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

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 *DIAZ v. ZUNIGA* PURSUANT TO RULE OF COURT 8.520(d)

Leah Spero, SBN 232472
leah@sperolegal.com
SPERO LAW OFFICE
255 Kansas Street, Suite 340
San Francisco, CA 94103
Telephone: (415) 565-9600

Howard A. Kipnis, SBN 118537 *
hkipnis@as7law.com
Steven J. Barnes, SBN 188347
sbarnes@as7law.com
ARTIANO SHINOFF, APC
2488 Historic Decatur Road, Suite 200
San Diego, California 92106
Telephone: (619) 232-3122

Counsel for Respondent
PATRICIA GALLIGAN

Appellant Brianna Haggerty has filed a supplemental brief discussing *Diaz v. Zuniga* (2023) 91 Cal.App.5th 916, which is the most recent decision to weigh in on whether the Legislature intended to treat trust modification under Probate Code section 15402 the same way that revocation is treated under section 15401. Specifically, must the trust's prescribed method of modification be explicitly exclusive to preclude modification by the statutory method in section 15401? The *Diaz* court joins the decisions holding that revocation and modification are treated differently, and *any* method of modification specified in the trust displaces the statutory method. (*Diaz*, at pp. 922–926.) *Diaz* defends this position as honoring the intent of the trustor (*id*. at p. 926), and the supplemental brief by Haggerty focuses on this justification. However, the Legislature already decided that the best way to honor the intent of trustors is through the explicitly exclusive rule set forth in section 15401. Respondents file this joint supplemental brief to address *Diaz*'s misguided analysis on this point.

To start, there is no dispute that under the plain language of section 15401, the explicitly exclusive rule applies to revocation. However, because the modification statute, section 15402, does not repeat the rule, some courts have determined that it does not apply. Respondents have already addressed that, as a textual matter, section 15402 incorporates the explicitly exclusive rule by reference. This brief focuses instead on why the Legislature's policy reason for the explicitly exclusive rule—to protect trustor intent—applies equally to modification.

The policy reason for the rule is well documented in the California Law Review Commission's report that recommended the creation of sections 15401 and 15402. (18 Cal. Law Revision Com. Rep. (1986) pp. 565–568.) Existing law already allowed the statutory method for revocation, and the same rule applied to modification because, under general principles of trust law, the power to revoke includes the power to amend. (*Id.* at pp. 567–568.) Several courts, however, allowed the use of the statutory method *only* "where the trust does not prescribe another method." (*Id*. at p. 567.) This restrictive rule was "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." (*Id.* at p. 568.) At the same time, the Commission acknowledged that some trustors may want to provide a more complicated method if there exists "a concern about 'future senility or future undue influence.'" (*Ibid*.)

The explicitly exclusive rule was the "compromise position." (Com. Rep. at p. 568.) It favors the availability of the statutory method, to give trustors flexibility. (*Id.* at p. 565.) Flexibility is one of the main advantages of a trust, and the power to alter the trust during the trustor's lifetime based on "changing needs, values, and circumstances" is a special advantage of a revocable trust. (*Ibid*.) The rule "allows a settlor to establish a more protective revocation scheme, but also honors the settlor's

intention where the intent to make the scheme exclusive is not expressed in the trust instrument." (Com. Rep. at p. 568.)

Diaz provides no reason for finding that the Legislature intended to strike a different balance when it comes to modifying a trust. (*Diaz*, *supra*, 91 Cal.App.5th. at pp. 921–926.) The same policy concerns that the Legislature considered for revocation apply with equal force to modification. On the one hand, binding a trustor to the method of modification specified in the trust could frustrate the intent of a trustor who forgets the specified method, or finds it too cumbersome, and intends to modify the trust by the statutory method, only to have it invalidated after his or her death for failure to comply with the particular procedure specified in the trust. On the other hand, a trustor should be given the option to choose a binding method, as long as that method is made explicitly exclusive. This is how the Legislature balanced the tradeoffs. (Com. Rep. at pp. 565, 568.)

Diaz raises the specter of undue influence as a reason for a more restrictive approach to modification. According to *Diaz*, when a trust specifies a more cumbersome procedure for modification than for revocation, the provision should be followed because it is necessarily ""designed to protect settlors from possible undue influence."" (*Diaz*, *supra*, 91 Cal.App.5th at p. 925 [quoting *Conservatorship of Irvine*, 40 Cal.App.4th 1334, 1343, quoting Cal. Trust Administration (Cont.Ed.Bar 1985) § 12.3, p. 458].) There are several problems with this rationale.

First, the Legislature already recognized that trustors may want cumbersome provisions to protect against undue influence, but it decided that the provision must be made explicitly exclusive in order to make that intent abundantly clear. (Com. Rep. at pp. 567–568.) Second, where evidence of undue influence exists in a particular case, the trust modification at issue can be challenged under other laws specifically designed for such problems. (Balistreri Amicus Brief, at p. 27; Galligan Answering Brief, at pp. 34–35.) Third, *Diaz*'s quotation about undue influence is taken out of context. The quote is from a CEB guide that describes two particular provisions that are "'designed to protect settlors from possible undue influence,'" neither of which appears in the *Diaz* trust: "'consent of a third party or a specific waiting period before the modification is effective.'" (*Conservatorship of Irvine*, at p. 1344 [quoting Cal. Trust Administration, at p. 458].) Moreover, the very same paragraph in the CEB guide summarizes that *even if* a provision is designed to protect against undue influence, it must be explicitly exclusive to prohibit the use of the statutory method:

> If the instrument makes the stated method [for modification or amendment of the trust] the exclusive method, it *must* be followed; if it does not, the trust may be modified [or amended] by a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime.

(*Conservatorship of Irvine*, 40 Cal.App.4th at p. 1344 [quoting Cal. Trust Administration, at p. 458].)

In sum, there is no indication that the Legislature intended to treat revocation and modification differently, nor is there a compelling reason to do so. The same Legislature that "want[ed] to protect trust settlors from the potentially harsh effects of a trust's procedural terms" for revocation also wanted "to protect *the same trust settlors* from the *same harsh results* when a settlor attempts to amend rather than revoke their trust." (Balistreri Amicus Brief, at p. 25.)

Turning finally to the trust in this case, the application of the explicitly exclusive rule honors the apparent intent of the trustor. The trust specified a single, non-exclusive method for both revocation and modification: "by an acknowledged instrument in writing." (Galligan Opening Brief, at pp. 10–11.) The trustor sent a signed, handwritten amendment to her estate attorney and instructed that it be placed with a copy of the trust. (*Id.* at p. 11.) The attorney confirmed receipt of the amendment and its validity. (*Id.* at pp. 11–12.) There was no suggestion of undue influence. After the trustor's death, a former beneficiary challenged the amendment on procedural grounds, not on the basis that the trustor lacked the intent to amend her trust. (*Id.* at p. 12.) Thus, even if the concerns in *Diaz* are considered, they are not present here.

Accordingly, the reasoning in *Diaz* should not be followed.

Dated: August 23, 2023 By: *s/* Leah Spero

Howard A. Kipnis
Steven J. Barnes
ARTIANO SHINOFF, APC
Leah Spero
SPERO LAW OFFICE
Attorneys for Respondent
Patricia Galligan

By: *s/* John Morris

John Morris
Roland H. Achtel
Scott J. Ingold
HIGGS FLETCHER & MACK LLP
Attorneys for Respondent
Union of Concerned Scientists

By: *s/* Oleg Cross

Oleg Cross
CROSS LAW APC
Attorney for Respondent
Racquel Kolsrud

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.

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

Executed on May 16, 2023, at Solana Beach, California.

s/ Steven Barnes
Steven J. Barnes

Proof of Service

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to this action.

On August 23, 2023, I served the foregoing document, described as **RESPONDENTS' JOINT SUPPLEMENTAL BRIEF REGARDING *DIAZ V. ZUNIGA* PURSUANT TO RULE OF COURT 8.520(d)** in case number **S271483**, on the interested parties in this action identified on the attached service list, electronically through TrueFiling to those for whom e-mail addresses are listed, or otherwise by first class mail.

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

Executed on August 23, 2023, at Solana Beach, California.

s/ Steven Barnes
Steven J. Barnes

Service List

I. Electronically Via TrueFiling:

Mitchell Keiter
Keiter Appellate Law
Mitchell.Keiter@gmail.com
Attorney for Appellant, Brianna McKee Haggerty

Elliot S. Blut
Blut Law Group, APC
eblut@blutlaw.com
Attorney for Appellant, Brianna McKee Haggerty

Kristen Caverly
Henderson, Caverly, & Pum LLP
kcaverly@hcesq.com
Attorney for Nancy Thornton, Trustee

Roland H. Achtel
Scott Ingold
John M. Morris
Rachel M. Garrard
Higgs Fletcher & Mack LLP
achtelr@higgslaw.com
ingols@higgslaw.com
jmmorris@higgslaw.com
rgarrard@higgslaw.com
Attorneys for Union of Concerned Scientists

Oleg Cross
Cross Law APC
oleg@caltrustlaw.com
Attorney for Racquel Kolsrud

Mara Allard
Allard Smith APLC
mara@allardsmith.com
Attorney for Colleen Habing, deceased

II. Via First Class Mail:

Office of the Attorney General
Charitable Trusts Section
1300 "I" Street
Sacramento, CA 95814-2919

California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

San Diego County Superior Court
1100 Union Street
Dept. 503
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: **sbarnes@as7law.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	Respondents' Joint Supplemental Brief re Diaz v. Zuniga

Service Recipients:

Person Served	Email Address	Type	Date / Time
Mara Allard The Law Office of Mara Smith Allard 159294	mara@allardsmith.com	e-Serve	8/23/2023 4:45:07 PM
Leah Spero Spero Law Office 232472	leah@sperolegal.com	e-Serve	8/23/2023 4:45:07 PM
John Morris Higgs Fletcher & Mack 99075	jmmorris@higgslaw.com	e-Serve	8/23/2023 4:45:07 PM
Elliot S. Blut Blut Law Group 162188	eblut@blutlaw.com	e-Serve	8/23/2023 4:45:07 PM
Paul Gruwell Ragghianti Fritas LLP 252474	pgruwell@rflawllp.com	e-Serve	8/23/2023 4:45:07 PM
Howard Kipnis Artiano Shinoff 118537	hkipnis@as7law.com	e-Serve	8/23/2023 4:45:07 PM
Oleg Cross Cross Law APC 246680	oleg@caltrustlaw.com	e-Serve	8/23/2023 4:45:07 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e-Serve	8/23/2023 4:45:07 PM
Kristen Caverly Henderson, Caverly & Pum LLP 175070	kcaverly@hcesq.com	e-Serve	8/23/2023 4:45:07 PM
Steven Barnes	sbarnes@as7law.com	e-Serve	8/23/2023 4:45:07 PM

Artiano Shinoff 188347			
Kevin O'brien Hartog, Baer & Hand PC 215148	kobrien@hbh.law	e-Serve	8/23/2023 4:45:07 PM
Roland Achtel Higgs Fletcher & Mack LLP	achtelr@higgslaw.com	e-Serve	8/23/2023 4:45:07 PM
Scott Ingold Higgs Fletcher & Mack LLP 254126	ingolds@higgslaw.com	e-Serve	8/23/2023 4:45:07 PM
Paul Carelli Artiano Shinoff 190773	pcarelli@as7law.com	e-Serve	8/23/2023 4:45:07 PM
Rachel Garrard Higgs Fletcher & Mack 307822	rgarrard@higgslaw.com	e-Serve	8/23/2023 4:45:07 PM
Paul Carelli Artiano Shinoff	pcarelli@stutzartiano.com	e-Serve	8/23/2023 4:45:07 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.

8/23/2023

Date

/s/Steven Barnes

Signature

Barnes, Steven (188347)

Last Name, First Name (PNum)

Artiano Shinoff

Law Firm