No. S271483

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

On Grant of Petition for Review of a Decision
by the Court of Appeal, Fourth Appellate District
Case No. D078049

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

ANSWER BRIEF ON THE MERITS FOR RESPONDENT PATRICIA GALLIGAN

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QUESTION PRESENTED

Does the same law govern trust revocations and trust modifications, so that the settlor must make the method of modification provided in the trust explicitly exclusive to preclude use of the statutory method?

INTRODUCTION

Probate Code section 15402 states that "[u]nless 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 answer of what it means to "provide[] otherwise" lies in the incorporated procedure for revocation. That procedure, set forth in Probate Code section 15401, allows a settlor to revoke his or her trust either (1) by compliance with any method provided in the trust, or (2) by a signed writing delivered to the trustee *unless* "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation." Thus, a trust instrument "provides otherwise," for purposes of section 15402, if it specifies a method of modification and makes that method explicitly exclusive.

The legislative history of sections 15401 and 15402 reinforces this reading of the statute. The California Law Revision Commission, which drafted the statutes, expressed several goals at the time they were drafted and enacted together. One goal was to treat modification and revocation equally by codifying the longstanding common law rule that modification of a trust was part and parcel of the more inclusive power to revoke

a trust (i.e., "the general rule that a power of revocation implies the power of modification"). A second goal was to make trusts flexible, so they can more readily adapt to the changing needs and wants of settlors, and to avoid restrictive features that hamstring settlors from making changes freely and economically as circumstances change.

In this vein, a third goal was to move away from the prior rule for revocation and modification that was criticized as being too restrictive. The law at the time allowed settlors to revoke or amend their trust either by the terms in the trust or by using the statutory method, which was accomplished by a writing delivered to the trustee during the settlor's lifetime. But courts had disallowed use of the statutory method if the trust specified *any* method of revocation or modification, even if that method was stated in nonexclusive terms. In response, the Commission adopted the explicitly exclusive rule: the trust must explicitly make its own method exclusive to preclude the settlor's use of the statutory method. The Commission viewed this as a compromise that gave settlors needed flexibility but nonetheless still allowed them to bind themselves to more restrictive terms if they expressly chose to do so. Against this backdrop, it becomes clear that section 15402 allows modification by the statutory method for revocation in section 15401 unless the settlor makes a different method of modification explicitly exclusive.

The Court of Appeal correctly interpreted the statute and concluded that where, as here, the trust language did not make

the method of modification or revocation explicitly exclusive, the settlor could modify the trust by the statutory method. Because the settlor in this case indisputably complied with the statutory method, the Court of Appeal's opinion concluding that the subject trust amendment is valid should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

The relevant facts are undisputed and are taken from the record and the decision below, *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003, 1006–1007 (*Haggerty*). (See *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 824 (*Barefoot*) [the Court of Appeal's statement of the facts may be used if neither party sought rehearing].)

Jeane M. Bertsch (Bertsch) and her husband, Don, established a trust in 1987. (1 Clerk's Transcript (CT) 9.) After Don's death, Bertsch revoked the original trust and on the same day, January 22, 2015, created a new trust as the sole settlor. (1 CT 9, 15–41, 164.) The new trust is the subject of this appeal. Bertsch is referred to as either the settlor or the trustor, as both terms refer to the person who created the trust. (*In re Marriage of Perry* (1997) 58 Cal.App.4th 1104, 1109 & fn. 2 [explaining that the terms are interchangeable].)

The trust instrument provided that Bertsch reserved several rights to herself as trustor, "each of which may be exercised whenever and as often as [she] may wish," including the following: "The right by an acknowledged instrument in

writing to revoke or amend this Agreement or any trust hereunder." (*Haggerty, supra,* 68 Cal.App.5th at p. 1006.) No other provision discussed the power to revoke or amend the trust, and the phrase "acknowledged instrument" was not defined. The instrument named Nancy Thornton as successor trustee to serve upon Bertsch's death or incapacity. (1 CT 23.)

In 2016, Bertsch signed an amendment that made her niece Brianna Haggerty the successor trustee and the beneficiary of a residual distribution. (1 CT 43–46.) The document contains an Illinois notary's signature and acknowledgment but does not include a notarial seal or stamp. (*Ibid.*)

Subsequently, in 2017 Bertsch advised her former estate planning lawyer that she had a dispute with Haggerty. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1008, fn. 1.) Bertsch thereafter drafted two handwritten documents: a 2017 beneficiary list and a 2018 trust amendment. (*Id*. at p. 1006.) Neither of these documents named Haggerty as a beneficiary. (*Id.* at p. 1006.) The 2017 document was unsigned. (*Ibid.*) However, Bertsch signed the 2018 amendment and, above the signature, wrote a note to her former longtime estate attorney. (*Ibid.*; 1 CT 49, 158–159.) The note read, "I herewith instruct Patricia Galligan to place this document with her copy of the Trust. She can verify my handwriting." (1 CT 49.)

Bertsch mailed the amendment from her home in Chicago to Galligan in San Diego. (1 CT 158.) Galligan wrote back to Bertsch confirming receipt and assuring Bertsch that the trust

instrument gave Bertsch "the power to amend your trust in writing." (*Ibid.*)

Bertsch died in late 2018, and Thornton and Haggerty filed competing petitions in probate court to determine whether the 2018 amendment was valid. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1007.) Several beneficiaries filed objections to Haggerty's petition. (*Ibid.*)

B. Rulings in the Probate Court and Court of Appeal

In the probate court, Haggerty argued that the provision in the trust instrument allowing modification "by an acknowledged instrument in writing" required acknowledgment of the trustor's signature by a notary public or other specified person under Civil Code section 1181. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1007.) She further argued that the method of modification set forth in the trust instrument was the exclusive procedure to modify the trust. (*Ibid.*) She relied on the majority decision in *King v. Lynch* (2012) 204 Cal.App.4th 1186, 1193 (*King*), which held that "if any modification method is specified in the trust, that method must be used to amend the trust," and the statutory method specified in section 15401 cannot be used.

Respondent Galligan argued that the trust instrument's method of modification by "acknowledged instrument in writing" was ambiguous and meant to include "expressly advis[ing] someone that the instrument amending the Trust was genuine or authentic," rather than imposing the Civil Code requirements for acknowledgment by a notary public or other specified person.

(*Haggerty*, *supra*, 68 Cal.App.5th at p. 1007.) Alternatively, Galligan argued that the 2018 amendment was valid as a matter of law because the method of amendment specified in the trust agreement was not exclusive and, thus, the statutory method of modification by signed writing delivered to the trustee could be used. (*Ibid.*) Galligan distinguished *King* but also suggested that *King* was wrongly decided. (*Id.* at p. 1008.)

Based on the parties' briefing and arguments, the probate court determined that the 2018 amendment was valid and denied Haggerty's petition. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1008.) In a published decision written by Justice Guerrero, the Court of Appeal affirmed the probate court's ruling. (*Id.* at p. 1013.) The Court of Appeal sided with the dissenting opinion in *King* that "the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive." (*Id.* at p. 1011 [internal quotation marks and citations omitted].)

The court then concluded that, because Bertsch's trust instrument did not distinguish between the method of revocation and the method of modification, and because that method was not explicitly exclusive, the trust could be validly modified using *either* the method specified in the instrument or the statutory method in section 15401(a)(2). (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1012.) Further, because the amendment was signed by Bertsch and delivered to the trustee, it was valid under the statutory method. (*Ibid.*) The court did not address whether

Bertsch *also* complied with the method specified in the trust (by "acknowledged instrument in writing"), given its conclusion that the amendment was valid under the statutory method and given the fact that the probate court had not addressed the issue. (*Haggerty*, *supra*, 68 Cal.App.5th at pp. 1007, 1013; see Appellant's Opening Brief (AOB), p. 11.)

This Court granted Haggerty's petition for review of the following issue: 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 alternative statutory procedure in section 15401, or does prescribing any modification method preclude use of the statutory procedure?

C. The Statute and Its History

The Legislature enacted Probate Code sections 15401 and 15402 in 1986 together as part of the general reorganization of trust laws recommended by the California Law Revision Commission. (*King, supra,* 204 Cal.App.4th at p. 1195 (dis. opn. of Detjen, J.)) Prior to enactment of section 15401, trust revocation was governed by former Civil Code section 2280, which stated in relevant part, "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." (*Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, 963 (*Huscher*).) No statute addressed trust modification. (*King,* at p. 1191.) Instead, "courts held that, in general, a power of

revocation implied the power of modification." (*Ibid*.) Thus, modification and revocation followed the same rules, unless the trust specified different rules for them. (*King,* at p. 1191.)

Case law interpreting section 2280 was divided on when the statutory method for revocation could be used. In *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1344 (*Irvine*), the Court of Appeal held that a settlor could "bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement." Along these lines, other courts had held "that where the trust instrument prescribes [any] method of revocation, the prescribed procedure must be followed rather than the statutory method." (18 Cal. Law Revision Com. Rep. (1986) pp. 567–568.)

Taking a different approach, the Court of Appeal in *Huscher* held that under section 2280 a trust could be modified by the statutory method "*unless* the trust instructions either *implicitly or explicitly* specify an *exclusive method* of modification," in which case that method had to be used. (121 Cal.App.4th at p. 968 [emphasis added].) As the *Huscher* court acknowledged, though, this rule generated "problems of interpretation inherent in determining issues of implicit exclusivity." (*Id*. at p. 971, fn. 13.) Courts had to determine whether a modification or revocation method that was not explicitly exclusive was nonetheless "so specific that it would

effectively preclude any other method, thereby implying its exclusivity." (*Id.* at pp. 967–968.)

In crafting the new rule for revocation and modification, the Commission expressed criticism that these past approaches too readily displaced the basic statutory method (i.e., a signed writing delivered to the trustee). (18 Cal. Law Revision Com. Rep. at pp. 567–568.) The Commission drafted section 15401 to "move away from such a restrictive interpretation." (*King*, *supra*, 204 Cal.App.4th at p. 1195 (dis. op. of Detjen, J.).) The Commission acknowledged that some defenders of the current law felt that "a settlor may wish to establish a more complicated manner of revocation than that provided by statute where there is concern about 'future senility or future undue influence.'" (18 Cal. Law Revision Com. Rep. at pp. 567–568.) But others viewed the law "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. 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 Commission also discussed the need for flexibility in trust law. "A trust is a flexible mechanism which can be adapted to a variety of situations, but the person who drafts the trust may not adequately anticipate the needs of beneficiaries in changed circumstances." (18 Cal. Law Revision Com. Rep. at p. 565.) "Even the drafter's best efforts may not provide the appropriate

degree of flexibility, and 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." (*Ibid.*) "Restrictive features of a trust may come to be viewed as too restraining in the face of the interest in free alienability of property. A rigid trust may also become uneconomical to administer over time." (*Ibid.*)

Taking all of these concerns into account, the Commission adopted a "compromise position" that preferences the availability of the statutory method yet allows settlors to bind themselves to more onerous procedures, if they desire. (18 Cal. Law Revision Com. Rep. at p. 568.) Section 15401 "makes available the statutory method of revoking by delivery of a written instrument to the trustee during the settlor's lifetime except where the trust instrument *explicitly makes exclusive* the method of revocation specified in the trust." (*Ibid.* [emphasis added].)

The Commission also formalized the common law rule that the power of revocation includes the power of modification. (18 Cal. Law Revision Com. Rep. at p. 568.) As described by the Commission, section 15402 codifies this rule and "also makes it clear that the method of modification is the same as the method of [revocation] barring a contrary provision in the trust." (*Ibid.*) The Commission used the word "termination" in place of "revocation" in this part of the commentary, although section 15402 uses the word "revocation." In this context, the words are

interchangeable because a trust terminates when it is revoked. (Prob. Code, § 15407, subd. (a).)

The Commission's preference for flexibility—to allow trusts to adapt to a settlor's changing needs and priorities—is reflected throughout the statutory scheme. To start, section 15400 presumes that a trust is revocable by the settlor, "[u]nless a trust is expressly made irrevocable by the trust instrument."

Section 15401 presumes that the statutory method of revocation is available to a settlor. It states:

> (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.

(Prob. Code, § 15401, subd. (a).)

Section 15402 contains the presumption that modification can be accomplished by the same method as revocation: "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."

Subsequent sections likewise reflect the goal of flexibility. In section 15403, beneficiaries may petition the court for

modification or termination if they all consent. In section 15404, beneficiaries can modify or terminate a trust without court approval, as long as they are all in agreement. In sections 15411 and 15412, trusts can be combined or divided for good cause, if it would not defeat the trust purposes. All these rules are aimed at responding to the changing needs, values, and circumstances of the settlor and the beneficiaries.

D. Case Law Interpreting the Statute

To date, there are only six reported decisions construing section 15402: *Irvine*, *supra*, 40 Cal.App.4th at pp. 1343–1346; *Huscher*, *supra*, 121 Cal.App.4th at pp. 960, 966–967; *King*, *supra*, 204 Cal.App.4th at pp. 1190–1194; *Pena v. Dey* (2019) 39 Cal.App.5th 546, 551–555 (*Pena*); *Haggerty*, *supra*, 68 Cal.App.5th at pp. 1008–1012; and *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, 516–522 (*Balistreri*), review granted May 11, 2022, S273909. Four of these decisions, *Irvine,* the *King* majority*, Pena,* and the *Balistreri* majority, have interpreted section 15402 to mean that if the trust instrument prescribes *any* method of modification, that procedure must be followed, and the statutory method cannot be used. (*Irvine,* at p. 1343-1344; *King*, at p. 1193-1194; *Pena*, at p. 551-552; *Balistreri*, at p. 518.)

In contrast, *Huscher*, the *King* dissent, and the decision below have interpreted sections 15401 and 15402 together to mean that the statutory procedure can be used to modify a trust "unless the trust provides a modification procedure *and explicitly makes that method exclusive*." (*Huscher*, *supra*, 121 Cal.App.4th

at p. 967 [emphasis added]; *King*, *supra*, 204 Cal.App.4th at p. 1194-1198 (dis. op. of Detjen, J.); *Haggerty*, *supra*, 68 Cal.App.5th at p. 1011-1012.) The concurrence in *Balistreri* suggested a middle ground: the statutory procedure can be used to modify a trust unless the trust provides a modification procedure and makes it explicitly *or implicitly* exclusive by using nonpermissive language. (*Balistreri*, *supra*, 75 Cal.App.5th at p. 524 (conc. op. of Tucher, J.).)

ARGUMENT

In construing a statute, the Court's task "'is to determine the Legislature's intent so as to effectuate the law's purpose.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265 (*Cornett*) [citation omitted].) The Court's review is de novo and "begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context." (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1384 [citation omitted].) "[A] specific provision should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized." (*Bowland v. Mun. Court for Santa Cruz Cty. Judicial Dist.* (1976) 18 Cal.3d 479, 489 (*Bowland*).)

"The plain meaning controls if there is no ambiguity in the statutory language." (*Cornett, supra*, 53 Cal.4th at p. 1265.) If, however, "the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic

aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Ibid.*; *Coalition of Concerned Communities Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [same].) "The policy sought to be implemented should be respected." (*Bowland, supra,* 18 Cal.3d at p. 489.)

Here, the plain language of section 15402 states that the "procedure for revocation" can be used for modification unless the trust "provides otherwise." The phrase "procedure for revocation" indisputably refers to the procedure for revocation in the directly preceding statute, section 15401, which states that revocation can be accomplished by the method provided in the trust *or* by signed writing delivered to the trustee, unless the trust makes another method explicitly exclusive. In this context, the phrase "unless the trust instrument provides otherwise" is best understood as employing the same standard as section 15401: to wit, unless the trust makes another method explicitly exclusive.

Given the differences of opinion among the Courts of Appeal, however, the legislative history has a role in informing what section 15402 was intended to mean. Three main points stand out among the Commission's comments. First, the Commission intended to give settlors the flexibility to alter their trusts freely, as circumstances changed. Second, the Commission rejected the old law as too easily displacing the statutory method for revocation (and, by inclusion, modification) and thus adopted

the explicitly exclusive rule. And third, the Commission codified the rule that the power to revoke includes the power to modify.

Taken together, these three objectives lead inescapably to the conclusion that modification can be accomplished by the statutory method *unless* the trust makes another method of modification *explicitly exclusive*. Nothing in the Commission's statements suggests that it meant to treat modification less flexibly than revocation. Quite the opposite, all the Commission's statements about modification declare that modification should be treated the same as revocation, unless settlors intend to bind themselves to a different rule. Further, the Commission's overall goal was to avoid binding settlors to rigid methods.

In light of section 15402's text and history, the decision below correctly decided that "the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive." (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1011 [internal quotation marks and citations omitted].)

I. Section 15402 Allows Modification of a Trust by the Statutory Method for Revocation in Section 15401, Unless the Trust Provides an Explicitly Exclusive Method

A. Section 15402 Incorporates the Explicitly Exclusive Rule from Section 15401 by Reference

Section 15402 states that "[u]nless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." In

the context of the statutory scheme, the phrase "procedure for revocation" in section 15402 clearly refers to the procedure for revocation set forth in the directly preceding statute, section 15401. The statute allows revocation by two different methods: (1) by compliance with the method of revocation provided in the trust, or (2) by a writing signed by the settlor and delivered to the trustee. (Prob. Code, § 15401, subd. (a).) Either method may be used unless "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation." (Prob. Code, § 15401, subd. (a)(2).)

Because section 15402 imports the same procedure for modification as for revocation, an ordinary reader would simply read the word modification into the revocation procedure to determine the rule. The result would be that a trust may be modified (1) by compliance with the method specified in the trust, or (2) by signed writing delivered to the trustee, unless the trust provides that its own method is explicitly exclusive. (See Prob. Code, § 15401, subd. (a).)

Using the procedure for revocation, the phrase "unless the trust instrument provides otherwise" (§ 15402) means: unless the "trust instrument explicitly makes the method of [modification] provided in the trust instrument the exclusive method of [modification]" (§ 15401, subd. (a)(2)). In other words, taking the words of the statute as a whole, they simply mean that in general a trust may be modified by the procedure for revocation, unless the trust makes clear that the method of revocation may not be

used to modify or amend it. It would be inconsistent with the procedure for revocation to interpret the phrase, "unless the trust instrument provides otherwise," to mean that the provision of *any* method of modification, whether or not it is explicitly exclusive, displaces the statutory method.

Further, this latter interpretation would lead to strange results. If a trust provided the exact same procedure for both revocation and modification, but made it nonexclusive (as here), that procedure would *have to be used* for modification but *need not be used* for revocation. Notwithstanding how absurd that might sound to Bertsch given her express desire to employ the same method for both revocation and modification, this result would make sense if the Commission indicated an intent to treat modification more restrictively than revocation. But no such indication exists on the face of the statute. Rather, the plain language expressly incorporates the procedure for revocation to be used for modification. As set forth below, nor does the legislative history evidence an intent to treat modification more restrictively than revocation.

B. The Legislative History Demonstrates the Intent to Treat Revocation and Modification the Same

The legislative history confirms that the Commission intended to treat revocation and modification the same. Every mention of modification in the Commission's commentary reflects the view that the power to modify was simply inherent in, and

coextensive with, the power to revoke. The Commission formalized this view by codifying it into section 15402.

The starting point for the Commission's new rule was the old rule, former Civil Code section 2280, which addressed *only* revocation but was applied by the same terms to modification. (18 Cal. Law Revision Com. Rep. at p. 568 [citing Restatement (Second) of Trusts § 331 & com. *d* (1957) and *Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 771–782 (*Heifetz*)]; see also *Huscher*, *supra*, 121 Cal.App.4th at p. 962, fn. 5.) Case law on section 2280 treated revocation and modification as "fungible" because "[t]he unrestricted power to revoke implies a power to amend without revoking; i.e., it is unnecessary for the trustor to take the circuitous steps of complete revocation and creation of a new trust with the desired changes." (*Estate of Lindstrom* (1987) 191 Cal.App.3d 375, 385, fn. 11 [citing 7 Witkin, Summary of Cal. Law (8th ed. 1974) § 116, p. 5473; *Heifetz*, *supra*, 147 Cal.App.2d 776; and Rest. 2d Trusts, *supra*, § 331, com. *g*].)

The Commission embraced the common law rule and codified it as section 15402. (18 Cal. Law Revision Com. Rep. at p. 568.) Nothing in the Commission's discussions indicated any intent to treat modification differently than revocation. Rather, section 15402 was intended to clear up any doubt about the dual powers. The *Heifetz* decision, which the Commission cited for the common law rule, had expressed some uncertainty as to the legal basis for the rule but had nonetheless applied it approvingly. (*Heifetz*, *supra*, 147 Cal.App.2d at pp. 781–782.) The codification

of the rule in section 15402 resolved any uncertainty expressed in *Heifetz* by "mak[ing] clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust." (18 Cal. Law Revision Com. Rep. at p. 568.)

The Commission's overarching policy goal was flexibility in favor of amendment. The Commission stated: "The trust is a flexible mechanism which can be adapted to a variety of situations, but the person who drafts the trust may not adequately anticipate the needs of beneficiaries in changed circumstances. Even the drafter's best efforts may not provide the appropriate degree of flexibility, and 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. Obviously, during the lifetime of the settlor, a revocable trust does not suffer from these drawbacks, but after the settlor's death, the now irrevocable trust may encounter situations where modification or termination is needed. Changes in tax laws may make modification highly beneficial. Restrictive features of a trust may come to be viewed as too restraining in the face of the interest in free alienability of property. A rigid trust may also become uneconomical to administer over time." (18 Cal. Law Revision Com. Rep. at p. 565.)

The prior statute governing revocation had not proven flexible enough. The Commission recognized that some of the cases decided under the prior law, Civil Code section 2280,

allowed revocation by the statutory method ("writing filed with the trustee") only where the trust instrument did not prescribe another method. (18 Cal. Law Revision Com. Rep. at pp. 567–568.) And because cases treated revocation and modification the same, restrictions on revocation also constrained modification. (See *Huscher*, *supra*, 121 Cal.App.4th at p. 962, fn. 5.)

The Commission struck a new balance where the statutory method is available "except where the trust instrument explicitly makes exclusive the method of revocation specified in the trust." (*Ibid.*) "This allows a settlor to establish a more protective revocation scheme, but also honors the settlor's intention where the intent to make the scheme exclusive is not expressed in the trust instrument." (18 Cal. Law Revision Com. at p. 568.) Further, it gives effect to "the clear intention of the settlor who attempts to revoke a revocable trust by the statutory method," and it protects "the settlor [who] may have forgotten about the method provided in the trust, or may not be aware of the case-law rule" displacing the statutory method. (*Ibid.*)

These policy considerations are no less applicable to trust modifications than revocations. The Commission's statements in the introduction make this clear. The Commission discussed the need for the trust to "respond[] to the changing needs, values, and circumstances of the settlor and the beneficiaries." (18 Cal. Law Revision Com. at p. 568.) The most efficient way to respond to these changing needs is typically through modification. It would be unnecessarily "circuitous" for the settlor to make a

"complete revocation and creation of a new trust with the desired changes" instead of simply modifying the terms of the existing trust. (*Estate of Lindstrom*, *supra*, 191 Cal.App.3d at p. 385, fn. 11.) Given the Commission's priority for flexibility, it would be entirely inconsistent with these underlying objectives if modification were made more difficult than revocation.

Indeed, a later amendment to section 15401 underscores that the Commission intended to treat modification and revocation equally. In 1988, the Commission suggested, and the Legislature enacted, a change to what is now subdivision (c) of section 15401 relating to attorneys in fact. The change was "to make clear that the rule applicable to revocation by an attorney in fact applies to modification." (19 Cal. Law Revision Com. Rep. (1988) 1097.) The Commission noted that this change was "consistent with the rule provided in section 15402." (*Ibid.*; see also 20 Cal. Law Revision Com. Rep. (1988) 1874–1875.) Subsequent amendments to section 15401 did not change the procedure for revocation and modification; they only addressed the persons who could exercise those powers. (See 1990 Cal AB 759; 1994 Cal AB 3686; 2012 Cal AB 1683.)

In sum, the Commission intended to keep the rules pertaining to revocation and modification the same and to make them more flexible than the prior rule in Civil Code section 2280. That prior rule had led courts to displace the statutory method ("by writing filed with the trustee") too readily. Thus, the Commission drafted sections 15401 and 15402 to allow for the

statutory method, unless a settlor made another method explicitly exclusive.

C. Applying Different Rules for Revocation and Modification Conflicts with the Statute's Language and Purpose

Haggerty's reading of the statute relies on arguments about how the Commission *could have* written the statutes and what policy choices it *could have* made, rather than any contextual or legislative evidence showing what the Commission actually meant by what it did.

To start, Haggerty points to the fact that revocation and modification were set forth in two different statutes, rather than one, to suggest an intent to treat them differently. (AOB 31, 34.) The *King* majority made this same point and noted that, under the prior law, modification was "not governed by a separate statue" and simply implied as part of the revocation statute. (*King*, *supra*, 204 Cal.App.4th at p. 1191.) According to the majority, creating a separate statute for modification indicated "that the Legislature no longer intended the same rules to apply to both"; otherwise, section 15402 is rendered mere surplusage. (*Id*. at p. 1193.)

This argument elevates form over function. Sure, the Commission could have put the content of both statutes into one statute. Despite using two statutes, though, the Commission stated its intent to maintain the same rule for both. Further, separating the statutes does serve a purpose. It makes clear that settlors *can* treat modification and revocation differently, even

though the statutory presumption is to treat them the same. The Commission left flexibility for the settlor to treat them differently —that is, to "provide[] otherwise"—barring modification through use of the methods available for revocation by choosing an explicitly exclusive method of modification that is different from revocation.

Haggerty points out that section 15401, subdivision (c), discusses both revocation and modification in the same breath. (See AOB 14, 31–34.) But the Legislature added in the word modification as part of a subsequent amendment; it was not part of the statute when sections 15401 and 15402 were originally enacted. Further, the Legislature described the amendment to subdivision (c) as making it *consistent with* section 15402. (20 Cal. Law Revision Com. Rep. at pp. 1874–1875.) The Commission added the word modification "to make clear that the rule applicable to revocation by an attorney in fact applies to modification." (19 Cal. Law Revision Com. Rep. at p. 1097.)

In addition, Haggerty's analysis ignores that section 15401, subdivision (a), expressly refers to revocation "in whole or in part." Revocation in part is, in effect, a form of modification, so it is apparent the Legislature did not intend enactment of section 15402 to create a categorical divide between revocation and modification.

Haggerty nonetheless relies on *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726 (*Rashidi)*, for the proposition that amendment of the attorney in fact section (subdivision (c)), without the same

amendment to the settlor section (subdivision (a)), shows an intent to treat the rules of revocation and modification for settlors differently. (AOB *passim*.) *Rashidi* does not support this proposition. First, it did not address the type of situation here, where the Legislature amended one statutory section to bring it in line with another. Instead, *Rashidi* considered two statutory sections enacted at the same time. One section allowed for recovery of "noneconomic losses" in professional negligence actions against health care providers, and the other placed a cap on the amount of "damages for noneconomic losses" in such actions at $250,000. (*Rashidi,* at pp. 724–725 [discussing Civil Code section 3333.2, subd. (a), (b)].) The Court held that the use of these two different terms indicated the Legislature's intent to distinguish losses from damages and to treat them differently. (*Id*. at pp. 725–726.)

Second, the Court in *Rashidi* emphasized that treating the terms differently aligned with the legislative purpose behind the statutes. The same cannot be said of Haggerty's argument here. When the Legislature amended the attorney in fact section, it expressly stated that the amendment brought that statute in line with the rule for settlors in sections 15401 and 15402: namely, the power to revoke includes the same power to amend. (20 Cal. Law Revision Com. Rep. at pp. 1874–1875.) Haggerty's argument contradicts the express legislative intent.

Along the same lines, Haggerty argues that the Legislature could have used the explicitly exclusive language from section

15401 in section 15402, if it meant for modification to follow the same rule. (AOB 21.) But the Legislature did not have to repeat section 15401's description of the explicitly exclusive procedure because it incorporated that procedure by reference.

Alternatively, Haggerty argues that "[h]ad the Legislature wished to preserve the congruence" between revocation and modification, it could have left modification as an implied right. (AOB 13, 31.) But the Commission's commentary reflects its decision to formalize the common law rule by codifying it, rather than keeping it silent. (18 Cal. Law Revision Com. Rep. at p. 568.) As discussed above, the lead case on the common law rule wondered about the legal underpinnings for it, which might have spurred the decision to formalize it. (See *Heifetz*, *supra*, 147 Cal.App.2d at pp. 781–782.)

Haggerty also invokes two Latin maxims in support of her interpretation, but neither apply. The Commission expressly incorporated the procedure for revocation into the modification statute and, thus, there is nothing *sub silentio* about using the same procedure for both. (See AOB 16.) Likewise, the statement of the explicitly exclusive rule in section 15401, but not 15402, does not give rise to the principle *expressio unius est exclusio alterius*. (AOB 12, 36.) Again, the Commission incorporated the procedure by reference into 15402. Thus, use of the *expressio unius* maxim in this context would impermissibly ignore the Legislature's intent. (See *Cal. Fed. Sav. & Loan Ass'n v. City of L.A.* (1995) 11 Cal.4th 342, 351 [rejecting use of the *expressio*

unius maxim "where its operation would contradict a discernible and contrary legislative intent . . . on the face of the [statute]." (internal quotation marks and citations omitted)].)

Turning to policy, Haggerty offers thoughts on why the Legislature *could have* decided to treat modification more restrictively. Haggerty argues that an "unscrupulous caretaker or counsel cannot usurp an elder's assets by inducing [a settlor] to revoke the trust because intestacy laws would keep the estate within the family," whereas modification can enable the usurping of assets. (AOB 15, 42–43.)

Holding aside whether Haggerty's premise is correct, the question for statutory interpretation is what policy choices the Legislature *actually made*, not what choices it could have reasonably made. (*Bowland, supra*, 18 Cal.3d at p. 489 ["The policy sought to be implemented should be respected."].) The latter question is one for rational basis review, not statutory interpretation. (Compare *ibid*. with *People v. Noyan* (2014) 232 Cal.App.4th 657, 668 [for rational basis review "it is irrelevant whether the perceived reason for the challenged distinction actually motivated the Legislature," as long as it "may reasonably have been the purpose and policy" (internal quotation marks and citation omitted)].) The legislative history contains no mention of this concern that modification should be treated more restrictively than revocation.

More fundamentally, though, the argument's premise is faulty. Restricting settlors' ability to amend their trusts will not

readily prevent the harm imagined. Someone determined to unduly influence a settlor will find a way to comply with the method of revocation or modification required. For example, if the trust requires notarization for modification, that is easy enough to arrange. A notary's concern is only the true identity of the person signing the document, not whether that person is signing out of free will and is competent and of sound mind.

Further, the undue influencer could use revocation as an end run around difficult rules for modification. The influencer could induce the settlor to simply revoke the trust and create a new one, which has the same effect as modifying the trust. And even without either revocation or modification, an influencer can induce a settlor to transfer assets out of the trust and into the influencer's control.

Finally, Haggerty's theory assumes that the undue influencer will not be a family member who would inherit if the trust is revoked. (AOB 43 [asserting that if a trust is revoked by an undue influencer it will "remain within the family" under the law of intestacy and thus not benefit the influencer].) But revocation can present its own opportunities for the unscrupulous influencer within the family to manipulate the settlor.

Moreover, there are other provisions of law that do the protective work that Haggerty seeks to have section 15402 do. When concerns of undue influence arise, any trustee or beneficiary can file a proceeding to determine the validity of a trust provision, revocation, or amendment under Probate Code

section 17200. As well, Probate Code section 21380 presumes that certain donative transfers are the product of fraud or undue influence, which acts as a safeguard against undue influence. Plus, Welfare & Institutions Code section 15610.30, subdivision (a), prohibits "financial abuse" of an elder or dependent adult, which is established whenever a person or entity "takes, secretes, appropriates, obtains or retains" any interest in real or personal property of an elder or dependent adult "by undue influence." Indeed, such statutory liability is conclusively presumed where "the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (See Welf. & Inst. Code section 15610.30, subd. (b).) And, in any event, section 15402 itself allows the settlor to treat modification more restrictively, if there are concerns, as long as the settlor makes the procedure explicitly exclusive.

Haggerty points out that the explicitly exclusive rule may in some cases frustrate the settlor's intent (AOB 41), but that's a tradeoff that the Commission considered and accepted. Specifically, the Commission acknowledged that proponents of the old rule, which allowed displacement of the statutory procedure as long as the trust specified another procedure, had concern about undue influence. (18 Cal. Law Revision Com. Rep. at p. 568.) On the other hand, the Commission recognized that the old rule could hamstring settlors for whom there were no concerns about undue influence. (*Ibid.*) The Commission chose the explicitly exclusive rule as a compromise: a presumption of

flexibility with the option of making revocation or modification more difficult where circumstances warrant. (*Ibid.*)

Additionally, in deciding whether a trust instrument provides an explicitly exclusive method of modification, courts will continue to be guided by the "primary duty of a court in construing a trust[:] to give effect to the settlor's intentions." (*Barefoot*, *supra*, 8 Cal.5th at p. 826.) "The paramount rule in the construction of [trusts], to which all other rules must yield, is that a [trust] is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible. . . . [The] objective is to ascertain what the testator meant by the language he used." (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134 [internal quotation marks and citations omitted].) A settlor may make a method of modification explicitly exclusive in different ways, depending on the particular trust language and context, as long as the intent is evident.

Haggerty also cites to the Restatement (Second) of Trusts for support (AOB 12, 23), but a full reading of the Restatement actually undercuts her position. The Restatement expressed the general rule for modification of a trust, prior to section 15402, as follows: "If the settlor reserves a power to modify the trust *only* in a particular manner or under particular circumstances, [the settlor] can modify the trust only in that manner or under those circumstances." (Rest.2d Trusts, § 331, com. *d*, p. 144 (emphasis added).) Haggerty paraphrases this to mean that specifying *any*

procedure for modification would require use of that procedure. (AOB 12, 23.) But Haggerty's selective parsing of the rule reads the word "only" completely out of the Restatement, thereby changing the meaning entirely.

Significantly, it turns out the Third Restatement expresses the same general rule with more clarity. It states that "[i]f the terms of the trust reserve to the settlor a power to revoke or amend the trust exclusively by a particular procedure the settlor can exercise the power only by substantial compliance with the method prescribed. . . . Although the terms of the trust provide a method for the exercise of a power of revocation or amendment, if the terms do not make that method exclusive . . . . . the settlor's power can be exercised either in the specified manner or by a method" that clearly evidences the settlor's intent. (Rest. 3d Trusts, § 63, com. *i*, pp. 447–448.)

Thus, both the Second and Third Restatement of Trusts reflect the consensus that a method of modification (or revocation) stated in a trust must be made "exclusive" in order to displace the settlor's power to modify the trust in a manner that evidences the settlor's intent to do so—like the statutory method in section 15401. These Restatements support the interpretation that the Commission intended to require explicit exclusivity for both revocation and modification. (See *Estate of Giraldin* (2012) 55 Cal.4th 1058, 1072 ["California courts have considered the Restatement of Trusts in interpreting California trust law."].)

II. The Decision Below and Other Cases in Accord More Accurately Capture the Meaning of Section 15402 Than the Cases on Which Haggerty Relies

Haggerty's reading of section 15402 is the same view taken by the *Irvine* court, the *King* majority, *Pena*, and the *Balistreri* majority. In their view, the inclusion of *any* modification method in a trust requires the use of that method *only*, and the statutory method cannot be used. The Court of Appeal below sided instead with the view expressed in *Huscher* and the *King* dissent. In its view, the inclusion of a modification method in the trust does not displace the statutory method unless it is made explicitly exclusive. This latter view finds greater support in the text and history of the statute and "more accurately captures the meaning of section 15402." (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1011.) Similarly, the *Balistreri* concurring opinion, in a case decided after *Haggerty*, supports the view that available methods of revocation may be used to modify a trust unless barred by a contrary provision in the trust.

A. *Irvine*, *King*, *Pena*, and *Balistreri* Rely on an Incomplete Reading of the Statute, Its History, and Secondary Sources

1. The *Irvine* Decision

Irvine provided the first interpretation of section 15402 and formed the basis for later decisions in *King*, *Pena*, and *Balistreri*. The trust instrument in *Irvine* specified that the trustor could modify the trust during her lifetime by written instrument delivered by certified mail to the trustee, "provided, however, no such amendment shall be effective until thirty (30) days after

written notice of such amendment is personally served upon and accepted by the Trustees, [Fletcher] and HOMEFED BANK." (40 Cal.App.4th at p. 1337.) The opinion does not describe the trust instrument's procedure for revocation. The disputed amendment was personally served on someone mistakenly believed to have been the trustee, but who was subsequently determined not to be the trustee at the time of service. (*Id.* at pp. 1339–1340.)

The Court of Appeal focused on the fact that the method of modification in the trust had not been properly effectuated because acceptance of the amendment by the trustee was an essential part of the method. (*Irvine*, *supra*, 40 Cal.App.4th at pp. 1343–1344.) The opinion quoted at length from a 1985 Trust Administration publication by the California Continuing Education of the Bar (CEB) that discussed acceptance issues. (*Irvine*, at p. 1343 [quoting Cal. Trust Administration (Cont.Ed.Bar 1985) § 12.3, p. 458].)

However, the opinion failed to address other portions of the quoted text from the publication that discussed *when* an amendment procedure specified in a trust is deemed binding: "If the instrument makes the stated method [for modification or amendment of the trust] the exclusive method, it *must* be followed; if it does not, the trust may be modified [or amended] by a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime." (*Ibid.* (emphasis in original).) In other words, a trust provision for modification will

be the exclusive method *only if* the trust instrument makes it the exclusive method. (*Ibid.*)

Having failed to address this portion of the CEB publication, the *Irvine* court erroneously stated a contrary conclusion that section 15402 "recognizes 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 instrument*." (*Irvine, supra*, 40 Cal.App.4th at pp. 1343–1344 (emphasis added).) In other words, mere provision in the trust instrument of any method of modification precludes modification by the statutory method of revocation. (*Ibid.*)

Irvine asserted that this reading is "consistent with the Restatement Second of Trusts." (*Irvine*, *supra*, 40 Cal.App.4th at p. 1344.) The court then quoted the Restatement, in relevant part: "'If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.'" (*Irvine,* at p. 1344 [quoting Rest.2d Trusts, §331, com. *d*, p. 144].) Of course, the quoted language did not support *Irvine*'s reading because the method of modification in the trust is exclusive only if "the settlor reserves a power to modify the trust *only* in [that] particular manner." (Rest.2d Trusts, §331, com. *d*, p. 144.)

The other authorities that *Irvine* cited were no more persuasive because they interpreted the old rule for revocation and modification under Civil Code section 2280, which the

Commission considered too restrictive when it drafted sections 15401 and 15402. (See *Huscher*, *supra*, 121 Cal.App.4th at pp. 966–967 [criticizing *Irvine* on this point]; 18 Cal. Law Revision Com. Rep. at pp. 567–568 [discussing the problems with the old rule and adopting a new one], 635–636 [emphasizing that the new rule "differs from the case law under the former statute"].) Thus, *Irvine* provides no persuasive support for its construction of section 15402.

Finally, it is not clear that the *Irvine* court' statutory analysis was necessary since the result could have been justified by the failure to deliver the amendment to the trustee, rendering the amendment invalid under both the trust procedure and the statutory procedure.

2. The *King* Majority

The majority opinion in *King* relied on the analysis in *Irvine* and added some of its own observations about the statute's structure and language. (*King*, *supra*, 204 Cal.App.4th at p. 1193.) In particular, the court focused on the fact that revocation and modification are set forth in two different statutes rather than one. (AOB 31, 34.) But as discussed above, whatever the reason for this, the Commission expressly stated its intent was to maintain the same rule for both revocation and modification by codifying the common law rule. (18 Cal. Law Revision Com. Rep. at p. 568.) Given this clear indication of intent, the two-statute structure does not lead to the contrary conclusion by the *King* majority that the statutes were meant to follow different rules.

King also noted that the Legislature could have used the same explicitly exclusive language from section 15401 in section 15402 if it meant to apply the same rule. (*King*, *supra*, 204 Cal.App.4th at p. 1193.) But the Legislature did not have to repeat section 15401's explicitly exclusive language because it incorporated section 15401's language by reference in section 15402. Like *Irvine*, the *King* majority failed to provide persuasive support for its construction of Section 15402.

Even so, there may be an argument that "*King* was ultimately correctly decided on its facts." (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1011.) Unlike the trust in this case, the *King* trust was a two-settlor trust, and significantly, the purported amendment was made by only one of the settlors after the other had been incapacitated by a brain injury but apparently not adjudicated incompetent. (*King*, *supra*, 204 Cal.App.4th at p. 1189.) The trust instrument provided that "[d]uring the joint lifetimes of the Settlors, this Trust may be amended . . . by an instrument in writing signed by both Settlors and delivered to the Trustee." (*Id*. at p. 1188.) This language not only sets forth the *method* of modification (a signed writing delivered to the Trustee), but also identifies *who* has the power of modification (both Settlors).

Although the *King* trust used the term "may" for its method of modification, the particular facts of the case might have warranted a finding that the settlors intended the term to be mandatory and explicitly exclusive as to who had the power of

modification. (See *Kropp v. Sterling Sav. & Loan Ass'n* (1970) 9 Cal.App.3d 1033, 1044 [emphasizing that the trust language must be interpreted to effectuate the intention of the trustor and concluding that "the word 'may' as used in the trust instrument was mandatory rather than permissive"].) This Court need not resolve, however, the particular application of the statute in *King*, nor the unpresented issue of how to determine whether a trust document explicitly provides an exclusive method of revocation or modification.

3. The *Pena* Decision

In *Pena,* the Court of Appeal considered whether a settlor's handwritten interlineations to a prior trust amendment served as a valid further amendment. The trust instrument allowed modification "by written instrument signed by the settlor and delivered to the trustee." (*Pena, supra*, 39 Cal.App.5th at pp. 552–553.) The bulk of *Pena* addressed whether the handwritten interlineations comprised a "written instrument," concluding that they did (*id.* at pp. 552–553), and whether the settlor had signed the interlineations by signing a post-it note affixed to them, concluding that he had not (*id.* at pp. 553–555). The Court of Appeal ruled that "[b]ecause [the settlor] did not sign the interlineations, [the interlineations] did not effectively amend the trust." (*Id.* at pp. 553–555.)

Pena applied the rule in *King* and *Irvine* that the mere specification in the trust instrument of any method of modification precluded amendment by the statutory method. (*Id.*

at p. 552.) But the *Pena* court did not conduct its own statutory interpretation of section 15402, nor did it distinguish let alone even discuss *Huscher*'s contrary interpretation of section 15402.

In any event, because the *Pena* court determined that the settlor failed to sign the interlineations, they were not a valid modification even under the statutory method.

4. The *Balistreri* Decision

The *Balistreri* majority conducted its own analysis of section 15402 and sided with the *King* majority. (*Balistreri*, *supra*, 75 Cal.App.5th at pp. 516–522.) The court concluded that "[t]he most plain and straightforward reading of the phrase '[u]nless the trust . . . provides otherwise' in section 15402 is that when a trust provides for the use of a specific modification method, that method must be used." (*Id*. at p. 520.) The court found the statutory language sufficiently unambiguous and thus eschewed appellant's legislative history arguments. (*Id.* at p. 521) Nonetheless, the court reviewed the history and found that it did not "conclusively resolve what was intended by the phrase, '[u]nless [the trust] . . . provides otherwise.'" (*Id*. at p. 522.)

The *Balistreri* court read the phrase "provides otherwise" in isolation, rather than in harmony with the default position that the "procedure for revocation" applies to modification. (Prob. Code, § 15402.) The procedure for revocation allows revocation (1) by compliance with any method of revocation set forth in the trust or (2) by signed writing delivered to the trustee, unless the trust makes its stated method explicitly exclusive. (Prob. Code, §

15401.) Thus, by way of section 15402's incorporation by express reference, modification can be accomplished (1) by compliance with any method in the trust or (2) by signed writing delivered to the trustee, unless the trust makes its own method explicitly exclusive. In the context of this procedure, a trust only "provides otherwise" if it makes its own method explicitly exclusive.

Further, the court's brief description of the legislative history did not address the policy goals for the entire statutory scheme regarding revocation and modification. As discussed above, the Commission's guiding principle was to provide flexibility in favor of revocation and amendment. The Commission treated revocation and modification in the same manner, and emphasized that trusts should be "adapt[able] to a variety of situations, . . . and the changing needs, values, and circumstances of the settlor and the beneficiaries. . . . Restrictive features of a trust may come to be viewed as too restraining in the face of the interest in free alienability of property. A rigid trust may also become uneconomical to administer over time." (18 Cal. Law Revision Com. Rep. at p. 565.)

The Commission rejected as too restrictive the rule under prior cases that provision of *any* method of revocation in the trust precluded the use of the statutory method of revocation. (18 Cal. Law Rev. Com. at p. 568.) Instead, it chose the explicitly exclusive rule to maintain flexibility but at the same time also allowed more rigidity if the settlor desired. (*Ibid.*) There is no explanation in *Balistreri* as to why, then, the Commission would

have favored the old restrictive rule for modification so that provision of *any* method of modification in the trust precludes the use of the statutory method. To the contrary, the Commission meant for modification to follow the same rules as revocation. (*Ibid*.)

The trust at issue in *Balistreri* provided that "[a]ny amendment, revocation, or termination . . . shall be made by written instrument signed, with signature acknowledged by a notary public, by the trustor(s) making the revocation, amendment, or termination, and delivered to the trustee." (*Balistreri*, *supra*, 75 Cal.App.5th at p. 515.) The purported amendment was alleged to have been signed by both settlors one day prior to the death of one of them, but it had not been notarized. (*Id.* at p. 514.) The petitioner also raised issues of capacity and undue influence related to the settlor who passed away the day after the amendment. (*Id.* at p. 515.)

Applying the rule that provision of any method in the trust requires use of that method, the court affirmed the order invalidating the purported amendment because it was never notarized. (*Balistreri, supra*, 75 Cal.App.5th at p. 514.) Nonetheless the result would likely have been the same under the explicitly exclusive rule. The trust stated that "'[a]ny modification, revocation, or termination . . . *shall* be made'" by a signed, notarized writing and, arguably, the use of the word "shall" was intended to make the method mandatory. (*Ibid*. (emphasis added); *Larson v. State Pers. Bd*. (1994) 28

Cal.App.4th 265, 276 ["The ordinary meaning of 'shall' or 'must' is of mandatory effect, while the ordinary meaning of 'may' is purely permissive in character."].) While the *Balistreri* majority expressed doubt as to whether the word "shall" is mandatory, it did not cite any cases that view "shall" as permissive and, indeed, courts have construed "shall" as mandatory. (*Balestreri*, at p. 520, fn. 5; *Larson,* at p. 276 [shall is mandatory]; *CQL Original Products, Inc. v. Nat'l Hockey League Players' Ass'n.* (1995) 39 Cal.App.4th 1347, 1358 [same].)

The concurring opinion in *Balistreri* agreed with the result but took a different view of the phrase "provides otherwise" in section 15402. (*Balistreri, supra*, 75 Cal.App.5th at p. 523 (conc. opn. of Tuscher, P.J.).) The concurrence would read this language "to mean that the settlor may modify the trust using any appropriate procedure for revocation '[u]nless the trust instrument' says that the settlor may not (*i.e.,* 'provides otherwise'). (§ 15402.)." (*Ibid*.) Under this rule, the trust precluded amendment by the statutory method of revocation because it "sets forth a different procedure for amending the trust, *and* it does so in language ["shall be made"] that makes the specified method exclusive." (*Id.* at p. 523.)

The concurrence further suggested that a trust "provides otherwise" if it either *explicitly or implicitly* limits trustors to the use of the specified method. (*Balistreri, supra*, 75 Cal.App.5th at p. 524 (conc. opn.).) This view strikes a middle ground between the view that specification of any method displaces the statutory

method and the view that only an explicitly exclusive method displaces the statutory method. (*Id.*) And it is the view taken by the *Huscher* court in interpreting the old law under Civil Code section 2280. (*Ibid.*)

Nonetheless, *Huscher* itself pointed out that the new explicitly exclusive test in section 15401 was a purposeful change in law presumably to "avoid the problems of interpretation inherent in determining issues of implicit exclusivity." (*Huscher*, *supra*, 121 Cal.App.4th at p. 971, fn. 13.) Adopting a middle ground approach would reintroduce an ambiguity problem that the Commission sought to cure.

B. *Huscher*, the *King* Dissent, and the Decision Below Read Sections 15401 and 15402 Together in Light of the Statutes' Purposes

1. The *Huscher* Decision

In *Huscher,* the Court of Appeal addressed a trust governed by former Civil Code section 2280, but considered the differences between that rule and the new rule in Probate Code section 15402 to determine the contours of the old rule. (121 Cal.App.4th at pp. 963–971.) The court considered the decision in *Irvine*, which "although ostensibly carried out under the terms of Probate Code section 15401, relied almost exclusively on authorities that had interpreted Civil Code former section 2280." (*Id.* at p. 966.)

Regarding *Irvine*'s analysis of section 2280 law, the court criticized that it "offer[ed] inconsistent interpretations of the law" and arrived at the wrong rule that the provision of *any*

modification method in the trust meant that method had to be followed under section 2280. (*Huscher*, *supra*, 121 Cal.App.4th at pp. 966–967.) Instead, the court read section 2280 to mean that the statutory method of medication could be used "unless the trust instructions either implicitly or explicitly specify an exclusive method of modification. (*Id*. at p. 966.)

As discussed above, the court noted the "problems of interpretation inherent in determining issues of implicit exclusivity" and presumed that the change in law under section 15401 to explicit exclusivity was aimed to avoid these problems. (*Huscher*, *supra*, 121 Cal.App.4th at p. 971, fn. 13.) Moreover, the court read sections 15401 and 15402 together to mean that "the statutory procedure for modifying a trust can be used unless the trust provides a modification procedure and explicitly makes that method exclusive (explicit exclusivity)." (*Id*. at pp. 967–968.)

Turning to the trust in that case, the court determined that it was neither implicitly nor explicitly exclusive for purposes of the old rule. (*Huscher*, *supra*, 121 Cal.App.4th at p. 972.) The modification provision in the trust at issue in *Huscher* stated that the trustor "may at any time amend any of the terms of this trust by an instrument in writing signed by the Trustor and the Trustee." (*Ibid*.) Given the permissive language of the provision, either that method or the statutory method of modification could be used. (*Ibid*.) The trustor signed eight different amendments and delivered them to the trustee (which satisfied the statutory method), although none was signed by the trustee. (*Id.* at pp.

959–960.) These amendments were valid under the statutory method. (*Id.* at p. 972.)

2. The *King* Dissent

The *King* dissent engaged in an extended review of the legislative history of section 15402, and concluded the same rule applies to modification as to revocation, including the explicitly exclusive rule. (*King*, *supra*, 204 Cal.App.4th at pp. 1195–1196 (dis. op.).) The dissent's analysis emphasized the policy goals of the Commission in enacting sections 15401 and 15402. (*Ibid.*) As already discussed, these goals included: codification of the common law rule that "modification of a trust was viewed as merely one aspect of the more inclusive power to revoke a trust" (*id.* at p. 1196); "a perceived need to move away from" the prior law that too easily displaced the statutory method of revocation or modification (*id.* at p. 1195); a desire to make trusts "'a flexible mechanism'" and to avoid "'[r]estrictive features [that] may come to be viewed as too restraining in the face of the interest in free alienability of property'" (*id.* [citations omitted]); but still including a path for settlors "to establish a more protective" scheme for revocation or modification if the settlor intended these restrictions (*id.* at p. 1196). Based on these goals, the dissent sided with *Huscher*'s interpretation of section 15402 as incorporating the same rule for modification as for revocation, meaning that a trust must specify an explicitly exclusive method of modification to displace the statutory method. (*Id.* at p. 1197.)

Turning to the trust at hand, the dissent noted that it used "nonexclusive" language for the method of modification. (*King*, *supra*, 204 Cal.App.4th at pp. 1197 (dis. op.)) Thus, the dissent determined that the trust "did not explicitly exclude use of the alternative statutory method for modification" and could be amended by use of the statutory method. (*Id.* at p. 1198 [citing *Masry v. Masry* (2008) 166 Cal.App.4th 738, 742].)

3. The Decision Below

In the opinion below, the Court of Appeal engaged in the thorough review of legislative history taken by the *King* dissent and agreed with the interpretation that section 15402 incorporates the same explicitly exclusive rule for modification as for revocation. (*Haggerty*, *supra*, 68 Cal.App.5th at pp. 1008–1011.) The court emphasized that section 15402 "cannot be read in a vacuum" and did not "establish an independent rule regarding modification." (*Id.* at p. 1011.) Rather, the Commission intended to treat revocation and modification the same and intended to provide settlors with "greater flexibility" for both. (*Id.* at pp. 1010–1011.) While declining to comment on whether *King* "was ultimately correctly decided on its facts," the court rejected the majority's interpretation treating modification more restrictively than revocation because "'[n]othing in the Commission's comments on sections 15401 and 15402 supports that position.'" (*Id.* at p. 1010 [quoting *King*, *supra*, 204 Cal.App.4th at p. 1196 (dis. opn.)].)

The Court of Appeal's reading of the statute in this case, along with the decision in *Huscher* and the dissent in *King*, "more accurately captures the meaning of section 15402." (*Id.* at p. 1011.)

III. The Court of Appeal Correctly Applied Section 15402 to the Facts in This Case

A. The Trust Expressly Reserved Bertsch's Right to Amend or Revoke the Trust by Using the Same Nonexclusive Method, so Bertsch Could Amend by Employing the Statutory Method

Among the rights expressly reserved to Bertsch as sole settlor in the trust in this case was "[t]he right by an acknowledged instrument in writing to revoke or amend" her trust. (1 CT 23.) Citing *Masry v. Masry, supra,* 204 Cal.App.4th at p. 742, the Court of Appeal determined this language is nonexclusive and does not indicate that "Bertsch intended to bind herself to the specific method described in the trust agreement, to the exclusion of" the statutory method. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1012.) The *Masry* court held that a trust provision reserving to each of two settlors the right to revoke, in whole or in part, by written instrument delivered to the other settlor and to the trustee was not explicitly exclusive. (204 Cal.App.4th at pp. 740, 742.) The statutory method requires amendment by writing, signed by the settlor, delivered to the trustee during the settlor's lifetime. (Prob. Code, § 15401, subd. (a).) This method was indisputably met.

Bertsch signed the 2018 Amendment and included a handwritten instruction to her former estate planning attorney:

"I herewith instruct Patricia Galligan to place this document with her copy of the Trust. She can verify my handwriting." (1 CT 49.) Bertsch mailed the amendment from her home in Chicago to Galligan in San Diego, and Galligan confirmed receipt in writing. (1 CT 158.) Further, there are no allegations that Bertsch was unduly influenced or lacked capacity to execute the 2018 Amendment. Indeed, there is not a hint of evidence that the 2018 Amendment does not embody Bertsch's actual intent. (Cf. *Barefoot*, *supra*, 8 Cal.5th at p. 826 ["The primary duty of a court in construing a trust is to give effect to the settlor's intentions."].) Thus, the Court of Appeal correctly determined that the amendment was valid. (*Haggerty*, *supra*, 68 Cal.App.5th at p. 1012.)

B. Haggerty's Claim that *King* Controls Is Meritless

Haggerty proposes one final theory to prevent Bertsch's amendment from being given effect. She argues that the interpretation of section 15402 in the *King* majority should be applied, *even if it is incorrect,* based on the theory that it was the "prevailing law" when Bertsch devised her trust in January 2015. (AOB 15, 44.) This argument fails on several grounds.

First, the argument was not raised below and "is therefore not cognizable before this court." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 912.) Further, the argument assumes facts that were never established and that cannot be introduced for the first time before this Court. There is no evidence in the record that the trust was written in reliance on the *King* rule. And given

the factual dissimilarities between the trust terms here and in *King*, there is no reason to believe that Bertsch or her counsel would have looked to *King* as guidance.

Second, *King* was not binding at the time that Bertsch devised her trust, nor at the time of this litigation. There was a split of opinion as to how to interpret section 15402 by the time Bertsch devised her trust. *Irvine* (in 1995) and the *King* majority (in 2012) had ruled one way, and *Huscher* (in 2004) had ruled the other. Where, as here, there was "more than one appellate court decision, and such appellate decisions are in conflict," the probate court was at liberty to "make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) Similarly, the Court of Appeal was "not bound by an opinion of another District Court of Appeal." (*People v. Kim* (2011) 193 Cal.App.4th 836, 847.)

Third, judicial decisions involving statutory interpretation apply retroactively. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878.) "A judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." (*Ibid.* [internal quotation marks and citation omitted, emphasis added].) While the Court recognizes "'narrow exceptions to the general rule of retroactivity . . . when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic

rule,'" (*ibid.* [citation omitted]), none of these compelling factors apply here, and Haggerty does provide any argument for them.

Finally, even if this Court were to adopt a different rule than the Court of Appeal in this case, Bertsch would be entitled to argue on remand, as she did below, that the method of modification she used satisfied the method specified in her trust. Neither the trial court nor the Court of Appeal ruled on this issue because they concluded that the amendment was valid under the statutory method. (*Haggerty*, *supra*, 68 Cal.App.5th at pp. 1007, 1013.)

CONCLUSION

Section 15402 allows modification of a trust by the same procedure for revocation as set forth in section 15401. That procedure allows revocation by the statutory method (a signed writing delivered to the trustee) or by the method stated in the trust, unless the trust makes its own method explicitly exclusive. Thus, the same explicitly exclusive rule applies to modification. The text and legislative history of sections 15401 and 15402 compel this interpretation.

Further, construing Section 15402 as establishing the same procedure for modification as for revocation in the absence of explicit language to the contrary in the trust instrument accords with the statutory purposes of affording settlors greater flexibility as circumstances change, yet enabling them to implement a "more protective" revocation and modification scheme if they so desire. It will also completely avoid the

confusion created were this Court to allow one rule for a revocation "in part" and a different rule for a modification. Contrary to Haggerty's apprehension, construing Section 15402 to allow modification by the statutory method unless a trust instrument explicitly provides otherwise in no way precludes settlors from emulating Odysseus by binding themselves to a specified method of amendment; they need only set forth their intentions specifically in their trust instruments.

Here, the Court of Appeal correctly interpreted section 15402 and correctly applied it to the facts of the case. Respondent Patricia Galligan respectfully requests that this Court affirm the ruling below in its entirety.

Dated: May 20, 2022 By: *s/Howard A. Kipnis*

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CERTIFICATE OF WORD COUNT

I, Steven J. Barnes, hereby certify that word count as indicated in my computer is 11,927 words, exclusive of tables, this certificate, and required cover information.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate was signed on the 20th day of May 2022 at Solana Beach, California.

s/Steven Barnes
STEVEN J. BARNES

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

Executed on May 20, 2022, at Solana Beach, California.

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5/20/2022

Date

/s/Steven Barnes

Signature

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