No. S271483

FILED WITH PERMISSION

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Brianna McKee, Petitioner,

v.

Nancy F. Thornton, et al., Respondent.

Appeal from the Superior Court of the State of California,
County of San Diego, Case No. 37-2019-00028694-PR-TR-CTL
The Honorable Julia Craig Kelety, Presiding

Fourth Appellate District, Case No. D078049

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF

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CERTIFICATE OF INTERESTED PARTIES

I hereby certify under penalty of perjury, pursuant to California Rules of Court 8.208(e)(2), that I know of no person or entity, other than the parties themselves, who have any financial or other interest in the outcome of these proceedings.

Dated: September 1, 2022

HARTOG, BAER,
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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENTS

Applicant Mary Nivela-Balistreri (*Mary*) seeks leave to file an amicus curiae brief in support of the respondents in *Haggerty v. Thornton,* S271483 (*Haggerty Respondents*). Mary has an interest in the outcome of this case because she is the appellant and petitioner in *Balistreri v. Balistreri,* S273909. This Court granted review of *Balistreri* on May 11, 2022 but deferred further action pending the disposition of the same issue in *Haggerty*. Because the Court's decision in *Haggerty* may affect the outcome of Mary's appeal in *Balistreri*, this amicus brief may be Mary's only meaningful opportunity to brief this Court on the disputed issue.

Mary's amicus brief will assist the court in resolving *Haggerty* because her perspective on the construction and application of Probate Code section 15402 is different than that of the *Haggerty* Respondents. Because of this, Mary's amicus brief focuses on certain aspects of section 15402's legislative history and underlying purpose that are relevant to the disputed issue but that the *Haggerty* Respondents do not address.

The relevant term in Mary's revocable trust is worded differently than the trust term at issue in *Haggerty*. Mary contends that Probate Code section 15402, if correctly construed, compels the same result in both *Haggerty* and *Balistreri* despite the difference in wording. Respondents, on the other hand, contend that *Haggerty* can, potentially, be affirmed without disturbing the outcome in *Balistreri*. While Mary, like the

Haggerty Respondents, wants *Haggerty* to be affirmed, Mary has an interest in *how* the Court reaches that decision that the *Haggerty* Respondents do not share.

Mary has an interest in ensuring that, should this Court affirm *Haggerty*, it adopts reasoning and formulates a holding that (appropriately) applies to the broadest possible range of trust terms and provides predictability and certainty to the widest possible range of trust settlors. Mary, therefore, finds herself in a somewhat unique position as an individual litigant. Her interest in in the outcome of *Haggerty* is personal, but that interest aligns with trust settlors across the state who will benefit from a clear and broadly applicable construction of Probate Code section 15402.

Dated: September 1, 2022

HARTOG, BAER,
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By: KEVIN P. O'BRIEN
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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

I. Introduction

The Fourth Appellate District's decision in *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003 involves the same fact pattern as most other published appellate court decisions addressing California's rules for the revocation and amendment of revocable trusts during the settlor's lifetime. (1) A trust settlor attempts to revoke or amend their trust by executing and delivering a document that expresses their intent. (2) The settlor dies believing (or at least hoping) that they successfully revoked or amended their trust. (3) Following the settlor's death, the adversely affected beneficiary challenges the validity of the instrument based on the settlor's alleged failure to comply with the trust's formal procedural requirements for revoking or amending the trust. In *Haggerty* and *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, the settlors failed to have their signatures notarized. In *Hibernia Bank v. Wells Fargo Bank* (1977) 66 Cal.App.3d 399, the settlor failed to obtain written approval of her attorney. In *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, the settlor failed to obtain the third-party trustee's signature. There are other cases involving a similar trust terms and similar procedural defects.[1]

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[1] *See e.g., Masry v. Masry* (2008) 166 Cal.App.4th 738, 739 (trust settlor failed to deliver instrument to the other trust settlor); *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1345 (trust settlor failed to deliver instrument to trustee by certified mail).

Practically speaking, there are only two ways to resolve a dispute over the validity of a settlor's procedurally defective trust revocation or amendment. Validate the settlor's revocation or amendment despite the procedural defect, or invalidate the revocation or amendment based on the settlor's failure to strictly comply with the trust's terms. There are also fairly transparent policy reasons why the Legislature might choose to enact a statute that promotes one of these outcomes over the other.

Validating the settlor's revocation or amendment despite the procedural defect carries out what appears to be the deceased settlor's most recently expressed intent. Excusing the procedural defect does not prevent the adversely effected beneficiary from challenging the instrument on substantive grounds (*e.g.,* forgery, lack of capacity, undue influence, etc.) if they have cause to do so. Any such challenge, however, must be based on contemporaneous evidence of the settlor's cognitive ability, motivation, or intent rather than the mere existence or non-existence of a minor procedural error discovered after the settlor's death.

Invalidating the procedurally defective revocation or amendment, on the other hand, enforces trust terms that the settlor specifically adopted when they first executed their trust. The trust settlor, after all, may have had a specific reason for adopting a restrictive revocation or modification procedure, and courts should generally be wary of second guessing the settlor's originally expressed intent just because the result may appear to be harsh or unfair.

The conflict in authority between *Haggerty*, on the one hand, and *King v. Lynch* (2012) 204 Cal.App.4th 1186 and *Balistreri*, on the other hand, reflects a disagreement over which of these two outcomes the Legislature intended to promote when they drafted and enacted Probate Code section 15402 to govern the modification of revocable trusts during the settlor's lifetime.

With Probate Code section 15401, which governs trust revocation, the Legislature expressed a clear preference for the former, more forgiving approach. Under section 15401(a)(2), courts must presume that the settlor intended to retain the right to revoke using the default procedure of delivering a signed writing to the trustee during their lifetime (without meeting any other procedural requirements) *unless* the trust instrument explicitly makes the trust's revocation procedure exclusive. This "explicit exclusivity" requirement drastically limits the circumstances in which a court can invalidate a settlor's attempted revocation based solely on the settlor's failure to satisfy the trust's nominal procedural requirements.

With section 15402, the appellate courts have reached drastically different conclusions about the Legislature's intent. *Haggerty* concluded that the Legislature intended section 15402 to extend section 15401(a)'s liberalized trust revocation rules to trust modification. *King* and *Balistreri,* on the other, concluded that the Legislature intended section 15402 to substantively differentiate revocation and modification so that a trust's modification terms will be strictly enforced notwithstanding the more forgiving standards applicable to a trust's revocation terms.

This Court must determine which of these competing constructions "comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation what would lead to absurd consequences." (*Lopez v. Ledesma* (2022) 12 Cal.5th 848, 858.) Applying this criteria, it is clear that *Haggerty* is correctly decided and should be affirmed while *King* and *Balistreri* misconstrue section 15402 and must be disapproved.

Haggerty's construction of section 15402 as an extension of section 15401's updated revocation rules promotes outcomes that, in the Legislature's own estimation, more reliably carry out the settlors' intent and more closely conform to the public's expectations. *King's* and *Balistreri's* inferred distinction between sections 15401 and 15402, by contrast, isolates section 15402 from the statutory scheme in which it appears and leads to absurd results. There is no discernable practical or policy reason why a trust settlor's procedurally defective instrument should be validated if it expresses an intent to revoke the trust (in whole or in part) but invalidated if it expresses an intent to amend the trust's terms. This, however, is exactly the result that *King's* and *Balistreri's* construction of section 15402 compels.

II. Factual Background

Probate code sections 15401 and 15402 govern the revocation and amendment of revocable trusts during the settlor's lifetime. Section 15401 provides, in relevant part:

> (a) A trust that is revocable by the settlor . . . may be revoked in whole or in party by any of the following methods:
>
> (1) By compliance with the method of revocation provided in the trust instrument.
>
> (2) By a writing . . . 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.

(Prob. Code §15401(a)). Section 15402 provides that:

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

(Prob. Code §15402.) Both statutes were enacted as part of a consolidation and reorganization of California trust law that was drafted and recommended by the California Law Review Commission and adopted by the Legislature in 1986. (*See Selected 1986 Trust and Probate Legislation* (1986) 18 Cal. L. Revision Comm'n Reports 1201, 1222 ("A major purpose of this recommendation is to reorganize and consolidate the scattered provisions of existing law.")).

The trust at issue in *Haggerty* provided that the settlor, Jeane M. Bertsch, reserved "the right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." (*Haggerty, supra,* 68 Cal.App.5th at 1006.) Ms. Bertsch executed an instrument amending the trust but failed to have her signature notarized. (*Id.*) After Ms. Bertsch's death, the

adversely affected beneficiary challenged the validity the settlor's attempted amendment based on *King's* construction of section 15402, under which a trust's specified method for modification must be strictly followed regardless of whether the trust explicitly makes that method exclusive. (*Id.* at 1007.)

Both the trial court and appellate court declined to follow *King*, holding that section 15402 extends section 15401(a)'s trust revocation rules to trust modification. Ms. Bertch, therefore, retained the right to both revoke *and amend* her trust using section 15401(a)(2)'s default method for revocation because the trust instrument did not make the trust's specified method for revocation or amendment (*i.e.,* "by an acknowledged instrument") explicitly exclusive. (*Id.* at 1011-1012.)

Soon after *Haggerty* was published, the First District Court of Appeal issued its decision in *Balistreri*. The trust in *Balistreri* provided that "any amendment, revocation, or termination . . . shall be made by written instrument, with signature acknowledged by a notary public, by the trustor(s) . . . and delivered to the trustee." (*Balistreri, supra,* 75 Cal.App.5th at 515.) Like in *Haggerty*, the trust settlors executed and delivered a written instrument expressing their intent to amend the trust's terms but failed to have their signatures notarized. (*Id.*) The adversely affected beneficiary challenged the validity of the amendment following the death of one of the settlors. (*Id.*) The court declined to follow *Haggerty*, adopted *King's* construction of section 15402, and invalidated the amendment based on the

settlors' failure to strictly comply with the trust's terms. *(Id.* at 522.)

III. Legal Discussion

The current conflict among the appellate courts over the construction and application of Probate Code section 15402, which governs the modification of revocable trusts during the settlor's lifetime, reflects a disagreement over what the Legislature intended to accomplish when it enacted that statute in 1986. There is no dispute or disagreement that the Legislature enacted Probate Code section 15401, which governs trust revocation, for the express purpose of liberalizing California's rules for trust revocation so that trust settlors can exercise their right to revoke by delivering a signed writing to the trustee during their lifetime *despite* any additional procedural requirements the trust instrument imposes. (*See King, supra,* 204 Cal.App.4th at 1191-1192 ("According to the Law Review 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.")) The Legislatures' intended purpose for section 15402, however, is not as clear, and the appellate courts that have addressed the issue have reached drastically different conclusions. (*See Balistreri, supra,* 75 Cal.App.5th at 522 ("[The] legislative history does not conclusively resolve what was intended by the phrase, '[u]nless . . . provides otherwise' in section 15402.")

In *Haggerty*, the Fourth Appellate District concluded that the Legislature enacted section 15402 to extend section 15401(a)(2)'s liberalized rules for trust revocation to trust modification. (*Haggerty, supra,* 68 Cal.App.5th at 1011 ("Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification.")) Under this construction, settlors who retain the right to revoke using the default method (*i.e.*, delivering a signed writing to trustee during the settlor's lifetime) also retain the right to modify their trust using that method *unless* the trust instrument *explicitly* makes the trust's method exclusive as to revocation, revocation *and* modification, or just modification. (*Id.* at 1011-1012.) Thus, for trust terms like those at issue in *Haggerty* and *Balistreri*, which provide a single method for both revocation and amendment but do not explicitly make that method exclusive for either action, section 15402 authorizes the settlor to revoke *and* amend using the default method for revocation.

The Fifth and First Appellate Districts reached the opposite conclusion, respectively, in *King* and *Balistreri,* finding that the Legislature enacted section 15402 to differentiate between trust revocations and trust modifications so that different rules apply in each instance. (*King, supra,* 204 Cal.App.4th at 1193 ("[T]he Legislature no longer intended the same rules to apply to both revocation and modification."); *Balistreri, supra,* 75 Cal.App.5th at 518.) Under this construction, section 15401(a)(2)'s liberalized rules for trust revocation have no application to trust modification unless the

trust instrument is totally silent on modification. (*King, supra,* 204 Cal.App.4th at 1193 ("[I]f any modification method is specified in the trust, that method must be used to amend the trust.")) If a settlor adopts a trust term that specifies a method for modification, the settlor is bound to follow that method regardless of whether the trust explicitly makes that method exclusive. Thus, for trust terms like those at issue in *Haggerty* and *Balistreri,* which provide a single method for both revocation and amendment, the settlor remains free to revoke their trust using the default method of delivering a signed writing to the trustee but is bound to strictly comply with the trust's procedural terms when seeking to modify the trust. (*Balistreri, supra,* 75 Cal.App.5th at 522 ("[W]hen a trust specifies a method of amendment, under section 14502, that method must be followed for the amendment to be effective."))

These conflicting appellate decisions amply demonstrate that section 15402's plain language is subject to multiple reasonable interpretations. This Court, therefore, can and should adopt the construction that "comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Lopez v. Ledesma* (2022) 12 Cal.5th 848, 858.)

Under this criteria, it is clear that *Haggerty* is correctly decided and that the holdings of *Balistreri* and *King* are incongruous with the statute's underlying policy and purpose and, if followed, will lead to absurd results.

A. *Haggerty* is correctly decided because the Legislature drafted Probate Code section 15402 to extend section 15401's updated trust revocation rules to trust modification.

Haggerty is correctly decided and should be affirmed because it will achieve results that support and advance the Legislature's policy of protecting the settlors right to freely revoke and amend their revocable trust during their lifetime.

Before sections 15401 and 15402, trust revocation was governed by former Civil Code section 2280 and there was no statute addressing trust modification. (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 963.) The majority of appellate courts construed former section 2280 so that trust settlors were bound to follow the trust's specified method for revocation unless the trust instrument was totally silent on revocation. (*See e.g., Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300, 302-304; *Hibernia Bank v. Wells Fargo* (1977) 66 Cal.App.3d 399, 403-405.) Courts applied the same rules to trust modification based on the assumption that the power to revoke includes the power to amend. (*Huscher, supra,* 121 Cal.App.4th at 962 fn.5.) Courts, in essence, presumed that the settlor's decision to specify a method for revocation *or* modification in the trust instrument expressed an intent to bind themselves to follow that method. (*See Hibernia, supra,* 66 Cal.App.3d at 404.)

When the Legislature enacted section 15401 and 15402, they followed the California Law Review Commission's (*Commission*) recommendation to move away from the case-law rule requiring strict enforcement of a trust's procedural terms and adopted a more forgiving approach. (*Selected 1986 Trust and*

Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep. (*Commission Report*) 1268-1278.) The Commission observed that settlors who use revocable trusts for probate avoidance and estate planning do not typically intend to surrender their property rights during their lifetime and may not expect or understand that the trust's procedural terms may restrict their ability to freely exercise those rights. (Commission Report, 1268-1269, 1271 ("[T]he settlor may have forgotten about the method provided in the trust, or may not be aware of the case-law rule.")) A rule that requires settlors to strictly follow their trust's revocation terms regardless of the circumstances may run counter to the settlors' expectations by giving future beneficiaries an opportunity to exploit an otherwise inconsequential procedural oversight to frustrate their clearly expressed intent. (Commission Report, 1271 ([T]he [then existing] case-law rule may be criticized as defeating the clear intention of the settlor who attempts to revoke a revocable trust be the statutory method, in circumstances that do not involve undue influence or a lack of capacity."))

While the Commission's exposition of the reasons behind this change appear, on the surface, to be directed only at trust revocation, it is reasonable to assume that Commission's commentary also applies to trust modification. (Commission Report, 1270-1271.) Indeed, the Commission recognized that, under the then existing law, courts considered the power to amend as an implicit component of the power to revoke. (Commission Report, 1272; *see also Heifetz v. Bank of America*

(1957) 147 Cal.App.2d 776, 821-872 ([power to amend "an applied power embraced with the reservation of power to revoke in whole or in part").) The Commission's criticism of the then existing rules for trust "revocation," therefore, necessarily encompassed both revocation *and* modification and addressed circumstances that could involve a settlor's attempt to revoke their trust in whole, revoke their trust in part, amend the terms of their trust, or some combination thereof. (*See Estate of Lindstrom* (1987) 191 Cal.App.3d 375, 385 ("[R]evocation and amendment are fungible.")

The Commission's only express statement about section 15402 implicitly suggests that the statute was drafted to officially extend the new rules and policies for trust revocation to trust modification rather than to create distinct rules for trust modification. The Commission's official comment to section 15402 provides that:

> Under general principles the settlor . . . 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.

(Commission Report, 1271.) If the commission intended section 15402 to impose separate and distinct standards for trust modification, it seems likely the Commission would have given the Legislature some policy, practical, or substantive reason for treating trust modification and trust revocation differently. They

certainly would not have described section 15402 merely as a codification of the existing rule that settlors "may modify as well as terminate" a trust if they only intended this to be true in the rare instances in which a trust instrument is totally silent on the subject of modification.

Haggerty's construction of section appropriately recognizes that the Legislature enacted sections 15401 and 15402 at the same time and with the same objectives. (*Haggerty, supra,* 68 Cal.App.5th at 1101 ("Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification.")) Section 15402's language is less specific and detailed than section 15401's language because section 15402 serves a different function. (*King, supra,* 204 Cal.App. at 1196 (J.Dtjen dissenting) ("[S]ection 15402 was added, not to establish a different rule form section 15401. . . but in order to adopt the same flexible rule for modifications as for revocations.")) Section 15402 does not set new standards for trust modification, it confirms that, under section 15401's new rules for trust revocation, the power to revoke *still* includes the power to amend. (*Huscher, supra,* 121 Cal.App.4th at 968.)

The words "procedures for revocation" in section 15402 reference the procedures for revocation available to the settlor under section 15401(a)(1) and (2). For most trusts, this will include both the method set out in the trust and the statutory method of delivering a signed writing to the trustee. The words "unless the instrument provides otherwise" merely recognize that the trust instrument's language may, in some instances, limit the

"procedures for revocation" available to the settlor and preclude the settlor from using section 15401(a)(2)'s statutory method to revoke, amend, or any combination of the two. A trust instrument, therefore, "provides otherwise" under section 15402 when, pursuant to section 15401(a)(2), the trust instrument "explicitly makes" the trust's specified method for revocation (and modification via section 15402) "exclusive" and the settlor cannot rely on the statutory method to perform either function.

B. *King* and *Balistreri* focus on the wrong aspect of the Legislative history and ignore the purpose and objectives of the overall statutory scheme.

King and *Balistreri's* strict construction of section 15402 is premised almost entirely on an inference drawn from the Legislature's decision to address trust revocation and trust modification in separate statutes. (*King, supra,* 204 Cal.App.4th at 1193 ("[W]hen the Legislature enacted sections 15401 and 15402, it differentiated between trust revocations and modifications."); *Balistreri, supra,* 75 Cal.App.5th at 518.) This, *King* and *Balistreri* conclude, evidences an intent that "[t]he Legislature no longer intended the same rules to apply to both revocation and modification." (*King, supra,* 204 Cal.App.4th at 1193; *Balistreri*, *supra,* 75 Cal.App.5th at 518.) This inference might be reasonable if that one drafting choice represented all of the legislative history that there is to go on, but *King*'s and *Balistreri's* reasoning skips over several important aspects of the statute's history, background, and context that decisively undercut this conclusion.

California trust law, since 1931, has favored the revocability of trusts. (*Huscher, supra,* 121 Cal.App.4th at 963; Bird *Trust Termination Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie* (1985) 36 Hastings L.J. 563, 565-566 ("[In California a settlor may terminate a trust with relative ease.")) In 1931, The Legislature amended former Civil Code section 2280 to provide that "[u]nless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." (*Id.*) The 1931 version of section 2280 represented a significant departure from existing law because it made revocability the default. (*Id.* ("Where the original version of section 2280 made irrevocability the norm unless otherwise stated, the 1931 version opted to make revocability the norm unless the trust expressly declared itself irrevocable."))

The majority of jurisdictions at the time presumed that all voluntary (*i.e.* non-testamentary) trusts were irrevocable (and therefore un-amendable) unless the trust instrument expressly reserved the settlor's power to revoke. (*See Restatement (First) of Trusts* §330 (1935) ("The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power.")) *Any* powers the settlor expressly reserved in the trust instrument were strictly construed. (*See, e.g., Northwestern University v. McLoraine* (Ill.App. 1982) 438 N.E.2d 1369, 1373 ("Where a method of exercising a power of modification is described in the trust instrument, the power can be exercised only in the manner described."); *Phelps v. State St. Trust Co.*

(Mass. 1983) 115 N.E. 382, 383 ("[A] valid trust, once created, cannot be revoked or altered except by the exercise of a reserved power to do so, which must be exercised in strict conformity to its terms.")) A trust settlor reserving the power to revoke or amend by serving notice on the trustee by certified mail, for example, only reserved the power to revoke using that exact method.

According to scholars, California's decision to break away from the majority and make revocability (and amendability) the default was a direct response to the frustrating circumstances many trust settlors found themselves in during the depression. (Bird, *supra,* 36 Hastings L.J. at 569 fn. 27.) Trust settlors who previously relied on trust income for support were shocked to find that they could not access their trust's corpus when they needed to. (Commission Report, 1269.) The Legislature's liberalization of trust revocability, thus, reflected an attempt to conform California law to the public's practical uses of and reasonable expectations for the *inter vivos* trust.

The California appellate courts that construed and applied former section 2280, however, never fully aligned on and, by some estimations, never fully conformed to the statute's liberalizing intent. (*Huscher, supra,* 121 Cal.App.4th at 961 ("[Prior decisions] have obscured the true meaning of section 2280."); Bird, *supra,* 36 Hastings L.J. 367 (noting inconsistency between case-law applying former Civil Code section 2280 and that statute's policy in favor of revocability).) Courts recognized that California law compelled the exact opposite result as the majority view when the disputed trust was totally silent as to revocation.

(*See Rosenauer, supra,* 30 Cal.App.3d at 304 ("Civil Code section 2280 was undoubtedly intended to liberalize the power of revocation in California."); *Hibernia Bank, supra,* 66 Cal.App.3d at 403.) Many courts, however, lost track of this distinction when the disputed trust directly addressed revocation in some form or other. In these cases, courts superimposed the strict rules arising from the majority's presumption of irrevocability on to California trust law, holding that the settlors' power to revoke was limited to the powers *expressly reserved* in the trust instrument and concluding that a trust's procedural terms had to be narrowly construed and strictly enforced to carry out the settlor's intent. (*See Rosenauer, supra,* 30 Cal.App.3d at 304-305; *Hibernia Bank, supra,* 66 Cal.App.3d at 404.) These cases, in essence, created a presumption that all trust settlors intend their trust's revocation terms to be mandatory and exclusive unless the trust expressly states otherwise.

When the Legislature consolidated and reorganized California trust law in 1986 they adopted the revised statutory scheme recommended by the Commission. With this revised trust law, the Commission expressly recommended that the Legislature abandon the existing trust revocation rules that required and promoted the strict enforcement of a trust's procedural terms and adopt a more practical and flexible approach. (Commission Report, 1270-1271.) The objective of the new statutory scheme, as articulated by the Commission, was to limit the circumstances in which a settlor's clearly expressed intent could be defeated based solely on a procedural "gotcha"

discovered after the settlor's death while, at the same time, preserving the trustee's flexibility to adopt trust terms that suit their specific needs. (*Id.* ("The proposed law adopts a compromise position that makes 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.")).

King's and *Balistreri's* construction of section 15402 carves trust modification out of the Commission's general commentary on trust revocability and, by doing so, creates an unlikely one-step forward, one-step back scenario. The *King* and *Balistreri* courts recognize, as they must, that the Legislature changed the revocation rules to protect trust settlors from the potentially harsh effects of a trust's procedural terms. (*King, supra,* 204 Cal.App.4th at 1192; *Balistreri, supra,* 75 Cal.App.5th at 516.) *King* and *Balistrer*i, however, also reach the incongruous conclusion that that the Legislature does not want to protect the *same trust settlors* from *the same harsh results* when a settlor attempts to amend rather than revoke their trust. (*See Balistreri, supra,* 75 Cal.App.5th at 517 ("[W]hen a trust specifies an amendment procedure, a purported amendment made in contravention of that procedure is invalid.")) Simply put, this does not make sense.

Assume that a trust instrument requires that the settlor notarize their signature on any instrument intended to revoke or amend the trust but does not explicitly make this procedure exclusive. Assume that the settlor drafts, executes, and delivers

an instrument expressing an intent to revoke or amend their trust but fails to comply with the trust's notarization requirement. Perhaps the settlor did not recall that the trust included the notarization requirement, or perhaps the settlor was concerned that they might die before they had an opportunity to obtain a notary public's acknowledgement. Either way, the procedural defect is inconsequential to the meaning and authenticity of the settlor's instrument. Finally, assume that the settlor dies after they sign and deliver the instrument but before they were made aware of or had an opportunity to fix their procedural oversight.

Is there any discernable reason to presume that this settlor would want or expect a different result depending on whether the instrument they prepared revokes the trust in its entirety, revokes the trust in part, or modifies the trust's terms? No there is not. Will it advance some specific policy objective to validate a procedurally defective instrument that partially revokes a trust but to invalidate a procedural defective instrument that achieves the exact same result by amending the trust's terms? No it will not. *King* and *Balistreri's* narrow construction of section 15402 presumes not only that this is the outcome the settlor intended but also that this is the outcome the Legislature, for some unarticulated reason, wants to promote.

The argument that strict enforcement of a trust's procedural terms is necessary to carry out the settlor's apparent desire to protect themselves against future forgery, undue influence, or fraud, does not hold up if it only applies to trust

modification and does not apply to trust revocation. If a bad actor, for some reason, cannot successfully evade this "protection" by forging or fabricating an instrument that complies with the trust's nominal procedural terms, they would only need to forge or fabricate an alternate instrument that achieves the same results by revoking the trust in whole or in part instead of amending it. Moreover, the mere recognition of a procedurally deficient revocation or amendment as legally effective *does not* prevent an interested person or adversely effected beneficiary from challenging the validity of that instrument as the product of forgery, lack of capacity, undue influence, or fraud if they have grounds to do so. (*See* Bird, *supra,* 36 Hastings L.J. at 569 ("[A] revocation shown to be the product of fraud, duress, or undue influence, can be set aside regardless of the method employed.")).

C. *Haggerty's* construction of section 15402 compels the same result in both *Haggerty* and *Balistreri.*

Haggerty's construction of section 15402 compels the validation of the settlors' procedurally defective amendments in both *Haggerty* and *Balistreri* because the trust instruments in both cases involved terms that specified a single method for both revocation and amendment but did not make the trust's method for "revocation and amendment" explicitly exclusive. (*Haggerty, supra,* 68 Cal.App.5th at 1012; *Balistreri, supra,* 75 Cal.App.5th at 515, 520 fn.5.) And, in both cases, only the validation of the trust settlors' procedural defective instrument will accomplish the Legislature's objective of discerning and carrying out the

trust settlors' most recently expressed intent. In *Balistreri*, for example, the appellate court's invalidation of the settlors' amendment based entirely on the lack of a notary public's acknowledgment, deprives the proponent of the amendment of the opportunity to affirmatively prove that the amendment reflects her deceased husband's intent despite the procedural defect. (*Balistreri*, *supra,* 75 Cal.App.5th at 515 fn.2.)

While the trust term at issue in *Balistreri* includes the word "shall"—"any revocation [or] amendment . . . *shall* be made by written instrument, with signature acknowledged"—and the trust at issue in *Haggerty* does not, this is a distinction without a difference. (*Balistreri, supra,* at 519, 520 fn.5.) First and foremost, section 15401(a)(2)'s "explicit exclusivity" exception requires a direct, distinct, and unequivocal statement that the settlor intended to make the trust's method for revocation (or modification) exclusive and mandatory. (*Cundall v. Mitchell-Clyde* (2020) 51 Cal.App.5th 571, 583.) A statement is not "explicit" under this standard if it requires an inference to understand its intent. (*Id.*)

The use of the word "shall" only raises *an inference* of exclusivity and, therefore, does not fall under section 15401(a)(2)'s "explicit exclusivity" exception. (*See Terrant Bell Property LLC v. Superior Court* (2011) 51 Cal.4th 538, 542 ("Use in [a statute] of 'may' or 'shall' is merely indicative, not dispositive or conclusive.") It is always the context in which the word "shall" is used and not the word itself that implies a mandatory intent. (*Retired Employees Assn. of Orange County,*

Inc. v. County of Orange (2011) 52 Cal.4th 1171, 1184.) When the word "shall" is used in a strictly procedural context, for example, courts often construe the term as a "directory" rather than "mandatory," meaning a party's failure to strictly comply with the proscribed procedure is not dispositive of the matter. (*See In Re Melinda J.* (1991) 234 Cal.App.3d 1413, 1419 ("shall" construed as directory rather than mandatory when strict enforcement would place "undue weight on a matter of procedure rather than substance").)

Additionally, the application of *King's* narrow construction of section 15402 to the trust terms at issue in both *Haggerty* and *Balistreri* leads to the *same* absurd result notwithstanding the minor difference in wording between trusts. Both trusts provide settlors with a single, unified method for exercising their right to "revoke" or "amend." (*Haggerty, supra,* 68 Cal.App.5th at 1006; *Balistreri, supra,* 75 Cal.App.5th at 515.) Thus, in both cases, under *King's* construction of section 15402, the same exact language in the same exact trust term would have a drastically different legal effect depending how the settlor characterized what they intended to accomplish. If the settlor's procedurally defective instrument expresses an intent to revoke the part of the trust that contains a specific bequest to a beneficiary, it is valid. If the settlors' procedurally defective instrument expresses in intent to amend the trust to delete or alter the same specific bequest, it is invalid. There are no discernable policy or practical reasons why the Legislature would intentionally promote such an incongruous result.

D. *King* is distinguishable if limited to its facts but *Haggerty* and *Balistreri* are mutually exclusive and cannot co-exist.

Both *King* and *Balistreri* hold that, under section 15402, any and all trust terms addressing trust modification are presumed to be mandatory and exclusive regardless of the circumstances. The *King* decision, however, involves a trust term that is materially different than the trust terms at issue in *Haggerty* and *Balistreri*. Because of this, *King* can be distinguished and the outcome left undisturbed if that case is limited to its facts.

The dispute in *King* was not so much about *how* the settlor exercised his right to amend as *whether* the settlor had the right to amend in the first place. In *King*, the trust settlors were married and the trust contained their community property. (*King, supra,* 139 Cal.App.3d at 1188-1189.) The relevant trust term provided that both settlors, acting jointly, could amend the trust as to their jointly owned property. (*Id.*) This provision did not in any way limit or expand the settlors' existing property rights because, under Family Code section 761(a), a married settlor's right to amend a trust that contains community property "may be exercised only with the joinder or consent of both spouses." (Fam. Code §761(a).)

Both settlors were alive, but one lacked capacity. (*Id.* at 1189.) The settlor with capacity attempted to change the dispositive terms of the trust without the consent of the incapacitated spouse. (*Id.*) After the death of the incapacitated settlor, the settlor argued that his unilateral amendments were

valid because the trust did not explicitly state that the trust's requirement for joint amendments was the exclusive method for amending the trust. Therefore, according to the settlor, he remained free under section 15402 to unilaterally amend the entire trust using the statutory method to revoke set out in section 15401(a)(2). (*Id.* at 1190.) The court rejected this argument, concluding that section 15402 did not incorporate section 15401(a)'s "explicit exclusivity" standard and that the standards applicable to trust modification compelled the settlor to strictly follow the terms of the trust. (*Id.* at 1193.) The settlor's amendments were, therefore, invalid because they were not jointly made by both settlors. (*Id.*)

King's holding embodies the adage "bad cases make bad law." (*See e.g., Swanson v. Superior Court* (1989) 211 Cal.App.3d 332, 342 (J. Chanel concurring and dissenting).) The court *could have* invalidated the amendments based solely on the grounds that the settlor lacked authority to unilaterally amend the trust under Family Code section 761. The court, however, addressed the party's procedural arguments under section 15402 without considering whether the settlor had the right to unilaterally amend the trust in the first place. The court reached the correct result – concluding that the settlor could not unilaterally amend the dispositive terms of a trust he shared with his incapacitated wife—but followed the wrong reasoning to get there.

The circumstances in *Haggerty* and *Balistreri* are fundamentally different because the settlors in those cases were attempting to do something that they indisputably and

undeniably had the power to do. In *Haggerty* the decedent was the sole settlor, she retained the right to amend, and she attempted to exercise that power during her lifetime. (*Haggerty, supra,* 68 Cal.App.5th at 1006.) In *Ballistreri*, the settlors were married, they retained the power to amend the trust acting jointly, and they jointly attempted to exercise that right while they were both alive. (*Balistreri, supra,* 75 Cal.App.5th at 515.) In both cases the procedural defects were not raised until after the death of at least one of the settlors and it was too late to fix the error.

In *Haggerty* and *Baslistreri* the validation of the settlors' attempted amendment, arguably, fulfills what appears to be the settlors' most recently expressed testamentary intent. In *King*, by contrast, the challenged amendments, on their face, only reflected the intent of one of the settlors, and validating the amendments would unfairly erase the incapacitated spouse's expression of testamentary intent. Affirming *Haggerty*, therefore, does not require a different outcome in *King* as long as *King* is limited to its facts. The conflicting holdings in *Haggerty* and *Balistreri*, however, are mutually exclusive and cannot both stand.

IV. Conclusion

For the foregoing reasons, this Court should affirm *Haggerty*, adopt the *Haggerty* court's construction of Probate Code section 15402, and disapprove the narrow construction adopted by *King* and *Balistreri*. This is the only outcome that

will advance the Legislature's policy objectives, consistently and reliably carry out trust settlors' clearly expressed intent, and conform California trust law to trust settlors' reasonable expectations. A trust settlor's minor procedural misstep should not defeat a clear expression of their intent to revoke, revoke in part, or amend the terms of their trust unless the trust settlor explicitly states that this is their intent in the terms of the trust. Because section 15402 can reasonably be construed to compel this result, that is exactly how it should be construed and applied.

Dated: September 1, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify under penalty of perjury, pursuant to California Rules of Court 8.204(c), that this brief is printed in 13-point proportional spaced type, contains 6,177 words, and is within the 14,000-word limit set forth in Rule 8.204(c).

Dated: September 1, 2022

HARTOG, BAER,
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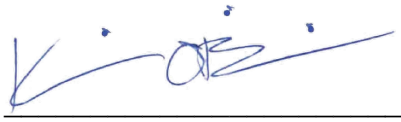

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PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 and not a party to the within action. My business address is 4 Orinda Way, Suite 200-D, Orinda, California 94563. On September 1, 2022, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; AMICUS CURIAE BRIEF

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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 on September 1, 2022, at Orinda, California.

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