IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Appellant's Opening Brief

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

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Table of Contents

Table of Authorities

Cases

Statutes

Other authorities

Question Presented

Does the same law govern trust revocations and trust modifications, so that the settlor must make the trust's prescribed method of modification explicitly exclusive to preclude the default alternative (Prob. Code, § 15401, subd. (a)(2)), or does prescribing any modification method preclude the default option?

Introduction

People sometimes exercise their agency by constraining it. Just as Odysseus instructed his crew to bind him to the mast to protect him from the lure of the Sirens, a trustor may instruct counsel to bind her to a restrictive method for modifying the trust, to protect her from those who would exert undue influence to usurp her assets. The law implements a trustor's agency by enforcing the terms she herself chose.

This case involves such a trust. In 2015, Jeane Bertsch created a trust that prescribed it could be modified by "an acknowledged instrument in writing." One year later, she and a notary signed an acknowledged document to modify her trust and benefit her niece, appellant Brianna Haggerty. Two years later, she signed another document—unnotarized—which purportedly modified the beneficiary list by disinheriting Haggerty and leaving $500,000 to her attorney. Bertsch died later that year.

This Court should enforce the trust's prescribed terms and find the 2018 unnotarized document was not a valid modification.

Statement of the Case[1]

A. Underlying documents

In 2015, Jeane Bertsch created a trust. (Opn. 2.) The trust agreement indicated Bertsch "reserves the following rights, each of which may be exercised whenever and as often as [she] may wish. [¶.] A. Amend or Revoke. The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." (Opn. 2.)

In 2016, Bertsch amended the trust to provide a benefit to her niece, appellant Brianna Haggerty, and nominated her as successor trustee. (Opn. 3.) Bertsch signed this document with a notary. (Opn. 3.)

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[1] The statement of the case is abbreviated because the case turns on one pertinent sentence in the trust and the two statutory provisions at issue. Respondents may wish to dwell on the case's specific facts and extrinsic evidence to support their position that Ms. Bertsch favored the modification. But courts must give effect to the entire trust, including its provisions for modification. (*Pena v. Dey* (2019) 39 Cal.App.5th 546, 555.) There was persuasive evidence in *Pena* that the trustor favored a certain modification, but it was invalid because it did not comply with the modification terms he himself had prescribed. (*Ibid.*) In other words, courts give effect to the trustor's intent regarding the *process* of modification as well as its *outcome*.

In 2018, Bertsch drafted a handwritten document to revise the beneficiary list and exclude Haggerty. (Opn. 3.) It was not notarized. (Opn. 3.) Bertsch died later that year. (Opn. 3.)

B. Trial court proceedings

Thornton, the original trust's nominated successor trustee, moved to confirm her appointment; she contended the 2016 modification had been revoked and the 2018 modification was valid. (Opn. 3.) Haggerty's petition contended the opposite: the notarized 2016 document validly modified the trust but the unnotarized 2018 document did not. (Opn. 3.) The court concluded the 2018 note validly modified the trust. (Opn. 5.)

C. The Court of Appeal

The Court of Appeal affirmed. (Opn. 13.) It found the trust agreement "did not distinguish between revocation and modification," and Bertsch's prescribed method ("an acknowledged instrument") was not explicitly exclusive. (Opn. 11.) Therefore, section 15401, subdivision (a)(2)'s fallback method to revoke the trust was also available to modify it. (Opn. 11.) The Court of Appeal found Bertsch complied with

this fallback method by signing her note and personally delivering it to herself as trustee. (Opn. 11-12.) The Court of Appeal did not find Bertsch complied with the trust's prescribed method.

Summary of Argument

This case involves variations on a familiar principle: *expressio unius est exclusio alterius*. For most of the twentieth century, a trustor could revoke a trust that was silent as to its revocation procedure by filing a writing with a trustee (the "fallback method"). (See *Fleishman v. Blechman* (1957) 148 Cal.App.2d 88, 95.) But where the trust specified a revocation method, only that method could validly revoke the trust. (*Hibernia Bank v. Wells Fargo Bank* (1977) 66 Cal.App.3d 399, 404; *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300, 304.) A 1986 recodification slightly loosened this protocol by authorizing the fallback method for revocation unless the trust's prescribed method was explicitly exclusive. (Prob. Code, § 15401, subd. (a)(2).)

Expressio unius also governed trust modifications. The power to revoke encompassed the power to amend, so a revocable trust could be modified, unless it specifically authorized only *full* revocation. (*Heifetz v. Bank of America Nat. Trust & Sav. Assn.* (1957) 147 Cal.App.2d 776, 781-782.) And where the trust was modifiable, the trustor could modify it by filing a writing with a trustee, unless the trust specified a modification method, in which case only that method could validly modify the trust. (Restatement (Second) of Trusts § 330(i); § 331(c)(d) (1957).)

The same principles of construction governing trusts created by individuals also govern statutes enacted by legislators. Because former Civil Code section 2280 was silent as to modification procedures, the law regarding revocation filled the vacuum as a fallback. But that changed in 1986, when the Legislature created separate provisions: Probate Code section 15401 governs "Revocable trusts," and Probate Code section 15402 governs "Modification of trust."[2] The former section authorized the fallback method unless the trust's prescribed method was explicitly exclusive. The latter said nothing about the fallback method or explicit exclusivity.

The rules governing revocation and modification have diverged. Had the Legislature wished to preserve the congruence, it easily could have done so. It could have declined to reference modification at all, and continue to implicitly include provisions for modification within those of revocation, following *Heifetz, supra,* 147 Cal.App.2d 776.

Alternatively, the Legislature could have expressly indicated the revised procedures apply to both revocation and modification, as it did with related provisions. (See e.g. § 15401, subd. (d); § 15403, subd. (a); § 15404, subd. (a).) In fact, the Legislature expressly changed another provision in

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[2] All undesignated statutory citation is to the Probate Code.

section 15401 (now codified in subdivision (c)) to clarify it intended to apply the provision equally to revocation and modification. Though it originally provided "A trust may not be **revoked** by an attorney," the Legislature changed it to provide "A trust may not be **modified or revoked** by an attorney." (Stats. 1988, ch. 113, § 19, p. 481, emphases added.) The Legislature made the change to "make clear that the rule applicable to revocation by an attorney in fact applies to modification." (Cal. Law. Revision Com. com., West's Ann. Prob.Code (2022 ed.) foll. § 15401.) In contrast to this clarification, which expressly referenced both revocation and modification to show the provision covered both, the Legislature left subdivision (a)(2) untouched, so it continued to reference only revocation. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726: "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.")

The Legislature took neither path to equate the fallback method's application to revocation and modification, and instead created and maintains divergent provisions for revocation and modification. This divergence proves the "Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a

limitation on modifications." (*Nivala Balistreri v. Balistreri* (Feb. 24, 2022, A162222) __ Cal.App.5th __ [p. 7] citing *King v. Lynch* (2012) 204 Cal.App.4th 1186, 1193.)

Not only the statutory text but also public policy confirms this interpretation. The Legislature had reason to make modification presumptively more difficult than revocation. An unscrupulous caretaker or counsel cannot usurp an elder's assets by inducing her to *revoke* the trust, because intestacy laws would keep the estate within the family. Only if the trustor *modified* the trust and selected a different beneficiary could the usurper take her assets.

In any event, whether or not this Court agrees with *King*'s reasoning, that decision stated California law as of 2015, when Ms. Bertsch created her trust. That law provided that a trustor could choose to "bind . . . herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement." (*King*, *supra*, 204 Cal.App.4th at p. 1193, internal citation omitted.) And where she did, "that method *must be used to amend the trust*.'" (*Ibid.*, emphasis added.) This was the rule that prevailed when Bertsch chose to bind herself to the modification method (an "acknowledged instrument") prescribed in the trust. Assuming arguendo this Court favors a different rule, it should apply only prospectively.

Argument

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

Section 15401 provides the trustor may revoke a trust through the fallback method unless the trust's prescribed revocation method is explicitly exclusive. There is no ground for concluding the Legislature intended to enact that same provision in section 15402 *sub silentio*.

California's presumption of trusts' revocability (and modifiability) created a need for default or fallback provisions. Because a trust that was silent as to revocation was revocable, there had to be some way to revoke it. Former Civil Code section 2280 thus filled the vacuum by authorizing a fallback procedure whereby the trustor could file a writing with the trustee. (*Fleishman*, *supra*, 148 Cal.App.2d 88, 95.) Similarly, trusts that were silent as to modification could be modified by the prescribed revocation method. (*Heifetz, supra,* 147 Cal.App.2d 776, 781-782.) But where the trustor specified a particular method, that method precluded the fallback model. (*Hibernia Bank, supra,* 66 Cal.App.3d 399, 404; *Rosenauer, supra,* 30 Cal.App.3d 300, 304.)

In 1986, the Legislature followed the recommendation of the California Law Revision Commission to reorganize and consolidate scattered provisions of existing law. (*Balistreri*,

supra, __ Cal.App.5th __ at p. 12.) The enactment "essentially clarifie[d] and codifie[d] existing provisions of law under a unified trust code." (Legis. Analyst, Analysis of Assem. Bill No. 2652 (1985-86 Session) (May 20, 1986) p.1) The Legislature repealed Civil Code section 2280 and enacted Probate Code sections 15401 and 15402.

Section 15401 [Revocation] (emphases added)

(a) A trust that is revocable by the settlor or any other person may be **revoked** in whole or in part by any of the following methods:

(1) By compliance with any method of **revocation** provided in the trust instrument.

(2) By a writing, other than a will, signed by the settlor or any other person holding the power of **revocation** and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. 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.

. . . .

(c) A trust may not be **modified or revoked** by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument.

(d) This section shall not limit the authority to **modify or terminate** a trust pursuant to Section 15403 or 15404 in an appropriate case.

Section 15402 [Modification] (emphasis added)

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

A. The caselaw is divided on whether revocation law remains congruent with modification law.

The question presented is whether the presumptive rules for revocation and modification remain congruent, so a trustor must make a modification method explicitly exclusive to preclude resort to the fallback method.

1. According to *King*, *Pena*, and *Balistreri*, the Legislature distinguished revocation law from modification law.

a. *King* (and *Pena*)

King held section 15402 maintained the rule for modification that formerly applied to both revocation and modification: The trustor's prescribing a particular method precluded another method, including the fallback method. (*King v. Lynch, supra,* 204 Cal.App.4th 1186, 1193.) "[I]f any modification method is specified in the trust, that method must be used to amend the trust." (*Ibid*.)

The trust in *King* prescribed revocation would occur where either trustor (husband or wife) signed a writing and delivered it to the other trustor and the trustee, but modification would occur only where *both* trustors signed a writing and delivered it to the trustee. (*King*, *supra*, 204 Cal.App.4th at pp. 1188-1189.) The court considered whether

the husband's unilateral writings validly amended the trust. (*Id*. at pp. 1188-1190.) Though these writings complied with the prescribed revocation method, they did not comply with the prescribed modification method. (*Id*. at p. 1194.)

King recalled the procedures for revocation and modification were congruent prior to 1986; because the rules on revocation applied to modification by implication, courts "applied the rules governing trust revocations to trust modifications." (*King*, *supra*, 204 Cal.App.4th at pp. 1192-1193.) But the Legislature superseded such legislation-by-implication by enacting sections 15401 and 15402. (*Id.* at p. 1193.) No longer did the rules for modification simply derive from those governing revocation; the Legislature "differentiated between trust revocations and modifications," thereby showing the Legislature "no longer intended the same rules to apply to both revocation and modification." (*Ibid*.) Recalling the text of section 15402 ("Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation"), *King* concluded that where the trust was silent as to modification, the trustor could modify the trust through the "procedure for revocation." (*Id*. at p. 1192.) But the fallback provision applied *only* where the trust was silent: "[I]f any modification method is specified in the trust, that method

must be used to amend the trust." (*Id.* at p. 1193.)

In invalidating the modifications, *King* continued former Civil Code section 2280's rule that the trustor's prescribed modification method would displace the fallback method. (See *Hibernia*, *supra*, 66 Cal.App.3d at p. 404; *Rosenauer*, *supra*, 30 Cal.App.3d at p. 304.) Section 15401 changed the law regarding automatic displacement for *revocation*; a prescribed method would displace the fallback method only if it was *explicitly exclusive*. (§ 15041, subd. (a)(2).) But section 15402 did not require explicit exclusivity, so *King* declined to read the statute as if it did. "If we were to adopt appellant's position and hold that a trust may be modified by the revocation procedures set forth in section 15401 unless the trust explicitly provides that the stated modification method is exclusive, section 15402 would become surplusage." (*Id.* at p. 1193.) *King* instead observed "the Legislature 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." (*Id.* at p. 1193.)

Pena v. Dey, *supra*, 39 Cal.App.5th 546, followed *King* in holding "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," and where she does so, "that method must be used to amend the trust." (*Id.*

at p. 552, citing *King*, *supra*, 204 Cal.App.4th 1186, 1193.) However, because the prescribed method in *Pena* was the subdivision (a)(2) method, the issue there was not which method had to be followed but whether the trustor validly executed it. (*Pena*, *supra*, 39 Cal.App.5th at pp. 548-549.)

b. *Balistreri*

Last month, the Court of Appeal followed *King* in *Balistreri, supra,* __ Cal.App.5th __. *Balistreri* resembles this case more than *King* in that: (1) the trust prescribed the same method for revocation as modification; (2) that method was an acknowledged written instrument; and (3) the trustor(s) had already modified the trust through an acknowledged written instrument before the modification in dispute. (*Id*. at p. 2.) Like *King*, *Balistreri* held that the trustors' prescribing a particular method (a notarized writing) bound them to it and precluded another method.

> By including that " 'specific method of … amendment' " in the Trust, [the trustors] expressed an intent to bind themselves to that method — indeed, a method they had repeatedly utilized in amending and revoking prior trusts — and they were not entitled to cast aside that procedure and amend the Trust using the revocation procedure set forth in section 15401, subdivision (a)(2).

(*Id*. at pp. 7-8; *King*, *supra*, 204 Cal.App.4th at p. 1193.)

Citing the Restatement ("If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, [settlor] can modify the trust only in that manner or under those circumstances") *Balistreri* held that a prescribed method for modification (unlike revocation) did not need to be explicitly exclusive to preclude the fallback method. (*Balistreri* at pp. 8-9.)

Balistreri extended *King* in holding the expression of a prescribed method precludes the fallback method even where (as here) the trust prescribed the same method for revocation and modification.

> Had the Legislature intended for section 15402 to require an explicit statement of exclusivity for modification procedures, it could have so stated, as it did in section 15401. (*King*, *supra*, 204 Cal.App.4th at p. 1193, fn. 3 [parallel citation] [noting Legislature used "different statutory language" in section 15402].) Or it elsewise could have omitted the qualifying phrase, "[u]nless the trust instrument provides otherwise," from section 15402. It did neither.

(*Balistreri, supra,* __ Cal.App.5th __ at pp. 8-9.)

It did not matter whether the text in the *trust* provided different procedures for revocation and modification, because the language in the *Probate Code* provides different procedures, demanding an explicit exclusivity to preclude the fallback method for revocation but not modification.

c. The *Balistreri* concurrence

The concurring justice in *Balistreri* expressing a "provisional opinion," also found dispositive the disparate texts of section 15401 and section 15402: "[T]hat the trust agreement does not expressly state its method is exclusive is of no moment, as the requirement for express exclusivity appears only in section 15401, subdivision (a)(2), governing revocation." (*Balistreri*, *supra*, __ Cal.App.5th __ at p. 1 (conc. opn. of Tucher, J.).) The concurrence agreed with the *King* and *Balistreri* majorities that a prescribed modification method need not be explicitly exclusive for it to displace the fallback method; for the concurrence, it was enough if it was explicitly *or implicitly* exclusive. (*Id*. at p. 3.) The *Balistreri* trust provided "[a]ny amendment, revocation, or termination . . . shall be made by written instrument signed, with a signature acknowledged by a notary public, by the trustor(s) . . . and delivered to the trustee." (*Id*. at pp. 2-3.) The concurrence found this showed an implicit exclusivity, so the fallback method could not apply. (*Id*. at p. 1.)

The majority and concurrence thus agreed that the trust sufficiently precluded the fallback method, though the majority held it did not matter whether the affirmatively prescribed method for modification was "mandatory" (because it "shall" be used) or "permissive" (because it "may" be used).

(*Balistreri*, *supra*, __ Cal.App.5th __ at p.11, fn. 5.) The majority cited *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033, 1044, which had cited *Stabler v. El Dora Oil Co.* (1915) 27 Cal.App. 516, 522, which observed courts frequently construe the word "may" in a mandatory sense as "must" or "shall." For example, the trust in *Kropp* prescribed "if Edward dies, the association 'may' pay the funds in the account to Maude, the beneficiary. In the next sentence it states, if the beneficiary is not living at Edward's death the association 'may' pay the funds in the account to Edward's personal representatives." (*Kropp*, at pp. 1043-1044.) Finding these prescriptions reflected the trustors' intent to effect the payments, the Court of Appeal construed them as mandatory. (*Id*. at p. 1044.)

There may be little practical difference between the *Balistreri* majority's position, that prescribing *any* method precludes the fallback method, and the *Balistreri* concurrence's position, that prescribing an *implicitly exclusive* method precludes it. Under the broad maxim, the expression of one method excludes others, so a specifically prescribed method is at least implicitly exclusive. There would be little point in prescribing a particular method if any other method would also suffice. If Bertsch specifically reserved "the right *by an acknowledged instrument* in writing to revoke

or amend this Agreement" then she did not reserve the right by any other method.

Otherwise, the reservation of the right to revoke or amend by an acknowledged instrument would be surplusage. Probate Code section 21120 provides a court should construe an instrument's words to "give every expression some effect, rather than one that will render any of the expressions inoperable." If the instant trust could be revoked or modified by means other than an acknowledged instrument, there would be no effect to Bertsch's prescribing that method.

2. According to the *King* dissent and the instant Opinion, the Legislature maintained the congruence between revocation and modification law.

Unlike *King*, *supra*, 204 Cal.App.4th 1186, *Pena*, *supra*, 39 Cal.App.5th 546, and *Balistreri*, *supra*, __ Cal.App.5th __, the dissenting opinion in *King* and the instant Opinion concluded the governing provisions for revocation and modification remained congruent after the recodification.

a. The *King* dissent

The dissenting opinion in *King* found the Legislature added to section 15402 *sub silentio* the explicitly exclusive condition and the subdivision (a)(2) fallback method provisions of section 15401. The dissent recalled the Law

Revision Commission's "compromise" rationale for section 15401's explicit exclusivity condition for revocation, and found it extended to modification (under section 15402) as well. (*King, supra,* 204 Cal.App.4th at pp. 1195-1196 (dis. opn. of Detjen. J.).) On the one hand, a trustor might wish to bind himself to a particular method to protect himself from a coercive caretaker.[3] The rule enabling a prescribed method to prevail over the fallback method "has been defended on the grounds that the 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.' " (Recommendation Proposing the Trust Law (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) pp. 1270-1271 [Law Rev. Com. Rep.].) But there was also reason to maximize trustors' current flexibility: "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." (*Id.* at p. 1271.) In some instances, the

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[3] For example, the presence of a third-party notary could provide a meaningful guardrail against documents generated due to elder abuse.

trustor's exclusive, prescribed method might derive not from foresight but oversight. "In fact, the settlor may have forgotten about the method provided in the trust, or may not be aware of the case-law rule." (*Ibid.*)

The dissent decided the same compromise policy applied to modifications as well as revocations. "[S]ection 15402 was added, not to establish a *different* rule from section 15401, as the majority asserts . . . but in order to adopt the *same* flexible rule for modifications as for revocations" unless the trust provides otherwise. (*King, supra,* at p. 1196 (dis. opn. of Detjen, J.) (emphasis added).) Because the modification provision was not explicitly exclusive, the dissent concluded the amendments were valid, so the husband should be "permitted to 'modify the trust by the procedure for revocation' (§ 15402) in accordance with section 15401, subdivision (a)(2)." (*Id.* at p. 1198.)

b. *Haggerty*

This case differs slightly from *King* in that the instant trust prescribed the same method for revocation as modification, in contrast to the disparate procedures prescribed by the *King* trust. The instant panel thus concluded there was no need to "consider whether *King* was ultimately correctly decided on its facts." (Opn. 10.)

Nonetheless, the instant panel found the *King* dissent more persuasive than its majority opinion and adopted its position that a trustor must explicitly exclude the fallback method for it to be unavailable. "Because the method of revocation and modification described in the trust agreement is not explicitly exclusive . . . the statutory method of revocation was available under section 15401." (Opn. 11.) The panel thus held the rule governing revocation (in section 15401) presumptively governed modification too. "Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification." (Opn. 10.) Because the power of revocation includes the power of modification, the Opinion found the method for each was also presumptively identical. (Opn. 10.)

The Opinion offered one meaningful distinction from the *King* dissent by offering an additional ground for displacing the fallback method: The trustor could render the modification method exclusive by prescribing a different method for revocation and modification. This divergence from the *King* dissent would matter, for example, in a case where the trust prescribed, without explicit exclusivity, a method for modification (e.g. an acknowledged written instrument), and prescribed that revocation could occur through *either* an acknowledged instrument *or* the fallback method. The *King*

dissent would find that the modification method was not explicitly exclusive, so the trustor could still modify through the fallback method. But the Opinion would find the prescriptions for revocation and modification were not identical, and therefore conclude that modification could occur only through the prescribed method.

The competing positions may be summarized as follows:

Opinion	**What must a trustor do to displace the fallback method?**
King	Prescribe any method for modification
Pena	Prescribe any method for modification
Balistreri majority	Prescribe any method for modification
Balistreri concurring opinion	Prescribe an explicitly or implicitly exclusive method
King dissent	Prescribe an explicitly exclusive method
Haggerty	Prescribe an explicitly exclusive method OR a method different from revocation

B. The textual disparity between sections 15401 and 15402 demonstrates revocation law is no longer congruent with modification law.

This Court should follow *King* and *Balistreri* and conclude the law governing revocations and the law governing modifications are no longer congruent. Though the Legislature could have maintained the congruence between revocation and modification law, the textual disparity between sections 15401 and 15402 demonstrates it chose not to do so.

It would not have been difficult to maintain the congruence. The Legislature could have remained silent as to modification, and thereby continue letting revocation law encompass modification law by implication, as it had under former Civil Code section 2280. (See *Heifetz, supra,* 147 Cal.App.2d 776.)

Alternatively, the Legislature could have recodified the law and "combined revocation and modification into one statute." (*King*, *supra*, 204 Cal.App.4th at p. 1193.) It could have indicated explicit exclusivity is a prerequisite for displacing the fallback method for both revocation *and modification*, especially as recodification updated the law so it no longer needed to rely on "implication" to establish procedures. In related provisions, the Legislature expressly applied the law identically to modification and revocation.

Section 15403, subdivision (a) (emphasis added):

(a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may petition the court for **modification or termination** of the trust.

Section 15404, subdivision (a) (emphasis added):

(a) A trust may be **modified or terminated** by the written consent of the settlor and all beneficiaries without court approval of the **modification or termination**.

Instead of continuing to rely on implication to determine the law, the Legislature chose to provide explicit guidance, going so far as to change a provision in section 15401 (now codified in subdivision (c)) from "A trust may not be **revoked** by an attorney" to "A trust may not be **modified or revoked** by an attorney" to "make clear that the rule applicable to revocation by an attorney in fact applies to modification." (Stats. 1988, ch. 113, § 19, p. 481, emphases added; Cal. Law. Revision Com. com., West's Ann. Prob.Code (2022 ed.) foll. § 15401.) At the time it revised this provision, the Legislature likewise could have clarified that section 15401, subdivision (a)(2) "in fact applies to modification." But subdivision (a)(2) was left untouched, and continued to reference only revocation.

This omission compels the conclusion that the Legislature did not intend for subdivision (a)(2) to cover both revocation and modification as does subdivision (c). (See *Rashidi v. Moser, supra,* 60 Cal.4th 718, 726, internal citation omitted: "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show a different intention existed.") The *Rashidi* court considered whether the $250,000 limit on noneconomic damages established by the Medical Injury Compensation Reform Act (Civ. Code, § 3333.2) applied to both judgments and settlements, or only judgments. This Court cited Business and Professions Code section 6146, subdivision (a) (which indicates its attorney fee limits apply "regardless of whether the recovery is by settlement, arbitration, or judgment") to note its contrast with Civil Code section 3333.2, which has no similar provision; it simply forbids "damages for noneconomic losses [to] exceed . . . $250,000." (*Rashidi*, at p. 726.) This Court therefore discerned the two provisions had a disparate reach, as the "Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform," just as the Legislature "knew how to limit the exclusivity of a revocation method provided in a trust." (*Ibid.*;

King, supra, 204 Cal.App.4th 1186, 1193.) *Rashidi* concluded the Legislature intended to exclude *settlements* from the rule limiting noneconomic damages, so different rules governed settlements and judgments. Likewise, this Court should conclude the Legislature intended to exclude *modifications* from the rule authorizing the fallback method unless the prescribed method is explicitly exclusive, so different rules govern modifications and revocations.

The *King* dissent did not account for the full effect of the 1986 recodification. The Legislature repealed Civil Code section 2280, which had been construed as providing the same rule for revocation and modification, and replaced it with sections 15401 and 15402, which had different provisions for revocation and modification. It was thus counterintuitive for the *King* dissent to find section 15402 was enacted not to "establish a *different* rule from section 15401" but to "adopt the *same* flexible rule for modifications as for revocations." (*King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.) (emphasis added).) An intent to provide the same rule for modifications as for revocations would have been more apparent if the Legislature had provided the same text in section 15401 and 15402, or if it had enacted one provision that covered both revocation and modification (see e.g. § 15401, subd. (c)), or even if it had

continued to derive the modification rule by implication from the revocation rule. (*Heifetz, supra,* 147 Cal.App.2d 776.)

The dissent erred in conflating the procedures concerning an individual trust with those concerning the law as a whole. For an *individual trust*, at least one silent as to modification, the trustor's expression of a particular revocation method enables that trustor to use the same method for modification, so "if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." (§ 15402.) That provision, however, does not address whether *California law* regulates modifications congruently with how it regulates revocations, which would require that just as a prescribed revocation method must be explicitly exclusive to displace the fallback method (superseding *Rosenauer*, *supra*, 30 Cal.App.3d at p. 304), a prescribed modification method must also be explicitly exclusive to preclude the fallback plan.

The dissent found the Legislature's purpose in enacting section 15401 was "specifically to change the restrictive rule adopted in [*Rosenauer*]. (Cal. Law. Revision Com. com., 54 West's Ann. Prob.Code (1991 ed.) foll. § 15401, p. 571.)" (*King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.) (emphasis added).) The dissent further contended "Nothing in the Commission's comments on section 15401 and 15402"

shows the Legislature intended to distinguish between revocations and modifications (*Ibid.*) But the cited comment itself referenced only revocation, not modification: "The settlor may **revoke** a revocable trust in the manner provided in subdivision (a)(2), unless there is a contrary provision in the trust. This changes the rule under prior case law. See *Rosenauer* [citation]." (Emphasis added.) Under *Rashidi, supra,* 60 Cal.4th 718, and the general *expressio unius* principle, one could reasonably find "something" in the Commission's comments showing an intent to distinguish between revocations and modifications, to change the law and supersede *Rosenauer* for the former but not the latter.

In any event, whether or not anything in the *Commission's comments* on section 15401 and 15402 shows an intent to distinguish between revocations and modifications, the *text of the Probate Code sections* themselves shows the Legislature did so distinguish. Accordingly, this Court should follow the reasoning of *Rashidi*, *supra*, 60 Cal.4th 718, 726, and conclude the Legislature intended a different presumptive framework for revocation and modification.

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.

As the Opinion below observed, this case differs from *King*, *supra*, 204 Cal.App.4th 1186, as the instant trust prescribed the same procedure for revocation and modification, so even if the *King* majority was right and the *King* dissent was wrong, the instant modification could still be valid. (Opn. 10.) But the instant congruence *of fact* between the instant trust's revocation and modification procedures does not establish the congruence *of law* between sections 15401 and 15402 needed to validate the use of the fallback method below.

Just as former Civil Code section 2280 offered a fallback method to fill the vacuum where the trustor offered none, section 15402 provides a fallback method (the revocation method) for trusts that are silent as to modification. But it is superfluous for the Legislature to prescribe a modification method where the trust itself provides one. Accordingly, as section 15402 provides, "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation," the

simplest and best understanding of the word "otherwise" is that it means the trust is not *silent* as to the modification method. The Court of Appeal adopted this construction in *King*, *supra*, 204 Cal.App.4th 1186, *Pena*, *supra*, 39 Cal.App.5th 546, and *Balistreri*, *supra,* __ Cal.App.5th __.

It was Bertsch's prescription of modification through an acknowledged written instrument, not a statutory fallback, that authorized modification below. The trust here did not need not a default modification method *because Bertsch provided her own*. There was no need to derive a modification method from the one governing revocation.

Unlike *King*, *Pena*, and *Balistreri*—or the *King* dissent —the Opinion found it significant that Bertsch prescribed the same method for revocation and modification. Under this theory, she did not provide "otherwise" because she expressly prescribed that the modification method was the same as the revocation method. And so, according to the panel, she also prescribed the fallback method for revocation described in section 15401, subdivision (a)(2). The problem with this theory is that Bertsch affirmatively prescribed the specific modification method of an *acknowledged instrument in writing* (and followed that method on a prior occasion); she did not prescribe that the means of modification be fully coextensive with all available methods of revocation, as

supplemented by section 15401, subdivision (a)(2).

But the Court of Appeal, by switching a few words, changed the provision from one prescribing the specific modification method of an acknowledged writing to one prescribing a full congruence between revocation and modification procedures. The *King* dissent had cited the Law Revision Commission report describing the presumptive rule that "**the** method of modification is the same as **the** method of termination." (*King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.), citing quoting Law Rev. Com. Rep. at p. 1271, emphasis added.) The Opinion removed the definite article "the," which suggests a single method, and is useful for a silent trust. The Opinion then restated the Law Revisions Commission's comment to hold "**an available** method of revocation is also **an available** method of modification." (Opn. 10-11, emphasis added.) This restatement thereby authorized the section 15401, subdivision (a)(2) method for modification, despite its absence from the text of both section 15402 and the instant trust.

As noted, the Legislature enacted section 15401, subdivision (a)(2) to loosen restrictions on *revocations*. And the Law Revision Commission explained the policy favoring the compromise position in terms of revocation only.

> [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.

(Law Rev. Com. Rep. at p. 1271, emphasis added.)

There is thus no ground for extending the fallback method to modifications here: Section 15402 does not prescribe it and the trust does not prescribe it. The only basis for such authorization is a form of imputed intent: Because Bertsch prescribed modification through an "acknowledged instrument in writing," and because that method could also effect revocation, she thereby authorized a full congruence between revocation and modification, so that any (statutorily authorized) method for revocation was also valid for modification. But the evidence does not show either she or the Legislature intended that result.

The weakness of the imputed intent theory can be seen by considering a hypothetical trust that prescribed modification through an acknowledged instrument, and revocation through an acknowledged instrument *or* the

fallback method.[4] The Opinion hinged on the modification method's not being explicitly exclusive. (Opn. 11; see also *King*, *supra*, 204 Cal.App.4th at p. 1198 (dis. opn. of Detjen, J.): "[T]he trust instrument did not explicitly exclude use of the alternative statutory method for modification.") If the lack of explicit exclusivity below justifies using the fallback method, then it would justify it even if the trust's prescribed revocation method differed by also embracing the fallback method. But that would explicitly contravene the trustor's expressed preference that the fallback method be available for revocation but *not* modification. *King* showed a trustor may choose a more protective scheme for modification than revocation, and it would frustrate that intent to authorize the fallback method for modification where the trustor prescribed it only for revocation. (*King*, *supra*, 204 Cal.App.4th at p. 1194 [authorizing congruent procedures for revocation and modification despite trustor's contrary preference "would cause the amendment provision to become superfluous and would thereby thwart the settlors' intent"].) It would also frustrate it where the trustor prescribed it for neither.

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[4] As noted, the *King* dissent and *Haggerty* would disagree about whether the fallback method would be valid in such a circumstance.

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

Not only do the texts of sections 15401 and 15402 differ, but the Law Revision Commission's comments indicate the rationale warranting looser restrictions concerns *revocations*. (Law Rev. Com. Rep. at p. 1271.) There are reasons why a trustor—as in *King*—might favor a more protective method for modification, and why the Legislature could have decided to strike a different compromise regarding the two functions, just as the Legislature could reasonably have favored a different rule regarding settlements and judgments in *Rashidi*, *supra*, 60 Cal.4th 718.

The *Rashidi* court observed the Legislature was primarily concerned with capricious and unpredictable jury awards when it enacted the cap on damages for judgments; settlement offers did not present the same concern. (*Rashidi*, *supra*, 60 Cal.4th at pp. 726-727.) Similarly, trustor concerns about "future undue influence while in a weakened condition" would be stronger regarding modification than revocation, warranting a more protective scheme. (Law Rev. Com. Rep. at p. 1271.) There is less concern about *revocation* due to undue influence by a caretaker or other acquaintance than there is about modification, because if a trustor revokes a trust under

such influence, the estate will be distributed according to the law of intestacy, and will remain within the family. Revocation thus will not help an outside acquaintance; to gain access to trust funds, he will need the trustor to *modify* the trust to add him as a beneficiary.

The textual disparity between section 15401 and 15402 is not irrational but reflects a sound policy judgment about the greater potential for mischief regarding modification. The Legislature could reasonably choose to loosen the procedure for revocation more than the procedure for modification.

E. Because Bertsch devised her trust agreement when *King* was the prevailing law, any decision superseding its rule that the trust's prescribed method "must be used to amend the trust" should apply prospectively only.

Finally, this Court should apply *King*, *supra*, 204 Cal.App.4th 1186, in evaluating the validity of the instant amendment, even if this Court ultimately favors the *King* dissent's position. The Court of Appeal decided *King* in 2012, and it was the prevailing law when Ms. Bertsch devised her trust—and its modification method—in 2015. *King* held a trustor " 'may bind . . . herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement,' " and that "if any modification method is specified in the trust, that method must be used to amend the trust." (*Id.* at p. 1193, internal citation omitted.) As in *King*, Bertsch's trust "specified a modification method and thus, under section 15402 the trust could only be amended in that manner." (*Id.* at p. 1194.)

When Bertsch devised her trust, the prescription of *any* method for modification sufficed to displace the fallback method. If this Court favors a different rule, it should apply prospectively only.

Conclusion

Disparate frameworks govern revocation, through section 15401, and modification, through section 15402. It would have been easy for the Legislature to maintain the pre-recodification congruence; it even altered section 15401, subdivision (c) to encompass modification expressly and "make clear that the rule applicable to revocation by an attorney in fact applies to modification." (Cal. Law. Revision Com. com., West's Ann. Prob. Code (2022 ed.) foll. § 15401.) It never revised subdivision (a)(2). Using both terms to reach both functions showed that using only one term would not reach both. (*Rashidi, supra,* 60 Cal.4th 718, 726.)

The reasoning of *Rashidi* should control here. The textual disparity between Civil Code section 3333.2 and Business and Professions Code section 6146, subdivision (a) showed the "Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform." (*Rashidi*, *supra*, 60 Cal.4th at p. 726.) And it had reason to treat settlements differently, because there was greater concern about excessive jury verdicts than settlement offers. (*Id*. at pp. 726-727.) Likewise, the Legislature "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."

(*Balistreri, supra,* __ Cal.App.5th __ [p. 7]], citing *King*, *supra*, 204 Cal.App.4th at p. 1193.) The Legislature likewise had reason to differentiate between revocations and modifications, and more tightly regulate the latter, where default intestacy rules cannot protect trusts from usurpation by outsiders.

Even if this Court decides the instant Court of Appeal construed the texts of section 15401 and 15402 more accurately than *King*, it was that case that described the controlling law when Bertsch devised her trust. The case instructed trustors they could bind themselves to a specific method, and if they did, "that method must be used to amend the trust." (*King, supra,* 204 Cal.App.4th at p. 1193.) Bertsch specified the method of an acknowledged writing; she used that method in 2016 to benefit her niece, and then failed to use that method in 2018 when she excluded her. Having bound herself to that method and used it, Bertsch was "not entitled to cast aside that procedure and amend the Trust using the revocation procedure set forth in section 15401, subdivision (a)(2)." (*Balistreri*, *supra*, __ Cal.App.5th __ [p. 8].)

This Court should adapt the lesson of Homer's epics: Where a trustor exercises her agency and binds herself to a specific method of modification, courts should respect that prescription and enforce it.

Respectfully submitted,

Dated: March 9, 2022 _____

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

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Dated: March 9, 2022

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Brianna McKee Haggerty

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