IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIANNA MCKEE HAGGERTY, Plaintiff and Appellant, v. **NANCY THORNTON, et al.,** Defendants and Respondents.	S271483 (San Diego County Superior Court Case No. 37-2019-00028694-PR-TR-CTL)

RESPONDENT RACQUEL KOLSRUD'S BRIEF

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
THE HONORABLE JULIA C. KELETY, JUDGE

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I. QUESTION PRESENTED

Where a sole trustor broadly reserved her rights to make changes to her own revocable trust at any time, including the "right by an acknowledged instrument to revoke or amend" it, without making that method exclusive, should the prefatory language in Probate Code section 15402, "Unless the trust instrument provides otherwise," be construed to mean that the trust may be modified by any available method of revocation under Probate Code section 15401?

II. STATEMENT OF THE ISSUES

During her lifetime, Jeane M. Bertsch set up a revocable trust, the Jeane M. Bertsch and Don C. Bertsch Trust, dated January 22, 2015 (the "Trust"), of which she served as the initial trustee. (Op. at 2.) The Trust was amended on October 25, 2016. (*Id.*) On June 10, 2018, Jeane executed the disputed Third Amendment, which had the effect of disinheriting Appellant after she had a well-documented falling-out with Jeane on account of Appellant's greed. (*See* Op. at 3.) On December 29, 2018, Jeane died. (*Id.*)

The Trust specifically provided that the trustor "reserve[d] the rights, each of which may be exercised whenever and as often as the Trustor may wish …. [including] [t]he right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." (Op. at 2.) Jeane signed the disputed amendment and sent it to her former attorney. (*Id.*)

It is undisputed the June 10, 2018 amendment is in Jeane's handwriting. In addition, Appellant never claimed that Jeane lacked capacity or was under any undue influence in making said amendment. Instead, the sole basis for Appellant's underlying Petition – and now this appeal – is Appellant's contention that the June 10, 2018 amendment was not "acknowledged," as provided in the trust agreement, and purportedly must fail for lack of

notarization – notwithstanding the fact that it reflects the testator's true intent and that the identity of the trustor was never in question. Relying on *King v. Lynch,* 204 Cal. App 4th 1186, 1191 (2012), Appellant argues that because the Trust provided a method for revocation or amendment – i.e. by "an acknowledged instrument" – that method became the exclusive method for an amendment. Appellant argues further that, where a trust provides for a revocation method that is either explicitly or implicitly exclusive, only that method of revocation may be used. (Op. Br. at 35).

As shown below, Appellant overextends the precedential value and reasoning of the majority in *King v. Lynch*. Perhaps sensing the deficiency of *King* as a broader rule, Appellant attempts to muddy the waters by exaggerating the "competing positions" in *King*, *Pena, Balistreri majority*, *Balistreri* concurring opinion, *King* dissent, *Haggerty*. (App. Op. Br. at 30.) But these "positions" do not represent six independent rules.

There is only one clear rule promulgated by the legislature: unless the method of amendment in the trust instrument is exclusive, then it is non-exclusive and the statutory method of revocation is available. As shown below, some trusts, as in *Balistreri v. Balistreri*, contain mandatory and expressly exclusive method of revocation, barring the statutory method of revocation. Others, as in *King,* are implicitly exclusive as to modification methods. Yet others may set a different standard for modification than for revocation. And while in each case, whether the stated method of amendment is non-exclusive, impliedly exclusive or expressly exclusive necessarily depends on the terms of the language of the underlying trust, the rule promulgated by the legislature is still the same: unless the method of amendment provided in exclusive, the statutory method of revocation is available.

Because the instant Trust does not differentiate between the power to revoke or amend, and further because it language is broad in Settlor's reservation ability to amend her trust, without making any method of modification exclusive, the statutory method for revocation under Probate Code 15401 was available. Accordingly, the decision below finding the June 10, 2018 amendment valid should be affirmed.

III. STATEMENT OF FACTS

The Bertsch Family Trust was created by Jeane B. Bertsch and Don C. Bertsch as Trustors. It was established on October 16, 1987 and was amended and restated on April 27, 1995, and then amended on January 26, 1998, on November 17, 2011, and on June 27, 2013. Don C. Bertsch died in 2011.

The Bertsch Family Trust was revoked by Jeanne M. Bertsch on January 22, 2015. All assets in the Bertsch Family Trust reverted to Jeanne M. Bertsch as separate property, and she created the Jeane M. Bertsch and Don C. Bertsch Trust (the "Trust") on January 22, 2015.

The Trust was amended on December 25, 2016. Trustor advised her prior estate planning attorney that Trustor had revoked the First Amendment. Op. at 5, n. 1. The Trust was then amended on December 23, 2017 and thereafter on June 10, 2018.

These two amendments change the beneficiaries of the Trust. Based on the last of these two amendments, dated June 10, 2018, it was Trustor's intent and instruction to her Trustee that, after paying all of the expenses of the trust estate, including its administration, it was Trustor's "desire and instruction" to give: (1) $2 million from her Trust to the Union of Concerned Scientists; and (2) for the remaining "half" to be distributed to the following

four beneficiaries in "equal portions": Patricia Bertsch, Patricia Galligan, Colleen Habing, and Racquel Kolsrud. Trustor Jeane M. Bertsch died on December 29, 2018, rendering the trust irrevocable. *See* Op. at 3.

Appellant does not dispute that the disputed amendment is in testator's handwriting. Nor does Appellant argue that testator lacked capacity, was unduly influenced, or cite any other cognizable legal reason why the testator's intent, as expressed in her handwritten amendment, should not be honored. Literally, the only perceived legal ground on which Appellant based her Petition – and now her appeal – is the contention that the amendment was not "acknowledged."

IV. ARGUMENT

A. The Legislature Intended Maximum Flexibility for the Trustor's Ability to Amend or Revoke a Trust

Unlike most other jurisdictions where a trust is irrevocable unless the trustor reserves the right to revoke, since 1931, California law provided a contrary rule that presumes transfers in trust revocable, unless the trust instrument provides otherwise. *See* California Law Revision Commission's *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, at 565 (1986). California's emphasis on flexibility of revocable trusts derives from a well-documented problem in 1929 and 1930, when "many trustors were not aware that they were creating inter vivos trusts" and because "in many cases the income from the trusts became inadequate to support the trustors, who found themselves precluded from reaching the trust corpus." *Id.* (citing Larson, Drafting the Trust: Distributive Provisions, in J. Cohan, Drafting California Revocable Trusts §§ 4.2-4.13, at 112-20) (2d ed. Cal. Cont. Ed. Bar 1984).

Indeed, the legislature has affirmatively created a "presumption of revocability" of trusts, writing maximum flexibility for trusts into the modern Probate Code. *See* Probate Code section 15400. ("Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor.")

California Law Review Commission was keenly aware of the flexibility created by the statutory method for revocation by the settlor, while also making it possible for the settlor to create an exclusive method of modification. In adopting then-new Section 15402, the Commission's comments reveal the intent to allow the statutory method of revocation, unless the trust instrument "explicitly makes exclusive" the method for revocation therein. *See id. at* 568.

B. Probate Code Sections 15401 and 15402 Must be Read Together

Appellant argues that if the legislature intended for revocation and modification to mean the same thing, the legislature would have simply combined sections 15401 and 15402. (App. Op. Br. at 31.) That well may have been a more elegant way to draft the statute; however, a court's role is not to conceive of more elegant hypothetical drafting efforts by the legislature, but to read all sections of the statute together and harmonize them, if at all possible. *See Channell v. Superior Court of Sacramento County*, 226 Cal.App.2d 246, 252 (1964). And here, the legislative clearly understood that the power to revoke includes the power to modify. *See* Probate Code § 15402.

C. The Trust Language Does Not Explicitly Make the Revocation Method Provided in the Trust Exclusive, Leaving the Statutory Method for Revocation Available

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." Probate Code § 15402. Probate Code § 15401, in turn, sets out the following procedure for revocation: "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." *Id.*, Section 15401, subd. (a).)

Here, the language of the Trust is broad, framed in terms of the trustor's reservation of her ability to amend or revoke it: "Revocability of Trust & Rights Reserved" "The trustor reserves the rights, each of which may be exercised whenever and as often as the Trustor may wish …. [including] [t]he right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder." (Op. at 2.) As the probate court correctly found, the Trust language did not explicitly or implicitly make this method of revocation the "exclusive method of revocation." There is nothing mandatory or exclusive – explicitly or implicitly – about the manner in which Jeane reserved her rights to amend or revoke her trust "as often as" she may wish. And any reasonable reading of the aforementioned

reservation of rights reveals the testator's intent to give herself flexibility in potentially revoking or amending her trust. *See Barefoot v. Jennings*, 8 Cal. 5th 822, 826 (2020) (primary duty of the court in construing a trust is to give effect to settlor's intentions) (internal citations omitted).

D. *King v. Lynch* Overextends the Language of Probate Code 15402, and the Facts of and Trust Language in *King* Are Distinguishable

The primary authority relied on by Appellant for the proposition that the method of revocation provided for in the trust is the "exclusive method of revocation," and which coincidently forms the entire basis of Brianna's underlying Petition, is the majority's opinion in *King v. Lynch*, 204 Cal. App 4th 1191 (2012). In *King*, a married couple created a joint revocable trust. *Id.*at 1188. The trust was subsequently subject to six amendments, the latter three of which – the fourth, fifth, and sixth – were only signed by the husband (after the wife was apparently incapacitated as a result of a brain injury), in an apparent contravention of express trust terms requiring *both* trustors to execute any amendments. *Id.* at 1189–1190. The probate court therefore invalidated the latter three amendments, finding that where express terms of the trust required both trustors to sign an amendment, only one of the trustors could not execute an amendment unilaterally. *Id.* at 1190.

The Fifth District in *King* reasoned that the phrase "unless the trust instrument provides otherwise" in Section 15402 must mean that, where as in any time a trust specifies a method for amendment (i.e. signed by both trustors), that is the exclusive method and the statutory language method for revocation under Section 15401 cannot be utilized. *Id.* at 1193-1194.

But *King v. Lynch* concerned a joint marital trust with the requirement that *both* trustors sign any amendments. While the Fifth District in *King* went

further in its analysis of Section 15402 than was necessary to affirm the probate court's ruling, as a matter the plain language of the trust requiring both trustors to sign any amendments, it is difficult to see how a court could infer the wife's testamentary intent with respect to the third, fourth, and sixth amendments – where she not only did not sign those amendments, but was also removed as trustee by virtue of the fourth purported amendment) specifically based on her inability to serve for capacity reasons. Given the apparent lack of capacity of the trustor and the trust's express requirements, it is difficult to see how the trial court in *King* could reach a different result.

E. The Language of the Trust Instrument Determines Whether Revocation is Coextensive with Modification, and Whether the Prescribed Method of Revocation is Non-Exclusive, Expressly Exclusive or Impliedly Exclusive

In *King*, "both" trustors necessarily means "not one" of the trustors, rendering the meaning of that specific method of trust modification impliedly exclusive, and foreclosing an individual trustor's unilateral ability to modify the trust. On the other hand, a trust instrument that mandates that any amendment, revocation, or termination "shall be made by written instrument signed, with signature acknowledged by a notary public" is expressly exclusive as to the method of modification and revocation. *See Balistreri v. Balistreri*, 75 Cal. App. 5th 511 (2022). And further, the same couple may agree to grant *either* trustor the ability to revoke the provisions regarding community property, but *both* would need to sign an instrument containing modifications to community property. *See Balistreri* at 512.

It is just easy to imagine a joint trust instrument where, for example, "either trustor" may "revoke or modify the trust, including, but without limitation, by an acknowledged instrument in writing." Surely, such a trust modification provision cannot be credibly argued to be exclusive simply

because a method of modification is included in the trust instrument. Indeed, the method of modification suggested above would treat amendment and revocation interchangeably, and would be non-exclusive because it would leave it up to either trustee to amend the joint trust, and further would leave open the method of amendment; an "acknowledged instrument in writing" would be only one such method, and the use of the qualifier "but without limitation" would underscore its non-exclusive nature. In other words, the specific language of the trust instrument determines whether the modification procedure is non-exclusive, expressly exclusive, or impliedly exclusive. But unless the trust makes the method of revocation exclusive – expressly or impliedly – the legislature left the statutory method of revocation available. *See* Probate Code § 15402.

The majority' conclusion in *King* that where a trust agreement states a method for revocation, that method becomes exclusive – while accurate in the context of specific facts in *King* requiring both trustors to sign any amendment – is reductionist and unworkable as a broader rule. Given that a method of modification referenced in a trust instrument may be non-exclusive, expressly exclusive, or impliedly exclusive – the mere mention of a method of modification cannot be dispositive. Nor did the legislature intend for it to be.

Indeed, a validation of *King* majority's rigid rule, whereby the modification method referenced in the trust becomes the exclusive method of modification, would lead to proliferation of trust litigation. As long as there is some specified method of revocation or amendment in the trust instrument, a beneficiary disinherited by an amendments is incented to challenge the statutory method of revocation. Such a litigation tax on amendments would run counter to the legislative intent behind Probate Code

sections 15401 and 15402, and indeed, run counter to the long-established Californian policy of presumptive revocability.

Instead, a rule that would be consistent with the language of the trust instrument and Probate Code sections 15402 and 15401 is: unless the method of modification referenced in the trust instrument *differentiates* between revocation and modification, then the power to revoke is coextensive with the power to amend. And further, unless the trust instrument makes the modification method referenced therein *exclusive* – expressly or impliedly by its terms – then the statutory method of revocation remains available.

Here, the language of the trust instrument does not differentiate between the power to revoke and amend. And further, the trustor broadly reserved her right to amend or revoke by an acknowledged instrument. "[A]s 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." Op. at 11 (citing *Masry v. Masry*, (166 Cal.App.4th 738, 742 (2008) [reservation of rights not explicitly exclusive].)

Appellant argues that the presence of a third-party notary "could provide a meaningful guardrail against documents generated due to elder abuse." (Appellant's Opening Brief at 23, n.3). This argument misses the mark.

As an initial matter, this rationale is hardly new. The notion of protecting the elderly settlor against "future senility or future undue influence while in a weakened condition" had long been offered as a rationale for

binding the trustor to the prescribed procedure in the trust for modification. *See* California Law Revision Commission's *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, at 568 (1986). But the legislature rejected this rigid paternalistic approach, and instead opted for a "compromise position that 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." *Id.*

Just as compellingly, the legislature has already created a comprehensive statutory scheme to prevent elder financial abuse and undue influence. *See* California Welfare and Institutions Code Section 15600, *et seq.*; Probate Code Section §§ 86, 21380.

Undue influence can be proven directly or through a burden-shifting presumption. *See* Welf & Inst Code § 15610.70; Probate Code Section § 86; *Lintz v. Lintz*, 222 Cal.App.4th 1346 (2014). For example, the presence of a person who is in a confidential relationship with settlor, and who stands to benefit from the instrument, and who also actively participates in procuring it, can give rise to a presumption of undue influence. *See* Probate Code Section § 21380(a)(1)-(6). And once that presumption is raised, the burden shifts to the alleged abuser by clear and convincing evidence that amendment was *not* the product of fraud or undue influence. *See* Probate Code Section § 21380(b). This is a high burden to meet. And not coincidentally, a claim for undue influence in the making of a testamentary instrument is coextensive with and supports a claim for elder financial abuse. *Cf.* Welf & Inst Code § 15610.70 and 15310.30. And once a claim for elder financial abuse is stated, that same claim supports a claim for double damages under Probate Code 859, without the necessity of finding bad faith. *Keading v. Keading*, 60 Cal.

App. 4th 1115 (2021). Moreover, the Elder Abuse and Dependent Adult Civil Protection Act provides for a variety of enhanced remedies, including prejudgment attachment and recovery of attorneys' fees. Welf & Inst. Code § 15657.5. In an area of law where the legislature has already developed an entire statutory scheme of remedies for undue influence and elder financial abuse in the execution of a testamentary instrument, there is no evidence that the legislature intended relying on assistance from vigilante notaries in preventing either, as Appellant would have the Court believe. *See* Welf & Inst. Code § 15610.70, *et seq.*; Probate Code Section §§ 86, 21380.

And finally, notarization does not actually offer any legal protection to the settlor. Under Civil Code §1185, any certificate of "acknowledgement" only verifies the identity "of the individual who signed" the document, and not the truthfulness or validity of the document itself. And here, it is undisputed that the signature on the disputed amendment is in testator's handwriting

F. Unlike in *King* and *Balistreri,* the Revocation Procedure Here is Neither Implicitly nor Explicitly Exclusive

While the trust agreement in *King v. Lynch* did not use the word "exclusive," an amendment required "an instrument in writing signed by both Settlors . . . ." *King* at 2. "[S]igned by both" necessarily implies that an amendment cannot be signed by one settlor *alone*. On the other hand, the mandatory language in *Balistreri* providing that any amendment "shall be made by written instrument signed, with signature acknowledged by notary public," is expressly exclusive. *Balistreri* at 1.

Here, on the other hand, the Trustor's reserving "[t]he right by an acknowledged instrument in writing to revoke or amend" does not render that method of revocation explicitly or implicitly exclusive. And given that the

trust was revocable during the trustor's lifetime and it was hers alone, using the statutory method of revocation or amendment is not inconsistent with the Trust's revocation method.

V. CONCLUSION

The terms of the Bertsch Trust, framed as trustor's broad reservation of her own right to make changes at any time, make modification coextensive with revocation. Where, as here, the trust instrument treats the right to modify equally with the right to revoke, there is no basis for a court to create a distinction between the two rights.

In addition, where the method of modification is not exclusive – expressly exclusive or implicitly by its terms – the statutory method of revocation must remain available. Here, the method of modification here is neither expressly or implicitly exclusive, permitting the statutory method of revocation, and rendering the disputed amendment dated June 10, 2018 valid. Accordingly, the lower court's decision should be affirmed.

Dated: May 23, 2022

Respectfully submitted,
CROSS LAW APC

By: 

OLEG CROSS

Attorney for Respondent
Racquel Kolsrud

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Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4,106 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

Dated: May 23, 2022

Respectfully submitted,
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By: 

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I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years, and not a party to this action. My business address is Cross Law APC, 5190 Governor Dr., Suite 108, San Diego, CA 92122. My e-mail address is oleg@caltrustlaw.com. On May 23, 2022, I served the documents described below in the manner described below:

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