

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____)	S271483
Brianna McKee Haggerty,)	
)	
Plaintiff and Appellant,)	4th Civ. No. D078049
)	
v.)	
)	San Diego County
Nancy F. Thornton et al.)	Superior Court
)	No. 37-2019-
Defendants and Respondents.)	00028694.PR.TR.CTL
_____)	

Appellant's Rule 8.520 (f)(7) Answer Brief

Appeal from the Superior Court of
San Diego County
Hon. Julia C. Keley, Judge

Mitchell Keiter, SBN 156755
Keiter Appellate Law
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212
310.553.8533
Mitchell.Keiter@gmail.com
Attorney for Appellant Brianna McKee Haggerty

Table of Contents

Table of Authorities	3
Introduction	5
Argument	5
Section 15402 does not incorporate the provisions of Section 15401 sub silentio.	5
A. Courts vindicate trustors' intent concerning process as well as outcome.	5
B. The Legislature did not expressly (or necessarily) incorporate section 15401, subdivision (a)(2) into section 15402.	9
C. The congruence between the instant trust's revocation and modification procedure does not support importing section 15401, subdivision (a)(2)'s rule into section 15402, because the trustor prescribed modification by an acknowledged instrument, not by <i>any</i> method authorized by the Legislature for revocation.	11
D. The Legislature reasonably could strike a different "compromise" regarding revocations and modification.	13
Conclusion	15
Certificate of Word Count	17
Proof of Service	

Table of Authorities

Cases

<i>Balistreri v. Balistreri</i> (2022) 75 Cal.App.5th 511, review granted May 11, 2022, S273909	7
<i>Estate of Lindstrom</i> (1987) 191 Cal.App.3d 375	9, 10
<i>Heifetz v. Bank of America Nat. Trust & Sav. Assn.</i> (1957) 147 Cal.App.2d 776	12
<i>Pena v. Dey</i> (2019) 39 Cal.App.5th 546	5, 6
<i>People v. Susser</i> (2016) 61 Cal.4th 1	8

Statutes

Probate Code

Section 15401 9, 10, 15
Section 15401, subd. (a)(1) 12
Section 15401, subd. (a)(2) 9-13
Section 15401, subd. (c) 11
Section 15402 8-12, 15

Other authorities

Campbell, *Courts Do Not Agree on the History and Meaning of California Probate Code Section 15402* (Spring 2022) 28
California Lawyers’ Association Trust & Estates Quarterly, Vol. II 10

Caverly, *Letter from the Editor* (Spring 2022) 28 California Lawyers’ Association Trust & Estates Quarterly, Vol. II . . . 15

Recommendation Proposing the Trust Law (Sept. 1986) 18
Cal. Law Revision Com. Rep. (1986) 7

Introduction

Appellant Brianna McKee Haggerty hereby answers the amicus brief of Mary Balistreri (MB). Appellant will respond to the specific points raised by the brief, while adhering as much as possible to the outline of the opening and reply brief.

Argument

Section 15402 does not incorporate the provisions of Section 15401 sub silentio.

A. Courts vindicate trustors' intent concerning process as well as outcome.

Amicus Mary Balistreri (Mary) follows respondents' challenge to the conclusion of *Pena v. Dey* (2019) 39 Cal.App.5th 546. That case held the intent of the trustor deserving implementation concerned not just the outcome but also the process. (See AOB 9, fn. 1.) *Pena* recognized there was "no dispute in this case that [the trustor] intended [a particular beneficiary] to receive a portion of his trust estate." (*Id.* at p. 549.) But it construed trustor intent more broadly, as "that intent 'must be ascertained from the whole of the trust instrument, not just separate parts of it.'" (*Id.* at p. 555.) Because the trust prescribed any amendment must be signed, and this one was not, the *Pena* court found it was not

a valid amendment. (*Ibid.*)

What Pena described as effecting the trustor's intent regarding the process of amendment is recharacterized by amicus Mary Balistreri as a "procedural 'gotcha,'" which imposes "harsh effects" and "results." (MB 25.) Mary asserts the hypothetical "*trust* included the notarization requirement." (MB 26; see also MB 25, describing the "trust's procedural terms.") But it is not an inanimate "trust" that required notarization; it was the human *trustor* who insisted on that procedural protection. Here, trustor Jeane Bertsch could have omitted this requirement, to facilitate subsequent modification. But she herself added the provision to the trust instrument—and then complied with it when amending the trust in 2016. (AOB 13-14.) That requirement was not inadvertent; though she prescribed that other writings would take effect even without notarization, she affirmatively added a notarization requirement for modification. (1CT 24, 27.)

The Law Revision Commission explained both sides of the legislative compromise: the Scylla of a straitjacket impeding a desired *revocation*, and the Charybdis of a coercive caretaker or acquaintance preying on a vulnerable elder.

[T]he 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.’ 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.

(See AOB 27, citing Recommendation Proposing the Trust Law (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) pp. 1270-1271.)

Notwithstanding this careful balancing, Mary sees any restraint on modification, even though expressly prescribed by the trustor, as a “procedural gotcha.” But because Bertsch constrained her own means of changing the trust, it is less of a “got you” than a “got myself.” Notarization might seem “inconsequential” to Mary (MB 18, 26), but it was not to Bertsch.

Because Mary is a party who would benefit from a last-minute change made by her husband as he lay on his deathbed (*Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, 515), she promotes what she calls the “forgiving approach” over the “strict” one, though they could just as easily be contrasted as the “careless” approach and the “careful” one. (MB 17-18.) To assert the superiority of the first approach, she quotes *one* of the two competing concerns balanced by

the Law Revision Commission—but not the other. (MB 18.) She describes any limits on modification as an “unlikely one-step forward, one-step back” provision, as if any changes to trust procedure must always go in the direction of looser policies regarding revisions. (MB 25.)

But the Legislature recognized there are legitimate interests and goals in conflict, which must be balanced. Accordingly, the goal of facilitating revisions should not always control over the goal of preventing coercion. (Cf. *People v. Susser* (2016) 61 Cal.4th 1, 16, internal citation omitted: “The Three Strikes law's ‘purpose is not a mantra that the prosecution can invoke in any Three Strikes case to compel the court to construe the statute so as to impose the longest possible sentence.’”)

Section 15402 struck that balance, and it did not authorize the fallback method for the instant modification.

B. The Legislature did not expressly (or necessarily) incorporate section 15401, subdivision (a)(2) into section 15402.

Like respondents, Mary also addresses the relationship between sections 15401 and 15402. Unlike Galligan, she does not contend the Legislature “expressly” incorporated the section 15401, subdivision (a)(2) method into section 15402. (See GB 24.) But she likewise elides over the obvious textual contrast.

The reply brief showed how the Law Revision Commission’s “balancing” analysis concerned only “revocation,” and “revocation” did *not* encompass modification. (ARB 27-28.) Mary nonetheless contends it does. She first asserts “it is *reasonable to assume* that [the] Commission’s commentary also applies to trust modification.” (MB 18, emphasis added.) And because courts have recognized the power to revoke includes the power to amend, the Commission’s commentary “**necessarily** encompassed both revocation *and* modification.” (MB 19, boldface added.)

To support this conflation, Mary cites *Estate of Lindstrom* (1987) 191 Cal.App.3d 375, 385, for the proposition that revocation and modification are “fungible.” (MB 19.) The actual quotation does not support such a comprehensive assertion: “*For purposes of this opinion,*

revocation and amendment are fungible.” (*Lindstrom*, at p, 385, fn. 11, emphasis added.) *Lindstrom* is a peculiar source for Mary to cite, as it cites the rule that “If the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust *only in that manner* or under those circumstances.” (*Id.* at p. 385, emphasis added.) (Of course, *Lindstrom* applied pre-recodification law, so it does not provide for the use of the section 15401, subdivision (a)(2) fallback method.)

Recodification ended this fungibility. It added the fallback revocation method through 15401, subdivision (a)(2), but provided no counterpart in section 15402. No longer is amendment a power that was included within the revocation power, it now has a separate and independent statutory basis. (See Campbell, *Courts Do Not Agree on the History and Meaning of California Probate Code Section 15402* (Spring 2022) 28 California Lawyers’ Association Trust & Estates Quarterly, Vol. II, 17.) The Legislature could have retained “fungibility” by (1) including the fallback method provision in section 15402; (2) referring to section 15401, subdivision (a)(2) in section 15402; (3) indicating in section 15401, subdivision (a)(2) that this fallback method applied to both revocation and modification; (4) providing in either section 15401 or 15402 that the law for revocation mirrors that for

modification; (5) describing the general procedures for revocation and modification with the same language; or (6) clarifying section 15401, subdivision (a)(2) “to make clear that the rule applicable to revocation . . . applies to modification,” as it did with what is now subdivision (c). (See AOB 14.)

The Legislature did none of these things.

C. The congruence between the instant trust’s revocation and modification procedure does not support importing section 15401, subdivision (a)(2)’s rule into section 15402, because the trustor prescribed modification by an acknowledged instrument, not by *any* method authorized by the Legislature for revocation.

Bertsch prescribed the same method to revoke and modify the trust. The reply brief explained, however, that prescribing the same method of an acknowledged instrument did not mean Bertsch also prescribed the fallback method. “Bertsch authorized the particular method of an acknowledged instrument (which the Legislature supplemented with the fallback method for *revocation*), not a full congruence between revocation and modification options.” (ARB 35.) The reply brief rejected respondents’ contention that section 15402 incorporated the fallback method. (ARB 21, fn. 2.)

Mary asserts both the prescribed and fallback method are available. “The words ‘procedures for revocation’ in section 15402 reference the procedures for revocation available to the settlor under section 15401(a)(1) [the prescribed method] and (2) [the fallback method].” (AOB 20.) This argument fails because section 15402 does not include the words “procedures for revocation”; it references the “procedure for revocation” in the singular. Neither respondents nor Mary may rewrite the statute to suit their position.

The reply brief observed it is *superfluous* for section 15402 to prescribed the same method for modification as revocation where the trustor prescribed the same, and *ineffective* where the trustor provides different ones. (ARB 17.) The provision carries weight only where the trust is silent as to the modification method, as occurred in *Heifetz v. Bank of America Nat. Trust & Sav. Assn.* (1957) 147 Cal.App.2d 776. The provision simply provides a default means to amend an amendable trust; it does not import the section 15401, subdivision (a)(2) method, which the Legislature omitted from section 15402.

D. The Legislature reasonably could strike a different “compromise” regarding revocation and modification.

Mary observes that where a trustor does not follow her prescribed method but delivers a signed writing (as described in section 15401, subdivision (a)(2)), that can effect revocation but not modification. (MB 29.) Mary denies any discernible policy could support such an “incongruous result.” (MB 29.) Appellant has offered policy reasons for the contrast, and observed it is enough to show the distinction would not produce an absurd result. (AOB 42-43; ARB 38-40.)

Mary contends a “bad actor” could improperly take funds from a trust by forging or fabricating an instrument to revoke a trust in part instead of amending it. (MB 27.) Of course, the more realistic concern is not forging or fabrication but undue pressure on a person with reduced capacity for resistance. But more importantly, there is a legitimate ground for distinction, because revoking a trust in part would not provide the same benefit to the usurper as amending it.

In fact, Mary’s own case provides a textbook example of why the Legislature might choose to regulate modifications more strictly than it regulates revocations. The trust provided Mary’s stepchildren would inherit her husband’s share of their community property, but the deathbed modification

provided instead that the property would remain under her control: “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.’” (*Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, 515, review granted May 11, 2022 S273909.) Had the trust been revoked, the children still would have inherited from their father through intestacy provisions. But if Mary successfully modifies the trust, she will keep the children’s shares under her control. A notarized document provides a meaningful guardrail against diverging from a trustor’s wishes.

Mary denies there is any need for such a guardrail, because even if someone did modify a trust by exerting undue influence, a disinherited heir could still challenge the modification. (AOB 27.) Of course, it is far easier to prevent unlawful pressure in the first place than to prove it after the fact (especially as the challenge will come after the death of the most useful witness). Under Mary’s theory, there is no reason to install a burglar alarm or even lock one’s doors, because a larceny victim can always hope to prosecute a thief, and successfully obtain a restitution order. But the Legislature could instead favor an ounce of prevention over a pound of cure.

Conclusion

Before recodification, California law had long recognized modification as a power included within revocation. (*Heifetz v. Bank of America Nat. Trust & Sav. Assn.* (1957) 147 Cal.App.2d 776, 781-782.) Recodification provided modification with independent statutory grounding, and created disparate provision governing revocation and modification. Section 15401 included a fallback method for revocation, but section 15402 had none for modification. Section 15401 required explicit exclusivity to preclude the fallback method; section 15402 did not.

Reasonable minds can differ on whether the provisions for revocation and modification *should be* presumptively congruent. Some who wish to “harmonize methods of revocation and modification” are proposing legislation. (Caverly, *Letter from the Editor* (Spring 2022) 28 California Lawyers’ Association Trust & Estates Quarterly, Vol. II, 6.) These policy arguments are best addressed to the Legislature. But until it revises the law, sections 15401 and 15402 will remain disparate provisions, with disparate texts and disparate conditions.

Bertsch did not validly modify her trust. This Court must reverse.

Respectfully submitted,

Dated: October 31, 2022

Mitchell Keiter

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

Certification of Word Count
(Cal. Rules of Court, rule 8.520(c)(1).)

I, Mitchell Keiter, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 2,051 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 31, 2022

Mitchell Keiter

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

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 31, 2022, I served the foregoing document described as **APPELLANT'S ANSWER BRIEF TO AMICUS** in case number **S271483** on the interested parties in this action.

See attached service list:

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

Executed this October 31, 2022, at Beverly Hills, California.

Mitchell Keiter

Mitchell Keiter

Service List

Kristen Caverly
Henderson, Caverly, Pum & Trytten LLP
kcaverly@hcesq.com

Howard Kipnis
Artiano Shinoff
hkipnis@as7law.com

Mara Allard
Allard Smith APLC
mara@allardsmith.com

Oleg Cross
Cross Law APC
oleg@caltrustlaw.com

Scott Ingold
Higgs Fletcher & Mack LLP
ingols@higgslaw.com

Leah Spero
Spero Law Office
leah@sperolegal.com

California Court of Appeal,
Fourth Appellate District, Division One

San Diego County Superior Court
Hon. Julia C. Kelety
1100 Union St.
San Diego, CA 92101

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HAGGERTY v.
THORNTON**

Case Number: **S271483**

Lower Court Case Number: **D078049**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **Mitchell.Keiter@gmail.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S271483_SUP_Haggerty

Service Recipients:

Person Served	Email Address	Type	Date / Time
Mara Allard The Law Office of Mara Smith Allard 159294	mara@allardsmith.com	e-Serve	10/31/2022 11:57:31 PM
Leah Spero Spero Law Office 232472	leah@sperolegal.com	e-Serve	10/31/2022 11:57:31 PM
John Morris Higgs, Fletcher & Mack L L P 99075	jmmorris@higgslaw.com	e-Serve	10/31/2022 11:57:31 PM
Elliot S. Blut Blut Law Group 162188	eblut@blutlaw.com	e-Serve	10/31/2022 11:57:31 PM
Paul Gruwell Ragghianti Freitas LLP 252474	pgruwell@rflawllp.com	e-Serve	10/31/2022 11:57:31 PM
Howard Kipnis Artiano Shinoff 118537	hkipnis@as7law.com	e-Serve	10/31/2022 11:57:31 PM
Oleg Cross Cross Law APC 246680	oleg@caltrustlaw.com	e-Serve	10/31/2022 11:57:31 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e-Serve	10/31/2022 11:57:31 PM
Kristen Caverly Henderson Caverly Pum & Trytten LLP 175070	kcaverly@hcesq.com	e-Serve	10/31/2022 11:57:31 PM
Steven Barnes	sbarnes@as7law.com	e-	10/31/2022

Artiano Shinoff 188347		Serve	11:57:31 PM
Kevin O'brien Hartog Baer Zabronsky & Verriere, A Professional Corporation 215148	kobrien@hbh.law	e-Serve	10/31/2022 11:57:31 PM
Roland Achtel Higgs Fletcher & Mack LLP	achtelr@higgslaw.com	e-Serve	10/31/2022 11:57:31 PM
Scott Ingold Higgs Fletcher & Mack 254126	ingolds@higgslaw.com	e-Serve	10/31/2022 11:57:31 PM
Paul Carelli Artiano Shinoff 190773	pcarelli@as7law.com	e-Serve	10/31/2022 11:57:31 PM
Rachel Garrard Higgs Fletcher & Mack 307822	rgarrard@higgslaw.com	e-Serve	10/31/2022 11:57:31 PM
Paul Carelli Artiano Shinoff	pcarelli@stutzartiano.com	e-Serve	10/31/2022 11:57:31 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/31/2022

Date

/s/Mitchell Keiter

Signature

Keiter, Mitchell (156755)

Last Name, First Name (PNum)

Keiter Appellate Law

Law Firm