No. S271483

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIANNA MCKEE HAGGERTY, *Appellant*, v. NANCY F. THORNTON, et al., *Respondents*.	Court of Appeal No. D078049 San Diego County Super. Ct. No. 37-2019-00028694-PR-TR-CTL

On Grant of Petition for Review of a Decision
by the Court of Appeal, Fourth Appellate District

Affirming an Order Denying a Trust Petition
San Diego County Superior Court
Case No. 37-2019-00028694-PR-TR-CTL
Honorable Julia Craig Kelety, Judge Presiding

RESPONDENTS' JOINT SUPPLEMENTAL BRIEF REGARDING *BARTENWERFER v. BUCKLEY* PURSUANT TO RULE OF COURT 8.520(d)

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This case centers on how to interpret California Probate Code section 15402, which governs the modification of trusts. Appellant Brianna Haggerty has filed a Supplemental Brief under Rule 8.520(d), in which she discusses at length the recent United States Supreme Court decision in *Bartenwerfer v. Buckley* (2023) 598 U.S. __ [143 S.Ct. 665], and suggests that it has relevance to the statutory construction issue here. Collectively, the Respondents submit this Supplemental Brief explaining that *Bartenwerfer* involves the interpretation of a federal bankruptcy statute that has no relation or likeness to section 15402, its analysis is simply inapplicable, and it does not support Haggerty's reading of section 15402.

In *Bartenwerfer*, a debtor argued that a federal bankruptcy statute prohibiting discharge of certain types of debt should be read more narrowly than its plain text. (*Bartenwerfer*, *supra*, 143 S.Ct. at p. 673.) Specifically, the debtor argued that although the statute prohibited the discharge of "any debt . . . for money . . . obtained by . . . false pretenses, a false representation, or actual fraud," the statute would not bar the discharge of debt incurred by her business partner's fraud and, instead, only applied to debt incurred by her own personal acts of fraud. (*Id.* at pp. 671–672.) The court rejected this argument and noted that other sections of the same statute "expressly require some culpable act on the part of the debtor," whereas this section of the statute did not. (*Id.* at p. 673.) Congress's use of different language in the different sections was assumed "'to be deliberate.'" (*Ibid.* [citation

omitted].) Based on this analysis, Haggerty argues that the textual disparities between Probate Code sections 15401 and 15402 show that "the Legislature intended different rules for revocation and modification" of trusts. (Haggerty's Notice of Supp. Authority, pp. 3–5.)

To the contrary, the textual disparities between the two Probate Code sections at issue here are due to the Legislature's deliberate choice to use incorporation by reference, which results in the same rules for revocation and modification. Probate Code section 15402 explicitly states that a trust may be modified "by the procedure for revocation" unless the trust "provides otherwise." Probate Code section 15401 explains in detail the "procedure for revocation": a trust is revocable either (1) by any method specified in the trust or (2) by signed writing delivered to the trustee. Section 15401 also explains when a trust "provides otherwise" for purposes of limiting what procedure can be used: when "the trust instrument explicitly makes the method . . . provided in the trust instrument the exclusive method." (Prob. Code, § 15401, subd. (a)(2).) Thus, a trust can be modified by either procedure for revocation, unless the trust instrument specifies a method of modification *and* makes that method explicitly exclusive.

This type of statutory incorporation-by-reference was not presented in *Bartenwerfer* and does not require the application of federal principles of statutory interpretation. However, if this Court were to look to the United States Supreme Court for

guidance, the most relevant case would be *Panama R. Co. v. Johnson* (1924) 264 U.S. 375, 391–392, which expresses the fundamental proposition that legislative bodies can "merely adopt[]" the rules set forth in one statute "by a generic reference" to them in a second statute. "This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference." (*Ibid.*) California courts follow the same rule: the Legislature may incorporate one statute into another and "the legal effect of such reference" is as if the law "referred to had been inserted therein *in extenso*." (*People v. Whipple* (1874) 47 Cal. 592, 594; see also *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 59; *In re Jovan B.* (1993) 6 Cal.4th 801, 816.)

Applying this fundamental principle here, section 15402's reference to the "procedure for revocation" brings along "all that is fairly covered by the reference." (*Panama R. Co.*, *supra*, 264 U.S. at p. 392.) In other words, it brings along "*in extenso*" the procedures for revocation described in section 15401. (*Whipple*, *supra*, 47 Cal. at p. 594.) Accordingly, a trust instrument may be modified by either method for revocation specified in section 15401, unless the trust instrument specifies a method of modification and makes that method explicitly exclusive. (Prob. Code, §§ 15401, 15402.)

Haggerty's remaining arguments about *Bartenwerfer* hold no weight. First, in terms of "legislative goals," the *Bartenwerfer* court rejected the debtor's reliance on the "'fresh start' policy of

modern bankruptcy law" for her interpretation because it is just one of many generalized goals and, further, the evolution of the particular statute at issue did not support her interpretation. (*Bartenwerfer*, *supra*, 143 S.Ct. at pp. 674–675.) Here, instead, Respondents and amicus Mary Balistreri have cited to statements by the California Law Review Commission that are specific to the goals for the statutes at hand. These statements of the Law Review Commission are "persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." (*W. v. Superior Court* (1978) 20 Cal.3d 618, 623.)

Next, Haggerty's argument about burden of proof presumes that her construction of section 15402 is the most "natural textual construction" and, thus, does not need to be justified further. (Haggerty's Notice of Supp. Authority, pp. 8–11.) However, the construction of the statute adopted by Justice Guerrero in the Court of Appeal decision on review here is the more natural reading of the statute, for the reasons already explained in Respondents' briefing on the merits.

Finally, Haggerty ends her discussion of *Bartenwerfer* by concluding that the trust in this case was not "validly modif[ied]." (Haggerty's Notice of Supp. Authority, p. 12.) But even if the Court were to adopt Haggerty's reading of section 15402, there is still an open issue as to whether the trust was validly modified by the method specified in the trust. (See Galligan's Answer Brief on the Merits, pp. 13–14, 55.) Neither the trial court nor the

Court of Appeal ruled on this issue because they concluded that the amendment was valid under the statutory method. (*Ibid*.) Thus, this issue would need to be resolved on remand.

Accordingly, *Bartenwerfer* does not support Haggerty's reading of section 15402 nor her conclusion that modification of the trust was invalid in this case.

Dated: May 11, 2023

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CERTIFICATE OF WORD COUNT

I, Steven J. Barnes, hereby certify that the word count of Respondents' Joint Supplemental Brief Regarding *Bartenwerfer V. Buckley* Pursuant to Rule of Court 8.520(d), exclusive of the cover information, this certificate, and signature block, as indicated in my computer is 1,059 words.

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