that predates the adoption of section 15402. Under prior law, there was a statutory procedure for revoking a trust similar to the statutory procedure available today (compare former Civ. Code, § 2280 with Prob. Code, § 15401, subd. (a)(2)), and case law allowed this statutory revocation procedure also to effect a modification, on the theory "that the right to revoke included an implied right to modify." (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962, fn. 5, 18 Cal.Rptr.3d 27.) This was the principle that section 15402 sought to codify. (Cal. Law Revision Com. com., West's Ann. Prob. Code (2021 ed.) foll. § 15402 ["This section codifies the general rule that a power of revocation implies the power of modification"].) The *Huscher* court, after analyzing cases decided under the earlier statute, derived from those cases the rule that "a trust may be modified in the manner provided by [the predecessor statute] unless the trust instructions either *implicitly or explicitly specify an exclusive method of* ****641** *modification*." (*Huscher*, at p. 968, 18 Cal.Rptr.3d 27, italics added.)

I am inclined toward a similar rule here: a trust may be modified by the current statutory procedure for revocation "unless the trust instrument provides otherwise" by implicitly or explicitly specifying an exclusive method of modification (or by expressly taking off the table the option of modification by a procedure for revocation). (§ 15402.) But my view here is ***525** provisional. Because the facts of our case do not require us to decide between this rule and the one the majority adopts, I would leave for another day resolution of this point of difference. On the case before us, the majority and I completely agree.

All Citations

75 Cal.App.5th 511, 290 Cal.Rptr.3d 630, 22 Cal. Daily Op. Serv. 2039, 2022 Daily Journal D.A.R. 1898

West's Annotated California Codes
Probate Code (Refs & Annos)
Division 9. Trust Law (Refs & Annos)
Part 4. Trust Administration (Refs & Annos)
Chapter 1. Duties of Trustees (Refs & Annos)
Article 3. Trustee's Duty to Report Information and Account to Beneficiaries (Refs & Annos)

West's Ann.Cal.Prob.Code § 16061.8

§ 16061.8. Limitation of actions to contest trust

Effective: January 1, 2023

Currentness

A person upon whom the notification by the trustee is served pursuant to paragraph (1) of subdivision (a) of Section 16061.7, whether the notice is served on the person within or after the time period set forth in subdivision (f) of Section 16061.7, shall not bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon the person, or 60 days from the date on which a copy of the terms of the trust is delivered pursuant to Section 1215 to the person during that 120-day period, whichever is later.

Credits

(Added by Stats.1997, c. 724 (A.B.1172), § 24. Amended by Stats.2000, c. 34 (A.B.460), § 5; Stats.2000, c. 592 (A.B.1628), § 2; Stats.2010, c. 621 (S.B.202), § 6; Stats.2017, c. 319 (A.B.976), § 88, eff. Jan. 1, 2018; Stats.2022, c. 30 (A.B.1745), § 1, eff. Jan. 1, 2023.)

Notes of Decisions (8)

West's Ann. Cal. Prob. Code § 16061.8, CA PROBATE § 16061.8
Current with all laws through Ch. 997 of 2022 Reg.Sess.

Notes Of Decisions (8)

Construction and application

Widow's breach of fiduciary duty claims against stepchildren, seeking return of condominium transferred to children through husband's trust upon his death, was not action to contest trust under probate statute or terms of trust, and thus was not subject to 120-day statute of limitations applicable to trust contests, though widow was attempting to remove from trust the only asset in it; probate code and trust's no-contest provision defined "contest" as being brought by

beneficiary, and widow was not beneficiary under trust, having been excluded by husband. Yeh v. Tai (App. 2 Dist. 2017) 227 Cal.Rptr.3d 275 . Contracts 329 ; Wills 68

Trial court abused its discretion in concluding that living trust settlor's son's petition for an order to determine the validity of a purported trust amendment by the settlor was barred by the doctrine of laches, where the petition was filed within the 120-day limitations period for an action to contest the trust, absent evidence that the trustee was prejudiced by any sort of delay in the timely filing and subsequent service of the petition or that the trustee had already commenced distributing trust assets. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(2)

Proper time for trust settlor's son to serve his petition for an order to determine the validity of a purported amendment of a living trust by the settlor was after the clerk set the hearing date and at least 30 days before that hearing date, but not necessarily at the time the petition was filed or within the 120-day limitations period for filing the petition. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(1)

Testator's children's petition to probate a will stating that it revoked a trust was an action to contest the trust, within meaning of limitations provision requiring an action to contest the trust to be filed within 120 days, since testator's children's petition necessarily involved the issue of the validity of the trust. Estate of Stoker (App. 2 Dist. 2011) 122 Cal.Rptr.3d 529, 193 Cal.App.4th 236 , modified on denial of rehearing, review denied. Trusts 365(1)

Trust beneficiary's petition for declaratory relief that proposed claims would not violate trust no contest clause was not a "trust contest" subject to statute of limitations for trust contests. Safai v. Safai (App. 6 Dist. 2008) 78 Cal.Rptr.3d 759, 164 Cal.App.4th 233 . Trusts 365(1)

Ripeness

Trial court properly deferred, as unripe, a ruling on whether or not trust beneficiary's proposed challenge to trust would be barred by statute of limitations, in granting beneficiary's petition for declaratory relief that proposed challenge would not violate trust no contest clause, since the challenge itself had not yet been filed with the court. Safai v. Safai (App. 6 Dist. 2008) 78 Cal.Rptr.3d 759, 164 Cal.App.4th 233 . Action 6

Notice

The 120-day period for living trust settlor's son to petition for an order to determine the validity of a purported trust amendment by the settlor began to run when the successor trustee served son with notice of the administration of the trust, since the petition was an action to contest the trust. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(1)

Trustee's notice to trust beneficiary that death of settlor made revocable inter vivos trust irrevocable was sufficient to begin 120-day period for filing challenges, although notice did not state that beneficiary was entitled to a copy of the terms of the trust, where trustee provided beneficiary with terms before serving notice. Germino v. Hillyer (App. 5 Dist. 2003) 132 Cal.Rptr.2d 478, 107 Cal.App.4th 951 , review denied. Trusts 367

West's Ann.Cal.Prob.Code § 16061.7

§ 16061.7. Status of trust changing to irrevocable, change of trustee of irrevocable trust, or power of appointment of irrevocable trust becoming effective or lapsing; notification; final judicial determination of heirship

Effective: January 1, 2018

Currentness

(a) A trustee shall serve a notification by the trustee as described in this section in the following events:

(1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Whenever there is a change of trustee of an irrevocable trust.

(3) Whenever a power of appointment retained by a settlor is effective or lapses upon death of the settlor with respect to an inter vivos trust which was, or was purported to be, irrevocable upon its creation. This paragraph shall not apply to a charitable remainder trust. For purposes of this paragraph, "charitable remainder trust" means a charitable remainder annuity trust or charitable remainder unitrust as defined in Section 664(d) of the Internal Revenue Code.[1]

(4) The duty to serve the notification by the trustee pursuant to this subdivision is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

(b) The notification by the trustee required by subdivision (a) shall be served on each of the following:

(1) Each beneficiary of the irrevocable trust or irrevocable portion of the trust, subject to the limitations of Section 15804.

(2) Each heir of the deceased settlor, if the event that requires notification is the death of a settlor or irrevocability within one year of the death of the settlor of the trust by the express terms of the trust because of a contingency related to the death of a settlor.

(3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General.

(c) A trustee shall, for purposes of this section, rely upon any final judicial determination of heirship, known to the trustee, but the trustee shall have discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee.

(d) The trustee need not provide a copy of the notification by trustee to any beneficiary or heir (1) known to the trustee but who cannot be located by the trustee after reasonable diligence or (2) unknown to the trustee.

(e) The notification by trustee shall be served by any of the methods described in Section 1215 to the last known address.

(f) The notification by trustee shall be served not later than 60 days following the occurrence of the event requiring service of the notification by trustee, or 60 days after the trustee became aware of the existence of a person entitled to receive notification by trustee, if that person was not known to the trustee on the occurrence of the event requiring service of the notification. If there is a vacancy in the office of the trustee on the date of the occurrence of the event requiring service of the notification by trustee, or if that event causes a vacancy, then the 60-day period for service of the notification by trustee commences on the date the new trustee commences to serve as trustee.

(g) The notification by trustee shall contain the following information:

(1) The identity of the settlor or settlors of the trust and the date of execution of the trust instrument.

(2) The name, address, and telephone number of each trustee of the trust.

(3) The address of the physical location where the principal place of administration of the trust is located, pursuant to Section 17002.

(4) Any additional information that may be expressly required by the terms of the trust instrument.

(5) A notification that the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust.

(h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

"You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later."

(i) Any waiver by a settlor of the requirement of serving the notification by trustee required by this section is against public policy and shall be void.

(j) A trustee may serve a notification by trustee in the form required by this section on any person in addition to those on whom the notification by trustee is required to be served. A trustee is not liable to any person for serving or for not serving the notice on any person in addition to those on whom the notice is required to be served. A trustee is not required to serve a notification by trustee if the event that otherwise requires service of the notification by trustee occurs before January 1, 1998.

Credits

(Added by Stats.1997, c. 724 (A.B.1172), § 23. Amended by Stats.1998, c. 682 (A.B.2069), § 10; Stats.2000, c. 34 (A.B.460), § 4; Stats.2000, c. 592 (A.B.1628), § 1; Stats.2010, c. 621 (S.B.202), § 5; Stats.2017, c. 319 (A.B.976), § 87, eff. Jan. 1, 2018.)

Notes of Decisions (11)

Footnotes

[1] Internal Revenue Code sections are in Title 26 of the U.S.C.A.

West's Ann. Cal. Prob. Code § 16061.7, CA PROBATE § 16061.7
Current with all laws through Ch. 997 of 2022 Reg.Sess.

Notes Of Decisions (11)

Construction with other laws

Beneficiary of subtrust lacked probable cause to bring action against trustee to void trust amendment and restatement based on lack of capacity, undue influence, and fraud, as required to apply amended trust's no contest clause as a bar to action, where beneficiary filed action after the expiration of the 120-day limitations period required under the Probate Code for bringing actions contesting trusts. Meiri v. Shamtoubi (App. 2 Dist. 2022) 297 Cal.Rptr.3d 397 . Trusts 140(2)

The statute providing that the time period for any "right or duty to do any act or make any response within any period or on a date certain after service of the document" is extended for an additional 10 days when the document is served by mail outside California does not apply to the time period to bring an action to contest a trust that has become irrevocable upon the settlor's death, because the Probate Code statute providing that service is complete when the notice is "deposited in the mail" is an express exception to the 10-day extension rule. Bridgeman v. Allen (App. 4 Dist. 2013) 161 Cal.Rptr.3d 657, 219 Cal.App.4th 288 , as modified. Limitation Of Actions 119(3)

Reasonable equivalent

Trustee's notice warning of the statute of limitations for contesting trust did not satisfy the statutory "reasonable equivalent" standard for such a notice, even though warning in notice was printed in a separate paragraph in greater than 10-point type, where warning was in the same 12-point type as the rest of the notice and was not bolded, italicized, underlined, printed in all capital letters, or differentiated by type size or color. Harustak v. Wilkins (App. 5 Dist. 2000) 100 Cal.Rptr.2d 718, 84 Cal.App.4th 208 , rehearing denied, review denied. Trusts 365(1)

Limitation of actions

Trust settlor's son's petition to determine the validity of amendments to the trust that eliminated son as a beneficiary did not relate back to a prior petition in which son sought the same relief before settlor's death, for purposes of the 120-day limitations period for a challenge to the trust, where the prior petition was dismissed without prejudice on the basis that the trust had not yet become irrevocable. Bridgeman v. Allen (App. 4 Dist. 2013) 161 Cal.Rptr.3d 657, 219 Cal.App.4th 288 , as modified. Limitation Of Actions 127(1)

Service of process

Proper time for trust settlor's son to serve his petition for an order to determine the validity of a purported amendment of a living trust by the settlor was after the clerk set the hearing date and at least 30 days before that hearing date, but not necessarily at the time the petition was filed or within the 120-day limitations period for filing the petition. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(1)

Serving a statutorily defective notice of change in trust status on beneficiary's attorney did not cure deficiencies in the notice. Harustak v. Wilkins (App. 5 Dist. 2000) 100 Cal.Rptr.2d 718, 84 Cal.App.4th 208 , rehearing denied, review denied. Trusts 58

Notice

The 120-day period for living trust settlor's son to petition for an order to determine the validity of a purported trust amendment by the settlor began to run when the successor trustee served son with notice of the administration of the trust, since the petition was an action to contest the trust. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(1)

Trustee's notice to trust beneficiary that death of settlor made revocable inter vivos trust irrevocable was sufficient to begin 120-day period for filing challenges, although notice did not state that beneficiary was entitled to a copy of the terms of the trust, where trustee provided beneficiary with terms before serving notice. Germino v. Hillyer (App. 5 Dist. 2003) 132

Cal.Rptr.2d 478, 107 Cal.App.4th 951 , review denied. Trusts 367

Admissibility of evidence

Trial court properly took judicial notice of the notification to settlor's son that revocable trust had become irrevocable upon settlor's death, in considering trustee's demurrer to son's petition to determine the validity of an amendment to the trust that eliminated son as a beneficiary, where son made no showing that the notification was not authentic and did not otherwise argue it was reasonably subject to dispute. Bridgeman v. Allen (App. 4 Dist. 2013) 161 Cal.Rptr.3d 657, 219 Cal.App.4th 288 , as modified. Evidence 2758

Review

Trial court abused its discretion in concluding that living trust settlor's son's petition for an order to determine the validity of a purported trust amendment by the settlor was barred by the doctrine of laches, where the petition was filed within the 120-day limitations period for an action to contest the trust, absent evidence that the trustee was prejudiced by any sort of delay in the timely filing and subsequent service of the petition or that the trustee had already commenced distributing trust assets. Straley v. Gamble (App. 2 Dist. 2013) 158 Cal.Rptr.3d 484, 217 Cal.App.4th 533 . Trusts 365(2)

Sufficiency and conspicuousness of trustee's notice warning of the statute of limitations for contesting trust was subject to de novo review; there was no evidentiary conflict, trial court did not assess the credibility of any witnesses in reaching its decision, issues of law predominated, and statutory standard for notice warning applied to a document, not conduct. Harustak v. Wilkins (App. 5 Dist. 2000) 100 Cal.Rptr.2d 718, 84 Cal.App.4th 208 , rehearing denied, review denied. Appeal And Error 3234

246 Cal.App.4th 1135
Court of Appeal, Second District, Division 7, California.

Mary Lynne BABBITT, Petitioner, v. The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; Lelia Carol McCormack, Real Party in Interest.

B263917
|
Filed April 25, 2016

Synopsis

Background: Remainder beneficiary filed petition seeking to compel trustee, who was also co-settlor, to provide accounting. The Superior Court, Los Angeles County, No. BP158931, David S. Cunningham, J., granted the petition, and trustee petitioned for mandamus relief.

Holdings: The Court of Appeal, Segal, J., held that:

[1] beneficiary had standing to petition for accounting, and

[2] beneficiary did not have any right to obtain information about the disposition of assets while the trust was revocable.

Writ issued.

West Headnotes (16)

[1] **Trusts**🔑Representation of cestui que trust by trustee
Trusts🔑Duty of trustee in general
Trusts🔑Who entitled to require accounting

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee
390Trusts
390VExecution of Trust by Trustee or by Court
390k270Duty of trustee in general
390Trusts
390VIAccounting and Compensation of Trustee
390k291Who entitled to require accounting

Probate court has discretion to compel a trustee to provide "information about the trust" to a remainder beneficiary where the beneficiary has sought such information and the trustee has failed to provide it within 60 days of the beneficiary's reasonable request; this information may include an accounting, even though remainder beneficiaries are not separately entitled to such information. Cal. Prob. Code §§ 16062, 17200(b)(7)(B).

3 Cases that cite this headnote

[2] **Trusts**🔑Conditions or reservations in instrument creating trust

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(2)Conditions or reservations in instrument creating trust

A "revocable trust" is a trust that the person who creates it, generally called the settlor, can revoke during the person's lifetime.

1 Case that cites this headnote

[3] **Trusts**🔑Representation of cestui que trust by trustee
Trusts🔑Duty of trustee in general

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee
390Trusts
390VExecution of Trust by Trustee or by Court
390k270Duty of trustee in general

Trustees of revocable trusts owe their duties not

to the beneficiaries but to the settlors of the trust. Cal. Prob. Code § 15800.

2 Cases that cite this headnote

[4] **Courts**Review and vacation of proceedings

106Courts
106VCourts of Probate Jurisdiction
106k202Procedure in General
106k202(5)Review and vacation of proceedings

Remainder beneficiary forfeited claim on appeal that trustee breached her duty as trustee to care for the welfare and wellbeing of settlor, where beneficiary did not make that argument in the probate court when seeking accounting.

1 Case that cites this headnote

[5] **Trusts**Review

390Trusts
390VIAccounting and Compensation of Trustee
390k329Review

The interpretation of statutory provisions bearing on the issue of standing to demand an accounting of a trust is a question of law.

5 Cases that cite this headnote

[6] **Trusts**Conditions and limitations in general
TrustsInterest remaining in settlor or creator of trust

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(2)Conditions and limitations in general
390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k153Interest remaining in settlor or creator of trust

Property transferred into a revocable inter vivos trust is considered the property of the settlor for the settlor's lifetime, and thus the beneficiaries' interest in that property is merely potential and can evaporate in a moment at the whim of the settlor.

3 Cases that cite this headnote

[7] **Trusts**Who entitled to require accounting
TrustsEnforcing performance of duties of trust

390Trusts
390VIAccounting and Compensation of Trustee
390k291Who entitled to require accounting
390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k336Enforcing performance of duties of trust

Before a settlor's death, and in the absence of a showing of incompetence, a contingent beneficiary lacks standing to petition the probate court to compel a trustee to account or provide information relating to a revocable trust. Cal. Prob. Code § 15800.

5 Cases that cite this headnote

[8] **Trusts**Who entitled to require accounting

390Trusts
390VIAccounting and Compensation of Trustee
390k291Who entitled to require accounting

After a settlor dies and the revocable trust or a portion of the trust becomes irrevocable, a contingent beneficiary has standing to petition the probate court for an accounting of assets. Cal. Prob. Code §§ 15800, 17200.

5 Cases that cite this headnote

[9] **Trusts**Who entitled to require accounting

390Trusts
390VIAccounting and Compensation of Trustee
390k291Who entitled to require accounting

Remainder beneficiary had standing to petition for accounting of revocable trust after co-settlor's death, as, at that point, trust was divided into revocable and irrevocable subtrusts, and thus beneficiary's remainder interest in portion of trust was no longer contingent. Cal. Prob. Code §§ 15800, 17200.

7 Cases that cite this headnote

[10] **Trusts**Supervision and discretionary powers

390Trusts
390IVManagement and Disposal of Trust Property
390k177Supervision and discretionary powers

The probate court has general power and the duty to supervise the internal affairs and administration of trusts.

3 Cases that cite this headnote

[11] **Trusts**Supervision and discretionary powers

390Trusts
390IVManagement and Disposal of Trust Property
390k177Supervision and discretionary powers

To preserve a trust and to respond to perceived breaches of trust, the probate court has wide, express powers to make any orders and take any other action necessary or proper to dispose of a petition concerning the internal affairs of the trust. Cal. Prob. Code § 17200.

3 Cases that cite this headnote

[12] **Courts**Review and vacation of proceedings

106Courts
106VCourts of Probate Jurisdiction
106k202Procedure in General
106k202(5)Review and vacation of proceedings

Court of Appeal reviews the probate court's construction of the Probate Code de novo.

2 Cases that cite this headnote

[13] **Trusts**Representation of cestui que trust by trustee
TrustsDuty of trustee in general

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee
390Trusts
390VExecution of Trust by Trustee or by Court
390k270Duty of trustee in general

Term "internal affairs of the trust," in statute allowing a trustee or beneficiary to petition the court concerning such affairs, includes information relevant to the beneficiary's interests, information necessary to enforce the beneficiary's rights, and information that could prevent or redress a breach of trust. Cal. Prob. Code §§ 16060, 16061, 17200(a).

2 Cases that cite this headnote

[14] **Trusts**Conditions or reservations in instrument creating trust
TrustsLimitations of authority imposed in creation of trust
TrustsDuty of trustee in general

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(2)Conditions or reservations in instrument

creating trust
390Trusts
390IVManagement and Disposal of Trust Property
390k172Limitations of authority imposed in creation of trust
390Trusts
390VExecution of Trust by Trustee or by Court
390k270Duty of trustee in general

The authority and rights of settlors of revocable trusts are not subject to fiduciary obligations. Reststatement (Third) of Trusts, § 74.

[15] **Trusts**Representation of cestui que trust by trustee
TrustsWho entitled to require accounting

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee
390Trusts
390VIAccounting and Compensation of Trustee
390k291Who entitled to require accounting

Remainder beneficiary, whose interest in revocable trust became partially irrevocable upon death of co-settlor, who was also co-trustee, and division trust assets into revocable and irrevocable trusts, did not have any right to obtain information about the disposition of assets while the trust was revocable, absent any claim that deceased co-settlor was incompetent or subject to undue influence, as, due to the revocable nature of the trust, nothing that an accounting might reveal could support a claim for breach of trust based on actions that occurred before co-settlor's death. Cal. Prob. Code §§ 15800, 17200.

5 Cases that cite this headnote

[16] **Statutes**Legislative record or journal
StatutesReports and analyses

361Statutes
361IIIConstruction
361III(H)Legislative History
361k1243Particular Kinds of Legislative History
361k1246Legislative record or journal
361Statutes
361IIIConstruction
361III(H)Legislative History
361k1243Particular Kinds of Legislative History
361k1249Reports and analyses

In construing a statute, bill reports and other legislative records are appropriate sources from which legislative intent may be ascertained.

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 229.

****354** ORIGINAL PROCEEDING; petition for writ of mandate. David S. Cunningham, Judge. Petition granted. (Los Angeles County Super. Ct. No. BP158931)

Attorneys and Law Firms

Law Office of Jan Morrison and Jan Morrison for Petitioner.

No appearance for Respondent.

Cooper & Lewis and Kenneth D. Cooper for Real Party in Interest.

****355** SEGAL, J.

***1138 INTRODUCTION**

In *In re Estate of Giraldin* (2012) 55 Cal.4th 1058, 150 Cal.Rptr.3d 205, 290 P.3d 199 (*Giraldin*) the California Supreme Court held that when the settlor of a ***1139** revocable trust appoints, during his lifetime, " 'someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable,' " the remainder beneficiaries " 'have standing to sue the trustee for breaches of fiduciary duty committed during the period of revocability.' " (*Id.* at pp. 1065–1066, 1068, 150 Cal.Rptr.3d 205, 290 P.3d 199.) This standing gives the beneficiaries the right to demand an accounting and information from the trustee regarding trust assets and transactions during the time period before the trust

became irrevocable. (*Id.* at pp. 1069–1072, 150 Cal.Rptr.3d 205, 290 P.3d 199.) But what if the settlor of a revocable trust does not appoint "someone other than himself to act as trustee," but instead appoints himself to be the trustee? We conclude that in this situation the rule is different. Although the beneficiaries of the irrevocable trust have standing to petition the probate court for an accounting and information after the settlor dies and the trust or a portion of the trust becomes irrevocable, the probate court does not have authority to order the trustee to provide an accounting or information regarding trust assets and transactions while the trust was still revocable, where, as here, there is no claim that the deceased settlor was incapacitated or subject to undue influence during the period of revocability.

FACTUAL AND PROCEDURAL BACKGROUND

Mary Lynne Babbitt (Babbitt) and her husband, Leland Babbitt (Leland) established the Leland C. Babbitt and Mary Lynne Babbitt Family Trust dated August 8, 1998, and they designated themselves cotrustees. The assets of the trust are the settlors' respective interests in their community property, including their residence in Los Angeles, another property located in Riverside County, and various bank and investment accounts, although Leland and Babbitt transferred only the Los Angeles property to the trust during Leland's lifetime.

When Leland died on May 5, 2014, the trust was divided into two subtrusts, Trust A, the survivor's trust, and Trust B, the decedent's trust. Both subtrusts distribute their income to Babbitt, who also has broad discretion to invade the principal of both subtrusts. During her lifetime, Babbitt retains the authority to amend or revoke Trust A. Trust B is irrevocable, and cannot be modified without the written consent of its beneficiaries. Leland's daughter from a previous marriage, Lelia Carol Babbitt, also known as Carol McCormack (McCormack), has a 50 percent remainder interest in Trust A and Trust B.

After Leland's death, McCormack requested an accounting of the trust assets from her stepmother, Babbitt. Dissatisfied with Babbitt's response, McCormack filed a petition on January 9, 2015, under ***1140** Probate Code section 17200,[1] asking the probate court to compel Babbitt to provide an accounting and the information required by section 16061.7.[2] Babbitt opposed ****356** the petition to the extent it sought an accounting of assets other than those in Trust B. She also argued that McCormack did not need an accounting because McCormack already had the original trust documents showing that the "one current trust asset" was the Babbitts' residence in Los Angeles. Babbitt asserted that her efforts to transfer to the trust the other assets that were supposed to be in the trust had been "frustrated and inhibited" by McCormack, who had in her possession the original trust and related documents that were necessary to effect the transfers but would not give them to Babbitt.

[1] Undesignated statutory references are to the Probate Code.

[2] Probate Code section 16061.7 requires that, when a revocable trust becomes irrevocable, the trustee must so notify the beneficiaries within 60 days of the event that caused the revocable trust to become irrevocable, which in this case was the death of Leland Babbitt. This notification must include the name and address of the trustee, the date of execution of the trust instrument, and a notice that the recipient is entitled, upon reasonable request, to receive from the trustee the "terms of the trust." (§ 16061.7, subd. (g)(5).)

In her reply in support of the petition, McCormack questioned what had happened to the trust assets that had not yet been transferred into the trust, including the "fate of at least $800,000 [in] cash accounts held in Leland's name within approximately 24 months of his death." For this reason, McCormack asked the court to compel Babbitt to provide a "full report of the activities of the trust and account of the assets ... for the period May 5, 2011 to the present." At the hearing on McCormack's petition, Babbitt objected to the scope of the accounting, arguing that the Probate Code did not authorize McCormack's request for pre-May 5, 2014 documents and that her request for those documents was untimely because McCormack made the request in her reply brief three days before the hearing.

The court granted McCormack's petition and ordered Babbitt to account "as to the activities of the trust from May 5, 2011 to the present." Babbitt prepared an accounting, but it only included information for the time period from May 5, 2014, the date of Leland's death, through March 2015. Among other things, the report stated that Babbitt had initiated the transfer of the Riverside County property to the trust and had opened a bank account into which she intended to transfer the cash assets of Trust B. The accounting also stated that certain accounts identified in the original trust document did not yet have to be transferred to the trust, no longer existed, or had been ***1141** consumed, gifted, or changed during Leland's lifetime. The accounting identified an account at Bank of America as "subject to funding into the Trust."[3]

[3] On September 11, 2015 the probate court approved the transfer of the Bank of America account to the trust.

Babbitt subsequently filed a motion to stay the proceedings in the probate court while she sought review of the probate court's order compelling the accounting. The court denied the motion. Babbitt then filed a petition for writ of mandate and a request for a stay. We issued an alternative writ and stayed proceedings in the probate court relating to McCormack's petition for an accounting.

DISCUSSION

A. *The Probate Code Authorizes Accountings for Beneficiaries of Irrevocable Trusts*

McCormack asked the probate court to compel Babbitt to provide an accounting of the trust's assets pursuant to sections 16060, 16061, 16062, and 17200, subdivision (b)(7). Section 16060 sets forth a trustee's general duty to keep beneficiaries "reasonably informed of the trust and its administration." Section 16061 provides that, except where a trust is revocable, "on reasonable request by a beneficiary, the trustee shall report to the beneficiary ****357** by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest." Section 16062 sets forth a trustee's obligation to account on a regular basis, but provides that contingent or remainder beneficiaries like McCormack are not entitled to an accounting. (See § 16062 [only beneficiaries to whom "income or principal is required ... to be currently distributed" are entitled to an accounting]; *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 526, 50 Cal.Rptr.3d 538 (*Esslinger*) ["[a] remainder beneficiary does not have a right to an accounting under Probate Code section 16062"].) Because McCormack is a remainder beneficiary, she is not entitled to an accounting under section 16062.

[1]Section 17200 authorizes a trustee or beneficiary of an irrevocable trust to petition the court concerning the "internal affairs of the trust." (*Id.* subd. (a).) Section 17200, subdivision (b)(7)(B), gives the probate court discretion to compel a trustee to provide "information about the trust" to a remainder beneficiary where the beneficiary has sought such information under section 16061 and the trustee has failed to provide it within 60 days of ***1142** the beneficiary's reasonable request.[4] This information may include an accounting, even though remainder beneficiaries are not entitled to such information under section 16062. (See *Esslinger, supra,* 144 Cal.App.4th at p. 526, 50 Cal.Rptr.3d 538 ["[w]hile an accounting under section 16062 is mandatory, information or a particular account under section 16061, sought by petition under section 17200, subdivision (b)(7), lies within the probate court's discretion"].)

[4] McCormack's original petition did not identify which subdivision of section 17200, subdivision (b)(7), she alleged authorized her petition, but neither subdivision (b)(7)(A) nor subdivision (b)(7)(C) applies. Subdivision (b)(7)(A) allows a court to compel a trustee to provide a copy of the "terms of the trust," but such terms exclude "documents which were intended to affect disposition only while the trust was revocable." (§ 17200, subd. (b)(7)(A); see § 16060.5 [defining "terms of the trust"].) Subdivision (b)(7)(C) allows a court to compel the trustee to account to the beneficiary where a trustee fails to do so pursuant to section 16062, which does not entitle remainder beneficiaries such as McCormack to an accounting. (*Esslinger, supra,* 144 Cal.App.4th at p. 526, 50 Cal.Rptr.3d 538.) Therefore, the only subdivision of section 17200 that authorizes a court to compel an accounting on behalf of a remainder beneficiary is subdivision (b)(7)(B).

[2] [3]"A revocable trust is a trust that the person who creates it, generally called the settlor, can revoke during the person's lifetime." (*Giraldin, supra,* 55 Cal.4th at p. 1062, 150 Cal.Rptr.3d 205, 290 P.3d 199, fn. omitted.) During the time a trust is revocable, section 15800 limits a trustee's obligations to the trust's beneficiaries. In particular, section 15800 provides that trustees of revocable trusts owe their duties not to the beneficiaries but to the settlors of the trust. (See *Giraldin, supra,* 55 Cal.4th at p. 1066, 150 Cal.Rptr.3d 205, 290 P.3d 199 [§ 15800 makes clear that, "so long as the settlor is alive, the trustee owes a duty solely to the settlor"].) Among the duties postponed by section 15800 are the duties to provide information or an accounting to beneficiaries of revocable trusts under sections 16061 and 16062. (See also § 16069, subd. (a) [limiting trustee's obligations "for the period when the trust may be revoked"].)

[4]The parties do not dispute that Babbitt and her late husband were the sole settlors and cotrustees of the trust, that until Leland's death on May 5, 2014, the trust was fully revocable, and that McCormack is a remainder beneficiary of Trust B. McCormack has not alleged that Leland ****358** was incapacitated, incompetent, or subject to undue influence before his death, nor has McCormack asserted a claim against Babbitt on Leland's behalf for breach of fiduciary duty, fraud, or other misconduct as a cotrustee of the trust before Leland's death.[5] McCormack has also not alleged that Babbitt breached any ***1143**

fiduciary duty owed to the beneficiaries after Leland's death. Babbitt argues that under these circumstances McCormack lacked standing to petition the probate court under section 17200 and that the probate court exceeded its jurisdiction by compelling an accounting for the period of time during which Leland was alive and the trust was revocable. We conclude that McCormack had standing to petition the probate court under section 17200 but that the court erred by ordering Babbitt to account for trust assets before Leland's death.[6]

[5] In her opposition to Babbitt's petition for writ of mandate, McCormack suggests that Babbitt somehow misused trust assets or neglected Leland while he was alive, but McCormack conceded in the probate court that she "is not saying or alleging that mischief with the trust or trust assets has taken place." McCormack also claims that Babbitt breached her duty as trustee "to care for the welfare and wellbeing of Leland," but she does not cite any trust provision or statute that creates such a duty and, because she did not make this argument in the probate court, she has forfeited it. (See *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603, 100 Cal.Rptr.3d 622, 217 P.3d 1194 [party may not, for the first time on appeal, change the theory of the cause of action or raise new issues not raised in the trial court]; *In re Estate of Westerman* (1968) 68 Cal.2d 267, 278–279, 66 Cal.Rptr. 29, 437 P.2d 517 [same].) At oral argument counsel for McCormack confirmed that McCormack is not aware of, and is not claiming, any breach of fiduciary duty owed by Babbitt to Leland or the beneficiaries.

[6] Babbitt argues in the alternative that the scope of the probate court's order violates her constitutional right to privacy. We do not reach this argument.

B. *McCormack Had Standing to Petition the Probate Court for an Accounting of Trust Assets*

[5]Although Babbitt did not raise the issue of standing in the probate court, she does now, and "contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438, 261 Cal.Rptr. 574, 777 P.2d 610; see *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1043, 184 Cal.Rptr.3d 517 [lack of standing "is a nonwaivable jurisdictional defect"]; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407, 158 Cal.Rptr.3d 115 (*Drake*) [" ' "the issue of standing is so fundamental that it need not even be raised below—let alone decided—as a prerequisite to our consideration" ' "].) "The interpretation of statutory provisions bearing on the standing issue is a question of law." (*T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1433, 120 Cal.Rptr.3d 477; see *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 249, 131 Cal.Rptr.3d 51 ["standing is a question of law, particularly where, as here, it depends on statutory provisions conferring standing"].)

[6] [7]Whether a beneficiary has standing to file a petition for an accounting of an inter vivos trust under section 17200 depends on whether the trust is revocable at the time the petition is filed. Until the trust becomes irrevocable, section 15800 limits the rights of beneficiaries to petition for an accounting. "[S]ection 15800 is consistent with the principle that '[p]roperty transferred into a revocable inter vivos trust is considered the property of the settlor for the settlor's lifetime,' and thus, 'the beneficiaries' interest in that property is " 'merely potential' and can 'evaporate in a moment at the whim of the ***1144** [settlor].' " ' " ****359** (*Drake, supra,* 217 Cal.App.4th at p. 407, 158 Cal.Rptr.3d 115, quoting *Giraldin, supra,* 55 Cal.4th at pp. 1065–1066, 150 Cal.Rptr.3d 205, 290 P.3d 199; see *Giraldin, supra,* at p. 1062, 150 Cal.Rptr.3d 205, 290 P.3d 199 ["beneficiaries' interest in [a revocable] trust is contingent only, and the settlor can eliminate that interest at any time"].) Therefore, before a settlor's death (and in the absence of a showing of incompetence), a contingent beneficiary lacks standing to petition the probate court to compel a trustee to account or provide information relating to the revocable trust. (*Id.* at pp. 1071–1072, 150 Cal.Rptr.3d 205, 290 P.3d 199; *Drake,* at pp. 408–409, 158 Cal.Rptr.3d 115.)

[8]After a settlor's death, however, "the rights of the contingent beneficiaries are no longer contingent. Those rights, which were postponed [by section 15800] while the holder of the power to revoke was alive, mature into present and enforceable rights under ... the trust law." (*Giraldin, supra,* 55 Cal.4th at p. 1070, 150 Cal.Rptr.3d 205, 290 P.3d 199.) Under section 17200, "a contingent beneficiary may petition the court subject only to the limitations provided in section 15800." (*Id.* at p. 1069, 150 Cal.Rptr.3d 205, 290 P.3d 199.) Thus, after a settlor dies and the trust or a portion of the trust becomes irrevocable, section 17200 gives a contingent beneficiary standing to petition the probate court for an accounting of assets. (*Giraldin, supra,* 55 Cal.4th at p. 1070, 150 Cal.Rptr.3d 205, 290 P.3d 199.)

[9]McCormack petitioned the probate court for an accounting after Leland's death when a portion of the trust had become irrevocable. She therefore had standing under section 17200 to bring a petition. The fact that she

had standing to bring her petition, however, does not mean she was entitled to all of the relief she sought in her petition.

C. *The Probate Court Erred by Compelling Babbitt To Account for Revocable Trust Assets*

[10] [11] [12]The probate court has general power and the duty to supervise the internal affairs and administration of trusts. (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413, 136 Cal.Rptr.3d 516; *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 426, 78 Cal.Rptr.3d 838.) "To preserve [a] trust and to respond to perceived breaches of trust, the probate court has wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by [a] section 17200 petition." (*Schwartz v. Labow,* at p. 427, 78 Cal.Rptr.3d 838; see § 17206.) The probate court, however, must exercise those powers "within the procedural framework laid out in the governing statutes" of the Probate Code. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 546, 75 Cal.Rptr.3d 19.) We review the probate court's construction of the Probate Code de novo. (***1145** *Kucker v. Kucker* (2011) 192 Cal.App.4th 90, 93, 120 Cal.Rptr.3d 688; *Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1124, 116 Cal.Rptr.3d 315.)

Section 17200, subdivision (a), states: "Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning *the internal affairs of the trust* or to determine the existence of the trust." (Italics added.) As noted, section 15800 does not preclude a contingent beneficiary such as McCormack from petitioning the probate court under section 17200 after the trust or a portion of the trust becomes irrevocable. The issue is whether the term "the internal affairs of the trust" includes an accounting of assets held by the trust while it was revocable where, as ****360** here, the trustee and the settlor were the same person.

[13]The term "internal affairs of a trust" includes "information about the trust under Section 16061." (§ 17200, subd. (b)(7)(B).) Section 16061 provides that, except where a trust is revocable, "the trustee shall report to the beneficiary by providing requested information ... relating to the administration of the trust *relevant to the beneficiary's interest*." (Italics added.) The term "internal affairs of a trust" also may include information sought pursuant to section 16060, which requires trustees to keep beneficiaries "reasonably informed of the trust and its administration." (See *Salter v. Lerner* (2009) 176 Cal.App.4th 1184, 1187, 99 Cal.Rptr.3d 1 [recognizing a beneficiary's right to petition the probate court for information under section 16060].) "The duty to provide information under section 16060 'is independent of, and potentially even broader than[,] the duty to report under ... section 16061 or to account under ... section 16062.' " (*Id.* at p. 1188, 99 Cal.Rptr.3d 1.) Information sought under section 16060, however, must be " 'reasonably necessary to enable the beneficiary to enforce *the beneficiary's rights under the trust or prevent or redress a breach of trust.*' " (*Id.* at p. 1187, 99 Cal.Rptr.3d 1, italics added.) Thus, under sections 16061 and 16060, the term "internal affairs of the trust" includes information relevant to the beneficiary's interests, information necessary to enforce the beneficiary's rights, and information that could prevent or redress a breach of trust.

[14]Because assets held in a revocable trust essentially belong to the settlor, the settlor may dispose of the trust's assets and effectively eliminate the beneficiaries' interest altogether "with no need to justify or explain" his or her actions. (Rest.3d Trusts, § 74, com. a, p. 25; see *Giraldin, supra,* 55 Cal.4th at p. 1072, 150 Cal.Rptr.3d 205, 290 P.3d 199 ["California courts have considered the Restatement of Trusts in interpreting California trust law"].) Indeed, "the authority and rights of settlors ... are not subject to fiduciary obligations." (Rest.3d Trusts, *supra,* § 74, com. a, p. 25; see *Giraldin,* at p. 1066, 150 Cal.Rptr.3d 205, 290 P.3d 199.) Where, as here, the assets were held in trust as community property, either spouse could have revoked the trust or withdrawn trust assets at his or her discretion while the ***1146** trust was revocable.[7] (See Fam.Code § 761, subd. (b); Rest.3d Trusts, § 63, com. k, p. 461.)

[7] The Babbitts' trust provides that either grantor can revoke the trust in whole or in part and bind the trust without first obtaining the consent of the other grantor.

Thus, during Leland's lifetime, and as long as he was competent, "the trust beneficiaries were powerless to act regarding the trust." (*Giraldin, supra,* 55 Cal.4th at p. 1067, 150 Cal.Rptr.3d 205, 290 P.3d 199.) During that period, the cotrustees could not have had any liability for "fail[ing] to sufficiently preserve" the beneficiaries' interests. (*Id.* at p. 1071, 150 Cal.Rptr.3d 205, 290 P.3d 199; see § 16462, subd. (a) [trustee of revocable trust is not liable to beneficiary for acts condoned by settlor or other person with power to revoke].) Nor could the beneficiaries have petitioned the probate court for information concerning the trust, including asking for the reports or accountings required by sections 16061 and 16062, and the beneficiaries were not entitled to a copy of the "terms of the trust." (§ 17200, subds. (a), (b)(7)(A).)[8]

[8] The Probate Code's definition of "terms of the trust" excludes "documents which were intended to affect

disposition only while the trust was revocable." (§ 16060.5.)

**361 [15]Leland's death did not give the beneficiaries a right to obtain information about the disposition of assets while the trust was revocable as "internal affairs of the trust" under the Probate Code. In the absence of any claim that Leland was incompetent or subject to undue influence, nothing that an accounting of such assets after his death might reveal could support a claim for breach of trust based on actions that occurred before his death. Thus, the probate court erred by compelling Babbitt to account for trust assets while the trust was revocable.

[16]While the list of proceedings in section 17200, subdivision (b), that concern the "internal affairs of the trust" is nonexclusive, the legislative history of the statutes governing the reporting and accounting provisions of the Probate Code confirms that this phrase does not include an accounting or information concerning trust assets while the trust was revocable where the settlor and trustee are the same person. The legislative history of section 16069, which excuses a trustee, while a trust is revocable, from complying with sections 16061, 16062, and 17200, subdivision (b)(7)(A), shows that the Legislature understood beneficiaries would not have a right to an accounting of revocable trust assets: "Revocable trusts are different from irrevocable trusts in that the contents of a revocable trust can be amended without approval from the beneficiaries. For this reason, the contents of revocable trusts should remain secret from beneficiaries so as to ensure the settlor's intent is fully realized, without undue pressure from potential beneficiaries." (Governor's Off. of Planning and Research, enrolled bill rep. on Sen. Bill No. 202 (2009–2010 Reg. Sess.) Sept. 1, 2010, p. 5.)[9] The Legislature **1147 demonstrated a similar understanding when it amended the definition in section 16060.5 of "terms of the trust" to clarify that information "regarding investment instructions and requests for withdrawals during the period when a trust was revocable" are not required disclosures. (Dept. of Consumer Affairs, enrolled bill rep. on Assem. Bill No.2069 (1997–1998 Reg. Sess.) Aug. 24, 1998, p. 3.) One of the purposes of this amendment was to clarify that only documents and trust provisions "that describe or affect an *irrevocable* trust ... must be disclosed." (*Ibid.*; see also § 16060.7 [excusing trustee from providing "terms of the trust" while trust is revocable].)

9 In construing a statute, bill reports and other legislative records are " 'appropriate sources from which legislative intent may be ascertained.' " (*Mt. Hawley Insurance Company v. Lopez* (2013) 215 Cal.App.4th 1385, 1401, 156 Cal.Rptr.3d 771; see *Ste. Marie v. Riverside County Regional Park and Open–Space District* (2009) 46 Cal.4th 282, 291, 93 Cal.Rptr.3d 369, 206 P.3d 739 [relying on enrolled bill report to interpret a statute]; *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1263–1264, 23 Cal.Rptr.3d 453, 104 P.3d 813 [using enrolled bill reports to determine the scope of legislative debate].)

The primary case on which McCormack relies, *Giraldin, supra,* 55 Cal.4th 1058, 150 Cal.Rptr.3d 205, 290 P.3d 199, actually supports Babbitt. *Giraldin* involved a third-party trustee who owed a fiduciary duty to the settlor and whose breach of that duty could "substantially harm the beneficiaries by reducing the trust's value against the settlor's wishes." (*Id.* at p. 1062, 150 Cal.Rptr.3d 205, 290 P.3d 199.) Here, that did not and could not happen because the trustees and settlors were one and the same.[10] As the Supreme Court in **362 *Giraldin* explained, through the use of what the court called a "colorful" hypothetical, settlors like Leland and Babbitt may dispose of revocable trust assets however they please without incurring any liability to contingent beneficiaries: " '[I]f 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,' " and could not be liable for failing to preserve the assets of the trust for the beneficiaries. (*Ibid.*) Like the dying cruise voyager in the *Giraldin* hypothetical, Leland and Babbitt owed their duties as trustees only to themselves before part of the trust became irrevocable, and they did not need to account to the beneficiaries for the disposition of trust assets during that time.

10 The other cases cited by McCormack are similarly distinguishable because, like *Giraldin,* they involved third-party trustees who owed fiduciary duties to the settlor during the settlor's lifetime or to the beneficiaries after the death of the settlor. (See *Christie v. Kimball, supra,* 202 Cal.App.4th at pp. 1410–1411, 136 Cal.Rptr.3d 516; *Esslinger, supra,* 144 Cal.App.4th at pp. 520–521, 50 Cal.Rptr.3d 538; *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 618, 79 Cal.Rptr.2d 146.) Although some courts have allowed beneficiaries to obtain an accounting for periods before a settlor's death where the settlor had " 'lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct' " (*Giraldin, supra,* 55 Cal.4th at p. 1073, 150 Cal.Rptr.3d 205, 290 P.3d 199; see *Drake, supra,* 217 Cal.App.4th at p. 407, 158 Cal.Rptr.3d 115), McCormack has not asserted any such claim on Leland's behalf.

***1148** Finally, courts in other jurisdictions that have considered whether a beneficiary can compel an accounting of revocable trust assets where the settlor and trustee were the same person, or where there is no evidence that the beneficiaries were damaged by a breach of duty to the settlor while the trust was revocable, have reached a similar result, although often because the beneficiaries lacked standing. For example, in *In re Trust No. T–1 of Trimble* (Iowa 2013) 826 N.W.2d 474 the court held that, while a trust is revocable, "the trustee owes duties exclusively to the settlor and the settlor has full discretion to do what she wishes with her assets—whether it works to the benefit of the beneficiaries of the trust or not." (*Id.* at p. 487; see *Tseng v. Tseng* (Or.App. 2015) 271 Or.App. 657, 669, fn. 3, 352 P.3d 74 ["[b]ecause the settlor retains complete control over the trust during the settlor's lifetime, actions by a settlor/trustee cannot harm the interests of a beneficiary in any cognizable way"].) The court in *Trimble* concluded that "[a] trustee who owes no accounting to beneficiaries while the trust is revocable should not face retroactive accounting duties for the same period upon the settlor's death." (*Trimble,* at p. 489,.)

Similarly, in *Matter of Malasky* (N.Y.App.Div. 2002) 290 A.D.2d 631, 736 N.Y.S.2d 151 a husband and wife created a joint revocable living trust and named themselves trustees. (*Id.* at p. 631, 736 N.Y.S.2d 151.) After the husband died, his children from a prior marriage sought an accounting from their stepmother of the trust assets from the trust's inception to the date of their father's death. (*Ibid.*) The court in *Malasky* held that, because the settlors also acted as trustees and retained the power to revoke or amend the trust at any time, the stepchildren had no pecuniary interest in the revocable trust until their father's death, and therefore could not seek an accounting of assets while the trust was revocable. (*Id.* at p. 632, 736 N.Y.S.2d 151.)[11]

[11] McCormack also argues that the doctrine of unclean hands bars Babbitt from seeking relief in this court because, according to McCormack, Babbitt has repeatedly underreported the cash and real property held by the trust. For example, McCormack complains that Babbitt originally represented that the only asset in the trust was the Los Angeles residence, but later identified "another approximate $300,000 in trust assets." McCormack mischaracterizes Babbitt's representations, which appear to have been accurate when she made them. After Leland's death and the commencement of these proceedings, Babbitt began transferring additional assets into the trust, as set forth in her April 27, 2015 accounting.

****363 DISPOSITION**

Let a peremptory writ of mandate issue directing the respondent court to vacate its order of April 22, 2015, and to enter a new order excluding the period of time between May 5, 2011 and May 5, 2014 from the order ***1149** compelling Babbitt to provide an accounting of trust assets. The stay of proceedings issued June 3, 2015 is vacated. Petitioner is to recover her costs in connection with this petition.

We concur:

PERLUSS, P.J.

BLUMENFELD, J.[*]

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

All Citations

246 Cal.App.4th 1135, 201 Cal.Rptr.3d 353, 16 Cal. Daily Op. Serv. 4380, 2016 Daily Journal D.A.R. 3979

End of Document

West's Ann.Cal.Prob.Code § 13550

§ 13550. Personal liability for debts chargeable against property

Currentness

Except as provided in Sections 11446, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551.

Credits

(Stats.1990, c. 79 (A.B.759), § 14, operative July 1, 1991.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1990 Enactment

Section 13550 continues Section 13550 of the repealed Probate Code without change.

Background on Section 13550 of Repealed Code

Section 13550 was added by 1986 Cal.Stat. ch. 783 § 24 and was amended by 1988 Cal.Stat. ch. 1199 § 102. The section continued subdivision (a) of former Probate Code Section 649.4 (repealed by 1986 Cal.Stat. ch. 783 § 9) without substantive change. The 1988 amendment corrected a section reference. For background on the provisions of this division, see the Comment to this division under the division heading. [20 Cal.L.Rev.Comm.Reports 1001 (1990)].

Notes of Decisions (10)

Current with all laws through Ch. 997 of 2022 Reg.Sess.

Notes Of Decisions (10)

In general

Under California law, debts of husband and costs of administering his estate are chargeable against entire community property. Pfeiffer v. U. S., E.D.Cal.1969, 310 F.Supp. 392 , supplemented 315 F.Supp. 392 . Marriage And Cohabitation 1063

In case of the death of either husband or wife, leaving the other surviving, for all purposes connected with the administration of the property of the community, the debts of the community are to be regarded, not as the mere private or individual debts of the husband, but as obligations involving the liability of each of the members of the community. Packard v. Arellanes (1861) 17 Cal. 525 . Marriage And Cohabitation 1046

Construction and application

A surviving spouse who receives a decedent's property without administration becomes personally liable for the decedent's debts chargeable against such property, within limits. Estate of Bonanno (App. 2 Dist. 2008) 80 Cal.Rptr.3d 560, 165 Cal.App.4th 7 . Marriage And Cohabitation 1046

Construction with other laws

Assuming Probate Code provisions governing liability for debts of deceased spouse and Family Code provision making spouses personally liable for any debts incurred by the other spouse for "necessaries of life" are in conflict, Probate Code provisions control, as they are clearly the more specific; Probate Code provisions specifically address the liability of a married person for the debts incurred by the other spouse upon the death of that spouse, whereas Family Code section merely addresses the general liability of a spouse for the debts of the other spouse incurred during marriage. Collection Bureau of San Jose v. Rumsey (2000) 99 Cal.Rptr.2d 792, 24 Cal.4th 301, 6 P.3d 713 . Marriage And Cohabitation 903

If the statutory schemes of Probate Code provisions governing liability for debts of deceased spouse and Family Code provision making spouses personally liable for any debts incurred by the other spouse for "necessaries of life" are in conflict, then former controls, as it is the later enactment. Collection Bureau of San Jose v. Rumsey (2000) 99 Cal.Rptr.2d 792, 24 Cal.4th 301, 6 P.3d 713 . Marriage And Cohabitation 903

Debts

After husband's death, the properties wife held with husband in joint tenancy with right of survivorship were properly considered in determining the extent of wife's personal liability for husband's debts, where husband's separate indebtedness arose before the creation of the joint tenancies, the properties were either community property or husband's separate property at the time of husband's death, and wife took an unencumbered interest in fee simple in the properties. Kircher v. Kircher (App. 1 Dist. 2010) 117 Cal.Rptr.3d 254, 189 Cal.App.4th 1105 , rehearing denied, review denied. Marriage And Cohabitation 533

Husband was personally liable for the debts left behind by his deceased spouse, including the hospital and medical bills, to the extent of his own share of the community property, and those portions of his deceased spouse's share of the community property and her separate property that passed to him without formal administration. Collection Bureau of San Jose v. Rumsey (2000) 99 Cal.Rptr.2d 792, 24 Cal.4th 301, 6 P.3d 713 . Marriage And Cohabitation 903

"Debts" of husband, referred to in § 202 (repealed; see, now, this section) do not include those incurred by him after his wife's death which have no relationship to their community property. Knego v. Grover (App. 4 Dist. 1962) 25 Cal.Rptr. 158, 208 Cal.App.2d 134 . Marriage And Cohabitation 1047

Trusts

Wife's one-half share of community property, which was transferred into two trusts upon her death, did not pass to the trustees entirely free from liability for debts incurred by surviving husband during couple's marriage, given absence of termination of marriage by way of dissolution and judicially approved division of community property, or judicially approved allocation of debts between trustees and surviving husband. Dawes v. Rich (App. 4 Dist. 1997) 70 Cal.Rptr.2d 72, 60 Cal.App.4th 24 , review denied. Marriage And Cohabitation 757 ; Marriage And Cohabitation 902

Limitations

In cases where the debtor spouse has died, Probate Code's one-year limitations period applies to actions brought under either provision of Family Code making spouses personally liable for any debts incurred by the other spouse for "necessaries of life" or provision creating a right of reimbursement in the creditor-spouse and requiring that such right be exercised in proceedings upon the death of a spouse. Collection Bureau of San Jose v. Rumsey (2000) 99 Cal.Rptr.2d 792, 24 Cal.4th 301, 6 P.3d 713 . Executors And Administrators 437(3)

62 Cal.App.5th 801
Court of Appeal, Second District, Division 6, California.

David BRESLIN, as Trustee, etc., Plaintiff and Respondent,
v.
Paul G. BRESLIN et al., Defendants and Respondents;
Pacific Legal Foundation et al., Defendants and Appellants.

2d Civ. No. B301382
|
Filed 4/5/2021

Synopsis
Background: Trustee of restated living trust filed petition to designate trust beneficiaries. Following court-ordered mediation, trustee filed motion to approve settlement agreement, pursuant to which charities listed in estate planning documents that elected to not participate in mediation were excluded from list of designated beneficiaries. The Superior Court, Ventura County, No. 56-2018-00521839-PR-TR-OXN, Roger L. Lund, J., approved settlement, and charities appealed.

Holdings: The Court of Appeal, Gilbert, Presiding Justice, held that:

[1] by electing not to participate in court-ordered mediation, charities waived right to evidentiary hearing on objections to settlement agreement;

[2] statutes authorizing trust beneficiary to "disclaim any interest, in whole or in part, by filing disclaimer as provided," and requiring that disclaimer be in writing and signed by beneficiary, did not apply to charities who forfeited their interest in trust by electing to not participate in mediation;

[3] charities waived right to challenge trustee's alleged partiality in excluding charities as beneficiaries;

[4] charities could not be heard to complain that trustee breached fiduciary duty by entering into settlement agreement that resulted in large gifts to settlor's family members and trustee;

[5] charities could not be heard to complain that trustee failed to keep them reasonably informed about mediation and resulting settlement agreement; and

[6] order approving settlement agreement was not result of extrinsic fraud.

Affirmed.

Tangeman, J., filed dissenting opinion.

Opinion, 274 Cal.Rptr.3d 426, vacated.

West Headnotes (10)

[1] Courts Review and vacation of proceedings

106Courts
106VCourts of Probate Jurisdiction
106k202Procedure in General
106k202(5)Review and vacation of proceedings

The standard of review for the probate court's approval of a settlement is abuse of discretion.

3 Cases that cite this headnote

[2] Courts Nature and scope of jurisdiction in general

106Courts
106VCourts of Probate Jurisdiction
106k198Nature and scope of jurisdiction in general

The probate court has the power to order the parties into mediation.

1 Case that cites this headnote

[3] Courts Procedure in General

106Courts
106VCourts of Probate Jurisdiction
106k202Procedure in General
106k202(1)In general

Parties may not ignore the probate court's order to participate in mediation proceedings and then challenge the result. Cal. Prob. Code § 17206.

1 Case that cites this headnote

[4] **Compromise, Settlement, and Release**Hearing

89Compromise, Settlement, and Release
89VIIApproval of Settlements
89VII(D)Proceedings for Approval
89k709Hearing
89k710In general

By electing not to participate in court-ordered mediation in action to determine beneficiaries of restated living trust, charities listed in estate documents with restated trust waived right to evidentiary hearing on objections to settlement agreement entered as result of mediation. Cal. Prob. Code § 17206.

[5] **Trusts**Acceptance by cestui que trust

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k39Acceptance by cestui que trust

Statutes authorizing trust beneficiary to "disclaim any interest, in whole or in part, by filing disclaimer as provided," and requiring that disclaimer be in writing and signed by beneficiary, did not apply to charities who forfeited their interest in living trust by electing to not participate in court-ordered mediation on trustee's petition to designate beneficiaries. Cal. Prob. Code §§ 275, 278.

[6] **Alternative Dispute Resolution**Failure to mediate

25TAlternative Dispute Resolution
25TIIIMediation
25TIII(C)Performance, Breach, Enforcement, and Contest of Agreement to Mediate
25Tk463Failure to mediate

By electing to not participate in court-ordered mediation in action by trustee to determine beneficiaries of restated living trust, for which charities listed in estate planning binder with restated trust received notice, charities waived any right to challenge trustee's alleged partiality in excluding charities as beneficiaries; charities' failure to participate was not due to any action of trustee. Cal. Prob. Code §§ 16003, 17206.

[7] **Alternative Dispute Resolution**Failure to mediate

25TAlternative Dispute Resolution
25TIIIMediation
25TIII(C)Performance, Breach, Enforcement, and Contest of Agreement to Mediate
25Tk463Failure to mediate

By electing to not participate in court-ordered mediation on trustee's petition to designate beneficiaries of restated living trust, charities who were listed in estate planning documents could not be heard to complain that trustee breached fiduciary duty by entering into settlement agreement that resulted in large gifts to settlor's family members and trustee who stood to gain little or nothing under trust, where all parties who participated in mediation approved settlement agreement.

[8] **Alternative Dispute Resolution**Failure to mediate

25TAlternative Dispute Resolution

25TIIIMediation
25TIII(C)Performance, Breach, Enforcement, and Contest of Agreement to Mediate
25Tk463Failure to mediate

By electing to not participate in court-ordered mediation on trustee's petition to designate beneficiaries of restated living trust, charities that were listed in settlor's estate planning documents could not be heard to complain that trustee failed to keep them reasonably informed about mediation and resulting settlement agreement, in accordance with statute requiring trustee to keep beneficiaries reasonably informed of trust and its administration; statute did not determine that charities were beneficiaries of trust, and even assuming they were beneficiaries, notice of mediation, which charities received, informed charities, as prospective beneficiaries, of their rights and of risk of forfeiture of their interests for failure to participate in mediation. Cal. Prob. Code § 16060.

Probate court's order approving settlement agreement resulting from court-ordered mediation on trustee's petition to determine beneficiaries of restated living trust, which agreement resulted in exclusion of charities that elected to not participate in mediation, was not result of extrinsic fraud, as justification for setting aside agreement, based on charities' assertion that one beneficiary that participated in mediation urged probate court to find that charities listed on paper found with restated trust were beneficiaries and requested award of attorney fees if successful because all listed charities would benefit by beneficiary's success; beneficiary did not claim to be legal representative for all charities on list but instead argued only that, by representing its own interest, other parties would benefit and should therefore share in burden of attorney fees, under "substantial benefit" doctrine.

Witkin Library Reference: 13 Witkin, Summary of Cal. Law (11th ed. 2017) Trusts, § 266 [Orders and Appeal.]

[9] Trusts Representation of cestui que trust by trustee

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee

The information that a trustee is obligated to provide to trust beneficiaries regarding the trust and its administration must be the information reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or prevent or redress a breach of trust. Cal. Prob. Code § 16060.

[10] Compromise, Settlement, and Release Reconsideration

89Compromise, Settlement, and Release
89VIIApproval of Settlements
89VII(D)Proceedings for Approval
89k718Reconsideration

****915** Superior Court County of Ventura, Robert L. Lund, Judge, (Super. Ct. No. 56-2018-00521839-PR-TR-OXN) (Ventura County)

Attorneys and Law Firms

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Opinion

GILBERT, P. J.

***803** The legal historian Frederic William Maitland is reputed to have said, "The law is a seamless web." He didn't.[1]

[1] "Such is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web." (Maitland, A Prologue to a History of English Law (1898) 14 L.Q.Rev. 13.)

The phrase, however, applicable to the law in general, is particularly apt here. This case began and ended in probate court. But the law concerning mediation also applies. The proceeding here is made from the seamless fabric of probate and mediation law.

****916** The trustee of a decedent's trust petitioned the probate court to determine the trust beneficiaries. The potential trust beneficiaries received notice of the petition. The probate court ordered the matter to mediation. The same potential beneficiaries received notice of the mediation, but some did not participate. The participating parties reached a settlement that excluded the nonparticipating parties as beneficiaries. The probate court approved the settlement. The nonparticipating parties Pacific Legal Foundation et al.[2] (collectively "the Pacific parties") appeal. We affirm. A party receiving notice under the circumstances here, who fails to participate in court-ordered mediation, is bound by the result.

[2] The nonparticipating parties are: Pacific Legal Foundation, Judicial Watch, Save the Redwoods League, Concerned Women of America, Catholics United for Life, Catholic League, Sacred Heart Auto League, National Prolife Action Center, doing business as Liberty Counsel, and Orbis International.

FACTS

Don Kirchner died in 2018 leaving an estate valued at between $3 and $4 million. Kirchner had no surviving wife or children, but he was survived nieces and nephews.

Kirchner's estate was held in a living trust dated July 27, 2017.[3] The trust was amended and restated on November 1, 2017 (restated trust). David Breslin (Breslin) was named the successor trustee in the restated trust.

[3] The parties take issue with case title, often referred to as the caption. They believe it should be "In the matter of the Don Kirchner Living Trust." Apparently, the parties did not consult the California Style Manual. This is what they would have learned: "Similar to estates ..., trusts are not recognized as legal entities and cannot sue or be sued. Only trustees can be named as parties, thus it is improper to name 'The ABC Trust' as a party. (See Prob. Code, §§ 17200, subd. (a), 17200.1; see also Code Civ. Proc., § 369, subd. (a)(l).) Additionally, the description 'Trustee of the ABC Trust' is not properly listed as a party name; the trustee's name is listed followed by 'as Trustee, etc.' 'Trustees of the California State University' is an official board name, not a description, so it is properly used in titles (see Ed. Code, § 66600). Trust administration cases do not use a nonadversary title, such as 'In re the Matter of the Charles G Adams Trust,' to identify the trust. In addition, the lower court designations of 'Petitioner' and 'Respondent' are changed to 'Plaintiff' and 'Defendant' in accordance with [California Style Manual] section 6:42." (Cal. Style Manual (4th ed. 2000) § 6:47.)

***804** Breslin found the restated trust, but initially could not find the original trust. The restated trust makes three $10,000 specific gifts and directs that the remainder be distributed to the persons and charitable organizations listed on exhibit A in the percentages set forth.

The restated trust did not have an exhibit A attached to it, and no such exhibit A has ever been found. But in a pocket of the estate planning binder containing the restated trust, Breslin found a document titled "Estates Charities (6/30/2017)." The document listed 24 charities with handwritten notations that appear to be percentages.

Breslin filed a petition in the probate court to confirm him as successor trustee and to determine the beneficiaries of the trust in the absence of an attached exhibit A. Breslin served each of the listed charities, including the Pacific parties. Only three of the listed charities filed formal responses. The Pacific parties did not.

The probate court confirmed Breslin as successor trustee and ordered mediation among interested parties, including Kirchner's intestate heirs and the listed charities. The mediator's fees were to be paid from the trust. One of the listed charities, the Thomas More Law Center (TMLC), ****917** sent notices of the mediation to all the interested parties, including the Pacific parties. Approximately four notices of continuances were sent to all the parties, including the Pacific parties, before the mediation took place.

The mediation notice included the following:

"Mediation may result in a settlement of the matter that is the subject of the above-referenced cases and of any and all interested persons' and parties' interests therein. Settlement of the matter may result in an agreement for the distribution of assets of the above-referenced Trust and of the estate of Don F. Kirchner, Deceased, however those assets may be held. Settlement of the matter may also result in an award of attorneys' fees to one or more parties ***805** under *Smith v. Szeyller* (2019) 31 Cal.App.5th 450, 242 Cal.Rptr.3d 585. Interested persons or parties who do not have counsel may attend the mediation and participate.

"Non-participating persons or parties who receive notice of the date, time and place of the mediation may be bound by the terms of any agreement reached at mediation without further action by the Court or further hearing. *Smith v. Szeyller* (2019) 31 Cal.App.5th 450, 242 Cal.Rptr.3d 585. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

"All represented parties (or his, her or their counsel) and all unrepresented parties that intend to participate in the mediation are requested to advise the undersigned of his, her or their intention to be present and participate by making contact via either email ... or U.S. Mail. Notice to participate in mediation will not be accepted via telephone."

Only five of the listed charities appeared at the mediation, including TMLC. The intestate heirs also appeared. The Pacific parties did not appear. The appearing parties reached a settlement. The settlement agreement awarded specific amounts to various parties, including the appearing charities, and attorney fees with the residue to the intestate heirs. The agreement did not include the Pacific parties.

TMLC filed a petition to approve the settlement. When the Pacific parties received notice of this petition, they filed objections.

Prior to the hearing on the petition, Breslin filed a supplemental declaration stating that he found the original trust document. The restated trust had no exhibit A attached, but he found attached to the original trust an exhibit A listing the same charities as were found on the document in the binder with the restated trust.

The probate court granted Breslin's petition to approve the settlement. The court denied the Pacific parties' objections on the grounds that they did not file a response to Breslin's petition to determine the beneficiaries and did not appear at the mediation.

The Pacific parties appeal.

***806** DISCUSSION

I

Standard of Review

[1]The Pacific parties contend that because the issues here do not involve findings of fact, the standard of review is de novo. The standard of review for the probate court's approval of a settlement is abuse of discretion. (*Estate of Green* (1956) 145 Cal.App.2d 25, 28, 301 P.2d 889.) The dispute is academic, however. The result is the same under either standard.

****918** II

Forfeiture of Rights

[2]The probate court has the power to order the parties into mediation. (See Prob. Code,[4] § 17206 ["The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition"].) The court did so here. The Pacific parties received notice of the mediation, but chose not to participate.

4 All statutory references are to the Probate Code.

[3]In *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450, 458, 242 Cal.Rptr.3d 585, we held that a party who chooses not to participate in the trial of a probate matter cannot thereafter complain about a settlement reached by the participating parties. The Pacific parties point out that there was no trial here. True, but the mediation ordered by the probate court, like the trial in *Smith*, was an essential part of the probate proceedings. The Pacific parties may not ignore the probate court's order to participate in the

proceedings and then challenge the result. The probate court's mediation order would be useless if a party could skip mediation and challenge the resulting settlement agreement.

[4]The Pacific parties complain they were denied an evidentiary hearing. But the probate court has the power to establish the procedure. (§ 17206.) It made participation in mediation a prerequisite to an evidentiary hearing. By failing to participate in the mediation, the Pacific parties waived their right to an evidentiary hearing. It follows that the Pacific parties were not entitled to a determination of factual issues, such as Kirchner's intent, and cannot raise such issues for the first time on appeal. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4, 50 Cal.Rptr.2d 242, 911 P.2d 429 [court will not address issues raised for the first time on appeal].)

***807** *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1310, 78 Cal.Rptr.3d 435, is of no help to the Pacific parties. There the Court of Appeal held that estate beneficiaries who petitioned to set aside a settlement agreement were entitled to an evidentiary hearing. But *Bennett* did not involve a party's failure to respond to a mediation order.

[5]The Pacific parties argue the only way they can forfeit their interest is by filing a written disclaimer. They rely on section 275. That section provides, "A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this part." (*Ibid.*) The disclaimer must be in writing signed by the disclaimant. (§ 278.) We agree the Pacific parties did not disclaim their interest. Instead, they forfeited their interest when they failed to participate in mediation as ordered by the court.

Had the Pacific parties appeared at the initial probate hearing, for which they received notice, they would have had the opportunity to object to mediation. Instead, they waited until after the mediation, for which they also received notice, in addition to notices of continuances, to finally object to the result. The dissent expresses concern for the due process rights of parties who ignored these multiple notices, and apparently no concern for the parties who responded to the notices and spent time and effort complying with the probate court's order for mediation.

III

Trustee's Duties

(a) Impartiality

[6]The Pacific parties contend the trustee failed in his duty to deal impartially ****919** with all beneficiaries. (§ 16003 ["If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them"].)

But all interested parties received notice of the mediation and had an opportunity to participate. The Pacific parties' failure to participate was not the fault of the trustee.

(b) Trustee's Personal Profit

[7]The Pacific parties contend the trustee breached fiduciary duties by approving large gifts to Kirchner family members, including himself, who stood to gain little or nothing under the trust.

***808** But all parties who participated in the mediation approved the settlement, not just the trustee. And the probate court approved the settlement. The Pacific parties may not refuse to participate and then complain that they received nothing.

Moreover, the Pacific parties' argument assumes the beneficiaries of the trust are known. The court did not determine the identity of the beneficiaries. The Pacific parties may have requested an evidentiary hearing on the matter had they abided by the probate court's order and participated in the mediation. They chose not to do so.

(c) Notice

[8]The Pacific parties contend that the trustee failed to keep them reasonably informed about the mediation and his intent to execute the settlement agreement.

The Pacific parties do not claim they lacked notice of the mediation. Had they participated, they would have been informed of all the developments, including the trustee's willingness to sign the settlement agreement.

The Pacific parties apparently believe that after the trustee and participating parties have gone through mediation and reached a settlement, they should have been notified before the settlement was signed. Then they could have

registered their objection. But that would defeat the purpose of the court-ordered mediation.

[9]The Pacific parties cite section 16060 for the proposition that the trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration. The information provided pursuant to section 16060 must be the information reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or prevent or redress a breach of trust. (*Salter v. Lerner* (2009) 176 Cal.App.4th 1184, 1187, 99 Cal.Rptr.3d 1.)

First, the probate court did not determine that the Pacific parties were beneficiaries of the trust. Second, assuming they were or could have been beneficiaries, the notice of mediation was all the information necessary for them to protect their interest.

***809** The Pacific parties argue that the mediation notice failed to inform them that they could forfeit their interest if they did not participate. But the notice stated that nonparticipating persons or parties may be bound by the terms of any agreement reached at the mediation, and the rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in the mediation. Synonym for lost is forfeiture.

The Pacific parties argue that the loss of rights referred to in the notice may be read as only referring to procedural rights. But the notice says that nonparticipating parties may be bound by any agreement reached during mediation. The notice obviously refers to substantive rights.

IV

Extrinsic Fraud

[10]The Pacific parties contend the probate court's order approving the settlement ****920** should be set aside for extrinsic fraud.

The Pacific parties' contention is based on TMLC's response to the trustee's petition to determine trust beneficiaries. TMLC urged the probate court to find that the charities listed on the paper found with the restated trust are the beneficiaries. TMLC also requested attorney fees if successful because all the charities listed would benefit by its success.

TMLC was not claiming to be the legal representative for all the charities on the list. It was only claiming that by representing its own interest other parties will benefit and should share in the burden of attorney fees under the substantial benefit doctrine. (See *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 460, 242 Cal.Rptr.3d 585.) There was no extrinsic fraud.

V

Attorney Fees

The intestate beneficiaries contend they should be awarded attorney fees under the substantial benefit doctrine. That is a matter to be decided by the probate court.

DISPOSITION

The judgment (order) is affirmed. Costs are awarded to respondents.

I concur:

YEGAN, J.

TANGEMAN, J., dissenting:

***810** I respectfully dissent. A trust must be administered according to the testator's intent. (Prob. Code,[1] § 21102, subd. (a).) Administration consistent with that intent is the "paramount rule ... to which all other rules must yield." (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134, 59 Cal.Rptr.2d 2, 926 P.2d 969.) That means honoring Don Kirchner's final wishes above all else.

[1] Unlabeled statutory references are to the Probate Code.

Here, however, the probate court exalted principles of forfeiture over Kirchner's express wishes, concluding that the Pacific parties forfeited their rights to the gifts Kirchner wanted them to have because they did not

satisfy a requirement Kirchner did not impose: participation in mediation at their expense. In effect, the court imposed a terminating sanction against the nonappearing beneficiaries. The majority countenances this result. I would not.

Equity abhors a forfeiture. (*Hand v. Cleese* (1927) 202 Cal. 36, 46, 258 P. 1090.) And forfeiture is an especially harsh result here: It elevates the probate court's power to order mediation (§ 17206) over myriad provisions of the Probate Code, including those related to notice requirements (§ 17203), hearings and objections (§ 1040 et seq.), and the approval of settlements (§ 9837), as well as their constitutional counterparts (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 208, 124 Cal.Rptr. 14, 539 P.2d 774 [due process requires a notice and hearing in "every significant deprivation" of an interest in property]). It forces potential beneficiaries to participate in costly mediation (legal entities cannot appear except through counsel), something "antithetical to the entire concept" thereof. (*Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 543, 53 Cal.Rptr.3d 115.) It permits a trustee to favor some beneficiaries over others—in breach of the duty of impartiality (§ 16003)—simply because the latter did not participate in mediation. And perhaps most significantly, by permitting some beneficiaries to cut other beneficiaries out of trusts altogether, it defeats the express ****921** intentions of testators and negates the expectations testators hold knowing that their final wishes will be fulfilled without regard for the wishes of others.

Smith v. Szeyller (2019) 31 Cal.App.5th 450, 242 Cal.Rptr.3d 585 (*Smith*) does not support the result the majority reaches here. In *Smith*, we held that a beneficiary who did not participate in trial forfeited her objections to the settlement reached by the litigants who did participate because that settlement did not impact her inheritance (*ibid.* at p. 458, 242 Cal.Rptr.3d 585) and "preserved a common fund for the benefit of [her and] the [other] nonparticipating beneficiaries" (*id.* at p. 461, 242 Cal.Rptr.3d 585). We also concluded that the nonparticipating beneficiary forfeited her objections because she did not submit them until after the probate court had approved the settlement. (*Id.* at p. 456, 242 Cal.Rptr.3d 585.)

***811** In contrast, the settlement here disinherited the Pacific parties and redistributed their gifts to other parties contrary to the testator's express directions. And the Pacific parties filed their objections before the probate court approved the settlement. Moreover, the "notice" that required the Pacific parties to attend the mediation at which the settlement was reached came from a party that unilaterally decreed that it could settle the case on their behalf. And unlike the situation in *Smith*, the facts here changed dramatically after mediation, when Breslin found a document—Exhibit A—that confirmed the Pacific parties' unqualified right to inherit funds from Kirchner.

A charitable gift must be carried into effect if it "can possibly be made good." (*Estate of Tarrant* (1951) 38 Cal.2d 42, 46, 237 P.2d 505.) The majority's newfound requirement that a party participate in mediation before it can inherit ignores this command. It will reduce the number of gifts that "can possibly be made good" by encouraging parties to send out mediation notices whenever they desire to eliminate gifts to beneficiaries that don't appear—for whatever reason. That will not advance the interests of testators, but will instead introduce uncertainty into probate proceedings, defeat express testamentary wishes, and lead to inequitable results. I would reverse the judgment of the probate court.

All Citations

62 Cal.App.5th 801, 276 Cal.Rptr.3d 913, 21 Cal. Daily Op. Serv. 3078, 2021 Daily Journal D.A.R. 3207, 2021 Daily Journal D.A.R. 6963

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Declined to Follow by Stuart v. Warner, Cal.App. 1 Dist., September 8, 2022

178 Cal.App.4th 1488
Court of Appeal, Fourth District, Division 1, California.

Tammy KING, Plaintiff and Appellant,
v.
Barbara JOHNSTON, Defendant and Respondent.

No. D054136.
|
Nov. 9, 2009.

Synopsis
Background: Beneficiary of testamentary trust brought action against the deceased former trustee's daughter, for breach of trust. After bench trial, the Superior Court, Imperial County, No. ECU03358, Jeffrey B. Jones, J., found that beneficiary lacked standing to bring the action and entered judgment for former trustee's daughter. Beneficiary appealed.

Holdings: The Court of Appeal, Aaron, J., held that:

[1] beneficiary had standing to recover from former trustee's daughter as third-party participant in breach of trust, and

[2] trial court failed to resolve issue of whether former trustee's daughter acted as trustee de son tort after trustee's death.

Reversed and remanded with directions.

West Headnotes (15)

[1] Trusts🔑Intermeddling with trust estate and trustees de son tort

390Trusts
390IIIAppointment, Qualification, and Tenure of Trustee
390k170Intermeddling with trust estate and trustees de son tort

A "trustee de son tort" is one who is treated as trustee because of his wrongdoing with respect to property over which he exercised authority which he lacked.

9 Cases that cite this headnote

[2] Trusts🔑Complainants

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(2)Complainants

As a general rule, the trustee is the real party in interest with standing to sue and defend on the trust's behalf.

3 Cases that cite this headnote

[3] Trusts🔑Complainants

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(2)Complainants

A trust beneficiary cannot sue in the name of the trust.

2 Cases that cite this headnote

[4] Trusts🔑Right of action by beneficiary

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k247Right of action by beneficiary

A trust beneficiary can bring a proceeding against a trustee for breach of trust.

2 Cases that cite this headnote

[5] **Trusts**Persons against whom trust may be enforced

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k348Persons against whom trust may be enforced

A trust beneficiary can pursue a cause of action against a third party who actively participates in or knowingly benefits from a trustee's breach of trust.

2 Cases that cite this headnote

[6] **Trusts**Necessary and proper parties in general

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(1)Necessary and proper parties in general

When a third party acts to further his or her own economic interests by participating with a trustee in a breach of trust, it is not necessary for the beneficiary to join the trustee in a suit against the third party, because primarily it is the beneficiaries who are wronged and who are entitled to sue.

2 Cases that cite this headnote

[7] **Trusts**Persons against whom trust may be enforced

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k348Persons against whom trust may be enforced

When a third party acts to further his or her own economic interests by participating with a trustee in a breach of trust, the liability of the third party is to the beneficiaries, rather than to the trustee, and the right of the beneficiaries against the third party is a direct right and not one that is derivative through the trustee.

4 Cases that cite this headnote

[8] **Trusts**Persons against whom trust may be enforced
TrustsComplainants

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k348Persons against whom trust may be enforced
390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(2)Complainants

When the claim being asserted rests in whole or in part on alleged breaches of trust by the trustee, a beneficiary has standing to pursue such a claim against either (1) the trustee directly, (2) the trustee and third parties participating in or benefiting from his, her, or its breach of trust, or (3) such third parties alone.

5 Cases that cite this headnote

[9] **Trusts**Complainants

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(2)Complainants

Testamentary trust beneficiary had standing to

recover from the deceased former trustee's daughter the value of property that daughter helped trustee to transfer out of the trust without consideration, under the theory that daughter acted as a third-party participant in the breach of trust, even though a new trustee had been appointed and was not a party to the action, and even if there had been no actual conspiracy between the former trustee and her daughter, where daughter exercised undue influence over trustee with respect to the transactions while trustee was in failing physical and mental health.

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 150; Cal. Jur. 3d, Trusts, §§ 368, 370, 371; Cal. Civil Practice (Thomson Reuters 2009) Probate and Trust Proceedings, § 24:151; Ross, Cal. Practice Guide: Probate (The Rutter Group 2009) ¶ 1:15.3 (CAPROBTE Ch. 1-A).

[10] **Trusts**Persons against whom trust may be enforced

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k348Persons against whom trust may be enforced

The naming of a successor trustee does not prevent a beneficiary from proceeding on a claim against a third party who participated in and/or benefited from a predecessor trustee's breach of trust.

2 Cases that cite this headnote

[11] **Trusts**Rights and title of purchasers

390Trusts
390IVManagement and Disposal of Trust Property
390k188Sale and Conveyance
390k203Rights and title of purchasers

When the beneficiaries are successful in a suit against a transferee of trust property, the court ordinarily orders the defendant to pay the trustee.

[12] **Trusts**Persons against whom trust may be enforced

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(A)Rights of Cestui Que Trust as Against Trustee
390k348Persons against whom trust may be enforced

In testamentary trust beneficiary's action against the former trustee's daughter, seeking to recover the value of property that daughter helped trustee to transfer out of the trust without consideration under the theory that daughter acted as a third-party participant in the breach of trust, beneficiary's recovery could be directed to the trustee, and beneficiary could recover the value of lost property required to make the trust whole, even though trustee was not a party to the action.

1 Case that cites this headnote

[13] **Trusts**Intermeddling with trust estate and trustees de son tort

390Trusts
390IIIAppointment, Qualification, and Tenure of Trustee
390k170Intermeddling with trust estate and trustees de son tort

Trustee's daughter acted as a third party participant in trustee's breach of trust, rather than as a trustee de son tort, in helping trustee to transfer property out of the trust without consideration, where daughter did not assume the role of trustee during trustee's lifetime, but daughter unduly influenced trustee and was involved in the transactions that amounted to a breach.

9 Cases that cite this headnote

5 Cases that cite this headnote

[14] **Appeal and Error**Judge as factfinder below in general

30Appeal and Error
30XVIReview
30XVI(F)Presumptions and Burdens on Review
30XVI(F)2Particular Matters and Rulings
30k3935Verdict, Findings, and Sufficiency of Evidence
30k3938Judge as factfinder below in general (Formerly 30k934(2))

The Court of Appeal could not infer from the trial court's failure to address the issue of whether a former trustee's daughter acted as trustee de son tort after trustee's death that the trial court had resolved the issue against trust beneficiary, in entering a judgment in daughter's favor after bench trial on beneficiary's breach of trust action, where beneficiary asked the trial court to address the issue and requested a statement of decision, the trial court did not address the issue, the trial court improperly rejected beneficiary's proposed statement of decision in its entirety on the ground that it included some legal analysis with which the court did not agree, and the trial court did not issue a statement of decision.

4 Cases that cite this headnote

[15] **Trusts**Intermeddling with trust estate and trustees de son tort

390Trusts
390IIIAppointment, Qualification, and Tenure of Trustee
390k170Intermeddling with trust estate and trustees de son tort

Unlike a situation involving an appointed trustee who necessarily has a relationship to all of the trust property, a court imposes trustee de son tort liability with respect to an individual's conduct in relation some particular item or property, which might not be coextensive with the trust property as a whole.

Attorneys and Law Firms

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Law Offices of William F. Roche and William F. Roche, El Centro, for Defendant and Respondent.

AARON, J.

***1491** I.

INTRODUCTION

Plaintiff Tammy King appeals from a judgment entered in favor of defendant Barbara Johnston. Tammy,[1] a beneficiary of the Arthur L. Gilbert Testamentary Trust, sued Barbara in a civil action, alleging that Barbara had unduly influenced the trustee, Lenora Gilbert, to breach the trust.[2] According to Tammy, Barbara induced Lenora to transfer a piece of trust property to herself, without consideration, after which Barbara induced Lenora to mortgage the property for a personal loan. The bank eventually foreclosed on the property, and Lenora lost title. Tammy also alleged that Barbara took money and ****272** rents that belonged to the trust and used them for her own personal benefit.

1 Throughout the record the parties refer to the various family members involved in this case by their first names. We adopt the same practice for clarity.

2 Barbara is Lenora's daughter and the stepdaughter of Arthur Gilbert.

[1] Tammy asserted, in the alternative, that Barbara had essentially taken over the role of trustee while Lenora was

still alive but in failing mental and physical health, and that Barbara's actions during this period of time constituted a breach of trust. Tammy further alleged that after Lenora's death, Barbara acted as trustee and thus became a trustee *de son tort,*[3] and that Barbara breached her duties as trustee during that period of time by failing to properly care for and/or recover trust property.

[3] A trustee *de son tort* is one "who is treated as trustee because of his wrongdoing with respect to property ... over which he exercised authority which he lacked." (Black's Law Dict. (5th Ed.1979) p. 1357, col. 2.)

After a bench trial, the trial court determined that Tammy should recover nothing from Barbara. Specifically, the trial court concluded that Tammy had ***1492** failed to establish the existence of a conspiracy between Lenora and Barbara, that Tammy had not established that Barbara was a de facto trustee before Lenora died, and that Tammy, as a trust beneficiary, did not have standing to sue Barbara without joining the current trustee, Lloyd Gilbert, in the action.

The trial court also concluded that Barbara had unduly influenced Lenora to breach the trust, and that Barbara had "acted as trustee" after Lenora's death, before Lloyd accepted his role as trustee. Despite these findings, the court determined that because Tammy lacked standing to sue Barbara for Barbara's role as a third-party participant in Lenora's breach, Tammy could not recover under that theory. The court also declined to award Tammy any relief as to her claim that Barbara had acted as trustee after Lenora's death, because, the court noted, Lloyd was "actively recouping" the value of the trust rental income that Barbara had wrongfully retained by withholding her share of the trust distributions.[4]

[4] As we explain in part II.A., *post,* Barbara was also a beneficiary of the trust.

On appeal, Tammy contends that the trial court erred in denying her relief in the form of the value of the trust property that Lenora transferred out of the trust and lost after defaulting on her loan. Specifically, Tammy asserts that the court erred in concluding that she did not have standing to sue Barbara for Barbara's role as a third-party participant in Lenora's breach of trust. Tammy also contends that the trial court erred in failing to grant relief to make the trust whole by rejecting Tammy's argument that Barbara acted as a trustee *de son tort* during Lenora's tenure as trustee. Tammy further contends that the trial court erred in failing to make a determination as to whether Barbara became a trustee *de son tort* by acting as trustee after Lenora's death. If Barbara were found to have been a trustee *de son tort,* she may have been obligated to fulfill the same duties a trustee would be required to fulfill, including protecting and restoring trust property.

We conclude that the trial court erred in determining that Tammy did not have standing to sue Barbara for Barbara's role as a third-party participant in a trustee's breach. We also conclude that the court erred in failing to consider and make the necessary findings as to whether Tammy could recover from Barbara under a theory that after Lenora's death, Barbara became a trustee *de son tort,* and thus had duties to the trust beneficiaries, which she breached. We therefore reverse the judgment and remand the case.

****273 *1493** II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

Upon Arthur Gilbert's death in 1991, his widow Lenora became the trustee of the Arthur L. Gilbert Testamentary Trust. Upon Lenora's death, the trust estate was to be distributed as follows: (a) 15 percent to Tammy and 15 percent to Tammy's sister, Brenda Leifheit (representing an even split of the 30 percent that would have gone to their deceased father, one of Arthur's sons); (b) 30 percent to Lloyd, Arthur's other son; (c) 30 percent to Barbara, Arthur's stepdaughter; and (d) 10 percent to the Church of Christ.[5]

[5] Before trial, Tammy acquired the beneficial interests of both Brenda and the Church of Christ. Tammy is thus currently entitled to a 40 percent share of the trust estate.

During the distribution of Arthur's estate, Lenora, as trustee, received title to two parcels of land, "Parcel 21" and "Parcel 17," which are adjacent to each other. Mark Osterkamp rented both parcels for farming.

Lenora personally received title to two other parcels of land, the Gilbert residence, and a property identified as "Parcel 6." Parcel 6 sits directly west of Parcel 21 and

directly north of Parcel 17. Osterkamp also rented Parcel 6 from the Gilbert family.

Arthur's probate closed in 1993.

In December 1995, Lenora suffered a seizure and spent approximately two weeks in the hospital. In January 1996, Lenora told her niece by marriage that she had been sick and that Barbara was taking care of her finances.

In the summer of 1997, Lenora was living at a residence that she owned on Dahlia Lane in Imperial, California. Barbara lived approximately seven and a half or eight miles from Lenora, on James Road. That summer, Lenora transferred Parcel 17 out of the trust without consideration, and used Parcel 17 and the Dahlia Lane property as security for a personal loan from Ford Consumer Finance. The escrow officers who handled the transaction stated that a woman who identified herself as Barbara Johnston had directed that any mail concerning the transaction be sent to Barbara's James Road address.

Lenora's physical and mental health continued to decline. After Lenora was diagnosed with dementia, Barbara opened a joint savings account with Lenora. Osterkamp's rent checks were deposited into this account. Over a ***1494** number of months, thousands of dollars in rental income belonging to the trust was withdrawn from the joint account. During this time, Lenora could not drive and had difficulty walking.

Around March of 2000, Barbara began endorsing Osterkamp's rent checks by signing Lenora's name. That year, Barbara entered into a lease with Osterkamp. The lease included Parcel 17. Barbara signed both Lenora's name and her own name on the lease agreement.

Lenora failed to make payments on the personal loan that was secured by the property that she had transferred out of the trust. The lender eventually foreclosed and took title to Parcel 17 and the Dahlia Lane residence. Lenora then moved in with Barbara and Barbara's husband.

Lenora died on March 26, 2002. After Lenora died, Barbara told Osterkamp to make his rent checks out to her as trustee.[6] Osterkamp's first rent check after ****274** Lenora's death was made payable to "Barbara Johnston—Trustee Arthur L. Gilbert Trust," and was dated March 27—the day after Lenora died. Osterkamp asked Barbara to show him the trust documents, and then asked her about Lloyd. Barbara told Osterkamp that she did not know where Lloyd was, and said she did not know how to get in touch with him.[7] Osterkamp continued to pay his rent to Barbara, as trustee, for a number of months. Barbara endorsed and deposited the checks, despite the fact that she had seen Lloyd at Lenora's funeral in late March 2002, and knew that he was the named successor trustee. Barbara claimed that she believed that Lloyd did not want to have anything to do with the trust because he had said, "[t]ake care of things or something along those lines" to her at the funeral.

[6] Although Parcel 17 was no longer trust property, Parcel 21 remained trust property.

[7] Lloyd resided at the same address from the time of Arthur's probate proceedings to the time of trial.

In December 2002, an attorney for Lloyd wrote to Barbara and inquired about the trust property. Barbara did not respond to the letter. In May or June 2003, another attorney for Lloyd contacted Barbara. Barbara claimed at trial that she "had no information regarding the trust" to give to Lloyd's attorney at that time. On August 7, 2003, Lloyd recorded a document entitled "Affidavit of Succession Trustee." Barbara did not provide either Lloyd or Tammy with financial information about the trust.[8] Barbara testified that she had burned receipts and money orders that could have shown how she spent the rental income from Osterkamp after Lenora's death.

[8] Even after this lawsuit was filed, Barbara produced no records relating to the trust in response to Tammy's discovery requests.

***1495** Tammy presented evidence that Lenora could have used her own personal property, namely Parcel 6, as security for the personal loan.[9] Barbara stood to inherit 100 percent of Lenora's personal property upon Lenora's death, but was to inherit only a 30 percent share of the trust property, which included Parcel 17. An expert appraised Parcel 17 to be worth $429,000 at the time of trial, but adjusted the value of the property to $423,000 to account for the estimated $6,000 that it would cost to address a drainage problem on the property.

[9] Parcel 6 and Parcel 17 are approximately the same size and contain similar soil types. Together the parcels make up a 160 acre farm.

B. *Procedural background*

Tammy filed her original complaint against Barbara on

November 14, 2006. In her complaint, Tammy alleged seven causes of action, which she identified as: (1) "Conspiracy to Breach Trust—Transfer of Lots 1–36 from the Trust Without Consideration"; (2) "Conspiracy to Breach Trust—Use of Trust Property for Personal Advantage"; (3) "Conspiracy to Breach Trust—Receipt of Trust Property in Violation of the Terms of the Trust"; (4) "Conspiracy to Breach Trust—Failure to Recover Trust Property"; (5) "Conspiracy to Breach Trust—Acting in the Place and Stead of Incapacitated Trustee"; (6) "Conspiracy to Breach Trust—Unduly Influencing Incapacitated Trustee"; and (7) "Accounting."[10] Barbara answered the complaint on January 24, 2007.

[10] Although Tammy titled her causes of action using the word "conspiracy," the allegations supporting the causes of action did not set forth the elements of civil conspiracy. However, as we explain further, Tammy was not required to establish the existence of a civil conspiracy in order to prevail against Barbara.
The trial court also recognized that although a number of Tammy's causes of action were labeled as claims of "conspiracy," those "labels are not exactly consonant with the facts pled in some of them."

****275** The court granted Tammy's request to file an amended complaint (FAC), which she filed on November 26, 2007. Tammy retained the same allegations as the original complaint in the FAC, and added two causes of action entitled "Breach of Trust" and "Bad Faith Breach of Trust." Tammy's allegations included the contention that "Barbara Johnston, acting for [her] own personal advantage, induced, aided and abetted the foregoing breach of trust [i.e., Lenora's taking of Parcel 17 and using it as security for a personal loan] all to plaintiff's damage in an amount to be proved at trial." Barbara answered the FAC on February 20, 2008.

Trial in the matter was set to begin on April 23, 2008. In the days just prior to trial, Tammy moved to file a second amended complaint (SAC). In the proposed SAC, Tammy sought to add Lloyd, as trustee, as a plaintiff in the ***1496** action, as well as to clarify certain allegations in the FAC. Tammy submitted a declaration of Lloyd in which he stated, "I was reluctant to act as Trustee in support of Tammy King's allegations in this case until I had determined that her allegations against Barbara Johnston were substantial. I am now convinced that the allegations are substantial, and I have agreed to become a Plaintiff in this case with her."

After discussing the matter of adding Lloyd as a plaintiff in the case, and in response to Barbara's attorney's objection that discovery would have to be reopened if Lloyd were added as a plaintiff, the trial court gave Tammy the option of proceeding to trial without amending the complaint or postponing trial. Tammy's attorney indicated that Tammy wanted to go forward with trial, and the trial court denied the motion to file the SAC.

The court held a bench trial between April 25 and May 8, 2008. At the conclusion of trial, the court requested that the parties brief the issue of Tammy's standing to bring the action. The parties filed their briefs on this issue on May 16.

The trial court issued its tentative decision on August 14, 2008. The court organized its tentative decision around a number of questions that also served as topic headings. Specifically, the court asked, and then provided answers to, the following questions: (1) "Did defendant JOHNSTON conspire with Lenora Gilbert?"; (2) "Were the alleged breaches of trust of Lenora Gilbert the result of undue influence by defendant?"; (3) "Did defendant become the de-facto trustee?"; (4) "Does plaintiff, as a trust beneficiary, have standing to bring the instant suit?" The court's final heading was not presented in the form of a question, but rather, as a statement: "Defendant's acts as trustee subsequent to the death of Lenora."

Among the trial court's conclusions was its determination that the evidence created "a strong inference that Lenora's actions were due to the undue influence of [Barbara]." The court found that the evidence demonstrated that (1) Lenora "was in failing physical and mental health at the [relevant] times;" (2) Lenora was "dependent on [Barbara] for assistance regarding financial matters and medical issues;" (3) Barbara "communicated with the title company and a lender regarding a loan transaction secured by trust property;" (4) Barbara "provided significant assistance to Lenora regarding personal banking;" (5) "[d]ocuments regarding transactions involving trust property were sent to [Barbara's] address;" and (6) Barbara "signed ****276** Lenora's name to transactional documents and checks." The trial court rejected Barbara's claims that she had not signed Lenora's name on documents and checks, and inferred from the lack of credibility of Barbara's testimony that Barbara had, in fact, been involved in Lenora's actions concerning trust property. The court ***1497** stated, "The fact that [Barbara] executed Lenora's signature was abundantly clear to the court sitting as trier of fact; [Barbara's] falsehoods in this regard were further confirmed by uncontradicted expert testimony."

The court ultimately concluded that Barbara had exercised undue influence over Lenora with regard to Lenora's breach of her duties as trustee, explaining:

"Here, the evidence showed that Lenora took actions

> inconsistent with her duties as trustee (transferring property out of the trust without consideration) at a time when she was in failing physical and mental health; the evidence further shows that [Barbara] was involved in the transactions. Lenora was, to a great extent, dependent on [Barbara] to assist her with financial and other matters. This, coupled with [Barbara's] false and patently unreasonable denial of *any* involvement with Lenora's financial affairs compels the conclusion that [Barbara] did, in fact, exercise undue influence over Lenora."

However, the trial court rejected Tammy's theory that Barbara had acted in the capacity of trustee prior to Lenora's death. Although the trial court referred to the theory under which Tammy sought to hold Barbara liable as a trustee for her conduct prior to Lenora's death as one involving a "de facto trustee," and not, as Tammy had argued, a trustee *de son tort,* the court did refer in its discussion to the primary case on which Tammy had relied, and appeared to address Tammy's contention regarding the trustee *de son tort* theory. The court also concluded that Barbara had not conspired with Lenora because there was no evidence that the two had agreed to do anything.

The trial court concluded that Tammy did not have standing to bring the lawsuit without naming Lloyd as a defendant for his having failed to bring the lawsuit in the first place.

Finally, the court made the following determination:

> "The court finds that defendant acted as trustee subsequent to the death of Lenora and prior to the succession of Lloyd. During this time, defendant took possession of funds belonging to the trust (rental income); defendant has failed to account for these funds or their disposition. [¶] The evidence shows that the current trustee is actively recouping the funds from defendant by means of withholding distribution of trust income. This appears to be an eminently practical method for the recovery of trust property. The court declines to interfere with the non-party trustee's discretion in recovery of the funds."

The court indicated that its tentative decision was to grant judgment in favor of Barbara, and indicated that Barbara was to prepare a proposed statement of decision if one was requested.

On August 28, 2008, Tammy filed a request for a statement of decision. In her request, Tammy asked the court to clarify a number of matters related to ***1498** the issues that she has raised in this appeal, and specifically urged the court to consider case law that she had presented to the court, but to which the court had not referred in its tentative decision.

On September 23, 2008, Tammy filed a proposed statement of decision. In that document, Tammy specifically raised the ****277** issue of Barbara's participation in Lenora's breach of trust. In support of her proposed statement of decision, Tammy also filed three memoranda of points and authorities, each of which argued an independent theory as to why the court should hold Barbara liable—including the theories that Barbara was a trustee *de son tort,* and that Tammy has standing to bring a claim that Barbara was a third-party participant in Lenora's breach. Tammy also filed a proposed judgment.

It appears that at some point Tammy moved to amend the operative complaint, after trial, to conform to proof. Although the motion is not in the record, the record contains Barbara's opposition to amending the complaint a third time, which was filed on September 30, 2008. That same day, the trial court filed an order adopting its tentative decision as its final statement of decision. The court rejected Tammy's request for a statement of decision, stating that Tammy's proposed statement of decision was "replete with argument and citations to case law, and appears to be merely a posttrial brief." The court also noted that Barbara's method for responding to Tammy's proposed statement of decision—which was to do nothing more than file a notice of lodgment of the court's tentative decision—was wholly inadequate. The trial court stated, "The parties have utterly failed to comply with the statutes and rules of court relating to the preparation of a statement of decision. This failure is so complete that the court cannot discern what controverted issues it is required to address. Therefore, the [c]ourt finds that the parties have waived any further statement of decision herein; the tentative ruling shall become the statement of decision of the court forthwith."

The court filed a judgment on November 3, 2008. Tammy filed a timely notice of appeal on November 21, 2008.

III.

DISCUSSION

Tammy contends on appeal that the trial court should have found Barbara liable for—at a minimum—the value of Tammy's portion of the value of Parcel 17, which was lost during Lenora's tenure as trustee. Tammy offers multiple theories as to how she, as a beneficiary, should have been permitted to recover from Barbara the value of Parcel 17. Tammy's first theory is that she has standing to sue and may recover from Barbara the value of Parcel 17, ***1499** which Lenora transferred to herself without consideration, because Barbara was a third-party participant in Lenora's breach of trust. A second theory Tammy proposes is that the trial court should have determined that Barbara was a trustee *de son tort* of the trust, before and/or after Lenora's death. With respect to the time period during which Lenora was ostensibly the trustee, Tammy contends that Barbara "fully assumed the character and duties of the Trustee and managed the Trust estate as Trustee long before her mother died." According to Tammy, Barbara may be held liable as a trustee *de son tort* for allowing Parcel 17 to be removed from the trust without consideration and eventually foreclosed on. Further, according to Tammy, she, as a beneficiary, can maintain this action against Barbara and recover for the trust the value of Parcel 17 because a beneficiary may always sue a trustee—which Tammy asserts includes a trustee *de son tort*—for his or her breach of trust.

With respect to the time period after Lenora died and before Lloyd accepted his position as successor trustee, Tammy contends that even if Barbara did not become a trustee *de son tort* before Lenora's death, she clearly became one when, after Lenora's death, she held herself out as ****278** trustee and took control of trust property. Tammy asserts that Barbara is therefore liable for any breach of her trustee duties during this time, and that a trust beneficiary may sue her for any such breach.

We conclude that the trial court erred in determining that Tammy offered no theory pursuant to which she may recover from Barbara. Based on the trial court's findings of fact, Tammy could recover from Barbara under either a third-party participant theory, or, possibly, under a theory that Barbara was a trustee *de son tort* after Lenora's death. The trial court clearly found that Barbara was significantly involved in (if not wholly responsible for) Lenora's breach of trust—i.e., the breach that resulted in the trust losing Parcel 17. Based on this finding, the trial court should have permitted Tammy to recover damages that the trust suffered under the third-party participant theory. Further, the court should have determined whether, and if so, to what extent, Tammy may recover from Barbara under the theory that Barbara was a trustee *de son tort* for the trust property after Lenora's death.

A. *Tammy may recover from Barbara the value of property that Barbara helped Lenora to transfer out of the trust, under the theory that Barbara acted as a third-party participant in the breach*

In the trial court's statement of decision, the court posed the question, "Does Plaintiff, as a Trust Beneficiary, Have Standing to Bring the Instant Suit?" The court's answer to this question was no. Citing *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 8 Cal.Rptr.2d 869, the trial court noted that "[n]ormally, the trustee is the real party in interest regarding claims ***1500** of the trust against third parties, and [the trustee] has the exclusive right to bring an action." The trial court did acknowledge the existence of an exception to that general rule, stating that a beneficiary may "bring an equitable action against the third party *and the trustee,*" in situations "where the trustee *should* bring the action against a third party but refuses to do so." However, because Tammy had not named Lloyd as a defendant in the action, the court concluded that Tammy's action failed to meet the requirements of the exception that permits a beneficiary to sue a third party.[11] However, the trial court failed to recognize another exception to the general rule—one that applies here. Specifically, a beneficiary may pursue claims against a third party on his or her own, without participation by the trustee, when that third party actively participated in, or knowingly benefited from, a trustee's breach of trust.

[11] The question of who is the proper plaintiff should, in most circumstances, be addressed much earlier in the proceedings, not after a full trial on the merits of an action. Barbara's only mention of the issue of standing during any of the pretrial proceedings came in the form of the following unexplained general assertion in her answer to the FAC: "PLAINTIFF LACK OF STANDING" [*sic*]. Barbara simply never challenged Tammy's standing in any substantive way. As a result, the parties and the court invested significant time, energy and resources in a trial, when, if the trial court were correct in its ruling, all of this would have been wasted.

[2] [3] [4] [5] "As a general rule, the trustee is the real party in interest with standing to sue and defend on the trust's behalf. [Citations.] Conversely, a trust beneficiary cannot sue in the name of the trust. [Citations.]" (*Estate of Bowles* (2008) 169 Cal.App.4th 684, 691, 87 Cal.Rptr.3d 122 (*Bowles*).) "But a trust beneficiary can bring a proceeding against a trustee for breach of trust. [Citations.]" (*Id.* at pp. 691–692, 87 Cal.Rptr.3d 122.)

"Moreover, ****279** it is well established, and this court has held, that a trust beneficiary can pursue a cause of action against a third party who actively participates in or knowingly benefits from a trustee's breach of trust. [Citations.]" (*Id.* at p. 692, 87 Cal.Rptr.3d 122.)

[6] [7] [8] "Ordinarily, when a third party acts to further his or her own economic interests by participating with a trustee in such a breach of trust, the beneficiary will bring suit against *both* the trustee and the third party. However, it is not necessary to join the trustee in the suit, because 'primarily it is the beneficiaries who are wronged and who are entitled to sue....' [Citation.] The liability of the third party is to the beneficiaries, rather than to the trustee, 'and the right of the beneficiaries against the [third party] is a *direct right* and not one that is derivative through the trustee.' [Citation.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 467, 80 Cal.Rptr.2d 329; see also *Bowles, supra,* 169 Cal.App.4th at p. 694, 87 Cal.Rptr.3d 122 ["[T]he beneficiary's cause of action is independent and not derivative through the trustee; therefore, the trustee is not a necessary party to the action. [Citations.]"].) Thus, " 'when the claim being asserted rests in whole or in part on alleged breaches of trust by the ***1501** trustee, a beneficiary has standing to pursue such a claim against either (1) the trustee directly, (2) the trustee and third parties participating in or benefiting from his, her, or its breach of trust, or (3) such third parties alone.' " (*Bowles, supra,* 169 Cal.App.4th at p. 694, 87 Cal.Rptr.3d 122, citing *Harnedy v. Whitty* [(2003)] 110 Cal.App.4th [1333,] 1341–1342[, 2 Cal.Rptr.3d 798]; 60 Cal.Jur.3d [2005] Trusts, § 382, p. 527.)

[9] Tammy alleged—and, according to the trial court's findings, established—that Barbara actively participated in Lenora's breaches of fiduciary duty, including the transfer of Parcel 17 to Lenora as an individual without consideration. Specifically, the court found that Barbara "was involved" in the transactions that resulted in Lenora "transferring property out of the trust without consideration[ ] at a time when [Lenora] was in failing physical and mental health," and that Barbara "exercise[d] undue influence over Lenora" with regard to these transactions. In a typical case, these facts would bring Tammy's claim against Barbara within the exception that a trust beneficiary may pursue a cause of action against a third party who actively participates in or knowingly benefits from a trustee's breach of trust.

However, we have not found any California authority that directly addresses the unique situation presented here—i.e., one in which a beneficiary brings a claim against a third party for her participation in a trustee's breach, despite the fact that a successor trustee has taken over the duties of the breaching trustee. Thus, it is an open question whether the appointment of a successor trustee extinguishes a beneficiary's ability to sue that third party for involvement in a prior trustee's breach of trust.

The authors of a well known treatise on trusts appear to be of the view that a successor trustee's appointment might extinguish a beneficiary's right to sue a third party: "In such a case [where a trustee in breach of trust transfers trust property to someone who is not a bona fide purchaser and thereafter ceases to be trustee], *it would seem* that the beneficiaries cannot maintain a suit against the transferee unless the successor trustee refuses to sue or is unavailable." (5 Scott & Ascher on Trusts (5th Ed.2008) § 29.1.11.4, p. 1999, italics added.) However, Scott and Ascher cite no authority to support their conclusion that a beneficiary may not maintain ****280** an action in a situation in which a successor trustee has been appointed.[12] Nor do they offer any reason why "it would seem" that such a rule is appropriate.

12 In relation to this principle, the authors do offer citations to two California cases, *Atascadero, supra,* 68 Cal.App.4th at page 467, 80 Cal.Rptr.2d 329, and *Wolf v. Mitchell* (1999) 76 Cal.App.4th 1030, 1041, 90 Cal.Rptr.2d 792 (*Wolf*). However, Scott and Ascher do not cite these cases as authority for the proposition in question; rather, they simply note that these cases "cit[e] the text" of their work with regard to this principle. (5 Scott & Ascher on Trusts, *supra,* § 29.1.11.4, fn. 2, p. 1999.). Although both the *Atascadero* and *Wolf* courts referred to a prior edition of the text (i.e., 5 Scott on Trusts (4th Ed.1989) § 294.4, pp. 104–105) and cited the text with regard to this rule, in neither of these cases was the court required to adopt or reject the rule. As the *Wolf* court explained: "In *Atascadero* the Court of Appeal considered a passage of Scott on Trusts which notes that a beneficiary should not be allowed to maintain an action against a third party that actively participates in a breach of trust if the offending trustee has been removed and a successor appointed. (*Atascadero, supra,* 68 Cal.App.4th at p. 467, 80 Cal.Rptr.2d 329, citing 4 Scott on Trusts, *supra,* § 294.4, pp. 104–105.) The court had no occasion to apply this rule in *Atascadero* because the county remained the trustee of the [statutory investment trust] both during and after the breaches of fiduciary duty, even though the occupant of the county treasurer position had changed. (68 Cal.App.4th at pp. 468–470, 80 Cal.Rptr.2d 329.) We also have no occasion to consider whether the rule suggested by this passage of Scott on Trusts should be applied in an appropriate case. Here a current cotrustee (Fred) is alleged to have actively participated with the prior trustee (David) in the breaches of trust alleged in the complaint. Indeed, he is alleged to have been the primary recipient of the funds dissipated from the trust.

> Under these circumstances, '... it is unnecessary for the beneficiar[y] to call on [the current trustee] to undo what he has done.' (4 Scott on Trusts, *supra,* § 294.1 at p. 100.)" (*Wolf, supra,* 76 Cal.App.4th at p. 1041, 90 Cal.Rptr.2d 792.)

***1502** In contrast to Scott and Ascher's position on this issue, the court in *Bowles* implicitly determined that a beneficiary may bring a claim against a third party who participated in a trustee's breach of trust, despite the appointment of a successor trustee. In *Bowles,* the plaintiff beneficiary sued two defendants, alleging that Ms. Bowles, the trustee, had breached her fiduciary duties as trustee, and that the two defendants had induced, aided and abetted Ms. Bowles's breaches with the knowledge that the transactions breached Ms. Bowles's duties as trustee. (*Bowles, supra,* 169 Cal.App.4th at p. 691, 87 Cal.Rptr.3d 122.) By the time the plaintiff filed the action, Ms. Bowles had died and a bank had been appointed successor trustee. (*Id.* at p. 689, 87 Cal.Rptr.3d 122.) Although the *Bowles* court did not specifically address the issue of the existence of a successor trustee and/or the effect of the appointment of a successor trustee on the beneficiary's claims, the court concluded that the plaintiff had standing to bring the action against the third parties in that situation.

[10] We affirmatively state here what the *Bowles* court implicitly concluded—i.e., that the naming of a successor trustee does not prevent a beneficiary from proceeding on a claim against a third party who participated in and/or benefitted from a predecessor trustee's breach of trust. If it is true that " 'the right of the beneficiaries against the [third party] is a *direct right* and not one that is derivative through the trustee [,]' " (*Atascadero, supra,* 68 Cal.App.4th at p. 467, 80 Cal.Rptr.2d 329), we see no reason why an independent claim that exists prior to the appointment of a successor trustee should be extinguished upon that appointment, and Barbara has offered no reason why the appointment of a successor trustee should serve to wipe out a beneficiary's "direct right" against a third party. We ****281** therefore conclude that a beneficiary, like Tammy, may maintain an action against and recover from a third party who has assisted a former trustee in committing a breach of trust, even where a successor trustee has been appointed.

***1503** Barbara contends on appeal that "[w]ithout a conspiracy[,] Tammy King [cannot] jump over the Trustee and sue Barbara Johnston." She asserts that in *Bowles* and in *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 3 Cal.Rptr.2d 236, "there was sufficient evidence produced at trial that the third party actively participated in a conspiracy to breach the trust." Barbara further contends that in these cases, "[t]here were conspiracies," but that in the present case, the trial court ruled that "there was no conspiracy between Barbara Johnston and Lenora." Barbara misconstrues the scope of *Bowles* and *Pierce.* Neither case involved a conspiracy, and neither case suggests that evidence of a conspiracy is required in order to hold a third party liable for participating in or benefiting from a trustee's breach of trust. Rather, *Bowles* and *Pierce* involved situations strikingly similar to the one here. Thus, although the trial court in this case determined that Tammy had not proved the existence of an actual conspiracy between Lenora and Barbara, this is of no consequence to Tammy's standing to bring a claim against Barbara for Barbara's role as a third-party participant in Lenora's breach of trust.

[11] [12] Because the trial court concluded that Tammy did not have standing to bring claims against Barbara, the court did not make the necessary determinations with respect to Barbara's liability for her role as a third-party participant in Lenora's breach of trust. For example, the court did not make a finding as to the amount of the loss that the trust suffered as a result of Lenora's breach of trust. We must therefore remand the case to the trial court for it to determine the relief available to Tammy.[13]

> [13] Although Tammy is suing as a beneficiary of the trust, her recovery may be directed to the trustee: "When the beneficiaries are successful in a suit against a transferee of trust property, the court ordinarily orders the defendant to pay the trustee." (5 Scott & Ascher on Trusts (5th Ed.2008) § 29.1.11.2, p. 1996.) Although Barbara may not have been the "transferee of trust property," the same concepts apply to her as a third-party participant. (See *Wolf, supra,* 76 Cal.App.4th at pp. 1039–1041, 90 Cal.Rptr.2d 792 [referring to and relying on similar authority regarding "transferees of trust property" in suit against a third party who participated in breaches other than the transfer of property to the third party].) Tammy thus may recover from Barbara the value of the lost property that is required to make the trust—and not only Tammy—whole.

[13] As a final note, in determining that Tammy has standing to recover from Barbara under a theory that Barbara was an active third-party participant in Lenora's breach, we must necessarily uphold the trial court's conclusion that Tammy may not at the same time prevail on her theory that Barbara should be liable as a trustee *de son tort* for that same conduct, i.e., her conduct before Lenora's death. Barbara was either a third-party participant in a trustee's breach of trust, or she was a trustee *de son tort;* she cannot have been both a third

party and a trustee at the same time. Since there is substantial evidence to support the trial court's findings that Barbara did not " 'assume [ ] the role of trustee' " during Lenora's lifetime, and that Barbara unduly influenced Lenora and was involved in the transactions that amounted ***1504** to a breach, we reject Tammy's trustee *de son tort* theory of liability for Barbara's conduct prior to Lenora's death.

****282** B. *Tammy may recover from Barbara for Barbara's breach of trust after Lenora's death*

[14] In the alternative, Tammy could possibly recover the value of Parcel 17 for the trust under the theory that Barbara failed to meet her duties as a trustee (a trustee *de son tort*) after Lenora died. Although Tammy requested in her proposed statement of decision that the trial court address this issue, the trial court limited its consideration of Barbara's liability for her conduct after Lenora's death to Barbara's failure to account for rental income that belonged to the trust. The trial court failed to address Tammy's contention that Barbara should be held responsible for not seeking to redress the loss of trust property once Barbara held herself out as trustee after Lenora's death. Because Tammy brought to the trial court's attention the court's failure to consider Barbara's liability as a trustee *de son tort* after Lenora's death, we cannot infer from the court's failure to address these issues that the court resolved these issues against Tammy.[14] (See, e.g., *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 964, fn. 11, 72 Cal.Rptr.3d 1 ["The trial court is required upon appropriate request to issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues. [Citation.] If the trial court fails to resolve a controverted issue and the record shows that the omission or ambiguity was properly brought to the attention of the trial court, the appellate court may not draw factual inferences in support of the judgment. [Citation.]"].)

14 Tammy clearly brought these undetermined issues to the trial court's attention. She asked the court to clarify its finding that Barbara " 'acted as trustee subsequent to the death of Lenora and the prior to the succession of Lloyd,' " and specifically asked the court whether Barbara had become a trustee *de son tort* and whether Barbara had, in this capacity, breached her duties to the beneficiaries. However, the trial court did not address Tammy's concerns, instead concluding that both parties "failed to comply with the statutes and rules of court relating to the preparation of a statement of decision," and declaring that the "failure [wa]s so complete that the court cannot discern what controverted issues it is required to address." The trial court improperly rejected Tammy's proposed statement of decision in its entirety on the ground that it included some legal analysis with which the court did not agree. Tammy presented a host of issues that remained unresolved. The trial court's ruling could have benefited from consideration of these matters.

The trial court should have addressed whether Barbara could be held liable as a trustee *de son tort* for her failure to protect and/or recover Parcel 17 or its value after Lenora's death.[15] The fifth edition of Black's Law ***1505** Dictionary defined a trustee *de son tort* as a "[p]erson who is treated as a trustee because of his wrongdoing with respect to property entrusted to him or over which he exercised authority which he lacked." (Black's Law Dict. (5th Ed.1979) p. 1357, col. 2.)[16] In *England* ****283** *v. Winslow* (1925) 196 Cal. 260, 237 P. 542 (*England*), the Supreme Court explained the common law theory of imposing fiduciary duties on a person who acts as if he or she is a trustee by taking control of trust property, despite lacking the authority to do so. In *England,* the plaintiff was executrix of Sophia Winslow's estate, and the defendant was Sophia Winslow's husband at the time of her death. (*Id.* at p. 263, 237 P. 542.) After Winslow's death, the defendant collected the rents from occupants of a building that had been Winslow's separate property. (*Ibid.*) The plaintiff sought an accounting and the payment of all of the money that the defendant had collected from those tenants. (*Id.* at p. 264, 237 P. 542.) The court determined that the defendant had essentially become the trustee of those funds by virtue of acting as trustee, by taking control of and managing estate assets. (*Id.* at p. 267, 237 P. 542.)[17]

15 Tammy contends that the trial court did not properly consider whether Barbara was a trustee *de son tort* because the court instead addressed whether Barbara was a de facto trustee. Although the trial court may have used the term "de facto trustee" rather than "trustee *de son tort* " to describe Tammy's theory of Barbara's liability, the court nevertheless determined that, *at least during the time that Lenora was alive,* Barbara did not assume the role of de facto trustee *or* trustee *de son tort.* However, the trial court made no findings with regard to whether Barbara could be liable as a trustee *de son tort* for her actions *after* Lenora's death, despite the fact that the trial court determined that Barbara "acted as trustee" at that point in time.

16 Black's Law Dictionary has more recently altered its definition of trustee *de son tort* to the following: "A person who, without legal authority, administers a

living person's property to the detriment of the property owner." (Black's Law Dict. (8th Ed.2004) p. 1554, col. 1.)

17 The *England* court also found that the defendant had an agreement with the plaintiff in which he agreed to act in the capacity of trustee for the benefit of the estate, and that under this agreement, he was holding in trust for the estate all of the money he collected. (*England, supra,* 196 Cal. at pp. 265–267, 237 P. 542.) However, the court concluded that an alternative ground for imposing liability on the defendant with respect to the property belonging to the estate was that he was a trustee *de son tort* of the property. (*Id.* at pp. 267–268, 237 P. 542.)

The *England* court explained, "One who has assumed the relation and undertaken to act in the capacity of a trustee and who has thereby come into the possession and control of the money or property of another cannot be heard to deny the validity of the trust under which he has admittedly acted and the benefits of which he has received and holds. [Citation.] ... [A] person may become a trustee by construction by intermeddling with and assuming the management ***1506** of property without authority, and ... during the possession and management thereof by such constructive trustees they are subject to the same rules and remedies as other trustees, and cannot avoid their liability as such by showing that they were not in fact trustees, nor can they set up the statute of limitations." (*England, supra,* 196 Cal. at p. 267, 237 P. 542.) The court further described the basis for the doctrine, as follows:

" 'It is a well settled rule in the law of trusts that if a person not being in fact a trustee acts as such by mistake or intentionally, he thereby becomes a trustee *de son tort.* The rule is thus laid down by a recent writer: "A person may become a trustee by construction, by intermeddling with and assuming the management of property without authority. Such persons are trustees *de son tort* [just] as persons who assume to deal with a deceased person's estate without authority are administrators *de son tort,*.... During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees." [Citations.] ... It is plain that this branch of the law does not rest on the strict ground of estoppel as usually expounded in the law books. It rather depends upon a principle of public policy connected with the right administration of justice. [Citation.] The principle to be extracted from the cases is that the party acting as trustee shall not be allowed, in a court of justice, to set up, as against parties interested in the administration of the trust, a state of things inconsistent with his assumed character.' " (*England, supra,* 196 Cal. at pp. 267–268, 237 P. 542.)

[15] Although *England* is not recent authority, it appears to still be valid, and the equitable principles on which the notion ****284** of a trustee *de son tort* is based remain relevant today. The facts in this case seem to fit precisely with the notion espoused in *England* that one should not be permitted to assume the character of a trustee and wrongfully benefit from doing so without also having to assume the responsibilities of a trustee. There is evidence that Barbara held herself out as the trustee to Osterkamp, and that she went so far as to tell Osterkamp that she did not know where Lloyd was and that she could not get in touch with him. As the trial court apparently found, Barbara assumed management of the trust rental income by accepting the rental income in her name, as trustee. Barbara was seemingly the only person who took control of the trust assets after her mother died. The trial court specifically concluded that Barbara "acted as trustee" and that she "took possession of funds belonging to the trust" during the period of time after Lenora's death and before Lloyd accepted his position as trustee. However, the trial court did not address whether Barbara's conduct was such that she should be held to the same standards as a named trustee would be held. There were clearly sufficient facts to support a finding that Barbara wrongfully took over some or all of the trust property after her mother died. The trial court will have to determine on remand whether Barbara's conduct was sufficient to hold her liable as a trustee *de son tort* of some or all of the trust property and, if so, whether she breached her duties in that role, and what relief would be appropriate if the court finds that such a breach occurred.[18]

18 It is possible that the trial court will conclude that Barbara should not be held liable as a trustee *de son tort* for certain breaches for which an express trustee might be liable, since, unlike a situation involving an appointed trustee who necessarily has a relationship to all of the trust property, a court imposes trustee *de son tort* liability with respect to an individual's conduct in relation some particular item or property. This particular item or property might not be coextensive with the trust property as a whole.

Barbara does not offer any reason why she may not be held liable for her conduct after Lenora's death. She simply ignores the contention that she ***1507** assumed the role of trustee after Lenora's death, instead focusing all of her attention on, and citing the trial court's findings only with regard to, the time period *before* Lenora died. Barbara also incorrectly asserts that Tammy did not raise the trustee *de son tort* theory in the trial court. However, it

is clear that Tammy did, in fact, raise this issue in the trial court.

Thus, the trial court should have addressed whether Barbara breached her duties as a trustee *de son tort* in the manner in which she managed the trust assets and/or in failing to provide an accounting of the trust assets and/or in failing to seek to recover property that the trust had lost as a result of Lenora's breach of trust. On remand, the trial court should consider the extent to which Barbara may have owed fiduciary duties to the beneficiaries, and whether Barbara fulfilled, or instead, breached, any such fiduciary duties when she "acted as trustee" after Lenora's death and prior to Lloyd's succession as trustee.

C. *The trial court should determine the relief to be awarded*

Tammy asserts that she may recover various forms of relief, depending on the theory of liability under which she prevails. For example, Tammy contends that Barbara should be held liable for Tammy's portion of the value of Parcel 17 for Barbara's role as a third party who actively participated in Lenora's breach. Tammy contends that if Barbara is liable as a trustee *de son tort* for her actions while ****285** Lenora was still alive, then Barbara "is responsible to make the Trust whole for the damages she caused to it," which, Tammy contends, would "include the value of Parcel 17 at the date of trial." Tammy then suggests that if Barbara is held liable as a trustee *de son tort* for her actions after Lenora's death, Barbara should be "responsible for damages in the amount of the current value of Parcel 17, in order to make the trust whole, because she deprived the Trustee and Tammy of the opportunity to sue Lenora's estate for the value of Parcel 17." Alternatively, Tammy argues that, "the court may declare Barbara's beneficial interest in Parcel 6 to be held by Barbara as constructive trustee for the benefit of the Trust."

Tammy also asserts that under any theory, Barbara should be responsible "for the amount that the attorney's fees and costs of this litigation exceeded Tammy's share of the attorney's fees and costs that Lloyd, as successor Trustee, would have incurred by a timely action against Lenora's estate." Tammy also claims that Barbara should be liable for "double damages under Probate Code § 859," and asks this court to impose such damages, or to direct the trial court to do so.

We decline to address any of Tammy's arguments concerning her requests for particular relief, for a number of reasons. First, the trial court made no ***1508** findings with regard to damages because the court determined that Tammy did not have standing to sue Barbara, and because the court made no determination as to whether Barbara might be liable as a trustee *de son tort* for her conduct after Lenora's death. In the absence of any findings by the trial court with regard to damages and/or equitable relief, we decline to comment on what relief may or may not be appropriate and/or available to Tammy.

Second, other than with respect to Tammy's argument asserting that she should be awarded excess attorney fees as damages, Tammy provides no reasoned argument or authority on appeal to support her assertions with regard to any of the relief to which she claims she is entitled.[19] Third (and perhaps as a consequence of our second reason for declining to address possible relief), we are not convinced that Tammy would necessarily be entitled to recover different amounts under the various alternative theories that she presents. Rather, it appears that the essence of Tammy's complaints against Barbara revolve around the loss of Parcel 17. Regardless of how that loss may be remedied, and whether it be under a theory of third-party participant liability, or liability as a trustee *de son tort,* it would appear that the available relief would be similar, if not the same.[20] For example, Tammy proposes that she may recover double damages under Probate Code section 859 under any theory of liability. We leave to the trial court the determination as to the appropriate relief in these circumstances.

[19] Although Tammy does present a reasoned argument in support of her contention that she is entitled to an award of excess attorney fees that she would not have incurred if a proceeding to recover Parcel 17 or its value had been timely filed against Lenora's estate, it does not appear that Tammy made this argument in the trial court or that she presented any evidence as to how the court could determine such damages.

[20] Again, the court may direct that damages sought by a beneficiary be paid to the trustee. Thus, there is no reason to limit a beneficiary's recovery on behalf of the trust to only that amount to which that beneficiary is independently entitled.

IV.

DISPOSITION

The judgment of the trial court is reversed. The case is remanded to the trial court with the following directions:

****286** (1) the trial court shall consider the evidence presented at trial and determine whether Tammy has prevailed on her claim that Barbara is liable as a trustee for breaches of trust owed to the beneficiaries after Lenora's death under a trustee *de son tort* theory;

***1509** (2) the trial court shall find in favor of Tammy on her claim against Barbara for Barbara's actions as a third party who actively participated in Lenora's breach of trust; and

(3) after resolving the remaining issues of liability, the trial court shall determine the amount of non-duplicative damages Barbara is to pay to reimburse the trust, under either or both theories of liability (depending on the court's determination of liability under the trustee *de son tort* theory), and/or whether relief apart from money damages would be appropriate under the circumstances.

The trial court may conduct any further proceedings that may be necessary in light of the trial court's judgment.

Tammy is awarded costs on appeal.

WE CONCUR: McCONNELL, P.J., and O'ROURKE, J.

All Citations

178 Cal.App.4th 1488, 101 Cal.Rptr.3d 269, 09 Cal. Daily Op. Serv. 13,591, 2009 Daily Journal D.A.R. 15,871

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Declined to Extend by Tepper v. Wilkins, Cal.App. 2 Dist., April 19, 2017

55 Cal.4th 1058
Supreme Court of California

ESTATE OF William A. GIRALDIN, Deceased.
Christine Giraldin et al., Plaintiffs and Respondents,
v.
Timothy Giraldin et al., Defendants and Appellants.

No. S197694.
|
Dec. 20, 2012.

Synopsis
Background: Beneficiaries of family trust petitioned to remove trustee, to compel him to account for his actions during the period of his trusteeship, and to surcharge him for violations of fiduciary duty. Settlor's widow petitioned to confirm her community interest in real property partially held by the trust. The Superior Court, Orange County, No. A240697, David R. Chaffee, J., found that trustee breached fiduciary duty, imposed a surcharge against trustee, and found that widow's community interest in the properties had been transferred to the trust. Trustee and widow appealed. The Court of Appeal reversed and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:

[1] trustee of revocable inter vivos trust owes no duty to the beneficiaries during settlor's lifetime;

[2] trustee's lack of duty to beneficiaries during settlor's lifetime did not retroactively change after the settlor dies;

[3] beneficiaries have standing, after the settlor has died, to claim a violation of trustee's fiduciary duty to the settlor to the extent that violation harmed beneficiaries' interests;

[4] statutory grant of standing to decedent's personal representative of a cause of action that survives decedent's death is not exclusive; and

[5] following settlor's death, beneficiaries having standing to claim a violation of the trustee's fiduciary duty to the settlor include contingent beneficiaries.

Reversed and remanded.

Opinion, 131 Cal.Rptr.3d 799, superseded.

Kennard, J., dissented and filed opinion, in which Werdegar, J., concurred.

West Headnotes (12)

[1] **Trusts** Express Trusts in General
Trusts Interest remaining in settlor or creator of trust

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(1)In general
390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k153Interest remaining in settlor or creator of trust

Property transferred into a revocable inter vivos trust is considered the property of the settlor for the settlor's lifetime; accordingly, the beneficiaries' interest in that property is merely potential and can evaporate in a moment at the whim of the settlor.

20 Cases that cite this headnote

[2] **Trusts** Conditions and limitations in general

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(2)Conditions and limitations in general

So long as the settlor of revocable inter vivos trust was alive, he had the power to divest the beneficiaries of any interest in the trust. West's Ann.Cal.Prob.Code § 15800.

12 Cases that cite this headnote

[3] **Trusts**Representation of cestui que trust by trustee

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee

So long as the settlor of revocable inter vivos trust is alive, the trustee owes a duty solely to the settlor and not to the beneficiaries. West's Ann.Cal.Prob.Code § 15800(b).

27 Cases that cite this headnote

[4] **Trusts**Representation of cestui que trust by trustee

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee

Trustee of revocable inter vivos trust owed no duty to the beneficiaries during settlor's lifetime. West's Ann.Cal.Prob.Code § 15800(b).

20 Cases that cite this headnote

[5] **Trusts**Express Trusts in General

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(1)In general

During settlor's lifetime, and as long as he was competent, beneficiaries of revocable inter vivos trust were powerless to act regarding the trust. West's Ann.Cal.Prob.Code §§ 15800, 15801, 15802.

7 Cases that cite this headnote

[6] **Trusts**Representation of cestui que trust by trustee

390Trusts
390IVManagement and Disposal of Trust Property
390k173Representation of cestui que trust by trustee

Trustee owes no duty to the beneficiaries of a revocable inter vivos trust while the settlor is alive and competent, and this lack of a duty does not retroactively change after the settlor dies.

11 Cases that cite this headnote

[7] **Trusts**Right of action by beneficiary

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k247Right of action by beneficiary

Beneficiaries of revocable inter vivos trust have standing, after the settlor has died and can no longer protect his own interests, to claim a violation of the trustee's fiduciary duty to the settlor while the settlor was alive, to the extent that violation harmed the beneficiaries' interests. West's Ann.Cal.Prob.Code § 15800.

24 Cases that cite this headnote

[8] **Trusts**Construction and operation of provisions authorizing trusts in general

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k3Constitutional and Statutory Provisions
390k7Construction and operation of provisions authorizing trusts in general

The common law of trusts is the law of California except as modified by statute. West's Ann.Cal.Prob.Code § 15002.

5 Cases that cite this headnote

[9] **Trusts**Rights of action against trustees

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k250Rights of action against trustees

Statutory grant of standing to decedent's personal representative of a cause of action that survives decedent's death is not the exclusive designation of standing when it comes to claims for breach of a trustee's duty to a deceased settlor. West's Ann.Cal.C.C.P. § 377.30; West's Ann.Cal.Prob.Code §§ 850, 15800, 16420, 17200.

[10] **Trusts**Capacity of trustee to sue and be sued in general
TrustsRights of action against trustees

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k246Capacity of trustee to sue and be sued in general
390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k250Rights of action against trustees

As a general rule, the trustee is the real party in interest with standing to sue and defend on the trust's behalf; but this general rule does not extend to an action alleging the trustee itself breached a duty.

9 Cases that cite this headnote

[11] **Trusts**Right of action by beneficiary

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k247Right of action by beneficiary

A trust beneficiary can bring a proceeding against a trustee for breach of trust.

10 Cases that cite this headnote

[12] **Trusts**Right of action by beneficiary

390Trusts
390IVManagement and Disposal of Trust Property
390k245Actions Between, By, or Against Trustees
390k247Right of action by beneficiary

Following settlor's death, beneficiaries having standing to claim a violation of the trustee's fiduciary duty to the settlor of a revocable inter vivos trust include contingent beneficiaries. West's Ann.Cal.Prob.Code §§ 24(c), 15800, 17200.

See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 145.

12 Cases that cite this headnote

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Opinion

CHIN, J.

***1062** ****201** A revocable trust is a trust that the person who creates it, generally called the settlor,[1] can revoke during the person's lifetime. The beneficiaries' interest in the trust is contingent only, and the settlor can eliminate that interest at any time. When the trustee of a revocable trust is someone other than the settlor, that trustee owes a fiduciary duty to the settlor, not to the beneficiaries, as long as the settlor is alive. During that time, the trustee needs to account to the settlor only and not also to the beneficiaries. When the settlor dies, the trust becomes irrevocable, and the beneficiaries' interest in the trust vests. We must decide whether, after the settlor dies, the beneficiaries have standing to sue the trustee for breach of the fiduciary duty committed while the settlor was alive and the trust was still revocable.

[1] See Black's Law Dictionary (9th ed. 2009) page 1497, column 2.

Because a trustee's breach of the fiduciary duty owed to the settlor can substantially harm the beneficiaries by reducing the trust's value against the settlor's wishes, we conclude the beneficiaries do have standing to sue for a breach of that duty after the settlor has died. We reverse the judgment of the Court of Appeal, which concluded the beneficiaries have no such standing.

I. Factual and Procedural History

Because neither party petitioned for rehearing, we take most of these facts from ***208** the Court of Appeal's opinion. (See Cal. Rules of Court, rule 8.500(c)(2).)

William Giraldin and Mary Giraldin were married in 1959. When they married, William had four children and Mary had three.[2] William adopted Mary's children. Together, they had twin sons, Timothy and Patrick. William was a successful businessman and investor and accumulated a substantial fortune.

[2] To avoid confusion, we will sometimes refer to members of the Giraldin family by their first names.

In February 2002, William created the revocable trust at issue, the William A. Giraldin Trust (the trust), and made Timothy the trustee. William was the sole ***1063** beneficiary during his lifetime. The remainder beneficiaries were Mary, who was entitled to the benefits of the trust during her lifetime, and then the nine children, who would share equally in what remained after both William and Mary were deceased. William reserved to himself specified 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 William could exercise these rights only in writing.

The trust document also provided that "[d]uring [William's] lifetime, the Trustee shall distribute to [William] that amount of net income and principal as [William] direct[s]." In the event William was declared to be incapacitated, the trustee was instructed to distribute the amount of net income and principal the trustee deemed to be appropriate to support William's "accustomed manner of living" with the understanding that "the rights of remainder beneficiaries shall be of no importance." The trust document also provided that "[d]uring [William's] lifetime, the trustee shall have no duty to provide any information regarding the trust to anyone other than [William]." After William'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 that William "waive[d] all statutory requirements ... that the Trustee ... render a report or account to the beneficiaries of the trust."

The trust document also states that William "[did] not want the Trustee to be personally ****202** liable for his or her good faith efforts in administering the trust estate," and 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." William "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."

When first established, the trust contained no assets. The trust document indicated that William "had transferred and delivered to the Trustee the property described in schedule 1, attached," but the version of schedule 1 attached to the trust document was blank. It appears schedule 1 was never ***1064** completed. Before establishing the trust, William had indicated the *****209** intent to invest about $4 million, about two-thirds of his fortune, in a company his son Patrick had started some years before called SafeTzone Technologies Corporation (SafeTzone). Timothy was also a part owner of the company. In January 2002, William signed a document detailing his planned investment in the company. The day he executed the trust document, William also signed another document 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." William signed other documents indicating his intent to invest the money in the company.

Between February 2002 and May 2003, William made six payments of various amounts to invest in SafeTzone, ultimately totaling more than $4 million. The company issued stock to William. After the investment was fully funded, the stock was transferred into the name of the trust. William died in May 2005. By this time, the investment in SafeTzone had gone badly, and the trust's interest in the company was worth very little.

Four of William's children, Patricia Gray, Christine Giraldin, Michael Giraldin, and Philip Giraldin (collectively plaintiffs), sued Timothy in his capacity as trustee of the trust for breach of his fiduciary duties. They alleged, in effect, that Timothy had squandered William's life savings for his and Patrick's benefit, depriving the other seven children of their benefits from the trust. Plaintiffs sought to remove Timothy as trustee and to compel him to account for his actions while acting as trustee. An amended petition alleged that Timothy should be surcharged[3] for alleged breach of his fiduciary duties regarding the SafeTzone investment and in making loans to himself and Patrick from trust assets.[4]

[3] Black's Law Dictionary defines a "surcharge" in this context as the "amount that a court may charge a fiduciary that has breached its duty." (Black's Law Dict., *supra,* p. 1579, col. 1.)

[4] Mary also filed her own petition to confirm her community interest in the trust and other community assets. Because no issue regarding this aspect of the case is before us on review, we do not mention it again.

A court trial was held in October and November 2008. After the trial, the court ruled in plaintiffs' favor. It found Timothy had violated his fiduciary duty in various respects. It also found that William did not authorize many of Timothy's actions in writing as the trust required, and that William "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 [Timothy] to make such an investment." The court ordered Timothy be removed as trustee and that he make an accounting of the trust for the period of January 1, 2008 until his removal. Additionally, it ordered that Timothy be ***1065** surcharged "for his breach of the Trust and breach of fiduciary duties owed to Decedent William A. Giraldin" in the amount of $4,376,044 for the SafeTzone investment and surcharged $625,619 for other "unsupported disbursements, distributions and loans of ****203** Trust funds ...." It also ordered that Patrick return to the trust $155,000 loaned to him from trust funds.

Timothy appealed, raising several issues. The Court of Appeal additionally asked the parties to brief the question of whether, as its opinion describes it, plaintiffs had "standing to maintain claims for breach of fiduciary duty and to seek an accounting against [Timothy] based upon his actions as trustee during the period prior to [William's] *****210** death." After receiving the briefing, it found plaintiffs had no such standing. It explained that Timothy's "duties as trustee were owed solely to [William] during [the time William was alive], *and not to the trust beneficiaries.* Thus [plaintiffs], as beneficiaries, lack standing to complain of any alleged breaches of those duties occurring prior to [William'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 [citations], and thus also lack standing to seek such relief for the period prior to [William's] death."

The Court of Appeal also believed this action alleged a breach of Timothy's fiduciary duty solely towards the beneficiaries rather than toward William. "In this case," the Court of Appeal said, plaintiffs "were not purporting to pursue [William's] claims, or to seek redress for

alleged wrongs done to him. Instead, they were seeking to vindicate their own distinct interests, by claiming [Timothy] had breached duties allegedly owed *to them* during the period prior to [William's] death. We hold merely that [Timothy] owed them no such duties, and thus [plaintiffs] lacked standing to assert *those claims.* We express no opinion on the merit of any theoretical claims that might have been asserted on [William's] behalf. None were."

The Court of Appeal reversed the trial court's judgment "without prejudice to [plaintiffs'] right to seek a new accounting pertaining solely to the period after [William] Giraldin's death ...."

We granted plaintiffs' petition for review limited to the following question: "When the settlor of a revocable inter vivos trust appoints, during his lifetime, someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable, do the remainder beneficiaries have standing to sue the trustee for breaches of fiduciary duty committed during the period of revocability?"

II. Discussion

[1] [2] William created the trust during his lifetime, and he reserved the right to revoke it. Property transferred into a revocable inter vivos trust is ***1066** considered the property of the settlor for the settlor's lifetime. Accordingly, the beneficiaries' interest in that property is " 'merely potential' and can 'evaporate in a moment at the whim of the [settlor].' " (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319, 104 Cal.Rptr.3d 195, 223 P.3d 57, quoting *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 88, 90 Cal.Rptr.2d 99.) Thus, so long as William was alive, he had the power to divest the beneficiaries of any interest in the trust. (See generally *Steinhart v. County of Los Angeles, supra,* at pp. 1319–1320, 104 Cal.Rptr.3d 195, 223 P.3d 57.)

Consistent with these principles, Probate Code section 15800 provides: "Except to the extent that the trust instrument otherwise provides ..., 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.*" (Italics added.)[5]

[5] All further statutory references are to the Probate Code unless otherwise indicated.

[3] [4] The italicized language from section 15800, subdivision (b), makes clear that so long as the settlor is alive, the trustee owes a duty solely to the settlor ***211** and not to the beneficiaries. The Court of Appeal viewed this lawsuit as alleging only that Timothy violated a fiduciary duty towards the beneficiaries during William's lifetime. Had this been the case, the action could simply have been dismissed on the basis that no ****204** such duty exists. There would be no need to raise any standing question. But this case does not simply involve an alleged breach of Timothy's duty towards the beneficiaries. Although some of the trial court's order underlying this appeal was ambiguous regarding whether the court had found a violation of a duty towards the beneficiaries or towards William, a substantial thrust of this lawsuit and the trial court's order is that Timothy violated his fiduciary duty towards William during William's lifetime. To the extent, if any, that the trial court based its order on a breach of duty towards the beneficiaries during William's lifetime, we agree the court erred. No such duty exists. But to the extent the court based its order on a violation of Timothy's duty towards William during his lifetime, we must decide whether the beneficiaries have standing after the settlor's death to sue the trustee for breach of *that* duty.

The Law Revision Commission comment to section 15800 explains that the "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 ***1067** person holding the power to revoke the trust.... Section 15800 thus recognizes that the holder of a power of revocation is in control of the trust and should have the right to enforce the trust.... A corollary principle is that the holder of the power of revocation may direct the actions of the trustee.... Under this section, the duty to inform and account to beneficiaries is owed to the person holding the power to revoke during the time that the trust is presently revocable." (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (2011 ed.) foll. § 15800, pp. 644–645, , citations omitted.)

Similarly, section 15801, subdivision (a), provides that when a beneficiary's consent may or must be given, "during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the power to consent or withhold consent." The Law Revision Commission comment to this section explains that under its rule, "the consent of the

person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 16460(a) (limitations on proceedings against trustee)." (Cal. Law Revision Com. com., 54 West's Ann. Prob.Code, *supra,* foll. § 15801, p. 646.)

Section 15802 provides that "during the time that a trust is revocable and the person holding the power to revoke the trust is competent, a notice that is to be given to a beneficiary shall be given to the person holding the power to revoke and not to the beneficiary." The Law Revision Commission comment to this section explains that it "recognizes that notice to the beneficiary of a revocable trust would be an idle act in the case of a revocable trust since the beneficiary is powerless to act." (Cal. Law Revision Com. com., 54 West's Ann. Prob.Code, *supra,* foll. § 15802, p. 646.)

[5] These provisions mean that during William's lifetime, and as long as he was competent, the trust beneficiaries were powerless to act regarding the trust. A report of the California Law Revision Commission also makes this clear. "[T]he proposed law makes clear that the beneficiaries of a revocable living trust do not have the right to petition the court concerning the internal affairs of the trust ***212** until such time as the settlor, or other person holding the power to revoke, is unable to exercise a power of revocation, whether due to incompetence or death." (Recommendation Proposing the Trust Law (Dec. 1985) 18 Cal. Law Rev. Com. Rep. (1986) pp. 584–585; see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 145, p. 710 [quoting this language].)

The question we must decide is whether plaintiffs had standing, after William's death, to allege Timothy's breach of fiduciary duty towards William. The Probate Code does not address this question directly. That is, no ***1068** section expressly states that the beneficiaries of a revocable trust either have or do not have this standing. But the code, as a whole, implies that after the settlor has died, the beneficiaries of a revocable trust may challenge the trustee's breach of the fiduciary duty owed to the settlor to the extent that breach harmed the beneficiaries' interests. As the Law Revision Commission explained, section 15800 merely *postponed* the beneficiaries' ****205** enjoyment of their rights until after the settlor's death. (Cal. Law Revision Com. com., 54 West's Ann. Prob.Code, *supra,* foll. § 15800, p. 644.)

As a general matter, the Probate Code affords beneficiaries broad remedies for breach of trust. Section 16420, subdivision (a), provides that "[i]f a trustee commits a breach of trust, or threatens to commit a breach of trust, *a beneficiary ... may commence a proceeding* for any of the following purposes that is appropriate...." (Italics added.) These purposes include "[t]o compel the trustee to redress a breach of trust by payment of money or otherwise." (*Id.,* subd. (a)(3).) The Law Revision Commission comment to this section states that the "reference to payment of money in paragraph (3) is comprehensive and includes liability that might be characterized as damages, restitution, *or surcharge.*" (Cal. Law Revision Com. com., 54A Pt.1, West's Ann. Prob.Code (2011 ed.) foll. § 16420, p. 256, italics added.) Subdivision (b) of that section—which states that the "provision of remedies for breach of trust in subdivision (a) does not prevent resort to any other appropriate remedy provided by statute or the common law"—makes clear that the remedies the section affords beneficiaries are indeed broad.

Section 16462, subdivision (a), provides that "a trustee of a revocable trust is not liable *to a beneficiary* for any act performed or omitted pursuant to written directions from the person holding the power to revoke ...." (Italics added.) This provision is consistent with section 15800, which provides that the trustee's duties are owed to "the person holding the power to revoke," who in this case is the settlor. If the trustee's duty is to the settlor, and the trustee acts pursuant to the settlor's directions, the trustee has violated no duty. But section 16462, including the italicized language, "to a beneficiary," also implies that if the trustee does *not* act pursuant to the settlor's directions, the trustee *may* be liable to the beneficiaries. This implication would make no sense, and section 16462 would be meaningless, if the beneficiaries have no standing, ever, to bring an action challenging the trustee's actions while the settlor was still alive. We see no textual or other basis to support the dissent's argument section 16462 only governs actions taken after the settlor has died. (Dis. opn., *post,* 150 Cal.Rptr.3d at pp. 222–223, 290 P.3d at pp. 213–214.)

Section 16069 (formerly part of section 16064) provides that the trustee need not account to the beneficiary "[i]n the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when ***213** the trust ***1069** may be revoked." Timothy argues this means that he need not account to the beneficiaries ever for his actions while the trust could be revoked. The statutory language is somewhat ambiguous and may, indeed, be read as Timothy argues. But, as the cross-reference to section 15800 indicates, section 16069 must be read in context. Section 15800 provides that *during* the time the trust is revocable, the settlor has the rights afforded beneficiaries. We must read section 16069 to be consistent with section 15800. We do not read section 16069 to mean that the trustee never has to provide such

an accounting, even after the trust becomes irrevocable, i.e., after the settlor's death.

Section 17200 provides further support for this conclusion. Subdivision (a) of that section states: "Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust." Other than as affected by the reference to section 15800, section 17200 does not distinguish between inter vivos trusts and other trusts. (See *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1342, 47 Cal.Rptr.2d 587.) Section 24, subdivision (c), states that "beneficiary," "[a]s it relates to a trust, means a person who has any present or future interest, vested *or contingent.*" (Italics added.) Thus, a contingent beneficiary may petition the court subject only to the limitations provided in section 15800. But the latter provision merely states that "during the time" the trust is revocable, the settlor has the rights of a beneficiary, and the trustee's duties are to the settlor, not the beneficiary. Nothing in section 15800 limits the ability of beneficiaries to petition the court *after* the trust becomes irrevocable.

****206** Other than the Court of Appeal in this case, no California court has held the beneficiaries have no standing in this situation. Indeed, we are aware of no statute, judicial decision, or other authority, from this or any other state, denying such standing. The only California case on point has found standing. (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 79 Cal.Rptr.2d 146 (*Evangelho*).) In that case, the beneficiaries of a revocable trust sought, after the settlor's death, an accounting from the trustee for the period during which the trust was revocable. The trustee argued that "an accounting should not be ordered for the period when decedent was alive and the trust was revocable by decedent ...." (*Id.* at p. 617, 79 Cal.Rptr.2d 146.) The Court of Appeal disagreed.

The *Evangelho* court noted that while the trustor (i.e., settlor) was alive, the trust was revocable and subject to section 15800. (*Evangelho, supra,* 67 Cal.App.4th at p. 623, 79 Cal.Rptr.2d 146.) It then explained: "The effect of this section [15800], according to the Law Revision Commission comment on this code section, is to postpone the enjoyment of the rights of the beneficiaries of revocable trusts until the death or incompetence of the settlor or the person who can revoke ***1070** the trust. (Cal. Law Revision Com. com., 54 West's Ann. Prob.Code, *supra,* foll. § 15800, p. 644.) During the time the trust may be revoked, the trustee is not required to account to a beneficiary. ([Former] § 16064[, subd. (d)] [provision renumbered § 16069 by Stats. 2010, ch. 621, § 9].) [¶] The clear import of the legislative intent of section 15800 and [former] section 16064 was to postpone the enjoyment of rights under the trust law by contingent beneficiaries while the settlor could revoke or modify the trust. During the time the person holding the power to revoke is competent or alive, a trustee has no duty to account to contingent beneficiaries for the *****214** period when the trust may be revoked. When the person holding the power to revoke dies, the rights of the 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.

"Considered as a whole, the various Probate Code sections impose a duty on the trustee to protect the interests of the persons who are entitled to the proceeds of the trust. One facet of the duty is that the protected persons can compel an accounting. In the case of a revocable trust, two categories of person are protected. While the trust is revocable, the protected person is the settlor. However once the trust becomes irrevocable, such as by the death of the settlor, the beneficiaries become the protected persons. The Law Revision Commission comments explicitly speak about '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., 54 West's Ann. Prob.Code, *supra,* foll. § 15800, p. 644.) [¶] Accordingly, the actual words of the code sections and Law Revision Commission reveal the will of the Legislature to be that only decedent as settlor could compel an accounting while she was alive and competent. But once decedent died, the right to compel the accounting set out in the code sections passed to the ... beneficiaries." (*Evangelho, supra,* 67 Cal.App.4th at pp. 623–624, 79 Cal.Rptr.2d 146, fn. omitted.)

The Court of Appeal here found *Evangelho, supra,* 67 Cal.App.4th 615, 79 Cal.Rptr.2d 146, "unpersuasive, and decline[d] to follow it." It first "note [d] the *Evangelho* court did not have the benefit of the Supreme Court's opinion in *Steinhart* [*v. County of Los Angeles, supra,* 47 Cal.4th 1298, 104 Cal.Rptr.3d 195, 223 P.3d 57], with its clear explanation of the special nature of a revocable trust, to aid in its interpretation of Probate Code section 15800." But what we said in *Steinhart* about revocable trusts was merely background regarding the legal issue before us, which was a tax question. We said nothing about revocable trusts that was not already well established.

The Court of Appeal also stressed that the trustee's duties were owed to the settlor while he was still alive. It then

stated: "And if the trustee's duties are ***1071** 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." ****207** This statement is correct, but it does not address the question of whether the beneficiaries have standing to assert a breach of the duty towards the settlor after the settlor has died and can no longer do so personally.

The court provided a rather colorful hypothetical to illustrate its argument: "For example, if the settlor of a revocable trust learned he had a terminal disease, and was going to die within six months, he might decide that his last wish was to take his mistress on a deluxe, six-month cruise around the world—dissipating most of the assets held in his trust. The trustee, whose duties are owed to the settlor at that point, would have no basis to deny that last wish. However, if the trustee's duties were deemed to be retroactively owed to the trust beneficiaries—say, the settlor's widow and children—as soon as the settlor breathes his last breath on a beach in Bali, the trustee would find himself *liable* for having failed to sufficiently preserve *their interests* in the trust corpus prior to the settlor's death. In other words, the trustee's act, which was not a breach of any duty owed by the trustee when he committed it, would suddenly be *****215** 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."

[6] [7] The court's argument, applied to its hypothetical facts, is correct. In that hypothetical, the trustee would have breached no duty, so would have incurred no liability. But that is not the issue we are deciding. Let us change the hypothetical somewhat. Let us assume the *trustee* himself, unbeknownst to and against the wishes of the settlor (who wishes to leave behind a large trust for his beneficiaries), goes on the six-month cruise around the world with trust funds, dissipating most of the trust assets in the process. The acts do not come to light until the settlor has died and the beneficiaries discover the trust is devoid of assets. In that situation, the trustee *would* have violated his duty to the settlor, much to the beneficiaries' harm, and, as section 16462 implies, *would* be liable to the beneficiaries. The Court of Appeal is correct that the trustee owes no duty to the beneficiaries while the settlor is alive and competent, and this lack of a duty does not retroactively change after the settlor dies. But after the settlor has died and can no longer protect his own interests, the beneficiaries have standing to claim a violation of the trustee's duty *to the settlor* to the extent that violation harmed the beneficiaries' interests. A trustee, like our hypothetical one, cannot loot a revocable trust against the settlor's wishes without the beneficiaries' having recourse after the settlor has died.

The case of *Johnson v. Kotyck, supra,* 76 Cal.App.4th 83, 90 Cal.Rptr.2d 99, illustrates the difference between the beneficiaries' standing before and after the settlor's ***1072** death. In that case, the settlor, although still alive, was under the care and custody of a court-appointed conservator. The question was whether, in that situation, the beneficiary of a revocable trust was entitled to receive a trust accounting. The Court of Appeal concluded the beneficiary was not so entitled. Its analysis is instructive. The beneficiary had relied "on section 15800, which postpones the rights of trust beneficiaries 'during the time that a trust is revocable and the person holding the power to revoke the trust is competent.' " (*Id.* at p. 88, 90 Cal.Rptr.2d 99.) The court rejected this reliance. "[T]his provision does *not* mean that a trust automatically becomes irrevocable when the trustor becomes a conservatee. The Law Revision Commission comment to section 15800 explains: 'This section has the effect of postponing the enjoyment of rights of beneficiaries or 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. 644, italics added [by the *Johnson* court].)" (*Ibid.*) The court explained that the conservator, working with the court, was a person holding the power to revoke the trust. (*Ibid.*) It concluded, accordingly, "that section 15800 does not give a beneficiary ... any right to a trust accounting *so long as* a conservator retains authority ... to have the trust revoked and to abrogate [the beneficiary's] interest in the trust proceeds." (*Ibid.,* italics added.)

****208** But the *Johnson* court went on to explain that the conservator might be liable to the remainder beneficiary later, after the trust becomes irrevocable, for any malfeasance. It explained that "the conservator ignores misappropriations of the conservatee's property at its own peril." (*Johnson v. Kotyck, supra,* 76 Cal.App.4th at p. 89, 90 Cal.Rptr.2d 99.) Accordingly, the court merely concluded that the beneficiary "cannot be accorded all the rights *****216** of a vested beneficiary *before* the death of the trustor [i.e., the settlor]." (*Id.* at p. 90, 90 Cal.Rptr.2d 99, italics added.) This discussion suggests that after the settlor dies, the beneficiary would have standing to complain of the conservator's actions taken before the settlor's death.

Other legal sources support finding standing after the settlor's death. Although California's law of trusts is statutory, it also draws on the common law. "Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the

law of this state." (§ 15002.) The Law Revision Commission comment to this section states that it refers "to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions." (Cal. Law Revision Com. com., 54 West's Ann. Prob.Code, *supra,* foll. § 15002, pp. 484–485.)

Consistently with section 15002, California courts have considered the Restatement of Trusts in interpreting California trust law. (See *Esslinger v.* ***1073** *Cummins* (2006) 144 Cal.App.4th 517, 528, 50 Cal.Rptr.3d 538 [interpreting § 17200 in a way that made it consistent with the Rest.2d Trusts].) The Restatement Third of Trusts, like the Probate Code, does not expressly address the question here, but it supports the conclusion that beneficiaries do have standing after the settlor's death to sue for a trustee's breach of the duty owed to the settlor. Section 74 of that Restatement provides that while the trust is revocable, the trustee has a duty to do what the settlor directs (subd. (1)(a)), and that "[t]he rights of the beneficiaries are exercisable by and subject to the control of the settlor" (subd. (1)(b)). This section, like the similar section 15800, is inconclusive on the question before us. But the comments to this section are instructive. The comment to subdivision (1)(a), states: "A trustee is not liable to the beneficiaries for a loss that results from compliance with a settlor's direction in accordance with the terms of that direction." (Rest.3d Trusts, § 74, com. b, p. 29.) Later that comment adds, "As a practical matter, however, in the event of a surcharge action, the trustee does run a risk in relying on unwritten evidence to support a defense based on settlor direction or authorization." (*Id.* com. c, p. 30.) These comments imply that a trustee *may* be liable to the beneficiaries in at least some circumstances, which in turn implies that beneficiaries have standing to assert that liability.

One well-known treatise on trust law does address this question directly. "Consistent with the rule that the duties of a trustee of a revocable trust are owed exclusively to the settlor, at least while the settlor has capacity, the rights of non-settlor beneficiaries of a revocable trust generally are subject to the control of the settlor. Thus, as a general rule, the trustee cannot be held to account by other beneficiaries for its administration of a revocable trust during the settlor's lifetime. After the settlor's death, of course, the trustee is accountable to the trust's other beneficiaries for its administration of the trust after the settlor's death. Further, *many courts have allowed other beneficiaries to pursue breach of duty claims after the settlor's death, related to the administration of the trust during the settlor's lifetime, when, for example, there are allegations that the trustee breached its duty during the settlor's lifetime* and that the settlor had lost capacity, was under undue influence, or did not approve or ratify the trustee's conduct." (Bogert, The Law of Trusts and Trustees (3d ed. 2010) § 964, pp. 103–105, fns. omitted, italics added; see *****217** *Estate of Bowles* (2008) 169 Cal.App.4th 684, 692–694, 87 Cal.Rptr.3d 122 [considering this treatise in interpreting California trust law].) Among the cases the treatise cites to support the italicized language is *Evangelho, supra,* 67 Cal.App.4th 615, 79 Cal.Rptr.2d 146. (Bogert, *supra,* § 964, p. 105, fn. 35.)

****209** Bogert also cites some Florida cases. (Bogert, *supra,* § 964, p. 106, fn. 35.) In *Brundage v. Bank of America* (Fla.Dist.Ct.App.2008) 996 So.2d 877, 882, the court recognized that (as in California) the trustee owes no duty to the beneficiaries of a revocable trust. "However," the court held, "once the interest ***1074** of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary." (*Ibid.*) Another Florida court reached a similar conclusion while applying New York law. (*Siegel v. Novak* (Fla.Dist.Ct.App.2006) 920 So.2d 89, 95.) It explained that denying standing would be "contrary to our sense of justice—a trustee should not be able to violate its fiduciary duty ... and yet escape responsibility because the settlor did not discover the transgressions during her lifetime. With an interest in the corpus of the trust after the death of their mother, the [beneficiaries] have standing to challenge the disbursements.... Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded." (*Id.* at p. 96, fn. omitted.)

[8] The Uniform Trust Code is also instructive. California has not adopted the Uniform Trust Code. But it helps to illuminate the common law of trusts, which, as noted, is also the law of California except as modified by statute. (§ 15002.) One section of that code provides: "While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." (U. Trust Code (2000) § 603, subd. (a).) In substance, this provision is similar to section 15800. Like section 15800, it does not specifically address the question before us. But the accompanying comment does address the question. It expressly states what the comment to section 15800 implies: "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." (U. Trust Code, com. to § 603, pp. 553–554, italics added.)

We are aware of no common law source denying standing to beneficiaries in the situation here. The cited sources strongly indicate that the common law rule is that beneficiaries do have standing after the settlor's death. Because no California statute has modified that rule, we find these sources persuasive.

Timothy argues that other remedies exist for the trustee's breach of the fiduciary duty owed to the settlor. He suggests there might be a claim for elder abuse under Welfare and Institutions Code section 15600 et seq., appointment of a conservator for the settlor while he or she is alive, or a suit by the personal representative of the deceased settlor under Code of Civil Procedure section 377.30. Recognizing that the deceased's personal representative might be, and often is, also the trustee—indeed, Timothy's attorney acknowledged at oral argument that is the situation here—and that people are ***1075** unlikely to sue themselves, he argues that if the personal representative and *****218** trustee are the same person, the beneficiaries might petition the probate court to appoint an independent personal representative who could then investigate and possibly pursue the beneficiaries' claims.

A claim for elder abuse under Welfare and Institutions Code section 15600 et seq. might be a possible remedy under appropriate circumstances. But nothing in the Welfare and Institutions Code suggests that such a claim replaces all other possible actions.

[9] Code of Civil Procedure section 377.30 provides as relevant: "A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, ... and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." This provision certainly gives the personal representative standing to pursue an action like the one here. But that statute is a general grant of standing. Contrary to ****210** Timothy's and the dissent's arguments, nothing in this statute suggests its grant of standing is exclusive. The dissent asserts that this statute provides that "only" (dis. opn., *post,* 150 Cal.Rptr.3d at p. 221, 290 P.3d at p. 212) the personal representative may bring an action like this one, but the word "only" is not found in that section.

The Probate Code provisions discussed above concern specifically trusts and, as explained, they recognize a broad and nonexclusive list of remedies for beneficiaries to use to seek redress for breach of trust. Those provisions make clear that Code of Civil Procedure section 377.30's grant of standing is not exclusive when it comes to trusts. They expressly give these beneficiaries standing to bring some actions at least. In addition to Probate Code sections 16420 and 17200, discussed above, Probate Code section 850, subdivision (a), provides: "The following persons may file a petition requesting that the court make an order under this part: [¶] ... [¶] (3) The trustee or *any interested person* in any of the following cases: [¶] ... [¶] (B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another." (Italics added.) The term, "interested person," includes a beneficiary. (Prob. Code, § 48, subd. (a)(1).) Thus, Code of Civil Procedure section 377.30 is not the exclusive designation of standing when it comes to claims for breach of a trustee's duty to a deceased settlor. We must look to the relevant Probate Code sections to determine whether the beneficiaries have standing to bring such an action. Although no statute precisely answers this question, we conclude the Probate Code does give beneficiaries this standing for the reasons explained above. Code of Civil Procedure section 377.30 does not preclude this standing.

[10] [11] To be sure, "[a]s a general rule, the trustee is the real party in interest with standing to sue and defend on the trust's behalf." (*Estate of Bowles,* ***1076** *supra,* 169 Cal.App.4th at p. 691, 87 Cal.Rptr.3d 122.) But this general rule does not extend to an action alleging the trustee itself breached a duty. "[A] trust beneficiary can bring a proceeding against a trustee for breach of trust." (*Ibid.,* citing §§ 16420 and 17200; accord, *King v. Johnston* (2009) 178 Cal.App.4th 1488, 1500, 101 Cal.Rptr.3d 269.)

Thus, the existence of other possible remedies under other codes does not mean the beneficiaries lack standing under the Probate Code simply to assert, after the settlor's death, a breach of the duty the trustee owed the settlor to the extent that breach harmed the beneficiaries. Contrary to Timothy's and the dissent's arguments (dis. opn., *post,* 150 Cal.Rptr.3d at p. 221, 290 P.3d at p. 212), beneficiaries do not have to go through a two-step process *****219** —(1) move either to appoint a personal representative, if one does not already exist, or to have the existing personal representative removed and replaced by a new one, and then (2) have the new personal representative bring the action. They may bring the action directly, themselves.

Timothy and the dissent also argue that the actual trust

gave him great discretion to act, and that this action conflicts with the settlor's intent. (Dis. opn., *post,* 150 Cal.Rptr.3d at pp. 221–222, 290 P.3d at pp. 212–213.) But this argument just goes to whether there *was* a breach of a duty towards the settlor in this case, not to whether the beneficiaries have standing to assert a breach if there was one. We express no view regarding the merits of this particular case. We merely hold that, after the settlor's death, the beneficiaries have standing to assert a breach of the fiduciary duty the trustee owed to the settlor to the extent that breach harmed the beneficiaries.

[12] Finally, Timothy argues that even if vested beneficiaries have such standing, the actual plaintiffs' rights have still not vested. As long as Mary still lives, she is entitled to the benefits of the trust. Only after she dies will the remaining beneficiaries' rights vest. Thus, Timothy argues, only Mary may now assert a breach of his duty towards William; the other beneficiaries will have to await her death to bring this action. We disagree. Section 17200 permits a "beneficiary" to petition the court concerning the trust's internal affairs except as section 15800 provides. As we have explained, section 15800 merely postpones the beneficiaries' rights until the settlor's death. Section 24, subdivision (c), defines "beneficiary" to include a contingent ****211** beneficiary. The children need not wait for Mary's death to bring this action. Timothy argued in both the trial court and the Court of Appeal that the beneficiaries brought this action *too late,* that is, that it is time-barred by the statute of limitations or doctrine of laches. We express no opinion on this point, but this action is not *premature* simply because Mary is still alive.

***1077** Because the Court of Appeal concluded that plaintiffs have no standing to complain of Timothy's actions before William died, it did not decide any of the other issues in the case. It should do so on remand.

III. Conclusion

We reverse the judgment of the Court of Appeal and remand the matter to that court for further proceedings consistent with our opinion.

WE CONCUR: CANTIL–SAKAUYE, C.J., BAXTER, CORRIGAN, and LIU, JJ.

Dissenting Opinion by KENNARD, J.

As a means of transferring property at death, a person (the settlor) may place assets into a trust for the benefit of another (the beneficiary), reserve the right to withdraw the trust assets at any time, and appoint a third party (the trustee) to administer the trust. Such a trust is generally known as a "revocable trust." (Black's Law Dict. (9th ed. 2009) pp. 1647, 1654.) During the settlor's lifetime, the trustee owes the settlor a fiduciary duty to properly administer the trust assets. (Bogert, The Law of Trusts and Trustees (3d ed. 2010) § 964, pp. 97–98.) For a breach of that duty, the settlor can sue the trustee. After the settlor's death, can the beneficiaries sue the trustee on the deceased settlor's behalf? According to the majority, they can. I disagree. In my view, only the estate's personal representative (or, if none exists, the decedent's successor in interest) can sue on the deceased *****220** settlor's behalf. Therefore, unlike the majority, I would affirm the judgment of the Court of Appeal, which held that the trust beneficiaries here lacked standing to sue the trustee.

I

In 2002, William Giraldin created a revocable trust, designating his son Timothy as trustee. After William's death, the trust benefits were to go to his wife Mary, if still alive, and after her death William's nine children were to share equally in the remainder.

As set forth in the trust document, trustee Timothy was to distribute trust assets as directed by settlor William unless William was declared mentally incompetent. In the event of William's incompetency, Timothy was to provide William with trust assets sufficient to support William's "accustomed manner of living," without consideration of "the rights of the remainder beneficiaries." The trust document also described the trustee's "discretionary powers" as "absolute," explaining: "This means that the Trustee can act arbitrarily, so long as he ... does not act in bad faith." The settlor expressly "waive[d] the requirement that the Trustee's conduct" be that of "a reasonable, prudent person."

***1078** Between February 2002 and May 2003, at the direction of settlor William, Timothy invested trust assets of more than $4 million in SafeTzone Technologies Corporation (SafeTzone), a startup company founded by

William's son Patrick and partly owned by Patrick's twin brother, Timothy. Timothy also loaned Patrick $155,000 in trust assets. The startup was not a success; at William's death in 2005, the trust's original investment in SafeTzone was worth only $100,000.

The year after settlor William's death, four of his children (plaintiffs) sued trustee Timothy for a breach of fiduciary duty. They alleged that Timothy had squandered William's life savings on himself and twin brother Patrick, thereby reducing plaintiffs' potential trust benefits. According to plaintiffs, at the time of the trust's investments in SafeTzone, settlor William "was in declining health, had been suffering from Parkinson's Disease for many years and was unable to resist the influence of [trustee] Timothy." Plaintiffs sought court orders removing Timothy as trustee, compelling him to account for his acts as trustee, and surcharging him for the loss in the trust's value during the period before William's death. William's wife Mary ****212** (the primary beneficiary of the trust) and William's other children did not join in the lawsuit.

At the 2008 trial, the court ruled in plaintiff beneficiaries' favor. It found that, by investing more than $4 million of trust assets in SafeTzone, trustee Timothy breached his duty to avoid conflicts of interest, to deal impartially with the trust's beneficiaries, to preserve trust property, and to diversify trust investments. At the time of the investment in SafeTzone, the court said, settlor William lacked sufficient mental competence to analyze the benefits and risks of an investment in SafeTzone or to authorize Timothy to make such an investment. The court ordered that Timothy be removed as trustee and that he be surcharged $4,376,044 for the SafeTzone investment and $625,619 for other disbursements. Patrick was ordered to return $155,000 in trust assets that Timothy had loaned to him.

Trustee Timothy appealed. In reversing the trial court's judgment, the Court of Appeal held that plaintiff beneficiaries lacked standing to sue Timothy.

II

Probate Code section 15800 states: "Except to the extent that the trust instrument *****221** otherwise provides ..., during the time that a trust is revocable ...: [¶] ... [¶] (b) The duties of the trustee are owed to the person holding the ***1079** power to revoke." Thus, as the majority acknowledges, here trustee Timothy owed no duty to plaintiff beneficiaries with respect to the investment of trust assets in SafeTzone, because settlor William, who held the power to revoke the trust, was still alive when the investment was made. (Maj. opn., *ante,* 150 Cal.Rptr.3d at p. 210, 290 P.3d at p. 203.)[1] But the statute in question is silent on whether, after the trust settlor's death, the trust beneficiaries can sue the trustee for breaching the fiduciary duty owed to the settlor during the settlor's lifetime. The majority allows such an action. I would not.

[1] The Court of Appeal stated that plaintiff beneficiaries sued trustee Timothy for breaching a fiduciary duty Timothy allegedly owed to plaintiffs as beneficiaries, not for breaching the fiduciary duty owed to settlor William. But, as the majority notes, plaintiffs also alleged, and the trial court found, that Timothy had breached the fiduciary duty owed to William. (Maj. opn., *ante,* 150 Cal.Rptr.3d at p. 211, 290 P.3d at p. 204.)

Pertinent here is this language in Code of Civil Procedure section 377.30: "A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest ... and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest." Any wrongful refusal to bring such an action can be challenged by the beneficiary through a motion, in probate court, to remove the personal representative (Prob.Code, § 8500) on the ground that "[r]emoval is ... necessary for protection of the estate or interested persons" (Prob.Code, § 8502, subd. (d)). Here, plaintiff beneficiaries do not allege that they are the personal representatives of deceased settlor William, or that no personal representative exists and they are William's successors in interest.[2]

[2] The record does not show whether a personal representative exists here. At oral argument, counsel for defendant trustee Timothy said that Timothy is the decedent settlor's personal representative.

Code of Civil Procedure section 377.30's provision that only the decedent's personal representative (if any) may sue on the decedent's behalf would avoid the conflict of interest inherent in the majority's approach of also allowing the beneficiaries to sue: The suing beneficiaries generally have a personal interest in maximizing their share of the inheritance. That interest may be at odds with what the decedent had in mind, as this case illustrates. Under the trust document, trustee Timothy had "absolute" discretionary power in administering the trust and the

settlor "waive[d] the requirement that" Timothy's conduct as trustee be that of "a reasonable, prudent person," language reflecting the settlor's intent to protect Timothy from lawsuits related to Timothy's performance of his duties as trustee. The trust beneficiaries' personal interest in increasing their inheritance through a successful lawsuit ****213** against Timothy conflicts with the settlor's intent; thus, they should not be permitted to represent the deceased settlor's interests by filing an action on his behalf.

Applying here the above-discussed "personal representative" provision of Code of Civil Procedure section 377.30 would avoid litigation strategy ***1080** problems likely to ensue from the majority's holding that both the personal representative and the beneficiaries may sue. An example: A personal representative and several beneficiaries of a revocable trust sue the trustee on behalf of the deceased settlor, and the *****222** defendant trustee offers to settle. Some of the plaintiffs want to accept the offer; others do not. What to do? Which of the plaintiffs, all of whom purport to represent the deceased settlor's interests, get to decide whether to accept the offer? This quandary can be avoided by applying section 377.30. Because this statute allows only the decedent's personal representative (or if none, the decedent's successors in interest) to sue on the decedent's behalf, in the example just given the decision whether to accept the settlement offer is entrusted to the personal representative, not anyone else.

The majority acknowledges the absence of any statutory provision conferring on beneficiaries of a revocable trust the standing to sue the trustee for a breach of the statutory duty owed to the settlor during the settlor's lifetime. (Maj. opn., *ante,* 150 Cal.Rptr.3d at pp. 211–212, 290 P.3d at pp. 204–205.) But, according to the majority, permitting such a lawsuit is implicit from the Probate Code "as a whole." (*Ibid.*) In support, the majority cites Probate Code sections 16069, 16420, 16462, and 17200, which I discuss below.

Probate Code section 16069 states that the trustee of a revocable trust "is not required to account to the ... [¶] ... beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked." The majority states: "[A]s the cross-reference to section 15800 indicates, section 16069 must be read in context. Section 15800 provides that *during* the time the trust is revocable, the settlor has the rights afforded beneficiaries.... We do not read section 16069 to mean that the trustee never has to provide such an accounting, even after the trust becomes irrevocable, i.e., after the settlor's death." (Maj. opn., *ante,* 150 Cal.Rptr.3d at p. 213, 290 P.3d at p. 205.) But whether or not section 16069 permits beneficiaries to obtain an *accounting* from the trustee after the settlor's death, nothing in this statute implies that beneficiaries can sue the trustee on the deceased settlor's behalf for a breach of the fiduciary duty the trustee owed the settlor during the settlor's lifetime.

As to Probate Code section 16420, it gives beneficiaries a broad range of remedies when "a trustee commits a *breach of trust,* or threatens to commit a breach of trust ...." (Prob.Code, § 16420, subd. (a), italics added.) The Probate Code defines a "breach of trust" as "[a] violation by the trustee of any duty that the trustee owes the *beneficiary.*" (Prob.Code, § 16400, italics added.) The question here, however, is not whether plaintiff beneficiaries can sue defendant trustee Timothy for breaching a duty he owed to the beneficiaries. Rather, the question is whether the beneficiaries can sue the trustee for ***1081** breaching a duty owed to the trust's settlor during the settlor's lifetime, a point on which section 16420 is silent, thus providing no support for the majority's position.

With respect to Probate Code section 16462 's subdivision (a), the majority relies on that provision's language that "a trustee of a revocable trust is not liable to a beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke ...." This statutory language, the majority states, "implies that if the trustee does *not* act pursuant to the settlor's directions, the trustee *may* be liable to the beneficiaries." (Maj. opn., *ante,* 150 Cal.Rptr.3d at p. 212, 290 P.3d at p. 205.) The majority's reliance on this statutory language is misplaced, as I explain below.

The language in Probate Code section 16462 's subdivision (a) quoted by the majority describes a defense that a trustee may assert to avoid being held "liable to a beneficiary" (*ibid.*) of a revocable trust. *****223** But because the trustee of a revocable trust owes no duty to the beneficiary while the settlor is alive (Prob.Code, § 15800), a trustee is not liable to a beneficiary for actions taken during ****214** the settlor's lifetime. Thus, the statutory language relied on by the majority (see preceding paragraph) must refer to a lawsuit by a beneficiary of a revocable trust based on *the trustee's conduct after the settlor's death,* when the trustee owes the trust beneficiary a fiduciary duty (see Prob.Code, § 16002, subd. (a)) and can be held liable to the beneficiary for breaching that duty. In such a lawsuit challenging certain actions taken by the trustee after the settlor's death, Probate Code section 16462 's subdivision (a) absolves the trustee from liability to the beneficiary if the trustee acted "pursuant to written directions" (*ibid.*) from

the settlor. Notwithstanding the majority's insistence to the contrary, that statutory provision does not imply that a beneficiary may sue the trustee on the settlor's behalf based on the trustee's conduct *before* the settlor's death.

Finally, as to Probate Code section 17200 's subdivision (a), the majority relies on language stating that "[e]xcept as provided in Section 15800, a ... beneficiary of a trust may petition the court ... concerning the internal affairs of the trust." The majority reasons: "[Under this provision,] a contingent beneficiary may petition the court subject only to the limitations provided in section 15800. But the latter provision merely states that 'during the time' the trust is revocable, the settlor has the rights of a beneficiary, and the trustee's duties are to the settlor, not the beneficiary. Nothing in section 15800 limits the ability of beneficiaries to petition the court *after* the trust becomes irrevocable." (Maj. opn., *ante,* 150 Cal.Rptr.3d at p. 212, 290 P.3d at p. 205.)Maybe so. Neither Probate Code section 17200 's subdivision (a) nor section 15800, however, contains language implying that a beneficiary of a revocable trust may sue the trustee, on the deceased settlor's behalf, for breaching the fiduciary duty the trustee owed the settlor during the settlor's lifetime.

***1082** For the reasons set forth above, I would affirm the judgment of the Court of Appeal.

I CONCUR: WERDEGAR, J.

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