S271483

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIANNA MCKEE HAGGERTY,

Petitioner,

v.

NANCY F. THORNTON, et. al

Respondents.

ANSWER BRIEF ON THE MERITS

From a Decision of the Court of Appeal
Fourth Appellate District, Division One
D078049

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Respondent, UNION OF CONCERNED SCIENTISTS ("UCS"), submits this Answer Brief in response to the Opening Brief filed by Appellant, BRIANNA MCKEE HAGGERTY ("Haggerty").

I.

SUMMARY

Haggerty's Opening Brief observes that people "sometimes exercise their agency by constraining it," and suggests that Jeanne Bertsch ("Bertsch")—the settlor of the Trust at issue here—did just that by creating a trust and prescribing it could be modified by "an acknowledged instrument in writing."

UCS agrees with the threshold principle that one *may* exercise their agency by constraining it—as Odysseus did when he instructed his crew in absolute terms to bind him half-way up the mast "with a bond so fast [one] cannot possibly break away," and to bind him "more tightly still" if he begged or prayed to be set free. (See Samuel Butler's translation of Homer, *The Odyssey* (1919), at http://classics.mit.edu/Homer/odyssey.12.xii.html.) But that is not what happened here. On the contrary, the Trust gave the settlor (Bertsch) the express, unrestricted, unilateral authority to both revoke and amend the Trust—to free herself from the mast—

"whenever and as often as [she] may wish." Bertsch exercised that authority in preparing a Third Amendment to her Trust and her intent was properly fulfilled by the Court of Appeal decision validating that modification.

More broadly, UCS acknowledges the tension between this case and several other reported decisions, tension that requires resolution by this Court. Accordingly, UCS examines the plain language, the historical context, and the legislative intent behind the two controlling statutes, Probate Code sections 15401 and 15402 ("Section 15401" and "Section 15402"). UCS then examines the competing case law that addresses the essential issue presented—whether a trust can be modified in the same manner it can be revoked. Finally, UCS concludes that, of all the cases, the analysis and conclusion of the Court of Appeal in this case is most consistent with the statutory language, the legislative intent, and the first principle of probate law—protecting the objectives of the settlor. That decision should be adopted as a clear statement of California law and the judgment in favor of UCS should, accordingly, be affirmed.

II.

STATEMENT OF FACTS

A. The Trust

Bertsch—whose husband had died years before, and who had no children—established the Trust in January of 2015. (CT 15-36.) The Trust nominated private professional fiduciary Nancy Thornton ("Thornton") as successor trustee. (CT 23.)

The Trust provided for the payment of estate obligations and death taxes, and the disposal of the balance of the Trust Fund as provided in Exhibit 1. (CT 19-20.) Exhibit 1, in turn, bequeathed between $25,000 to $500,000 in cash or kind to each of 10 named beneficiaries (including $50,000 to Haggerty), with the residue distributed 50% to UCS and 50% to the San Diego Humane Society. (CT 18-20, 36-37.) Article XII of the Trust specified certain rights reserved by Bertsch:

> **Revocability of Trust & Rights Reserved**
>
> The Trustor reserves the following rights, each of which may be exercised whenever and as often as the Trustor may wish:
>
> **A. Amend or Revoke.** The right by an acknowledged instrument in writing

> to revoke or amend this Agreement or any trust hereunder.

(CT 33.)[1]

B. The First Amendment

In October of 2016, Bertsch signed and dated the First Amendment to the Trust. (CT 43-46.) The first two pages of the four-page document appointed Thornton as trustee, to take office upon Bertsch's resignation or incapacity, and appointed Haggerty as trustee upon Bertsch's death. (CT 43-44.) The first two pages also amended Article VI of the Trust ("Takers of Last Resort") to provide that any property not otherwise disposed of under the Trust be distributed to UCS, "to further their work on behalf of our planet earth and its inhabitants." (CT 36.)

The second part of the First Amendment (pages 3 and 4) makes no reference to any exhibit in the first two pages, but consists of a revised Exhibit "1" entitled "Distribution of Trust Estate," to replace the Exhibit 1 attached to the original Trust. (CT 45-46.) The revised Exhibit 1 specifies several general bequests,

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[1] The terms "trustor" and "settlor," are synonymous. (See, *e.g.*, *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1069.) UCS uses the term "settlor" throughout this brief, except when quoting other material that use the term "trustor."

including $1 million to UCS, with the residue to Haggerty if she is living or, if not, to UCS. (CT 45-46.) Bertsch signed "Page 4 of 4" of the First Amendment, as did a purported Notary Public with an illegible signature (though no notary stamp appears anywhere in the First Amendment). (*Ibid*.)

C. The Second Amendment

In December of 2017, Bertsch handwrote and dated a document titled "Beneficiary List for the Jeanne M. and Don C. Bertsch Trust." (CT 48.) The document provided that, "[a]fter paying financial expenses of settling this estate," the remainder of the Trust's assets should be distributed in specific amounts to five individuals—not including Haggerty—with the "remaining financial assets [to] be given to [UCS]." (CT 48.) The Second Amendment is not signed or otherwise expressly acknowledged by anyone. (*Ibid*.)

D. The Third Amendment

Finally, in June of 2018, Bertsch handwrote the Third Amendment. (CT 49.) It provided "Beneficiary Instructions" directing the Trust to "pay the current existing financial bills, taxes, fees and costs from the Trust," and then expressed "my desire and instruction" to "give one half (Two Million Dollars) to [UCS]," and

then to "give equal portions from the remainder half (Two Million Dollars)" among four persons (not including Haggerty). (CT 49.)

The Third Amendment, signed at the bottom, instructed Bertsch's former attorney, Patricia Galligan ("Galligan," another respondent in this matter), "to place this document with her copy of the Trust," and indicated that Galligan "can verify my handwriting." (CT 49.)

Bertsch served as trustee of the Trust until she died in December of 2018. (CT 51:6-7.)

III.

PROCEDURAL HISTORY

A. The Parties' Petitions in Probate

About six months later, in June of 2019, Thornton filed a "Petition for Confirmation of Appointment of Successor Trustee." (CT 8-13.)

Haggerty responded with a "Petition to Determine Validity of Trust Amendments," seeking a judicial determination as to both the construction and the validity of the Trust instruments. (CT 50-91.) Specifically, Haggerty argued that the First Amendment was valid because it was supposedly "acknowledged" (albeit without a notary

stamp), but that the Second and Third Amendments were *not* valid because they were not formally "acknowledged" by a notary public. (CT 53-54.) Haggerty also later filed an objection to Thornton's Petition. (CT 110-116.)

Each of the beneficiaries under the Third Amendment filed objections to Haggerty's Petition. (See CT 92-101 [Colleen Having], CT 102-109 [Racquel Kolsrud], CT 124-133 [Patricia Galligan], CT 134-139 [UCS].) Kolsrud also filed a petition that sought both to affirm the validity of the Second and Third Amendments and, in any event, to excuse strict compliance with the terms of the Trust based on Haggerty's violation of its "No Contest" clause. (CT 33, 117-123.)

B. The Trial Court Decision Affirming the Amendment

At a hearing in February of 2020, the trial court first consolidated the multiple petitions under a single case number. (RT 5:21-25.) The parties agreed the petitions presented a purely legal issue—"whether the trust can be amended in the way that [Bertsch] did or not"—and the trial court set that issue for briefing. (See RT 11:17-12:13, 16:3-15.)

The record includes briefs from UCS, Galligan, and Kolsrud, all of which object to Haggerty's Petition and support the Second and Third Amendments to the Trust. (See CT 124-131, 145-162 [Galligan]; 134-139, 163-212 [UCS]; 140-145 [Kolsrud].)

In August of 2020, the trial court filed its minute order finding simply that: "[T]he handwritten document[] signed and dated 06/10/2018 [the Third Amendment] is a valid Amendment to the Trust." (CT 213-214.)

C. The Court of Appeal Decision Affirming the Amendment

Haggerty appealed and the parties filed their respective briefs in the Court of Appeal (Fourth District, Division One).

The Court of Appeal heard oral argument and, in December of 2021, filed its decision—per Justice Guerrero, with Justices McConnell and Dato—affirming the trial court and confirming the validity of the Third Amendment. (Opn.) The decision first recited the statutory language of Sections 15401 (regarding trust revocations) and 15402 (regarding trust modifications). (Opn., p. 6.) It then examined the critical case law—primarily the majority and dissenting opinions in *King v. Lynch* (2012) 204 Cal.App.4th 1186 ("*King*")—and dissected the language of Bertsch's Trust, ultimately concluding as follows:

> Because the trust does not distinguish between revocation and modification, it does not "provide otherwise" than the general rule and under section 15402 the trust may be modified by any valid method of revocation. Moreover, as a reservation of rights, it does not appear Bertsch intended to bind herself to the specific method described in the trust agreement to the exclusion of other permissible methods. Because the method of revocation and modification described in the trust agreement is not explicitly exclusive (and no party argues otherwise) the statutory method of revocation was available under section 15401.

(Opn. at p. 11, citing *Masry v. Masry* (2008) 166 Cal.App.4th 738, 742.)

D. Haggerty's Petition for Review

Haggerty filed a Petition for Review, framing the question presented as follows:

> 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 ([Section 15401]), or does prescribing any modification method preclude the default option.

On December 22, 2021, this Court filed its order granting the petition for review.

IV.

DISCUSSION

Haggerty's essential argument is that, since the adoption of Sections 15401 and 15402 in 1986, the law regarding *modification* of trusts is "no longer congruent" with the law regarding *revocation* of trusts. (AOB, *passim*.) Thus, according to Haggerty, the "fallback" statutory method of revoking a trust—delivering a signed writing to the trustee, as provided in Section 15401(a)(2)—no longer applies to modifications governed by Section 15402; and, if a trust specifies *any* particular method of modification, that is the *only* valid method. Applied to this case, Haggerty argues that, because the Trust stated Bertsch *could* amend the Trust by an "acknowledged writing," she could *only* amend the Trust by that method, and not by the default statutory method she followed.

This case—and the larger legal issue it presents—involves a classic issue of statutory construction. As such, "the fundamental task" for this Court is to ascertain the Legislature's intent in enacting Section 15402 so as to effectuate its intended purpose. (*Smith v. Superior* Court (2006) 39 Cal.4th 77, 83; *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.)

Accordingly, UCS first examines (A) the fundamental policy—safeguarding a settlor's intent—that governs the interpretation of the Probate Code generally. UCS then examines (B) the plain language of Sections 15401 and 15402, (C) the legislative history behind those statutes, (D) the relevant case law, and (E) Haggerty's "prospective application" argument. Based on those considerations, UCS concludes (F) that the analysis of the Court of Appeal in this case should be adopted by this Court as the proper rule of law in California, and that the judgment in favor of UCS should therefore be affirmed.

A. The Primary Goal of Probate Law Is to Safeguard the Intent of the Settlor

There is one overriding, fundamental principle that applies throughout the entire body of probate law, reflected both in the statutes and through a long-settled line of cases that regards the ultimate goal of probate law to be to fulfill the intent of the settlor. (See, e.g., *In re Gump's Estate* (1940) 16 Cal.2d 535, 548 ["In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to ascertain and then, if possible, give effect to the intent of the maker."]; *Ephraim v. Metropolitan Trust Co. of California* (1946) 28 Cal.2d

824, 834 ["[T]he primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the Trustor or settlor."]. See generally Prob. Code, § 21102, subd. (a) ["The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."]. See also Welf. & Inst. Code, § 15610.30, 15656.5, 15657.6 [creating a private cause of action specifically designed to protect the rights of people to dispose of their property after death as they wish].)

In this case, there is no doubt that Bertch intended exactly what she wrote when she executed the Third Amendment. There was never any suggestion that she did not sign that amendment, that she lacked the testamentary capacity to do so, or that it was the product of any undue influence. As such, Haggerty's argument that the Third Amendment is invalid because the Trust specified one particular way in which it could be modified—ostensibly making that the *only* way the Trust could be modified—directly undermines Bertch's clear intentions. That, alone, is sufficient reason to adopt the analysis of the Court of Appeal and affirm the judgment in favor of UCS.

Beyond its own interest, however, UCS explains in the discussion that follows that the Court of Appeal's analysis in this case—confirming the ability of settlors to modify their trusts in the same manner they can revoke them (unless the trust expressly provides otherwise)—is the result that best serves the principal goal of protecting the intent of the settlor.

B. The Plain Language of the Statutes Supports the Analysis of the Court of Appeal

1. Introduction

The starting point in interpreting any statute is the plain language of the statute itself. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) Words should be given their usual and ordinary meaning and should be read in the context of the entire statutory scheme. (*Ibid*. See also *Cummings, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487 ("*Cummings*") ["[T]he words of a statute [must be construed] in context . . . harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole."]; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 ["[W]hen interpreting a statute, we must harmonize its various parts if possible, reconciling them in the

manner that best carries out the overriding purpose of the legislation."].)

2. The Plain Language of Section 15401

The specific statute at issue in this case is Section 15402 (titled 'Modification of Trust"), but because that statute must be harmonized "in the context of the statutory framework as a whole" (*Cummings, supra,* 36 Cal.4th at p. 487), UCS begins its analysis with consideration of the plain language of Section 15401—enacted in 1986 as the first section in Chapter 3, devoted to "Modification and Termination of Trusts."

Specifically, Section 15401, subdivision (a)(2), first provides that a revocable trust "may be revoked in whole or in part"—a revocation "in part" of course being a *modification*—by "any method of revocation provided in the trust instrument." (Prob. Code, § 15401, subd. (a)(2).) In the alternative, the statute provides that a revocable trust may be revoked—again "in whole or in part"—by the so-called "statutory method," that is, "by a writing . . . signed by the settlor . . . and delivered to the trustee during the lifetime of the settlor." (*Ibid.*) The statute includes only one proviso: that, if the trust "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." (*Ibid.*)

Bertsch complied with Section 15401, subdivision (a)(2). The trust gave her the authority to revoke or modify the Trust "as often as she wanted" (CT 33), and she did so here. She signed a writing and delivered it to the trustee (herself). (CT 35.) No one has questioned whether the signature on the document was hers, claimed she was incompetent to execute the document or that anyone exerted undue influence over her in the process. That statute and those facts, without more, compel the conclusion of the trial court and the Court of Appeal in this case.

3. The Plain Language of Section 15402

Section 15402 is the statute that deals specifically with trust modifications. It provides in full: "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."

Giving those 25 words their plain meaning, the declarative part of the sentence could not be any clearer: "[T]he settlor may modify the trust by the procedure for revocation" (that is, by specifying a particular manner of modification pursuant to Section 15401, subdivision (a)(1), or by the "statutory method" of

subdivision (a)(2) by delivering a signed writing to the trustee). The introductory phrase—"Unless the trust instrument provides otherwise"—qualifies the declarative clause; but UCS submits it, too, has a plain meaning—that the settlor may modify the trust by the procedure for revocation unless the trust provides that the settlor *may not* modify the trust by the procedure for revocation.

Under that interpretation, this case was correctly decided by the Court of Appeal. The Trust expressly reserved unto the settlor—Bertsch, who held that position until her death—the power to "amend or revoke" the Trust. (CT 26) The Trust specifically set forth one method to accomplish that purpose (by an "acknowledged writing"), but it did *not* "provide otherwise," which is to say it did not provide the settlor could *not* modify the Trust by the procedure for revocation. Therefore, that option was preserved, and was indisputably followed by Bertsch.

In sum, UCS submits the plain language of Sections 15401 and 15402, separately and together, is perfectly clear and yields the indisputable conclusion that the statutes were intended to be read together, that they present a unified ("congruent") procedure for revoking and modifying trusts, and that trusts can, therefore, be modified in the same manner they can be revoked. UCS recognizes,

however, that several reported cases do not share that conclusion, so further review of the historical circumstances surrounding and the specific legislative intent behind those statutes is warranted to help resolve which line of cases should be adopted.

C. The Legislative Intent

While the words of a statute are the "most reliable indication of legislative intent," if the statutory language is ambiguous, the Court may consider "[b]oth the legislative intent of the statute and the wider historical circumstances of its enactment." (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.) In this case, both inquiries support the plain language interpretation of the statutes supported by UCS.

Thus, it is relevant that, before the enactment of Sections 15401 and 15402, revocations of trusts were governed by Probate Code section 2280 ("Section 2280"). (See *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 962 ("*Huscher*").) No separate provision existed for modifications, but case law at the time recognized that the power to revoke included the implied power to modify. (*Id. at* p. 962, fn. 5, citing *Estate of Lindstrom* (1987) 191 Cal.App.3d 375, 385, fn. 11.) When first enacted in 1872, the statute provided, in short, that the trust could be revoked "only if

the trust instrument said so, and only then by following the method of revocation that was specified." (*Huscher*, *supra*, 21 Cal.App.4th at p. 963, citing *Carpenter v. Cook* (1900) 67 Cal.Unrep, 410, 411.) Even then, the power of revocation was strictly construed. (See Historical Notes, 10 West's Ann. Civ. Code (1954 ed.) foll. Former § 2280, p. 608.)

In 1931, the Legislature amended Section 2280 to read: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by a writing filed with the trustee." (Prob. Code, § 2280 [repealed].) Thus, as articulated in *Huscher*: "Where the original version of section 2280 made irrevocability the norm unless otherwise stated, the 1931 version opted to make revocability the norm unless the trust expressly declared itself irrevocable." (*Huscher*, *supra*, 121 Cal.App.4th at p. 963.)

In 1986, Section 2280 was repealed and supplanted by Sections 15401 and 15402. Section 15401 "retained the rule that a trust [was] revocable unless it [was] made irrevocable by the trust instrument," and made clear "that a revocable trust may be revoked in the manner provided by the statute . . . unless a manner specified in the trust [was] made exclusive." (See *King v. Lynch* (2012) 204

Cal.App.4th 1186, 1195, citing Selected Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) at p. 1213.) Notably, the Law Revision Commission (the "Commission") made clear that it wanted the trust to be a "flexible mechanism," given "some persons who draft trust instruments do not have the expertise needed to fashion an instrument that responds to the changing needs, values, and circumstances of the settlor and the beneficiaries." (*Id.* at p. 1268.) The Commission also noted that "[r]estrictive features of a trust may come to be viewed as too restraining in the face of the interest in the free alienability of property." (*Ibid.*)

In 1987, the Commission recommended further revisions to Sections 15401 and 15402, resulting in an amendment to Section 15401 setting forth the nature of what had always been understood to be the *implied* power of modification: "Under general principles the settlor . . . may modify as well as terminate a revocable trust. The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination barring a contrary provision in the trust." (Selected 1986 Trust and Probate Legislation (Sept. 1986), 18 Cal. Law Revision Com. Rep., (1986), p. 1271.) In addition, the Comments to amended Section

15402 provide: "This section codifies the general rule that a power of revocation implies the power of modification." (See *Haggerty*, *supra,* 68 Cal.App.5th at p. 1009, citing *Heifetz v. Bank of America National Trust & Savings Association* (1957) 147 Cal.App.2d 776, 781-782 [referring to the power to modify a trust as "an implied power embraced within the reservation of power to revoke in whole or in part"]; Restatement (Second) of Trusts, § 331, comment g ["Ordinarily a general power to revoke the trust will be interpreted as authorizing the settlor not only to revoke the trust in part . . . , but also to modify the terms of the trust . . . ."].)

In sum, it is clear that the intent of the Legislature in adopting Sections 15401 and 15402 was to reject the restrictive rule set forth in *Rosenauer v. Title Insurance & Trust Co.* (1973) 30 Cal.App.3d 300, 304 [requiring strict adherence to a trustor's expressed preference for a mode of revocation], and to make more flexible the general ability of a settlor to revoke or modify a trust instrument. Haggerty's proposed rule of law—drawing a distinction between a settlor's right to revoke and right to modify a trust and strictly construing the power where the trust sets forth one particular method of modification—runs counter to the clear

legislative intent to liberalize and make more flexible the power to both revoke and modify a trust instrument.

D. The Case Law Is Conflicting on the Critical Issue Presented.

The five principal cases relevant to the issue presented reveal two contradictory lines of analysis. One line—supported by Haggerty—holds that Sections 15401 and 15402 are no longer "congruent." According to that interpretation, if a trust specifies any method of modification, that method *must* be used to the exclusion of any other. The other line of analysis—supported by UCS—holds that the method for modifying trusts remains the same as that for revoking trusts, meaning a trust can be modified by the "statutory method" (delivering a signed writing to the trustee) unless the trust expressly says it cannot.

UCS now examines those cases in the order they were decided and concludes that the best-reasoned analysis, consistent with the plain language of the statutes, the legislative intent and history behind the statutes, and the central principle of giving effect to the settlor's intent, is the decision of the Court of Appeal in this case.

1. *Huscher v. Wells Fargo Bank*

This case—*Huscher*, *supra*, 121 Cal.App.4th 956—is a good starting point because the essential facts are similar to the facts in this case, and because the decision, from 2004, provides a thorough historical examination of the evolution of the law in California governing trust revocations and modifications. (See *Pacific Gas & Elec. Co., supra,* 16 Cal.4th at p.1152 [alluding to the importance of examining to the "wider historical circumstances" of a statute's enactment].)

In *Huscher*, the trust instrument—created prior to 1986 and therefore governed by prior Section 2280—provided that the trustor "may at any time amend any of the terms of [the] trust by an instrument in writing signed by the Trustor and the Trustee." (*Huscher*, *supra*, 121 Cal.App.4th at p. 972.) One party argued (like UCS here) that the trust did not explicitly make the indicated method of amendment the exclusive method, so delivery of a signed writing to the trustee was sufficient. (*Id*. at p. 959.) The other side argued (like Haggerty here) that, because the trust indicated one specific method of amendment, that the was the *only* way the trust could be amended. (*Ibid*.)

To resolve the dispute, the Court examined Section 2280, both as enacted and as amended, and the case law decided under both versions. In the end, the Court of Appeal concluded:

> [U]nder [former Section 2280], a trust's modification procedures must be followed if they are explicitly exclusive or if the provisions are so specific and detailed that they implicitly preclude resort to any other method. If not, then a modification may also be accomplished under the statutory procedures of [Section 2280], by delivering a signed modification to the trustee even if the trustee does not sign the amendment.

(*Id*. at p. 961. See also *id*. at p. 968 ["Our review leads us to conclude a trust may be modified in the manner provided by section 2280 unless the trust instructions either implicitly or explicitly specify an exclusive method of modification."].)

In the end, the Court emphasized that its "primary duty in construing the Trust is to give effect to [the settlor's] intent." (*Id*. at p. 972.) Thus, the Court concluded that, "where a trust's modification method does not suggest exclusivity, the section 2280 procedure"—that is, the "statutory method" of simply delivering a signed writing to the trustee—"should remain available to the trust as an alternative." (*Id*. at p. 971.) According to the Court, to hold otherwise, "could frustrate the intentions of a competent trustor

who did not intend to create an exclusive modification procedure and who sought to modify his trust pursuant to section 2280." (*Ibid.*)

2. *King v. Lynch*

In this case, from 2012, a married couple, Zoel and Edna Lynch, created a revocable trust. (*King*, *supra*, 204 Cal.App.4th at p. 1188.) The trust provided it could be amended "by an instrument in writing signed by both Settlors and delivered to the Trustee," and could be revoked "by an instrument in writing signed by either Settlor and delivered to the Trustee and the other Settlor." (*Ibid.*) Zoel and Edna both executed three amendments to the trust; but, after Edna suffered a brain injury that left her incompetent, Zoel executed a fourth, fifth, and sixth amendment, each one increasing the bequest to one child (David) and reducing the bequests to several other children and grandchildren. (*Id.* at p. 1189.)

When Zoel died, the children and grandchildren whose bequests were reduced challenged the fourth, fifth, and sixth amendments, resulting in a trial court ruling they were invalid inasmuch as they "were signed by only one of the settlors in contravention of the express terms of the trust." (*Id.* at p. 1190.) David appealed and the Court of Appeal, in a divided decision,

affirmed. (*Id*. at pp. 1188, 1194.) According to the majority decision (by Justices Levy and Dawson):

> The qualification "unless the trust instrument provides otherwise" [in Section 15402] indicates that if any modification method is specified in the trust, that method must be used to amend the trust. As noted by the Court in *Conservatorship of Irvine* (1995) 50 Cal.App.4th 1334, 1344, "section 15402 recognizes a trust 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."
>
> Before 1986, courts applied the rules governing trust revocations to the trust modifications. However, when the Legislature enacted [Sections 15401 and 15402], it differentiated between trust revocations and modifications. This indicates that the Legislature no longer intended the same rules to apply to both revocation and modification.

(*Id*. at p. 1193.)

On that basis, the majority concluded that, "to be effective, the amendments needed to be signed by both Zoel and Edna." (*Id*. at p. 1194.) Although that was a sufficient basis on which to affirm the trial court, the Court of Appeal stated further that, because the trust mentioned one possible method of modification, "the trust could only be amended in that manner." (*Ibid*.)

Justice Dietjen dissented, conducting a thorough historical analysis and concluding that Sections 15401 and 15402 were "enacted in response to a perceived need to move away from such a restrictive interpretation" and that the Commission "wanted the trust to be a 'flexible mechanism.'" (*Id*. at p. 1195.) Justice Dietjen also rejected the majority's reliance on *Huscher*, noting that the *Huscher* court specifically found that the language of Section 15402 "did not expressly preclude the settlor from using alternate statutory methods to modify the trust instrument." (*Id*. at p. 1197.)

Thus, Justice Dietjen concluded 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.) Because the trust at issue did not explicitly exclude use of the alternative statutory method for modification or revision," Justice Dietjen was "of the opinion" that:

> [Zoel] was permitted to modify the trust by the procedure for revocation in accordance with [Section 15401, subdivision (a)(2)], and that the fourth, fifth, and sixth amendments to the trust instrument were validly executed are effective in modifying the trust instrument in accordance with the terms of the amendments.

(*Id*. at p. 1198.)

3. *Pena v. Dey*

In this case from 2019, the trustee filed a petition for instructions after the death of the settlor regarding the settlor's handwritten interlineations on a trust document that made one of the settlor's friends (Day) a beneficiary. (*Pena*, *supra*, 39 Cal.App.5th at p. 548.) The trustee then moved for summary judgment, asserting that the interlineations did not constitute a valid amendment. (*Ibid.*) The trial court agreed and granted summary judgment, and Day appealed. (*Ibid.*)

The Court of Appeal affirmed, first reciting the analysis of the Court of Appeal in *King*—that, if a trust instrument specifies how the trust is to be modified, "that method must be used to amend the trust." (*Id.* at p. 552.) The Court then noted that the trust instrument at issue provided that any amendment "shall be made by written instrument signed by the settlor" and then framed the issue in the case as "whether the interlineations [the settlor] made to the [trust instrument] satisf[ied] this method of amendment." (*Ibid.*) Ultimately, the Court of Appeal concluded that "the interlineations in this case constitute a written instrument separate from the instrument," but that, "[b]ecause the trust's amendment provision requires an amendment be 'signed by the settlor,' we must

conclude the interlineations did not effectively amend the trust." (*Id.* at p. 553.)

In the end, the Court of Appeal concluded that its decision was consistent with the first principle of protecting the intent of the settlor: "[T]he 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. Because [the settlor] did not sign the interlineations, they did not effectively amend the trust." (*Id.* at p. 555.)

4. *Haggerty v. Thornton*

The facts of this case, decided by the Court of Appeal in 2021, are all set forth above. The issue presented—same as in *Huscher*, *King,* and *Pena*—is whether an amendment to a trust that complied with the statutory method was valid where the trust instrument specified an alternative method of modification, but did not expressly make that the *exclusive* method of modification.

Justice Guerrero, writing for a unanimous Court (with Justices McConnell and Dato) first recited the essential rules of statutory construction—ascertaining the intent of the Legislature with primary emphasis on the words of the statute, but looking also

to related statutes and the historical context. (*Id*. at p. 1008.) The Court then recited the language of Section 15401 and observed that the statute "changed the prior rule, which required that a trust instrument's method of revocation must be used if it was either explicitly or impliedly exclusive." (*Id*. at pp. 1008-1009, citing Cal. Law Revision Comm. Com. West's Ann. Prob. Code (2021 ed.) foll. § 15401.) The Court also cited to *Huscher*, *supra*, 121 Cal.App.4th at p. 971, fn. 13, to explain that "the change made was to require a statement of explicit exclusivity and thereby avoid the problems of interpretation inherent in determining issues of implicit exclusivity."

The Court then examined the language of Section 15402 and recited the double-edged logic of the *King* majority—(1) that, because the Legislature "differentiated" between revocations in Section 15401 and modifications in Section 15402, it indicated "that the Legislature no longer intended the same rules to apply to both revocation and modification"; and (2) that, if Section 15402 were interpreted otherwise (as it was in *King*), it "would cause the amendment provision [in Section 15401] to become superfluous and would thereby thwart the settlor's intent." (*Id*. at p. 1010, citing *King*, *supra*, 204 Cal.App.4th at p. 1194.)

The Court then examined the dissenting opinion in *King*—its focus on "the purpose of [Sections 15401 and 15402]," its comment on "the clear legislative choice to change the existing law in favor of permitting greater flexibility for the settlor," and its rejection of the proposed rule that "a method of modification [is] exclusive simply because it has been set forth in the trust instrument." (*Id*. at p. 1010, citing *King*, *supra*, 204 Cal.App.4th at pp. 1195-1196 (dis. opn. of Dietjen, J.).)

Ultimately, the Court stated it did not need to comment on the trust instrument in *King* because it "differs substantially from the language of the trust here," and did not need to "consider whether *King* was ultimately correctly decided on its facts." Still, guided by the legislative history and the purpose underlying the statutes, the Court stated:

> [A]s a general matter, we conclude the *King* dissent more accurately captures the meaning of section 15402 than the majority opinion. Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification. It recognizes the existing principle that "a power of revocation implies the power of modification." The method of modification is therefore the same as the method of revocation, "[u]nless the trust instrument provides otherwise," i.e., unless the trust instrument distinguishes between

> revocation and modification. The California Law Revision Commission made this point explicit: "'Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.'
>
> Under this interpretation, section 15402 is not mere surplusage, as the *King* majority believed. As the California Law Revision Commission's comment explains, it codifies the existing rule that the power of revocation includes the power of modification, thus an available method of revocation is also an available method of modification—unless the trust instrument provides otherwise.

(*Id.* at p. 1011, paragraphing added, internal citations omitted.)

With those principles in mind, the Court turned to the language of Bertsch's Trust and recited again the "primary duty" of the court to be "to give effect to the settlor's intentions." (*Id.* at p. 1012, citing *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 826.) From that perspective, the Court concluded that, because the Trust "does not distinguish between revocation and modification" and because it reserved to the settlor "the right by acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder, it "does not 'provide otherwise' than the general rule." (*Ibid.*)

> Moreover, as a reservation of rights, it does not appear Bertsch intended to bind herself to the specific method described in the trust agreement, to the exclusion of other permissible methods. Because the method of revocation and modification described in the trust agreement is not explicitly exclusive (and no party argues otherwise), the statutory method of revocation was available under section 15401. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738, 742 [reservation of rights not explicitly exclusive].) Bertsch complied. [Fn.]

(*Id*. at p. 1012, footnote omitted.)[2]

On that basis, the Court of Appeal concluded that Bertsch "complied with the statutory method by signing the 2018 amendment and delivering it to herself as trustee," and that the Third Amendment "was therefore a valid modification." (*Id*. at p. 1012.)

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[2] In its footnote, the Court of Appeal emphasized it was not "consider[ing] the situation in *King*," where the circumstances were "materially different." (68 Cal.App.5th at p. 1012, fn. 2.)

The Court of Appeal also distinguished this case from *Pena*, *supra*, 39 Cal.App.5th 546, where the same issue "was not clearly presented," and from *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, where the court's comments on the issue were "dicta, unaccompanied by any detailed analysis of the earlier law," and where the decision "exhibits no small degree of confusion over the interpretation of both [Section 2280 and Section 15401]." (*Ibid*.)

5. *Balistreri v. Balistreri*

In this case, husband and wife created a revocable trust that provided that any amendment "shall be made by written instrument signed, with signature acknowledged by a notary public." (*Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, 514, review granted May 11, 2022, S273909 ("*Balistreri*"). The day before husband died, the two sought to amend their trust by way of written instrument, signed by both, but not notarized. (*Id.* at p. 514.)

Wife petitioned the trial court to construe the trust and confirm the validity of the amendment; one of husband's children from a prior marriage filed his own petition to invalidate the amendment. (*Id.* at pp. 514-515.). The trial court ruled that the amendment was "null and void" because the trust instrument was not notarized. (*Id.* at p. 514.) Wife appealed, and the Court of Appeal, in a decision that considered each of the cases analyzed above, adopted the analysis of *King* and affirmed, holding:

> [W]hen a trust specifies a method of amendment—regardless of whether the method of amendment is exclusive or permissive, and regardless of whether the trust provides for identical or different methods of amendment and revocation—section 15402 provides no basis for

> validating an amendment that was not executed in compliance with that method.

(*Id.* at p. 514.)

The decision tracked the analysis in *King* and concurred with *King's* conclusion that, because the Legislature "differentiated between trust revocations and modifications," it indicated "that the Legislature no longer intended the same rules to apply to both revocation and modification." (*Id.* at p. 518, citing *King*, *supra*, 204 Cal.App.4th at p. 1192.) It also implicitly adopted the conclusion of *King* that Section 15402 would be "surplusage" if a trust could be modified by the revocation procedures set forth in Section 15401. (*Ibid.*) The decision also cited *King* for its conclusions that "the Legislature could have combined revocations and modifications into one statute," and that "the Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a limitation of modifications in section 15402." (*Id.* at p. 518, citing *King*, *supra*, 204 Cal.App.4th at p. 1193.)

The decision acknowledged the contrary conclusions in *Haggerty* and in the *King* dissent and agreed with the principle that the power to revoke a trust implies the power to modify it. (*Id.* at p. 520.) But the *Balistreri* court disagreed with *Haggerty*'s interpretation of the phrase "[u]nless the trust instrument provides

otherwise," concluding that the "most plain and straightforward reading of that qualifying phrase" was that "when a trust provides for the use of a specific modification method, that method must be used." (*Ibid*.) In the end, the decision states that wife had "not persuasively argued either statute [Section 15401 or 15402] is ambiguous, that its interpretation of the plain meaning of the statute governed, and that there was "nothing inconsistent" in the legislative history with its construction of section 15402. (*Id*. at p. 521.)

The decision concludes: "In sum, we hold that when a trust specifies a method of amendment, under Section 15402, that method must be followed for the amendment to be effective." (*Id*. at p. 522.)

E. Ultimately, the Better Analysis Is That Expressed in the *King* Dissent and in *Haggerty*.

The case law discussed above frames the issue with almost perfect juxtaposition. The *King*, *Pena*, and *Balistreri* cases all regard the plain language, the history of the statutes, and the legislative intent behind the statutes one way (restricting a settlor's options with respect to trust modifications where any specific method of modification is authorized by the trust). The *King*

dissent and *Haggerty* decision regard the plain language, the history of the statutes, and the legislative intent behind the statutes very differently (expanding the flexibility of a settlor to modify a trust unless that power is expressly restricted). Now, UCS reprises the key points made above and submits in conclusion the better analysis is that presented by the *King* dissent and *Haggerty*.

1. The Plain Language

The *King* case recites the principle that, in construing Section 15402, the court "begin[s] with its plain language, affording the words their ordinary and usual meaning." (*King*, *supra,* 139 Cal.App.4th at p. 1193, citing *Vasquez v. State of California* (2008) 4 Cal.4th 243, 251.) Then, without any effort at grammatical deconstruction, it simply concludes: "The qualification, 'unless the trust instrument provides otherwise,' indicates that if any modification method is specified in the trust, that method must be used to amend the trust." (*Id*.)

The *Haggerty* case recites the same starting principle that, "[o]rdinarily, the words of the statute provide the most reliable indication of legislative intent" but, where there is any ambiguity, the court may also "examine the context in which the language appears, adopting the construction that best harmonizes the statute

internally and with related statutes." (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1008.) Thus, the focus of the analysis should be on Sections 15400 and 15401 (both of which confirm that a trust is revocable unless the trust instrument "expressly" or "explicitly" makes the method of revocation provided in the trust instrument the exclusive method of revocation), and on Section 15402 (which states, plain as possible, that "the settlor may modify the trust by the procedure for revocation"). (Prob. Code, §§ 15400, 15401, subd. (a)(2), 15402.) With that as the central premise of the entire statutory scheme, the better interpretation is that the dependent clause that begins Section 15402—"Unless the trust instrument provides otherwise"—means the settlor may modify the trust by the procedure for revocation unless the trust says the settlor *may not* modify the trust by the procedure for revocation.

If the Court agrees, it should confirm the analysis and conclusion of *Haggerty*. And, because the Trust in this case did not expressly restrict the manner in which it could be amended—on the contrary, it expressly confirmed the right to revoke or amend "whenever and as often as the Trustor may like" (CT 33)—this Court's decision would also affirm the judgment in favor of UCS.

2. The History of the Statutes

Even if the Court deems the language of Section 15402 to be ambiguous, the history of Sections 15400, 15401, and 15402 also supports UCS's position.

The predecessor statute, Section 2280, first enacted in 1872, was rigid, providing a trust could not be revoked without the consent of the beneficiaries unless that power was expressly reserved, and even then the power had to be "strictly pursued." (See *Huscher*, *supra*, 121 Cal.App.4th at pp. 962-963, citing Historical Notes, 10 West's Ann. Civ. Code (1954 ed.) foll. former § 2280, p. 608.) The statute was amended in 1931, changing "the norm" to provide that a trust "shall be revocable" by a writing filed with the trustee unless the trust was made expressly irrevocable. (*Id*. at p. 963.) Then, in 1986—after several cases created exceptions for "implied irrevocability" (see *Huscher*, *supra*, 121 Cal.App.4th at pp. 963-971)—the Legislature adopted Sections 15400 and 15401 in 1986, both of which provided unequivocally that a settlor can revoke a trust by the statutory method unless the trust instrument "explicitly" or "expressly" makes the method of revocation provided in the trust instrument the exclusive method. (Prob. Code §§ 15400, 15401, subd. (a)(2).)

In sum, the power to revoke always included the power to amend, and the historical arc of that power has *expanded* with each amendment since inception to permit settlors greater flexibility in managing their assets. The interpretation of Section 15402 supported by UCS is consistent with that historical arc (expanding flexibility); the interpretation supported by Haggerty is not (restricting options).

3. The Legislative Intent

Finally, but most persuasively, the Commission's comments that accompany the various amendments to the statutory scheme confirm the legislative intent to expand flexibility and retain the congruence between the power to revoke and the power to modify.

Those Comments are recited in detail and in historical context in the *King* dissent and in *Haggerty*. Some were quoted above (*infra*, at pp. 24-25), but they bear repeating, at least in summary, because confirm the Commission— concerned that "some persons who draft trust instruments do not have the expertise needed to fashion an instrument that responds to the changing needs, values, and circumstances of the settlor and the beneficiaries"— wanted the trust to be a 'flexible mechanism.'" (*King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.),

citing Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., at p. 1271.) The Comments also confirm the Commission "balanced two competing interests"—the interests of some settlors to establish a more complicated manner of revocation where there is a concern about senility or future undue influence versus the interest of a settlor, unaffected by senility or undue influence, who is forgetful or not aware of the controlling case law. (*Id.* (dis. opn. of Detjen, J.), citing Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep., at p. 1270-1271.)

Ultimately, the most persuasive summary of this issue was written by Justice Guerrero in one of the concluding paragraphs of this case. The Court said it need not resolve whether *King* was correctly decided because the language of that trust document was so different from the one at issue in this case, but that:

> [A]s a general matter, we conclude the *King* dissent more accurately captures the meaning of [Section 15402] than the majority opinion. Section 15402 cannot be read in a vacuum. It does not establish an independent rule regarding modification. It recognizes the existing principle that "a power of revocation implies the power of modification." (Cal. Law Revision Com. com., West's Ann. Prob. Code, *supra*, foll. § 15402.) The method of modification is therefore the

> same as the method of revocation, "[u]nless the trust instrument provides otherwise," i.e., unless the trust instrument distinguishes between revocation and modification. (§ 15402.)
>
> The California Law Revision Commission made this point explicit: "'Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. omitted.] The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.'" (*King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn. of Detjen, J.), quoting Selected 1986 Trust and Probate Legislation (Sept. 1986) 18 Cal. Law Revision Com. Rep. [1986] p. 1271.)
>
> Under this interpretation, [Section 15402] is not mere surplusage, as the *King* majority believed. As the California Law Revision Commission's comment explains, it codifies the existing rule that the power of revocation includes the power of modification, thus an available method of revocation is also an available method of modification—unless the trust instrument provides otherwise. (See Cal. Law Revision Com., West's Ann. Prob. Code, *supra*, foll. § 15402.)

(*Id*. at p. 1011, paragraphing added)

Finally, the *Haggerty* court turned to the language of the Trust at issue in this case. (*Id*. at p. 1012.) It noted that the Trust "does not distinguish between revocation and modification," and

that it "reserved the right to the settlor to revoke or amend this agreement of any trust hereunder." (*Ibid.*) Accordingly, the Court concluded that the Trust did not "provide otherwise than the general rule," that it "does not appear Bertsch intended to bind herself to the specific method described in the [Trust]," and that "[i]t was therefore a valid modification of the trust agreement." (*Ibid.*)

In sum, the facts of this case and the result of this case in the Court of Appeal illustrate perfectly the more flexible approach which UCS submits is the one most likely to fulfill the intentions of ordinary settlors who know exactly what they want to do with their assets but who are not well versed in the intricacies of trust law.

V.

CONCLUSION

Haggerty opened her brief by framing a parable of Odysseus "instruct[ing] his crew to bind him to the mast to protect him from the lure of the Sirens." (AOB, p. 8.) She closes by asking the Court to "adapt the lesson of Homer's epics" and to respect and enforce the decision of a settlor to "bind herself to a specific method of modification." (AOB, p. 47.)

The analysis proposed by UCS (and supported by the *King* dissent and *Haggerty*) serves those goals and would permit any sailor or settlor to bind themselves to any mast as securely as they desire, exactly as Odysseus did with express and unequivocal instructions to his crew. That solution is far more sensible—far more flexible and consistent with the language of the statutes and the legislative intent behind them—than the alternative proposed by Haggerty (and supported by the *King* majority, *Pena*, and *Balistreri*), where sailors and settlors—perhaps forgetful or simply unsophisticated in the nuance of trust law—mistakenly bind themselves to a mast for one specific purpose, only to later learn they cannot unlash themselves when the winds of life suddenly—perhaps even on their deathbed, with no opportunity to consult trust documents or lawyers—change direction.

For those and all the reasons stated above, UCS submits Section 15402 should be interpreted to mean that, unless a settlor expressly restricts their ability to amend a trust in one particular manner, they may amend in the same manner they could revoke, including by delivering a signed document to the trustee prior to death.

Dated: May 20, 2022 HIGGS FLETCHER & MACK LLP

By:_____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I certify that this Answer Brief on the Merits contains 9,252 words, including footnotes.

Dated: May 20, 2022

HIGGS FLETCHER & MACK LLP

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PROOF OF SERVICE

I, the undersigned, declare: I am a resident of the State of California, over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, CA 92101. On May 20, 2022, I served the within document(s), with all exhibits (if any):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 20, 2022, at San Diego, California.

Melinda Perea

STATE OF CALIFORNIA
Supreme Court of California

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