

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
_____)	

Reply to Answer to 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

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
Argument	4
There is a conflict between this published opinion and extant precedents, which this Court must review and resolve to secure uniformity of precedent.	4
Conclusion	11
Certificate of Word Count	12
Proof of Service	

Table of Authorities

Cases

<i>Connerly v. State Personnel Bd.</i> (2006) 37 Cal.4th 1169 . . .	4
<i>King v. Lynch</i> (2012) 204 Cal.App.4th 1186	4, 5, 8-11
<i>Pena v. Dey</i> (2019) 39 Cal.App.5th 546	6

Statutes

Probate Code

Section 15401	10, 11
Section 15401, subdivision (a)(2)	4, 5, 7, 9, 10
Section 15402	9-11

Argument

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

Petitioner Haggerty first objects to the “amicus curiae” letter, filed in the case of *Haggerty v. Thornton* by respondent Nancy F. Thornton, who is the trustee of the estate at issue. Respondent Thornton is not an amicus; amici are “nonparties who often have a different perspective from the principal litigants.” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) Amici may write a letter to show the case will resound beyond the instant case. As trustee, Thornton instead writes to expedite the distribution of the instant trust.

Even if Thornton’s letter were procedurally proper, it is substantively unhelpful to this Court, because it fundamentally mischaracterizes *King v. Lynch* (2012) 204 Cal.App.4th 1186. The *King* trust prescribed “this Trust **may** be amended . . . by an instrument in writing signed by both Settlers” (*Id.* at p. 1189, emphasis added.) It was recognized by all parties that the method of modification was not explicitly exclusive, so appellant contended he could modify the trust by the default statutory method of Probate Code section 15401, subdivision (a)(2): “[A]ppellant argues that, because the trust did not explicitly make the method of

modification exclusive, Zoel had the power to modify the trust by the procedure for revocation.” (*Id.* at p. 1192.)

The question was whether this *legal* theory was correct. Though appellant favored equating revocation and modification so the same default statutory method that was available to revoke was also available to modify, the majority disagreed and held that appellant’s prescribing *any* method, even though it was not explicitly exclusive, precluded the statutory method. “[I]f any modification method is specified in the trust, that method must be used to amend the trust.” (*King, supra*, 204 Cal.App.4th at p. 1193.) The dissent, by contrast, endorsed appellant’s analysis. “ I conclude that section 15402 permits modification by the method established in section 15401, subdivision (a)(2), unless that method is *explicitly excluded* by the terms of the trust.” (*Id.* at p. 1194 (dis. opn. of Detjen, J.) And because it was not explicitly excluded by the trust, the dissenting justice would have allowed amendment by the statutory method.

Thornton, by contrast, disputes the factual premise accepted in *King* by the appellant, the majority, and the dissent --- that the trust’s modification method was not explicitly exclusive. Thornton attempts to distinguish the instant case from *King* by contending, that “**unlike** *King*, the Trust did not set forth an exclusive method of revocation or

modification.” (Letter at 3, emphasis added.) Of course, if the prescribed method of modification had been explicitly exclusive in *King*, there would have been no legal dispute between the majority and the dissent, as both would have agreed that only that method could be used.

Thornton’s real argument is that it does not matter which method is used; the court must discern the outcome favored by the settlor and implement it. That imperative was qualified in *Pena v. Dey* (2019) 39 Cal.App.5th 546, 555, which acknowledged the importance of giving effect to the settlor’s intent, but noted “that intent ‘must be ascertained from the whole of the trust instrument, not just separate parts of it.’ ” Settlers intend to prescribe not just a desired beneficiary but the *process* by which to revoke or modify a trust. “However, the manifest intent expressed in the trust instrument itself, stated explicitly in its amendment provision, is that a written instrument must be signed in order to constitute a valid amendment to the trust.” (*Ibid.*) Because the *Pena* settlor died before he could properly amend the trust, the amendment was not valid, regardless of whom he intended to designate as a beneficiary. (*Ibid.*) Thornton’s position, that the outcome is all that matters, directly conflicts with *Pena* and would by itself create a conflict warranting review.

The answer of Patricia Galligan makes no such factual mischaracterization but contends “the lower courts’ determination that the trust could be amended by the statutory method of revocation is beyond any serious dispute.” (Answer at 7.) What is beyond dispute is that where a settlor makes an explicitly exclusive method of modification (or revocation), that method must be followed. It is also beyond dispute that where a settlor prescribes a method of revocation that is not explicitly exclusive, that *either* that method *or* the statutory method of section 15401, subdivision (a)(2) may be used. But a dispute arises where a settlor prescribes a method of modification that is not explicitly exclusive.

EXPLICITLY EXCLUSIVE NOT EXPLICITLY EXCLUSIVE

REVOCATION	Prescribed method ONLY	Prescribed method OR Statutory method
MODIFICATION	Prescribed method ONLY	??

King and the instant opinion reached different conclusions as to what should fill the bottom right space in the table above. In specifying the prescribed method, the trust both here and in *King* used the word “may,” suggesting the prescribed method was not exclusive. (*King, supra*, 204 Cal.App.4th at p. 1188; Opn. 2.) *King* concluded that because the trust identified a specific method (even if not explicitly exclusive), the statutory method was unavailable: “[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.) By contrast, the Opinion concluded that because the prescribed modification method “is not explicitly exclusive . . . **the statutory method of modification was available.**” (Opn. 11, emphasis added.) Much of the conflict appears to center on the significance of the language prescribing a method in not explicitly exclusive terms. *King* found it showed the settlor had favored that method: a “trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement.” (*King*, at p. 1193.) The Opinion used the exact same language to reach the opposite outcome, in finding “it does not appear Bertsch intended to bind herself to the specific method described in the trust agreement” (Opn. 11.)

Section 15402 provides that where the trust is revocable (as in both *King* and here) “the settlor may modify the trust by the procedure for revocation.” The Opinion held this meant the settlor could use either the prescribed revocation method or the statutory method: “[U]nder section 15402 the trust may be modified **by any valid method of revocation.**” (Opn. 11, emphasis added.) This is a questionable construction of section 15402, which authorizes the settlor to use “**the** procedure for revocation.” (Emphasis added.) Section 15402 does not authorize “any procedure,” “either procedure,” or even “the procedures.” Its use of the singular warrants the conclusion that it is only “the procedure” identified by the settlor, and not also that identified by the Legislature in section 15401, subdivision (a)(2).

Galligan notes the trust here prescribed the same method for revocation and modification, in contrast to the *King* trust. The question is whether Bertsch’s prescription was *absolute*, so she intended the trust could be modified (or revoked) “by an acknowledged instrument in writing,” or *relational*, so Bertsch intended any unprescribed (statutory) method available for revocation was coextensively available for modification. In other words, does the same method authorized for revocation under section 15401, subdivision (a)(2) presumptively apply for modification too?

The Opinion, citing the *King* dissent, emphasized history and policy in concluding it does. “[T]he method of modification is the same as the method of termination, barring a contrary provision in the trust.” (Opn. 10, citing *King*, supra, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.)) The *King* dissent emphasized history in asserting the purpose of the current law, embodied in sections 15401 and 15402, was to make it easier to revoke and amend trusts. (*Id.* at p. 1195 (dis. opn. of Detjen, J.)) The *King* majority, however, emphasized the disparate texts of section 15401 and 15402 in denying the default statutory method applies as broadly to modification as it does to revocation. The majority held the Legislature’s differentiating “between trust revocations and modifications indicate[d] that the Legislature no longer intended the same rules to apply to both revocation and modification.” (*King*, at p. 1193.) And *King* observed that if (as urged by Galligan) the Legislature had wanted the section 15401, subdivision (a)(2) method to apply to modifications unless the prescribed method was explicitly exclusive, “the Legislature could have combined revocation and modification into one statute,” as it “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.” (*Ibid.*)

Conclusion

Section 15401 provides that unless the settlor prescribes an explicitly exclusive revocation method, the default statutory method is also available. Because there is no counterpart in section 15402, the *King* majority concluded the Legislature intended different standards to apply to revocation and modification, and that the premise that the power of revocation includes the power of modification does not mean the methods for each are presumptively congruent. (*King, supra*, 204 Cal.App.4th at p. 1193.) The Opinion instead concludes the methods are presumptively congruent, and the settlor must prescribe distinct methods for revocation and modification to preclude the statutory method. These positions are in conflict and warrant review. Thousands of settlors await clarification and guidance.

Respectfully submitted,

Dated: November 22, 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 1,532 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: November 22, 2021

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 November 22, 2021, I served the foregoing document described as **REPLY TO ANSWER TO PETITION FOR REVIEW** in case number **S271483** on the interested parties in this action.

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

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

Executed this November 22, 2021, at Beverly Hills, California.

Mitchell Keiter

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
REPLY TO ANSWER TO PETITION FOR REVIEW	D078049_REP_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	11/22/2021 7:44:57 PM
Elliot S. Blut Blut Law Group 162188	eblut@blutlaw.com	e-Serve	11/22/2021 7:44:57 PM
Howard Kipnis Artiano Shinoff 118537	hkipnis@as7law.com	e-Serve	11/22/2021 7:44:57 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e-Serve	11/22/2021 7:44:57 PM
Kristen Caverly Henderson Caverly Pum & Trytten LLP 175070	kcaverly@hcesq.com	e-Serve	11/22/2021 7:44:57 PM
Steven Barnes Artiano Shinoff 188347	sbarnes@as7law.com	e-Serve	11/22/2021 7:44:57 PM
Roland Achtel Higgs Fletcher & Mack LLP	achtelr@higgslaw.com	e-Serve	11/22/2021 7:44:57 PM
Paul Carelli Law Office of Artiano Shinoff 190773	pcarelli@as7law.com	e-Serve	11/22/2021 7:44:57 PM
Paul Carelli Stutz Gallagher	pcarelli@stutzartiano.com	e-Serve	11/22/2021 7:44:57 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.

11/22/2021

Date

/s/Mitchell Keiter

Signature

Keiter, Mitchell (156755)

Last Name, First Name (PNum)

Keiter Appellate Law

Law Firm