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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brianna McKee Haggerty, Plaintiff and Appellant, v. Nancy F. Thornton et al. Defendants and Respondents.	S_____ 4th Civ. No. D078049 San Diego County Superior Court No. 37-2019-00028694.PR.TR.CTL

Petition for Review

Appeal from the Superior Court of
San Diego County

Hon. Julia C. Kelety, Judge

Petition for Review After the Published Decision of the
Fourth District Court of Appeal, Division One

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Petition for Review

This petition follows from the published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on September 16. A copy of the Opinion is attached.

Question Presented

Does the same law govern trust revocations and trust modifications, so that the settlor must make the trust's prescribed method of modification explicitly exclusive to preclude the default alternative (Prob. Code, § 15401, subd. (a)(2)), or does prescribing any modification method preclude the default option?

Necessity for Review

The published Court of Appeal opinion (Opinion) creates a direct conflict with *King v. Lynch* (2012) 204 Cal.App.4th 1186, and *Pena v. Dey* (2019) 39 Cal.App.5th 546. Review is therefore necessary to secure uniformity of decision. (Rule of Ct., rule 8.500, subd. (b)(1).)

The conflict concerns the procedures for *revoking* and *modifying* trust agreements, and whether they are presumptively identical. Probate Code section 15401 supplements a trust's prescribed method for revocation with a default statutory method, which may be used unless the trust's prescribed method is explicitly exclusive. (§ 15401, subd. (a)(2).) Section 15402, which governs modifications, does not authorize a statutory method; it instead provides that where the trust does not provide otherwise, "the settlor may modify the trust by the procedure for revocation." The question here is whether "the procedure" refers to the trust's prescribed procedure, or also includes the statutory method described in subdivision (a)(2) of the other statute.

King, *supra*, 204 Cal.App.4th 1186, 1193, observed the Legislature, in enacting the two sections, "differentiated between trust revocations and modifications," showing it "no longer intended the same rules to apply to both revocation and modification."

Section 15401 [Revocation]

(a) 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 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.

Section 15402 [Modification]

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.

Due to the different statutory language, *King* rejected the theory that the "Legislature intended the same rules to apply to trust modification" as to revocation. (*King*, *supra*, 204 Cal.App.4th 1186, 1193, fn. 3.) *King* established that "if any modification method is specified in the trust, that method must be used to amend the trust." (*Id.* at p. 1193, cited in *Pena*, *supra*, 39 Cal.App.5th 546, 552.) The default statutory method therefore could revoke but not modify the trust.

The Opinion instead equated the two actions. "The method of modification is therefore the same as the method of revocation . . . unless the trust instrument distinguishes between revocation and modification." (Opn. 10.) From the traditional maxim that "a power of revocation implies the power of modification," the Opinion concluded the same *method* presumptively governs both functions. "[T]he 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." (Opn. 10-11.)

There are thousands of trusts in California, holding assets worth billions of dollars. By diverging from extant precedent, the Opinion has cast doubt upon the procedure for amending many if not most of them. Whereas *King* holds that prescribing a specific method for modification precludes the statutory alternative (as section 15402 lacks an analogue to section 15401, subdivision (a)(2)), the Opinion provides the statutory method remains available unless the prescribed method for modification is explicitly exclusive (as is the case for revocation).

This Court should grant review and resolve the conflict to provide clarity to lower courts, counsel, and trust settlors.

Statement of the Case

A. Underlying documents

In 2015, Jeane Bertsch created a trust. (Opn. 2.) The trust agreement nominated respondent Nancy Thornton as successor trustee, and prescribed "an acknowledged instrument in writing to revoke or amend this Agreement." (Opn. 2.)

In 2016, Bertsch amended the trust to provide a benefit to her niece, appellant Brianna Haggerty, and nominated her as successor trustee. (Opn. 3.) Both Bertsch and a notary signed this document. (Opn. 3.)

In 2018, Bertsch prepared a (signed but not notarized) document that revised the beneficiary list and excluded Haggerty. (Opn. 3.) Bertsch died later that year. (Opn. 3.)

B. Trial court proceedings

Thornton moved to confirm her appointment as successor trustee; she contended the 2016 modification had been revoked but the 2018 modification was valid. (Opn. 3.) Haggerty's petition contended the opposite: the 2016 modification was valid but the 2018 modification was not. (Opn. 3.) The court concluded the 2018 modification was valid. (Opn. 5.)

C. The Court of Appeal

The Court of Appeal affirmed. (Opn. 13.) It found the trust agreement "did not distinguish between revocation and modification," and the prescribed method ("an acknowledged instrument") was not explicitly exclusive. (Opn. 11.) The same statutory method available under section 15401, subdivision (a)(2) to revoke the trust agreement therefore was also available to modify it. (Opn. 11.) The Court of Appeal found Bertsch complied with this statutory method by signing the modification and personally delivering to herself as trustee, so this modification was valid. (Opn. 11-12.) It was this alternate method that effected valid modification; the Court of Appeal did not find the modification complied with the method prescribed by the agreement.

Argument

There is a conflict between this published opinion and extant precedents, which this Court must review and resolve to secure uniformity of precedent.

The Court of Appeal's conclusion conflicted with the precedents of *King v. Lynch*, *supra*, 204 Cal.App.4th 1186, and *Pena v. Dey*, *supra*, 39 Cal.App.5th 546. It is undisputed that where the trust agreement's prescribed method of *revocation* is not explicitly exclusive, the statutory method described in section 15401, subdivision (a)(2) may validly revoke the agreement. Section 15402, which governs modifications, does not authorize any method other than that authorized by the agreement. "[I]f a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." The disputed question is whether "the procedure for revocation" indicates the procedure for revocation prescribed by the trust agreement, or also encompasses the subdivision (a)(2) method.

A. The precedents emphasize the difference between the Section 15401 rule for revocation and the Section 15402 rule for modification.

The Court of Appeal emphasized the disparate provisions of section 15401 and 15402 in *King*, *supra*, 204 Cal.App.4th 1186. The trust there enabled either spouse to revoke the trust but required the signature of both to amend it. (*Id*. at pp. 1188-1189.) When the wife became incompetent, the husband unilaterally attempted to amend it. (*Id*. at p. 1189.) Over a dissent, the *King* majority found this attempted amendment was unauthorized. (*Id*. at p. 1194.)

King recalled the procedures for revocation and modification were congruent prior to 1986; because the rules on revocation applied to modification by implication, courts "applied the rules governing trust revocations to trust modifications." (*King*, *supra*, 204 Cal.App.4th at pp. 1192-1193.) But the Legislature changed that by enacting sections 15401 and 15402. (*Id.* at p. 1193.) These code sections "differentiated between trust revocations and modifications," and showed the Legislature "no longer intended the same rules to apply to both revocation and modification." (*Ibid*.)

Specifically, unless the trust agreement's method for revocation was explicitly exclusive, the section 15401, subdivision (a)(2), default method could validly effect revocation. (*King, supra,* 204 Cal.App.4th at p. 1192.) But

there was no analogue authorizing a statutory method of modification in section 15402. It simply provides, "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." *King* construed this to mean that trust agreements that were silent regarding the method of modification could use either the revocation method prescribed by the trust instrument or by subdivision (a)(2). (*Id.* at p. 1192.) But a trust instrument prescribing a method "provides otherwise": "**[I]f any modification method is specified in the trust, that method must be used to amend the trust**." (*Id.*, at p. 1193, emphasis added.)

From the different statutory language governing revocation (through section 15401) and modification (through section 15402), *King* concluded the Legislature did not intend for the law to treat revocations and modifications identically. (*King*, *supra*, 204 Cal.App.4th at p. 1193, fn. 3.) If the Legislature had wished for the same rule to govern both functions, it "could have combined revocation and modification into one statute." (*Id.* at p. 1193.) But it did not. "[T]he 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.) Equating the two provisions despite the

textual difference would render section 15402 "surplusage." (*Ibid.*)

King thus held different rules governed revocations and modifications. Unless it was explicitly exclusive, a trust instrument's prescribed method of *revocation* would not preclude the statutory alternative of section 15401, subdivision (a)(2), which thus could be used to revoke the trust. But any prescribed method of *modification* (even if not explicitly exclusive) would preclude the statutory alternative. (*King*, *supra*, 204 Cal.App.4th at p. 1193.)

Pena, *supra*, 39 Cal.App.5th 546, followed *King*. The trust instrument there prescribed the same method for both revocation and modification, either of which "shall be made by written instrument signed by the settlor and delivered to the trustee." (*Id.* at p. 549.) The *Pena* settlor devised amendments but died before he could sign them. (*Ibid.*) Unlike *King*, the prescribed method for revocation and modification in *Pena* was identical, but as in *King*, that method for modification was not fulfilled. *Pena* cited *King* in holding that where the trust instrument prescribes a method for modification, "'that method must be used to amend the trust.'" (*Pena*, at p. 552, quoting *King*, *supra*, 204 Cal.App.4th at p. 1193.) Because that method was not fulfilled, the attempted amendment was invalid. (*Pena*, at p. 555.)

B. The Opinion conflated the presumptive procedures for revocation and modification.

The Opinion declined to follow *King*, *supra*, 204 Cal.App.4th 1186, and *Pena*, *supra*, 39 Cal.App.5th 546, and instead found the *King* dissent more persuasive. The Opinion recalled the traditional maxim that "'a power of revocation implies the power of modification.' " (Opn. 10., citing Cal. Law Revision Com. com., West's Ann. Prob. Code (2021 ed.) foll. § 15402.) The Opinion distilled from this maxim that the methods for revocation and modification should be presumptively identical; the same explicit exclusivity needed to preclude the statutory method for revocation was also needed to preclude the statutory method for modification: "[T]he 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." (Opn. 10-11.)

Following the *King* dissent, the Opinion found the Legislature enacted section 15401 and 15402 to provide greater flexibility for settlors. (Opn. 8-9, citing *King*, *supra*, 204 Cal.App.4th at pp. 1195-1196 (dis. opn. of Detjen, J.).) Whereas the prior law precluded an alternative (statutory) method of revocation if the prescribed method was explicitly *or implicitly* exclusive (*King*, at p. 1191), section 15401

precluded the statutory method only if the prescribed method was explicitly exclusive. (*Id*. at p. 1196 (dis. opn. of Detjen, J.).) The dissent believed it would further the general purpose of greater flexibility to require the prescribed method be explicitly exclusive to bar the statutory method—for both revocation and modification. "[S]ection 15402 was added, not to establish a different rule from section 15401, as the majority asserts . . . but in order to adopt the same flexible rule for modifications as for revocations . . . '[u]nless the trust instrument provides otherwise.' " (*Ibid*, quoted in Opn. 8-9.)

The Opinion further diverged from *King* and especially *Pena*, *supra*, 39 Cal.App.5th 546, as to what it meant for a trust instrument to "provide otherwise." In both *Pena* and the instant case, the revocation and modification method were identical. Because there was a prescribed modification method, the *Pena* court concluded the trust instrument provided otherwise (from the default statutory method). That statutory method could apply where *there was no prescribed modification method at all*. "[I]f 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*." (*Pena*, at p. 552, citing *King*, *supra*, 204 Cal.App.4th at p. 1192.) But the

instrument was not silent on modification; it provided a method (the same one prescribed for revocation). (*Id*. at p. 549.) Because the "trust instrument does specify how the trust is to be modified . . . 'that method must be used to amend the trust.' " (*Id*. at p. 552, quoting *King* at p. 1193.)

The Opinion, however, found that because the prescribed method for modification was the same as for revocation, the trust instrument did not provide otherwise. "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." (Opn. 11.)

C. The Opinion creates a direct conflict with extant precedent, which this Court must resolve to remove uncertainty and secure uniformity of precedent.

The Opinion did not declare its holding was in direct conflict with *King* and *Pena*. Though it favored the *King* dissent over the majority opinion, it found no "need to comment on *King*'s interpretation of its trust document," or "whether *King* was ultimately correctly decided on its facts." (Opn 10.) It also found *Pena* "distinguishable." (Opn. 12, fn. 2.) But the instant Opinion adopted a rule that conflicts with that of *King* and *Pena* and produces different outcomes—wherever a trust instrument (as here) prescribes a modification method but does not establish it as explicitly exclusive. Under the Opinion, the section 15401, subdivision (a)(2) method remains available: "Because the method of . . . modification described in the trust agreement is not explicitly exclusive . . . the statutory method of revocation was available under section 15401 [subdivision (a)(2)]." (Opn. 11.) But under *King* and *Pena*, the existence of a prescribed method (even if not explicitly exclusive), precludes the statutory alternative: "[I]f *any modification method is specified* in the trust, that method must be used to amend the trust." (*King,* supra, 206 Cal.App.4th at p. 1193, emphasis added.) The Opinion (like the *King* dissent) cannot coexist with *King*. This Court must choose one or the other.

Conclusion

This case presents a choice between the text-based position of the *King* majority, that the disparate substance of sections 15401 and 15402 warrants a disparate construction of the rules governing revocation and modification, and the history-based position of the *King* dissent, that the Legislature enacted sections 15401 and 15402 to fulfill the imperative of greater flexibility for settlors, without regard to the particular function (revocation or modification) at issue. The case also presents an internal textual question regarding section 15402. As it holds "the settlor may modify the trust by the procedure for revocation," does "the procedure for revocation" refer to the procedure prescribed in the trust instrument, or also to the statutory method provided in section 15401, subdivision (a)(2)?

Of course, appellant Haggerty would assert the reference to "the procedure" is in the singular, and thus does not encompass another procedure, especially as the Legislature could have added a default procedure like section 15401, subdivision (a)(2) to section 15402 but did not. Appellant would also note that the textual contrast restricting modification more than revocation is not an absurd but a rational position. If a trust is revoked, the corpus will be distributed according to California's testacy and probate laws,

which ensure an improvident revocation does not effect a substantial injustice. By contrast, there is no such backstop for improvident modification.

But the more immediate point is that *King* and the Opinion (like the *King* majority and the *King* dissent) are in conflict, and will lead to different outcomes in many if not most cases. This Court should grant review to resolve the conflict between the published opinions and provide uniformity of precedent.

Respectfully submitted,

Dated: October 26, 2021

_____

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

Certification of Word Count
(Cal. Rules of Court, rule 8.204(c).)

I, Mitchell Keiter, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 2,742 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect version X3 word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 26, 2021

_____

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

Filed 9/16/21

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRIANNA McKEE HAGGERTY, Plaintiff and Appellant, v. NANCY F. THORNTON et al., Defendants and Respondents.	D078049 (Super. Ct. No. 37-2019-00028694-PR-TR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Julia C. Kelety, Judge. Affirmed.

Blut Law Group and Elliot S. Blut for Plaintiff and Appellant.

Artiano Shinoff, Howard A. Kipnis and Steven J. Barnes for Defendant and Respondent Patricia Galligan.

Cross Law and Oleg Cross for Defendant and Respondent Racquel Kolsrud.

Higgs Fletcher & Mack, Roland H. Achtel and Scott J. Ingold for Defendant and Respondent Union of Concerned Scientists.

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.

Brianna McKee Haggerty appeals an order of the probate court finding that a trust agreement was validly amended, 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 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

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 (*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. Galligan distinguished *King* and suggested it was wrongly

decided. UCS and Racquel Kolsrud filed briefs advancing similar arguments.[1]

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

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.) "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." ' "

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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."

(*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.)

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; *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 970 (*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.)

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. In *King*, a married couple created a

revocable trust. (*Id.* at p. 1188.) 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.) 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.) The majority recognized that, under section 15401, a method for *revocation* must be explicitly exclusive to displace the statutory method. (*Id.* at p. 1192.) 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.) 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, 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. 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.)

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 (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.) 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.) 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 (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 (dis. opn. of Detjen, J.).)

The *King* dissent found support in *Huscher*, *supra*, 121 Cal.App.4th at pages 960 through 963, which examined both current and prior law. (*King*, *supra*, 204 Cal.App.4th at p. 1197 (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 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: "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, quoting *Huscher*, at p. 967.) (The *King* majority responded that the discussion of section 15402 in *Huscher* was dicta and unpersuasive, see *King*, at p. 1193, fn. 3.)

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 (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 (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.)

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.) 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.)

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 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 [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]

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.

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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, 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 [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 is likewise unpersuasive for the reasons discussed in *Huscher*, *supra*, 121 Cal.App.4th at pages 966 through 967 and footnote 13.

DISPOSITION

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

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

09/16/2021

KEVIN J. LANE, CLERK

By A. Galvez
Deputy Clerk

Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. On October 26, 2021, I served the foregoing document described as **PETITION FOR REVIEW** in case number **D078049** on the interested parties in this action.

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

Executed this October 26, 2021, at Beverly Hills, California.

_____

Mitchell Keiter