Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Appellant's Reply Brief

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

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Introduction

This case considers whether the same law governing trust revocations also governs modifications, so trustors can preempt the fallback method only by explicitly excluding it. Appellant offers many reasons for finding sections 15401 and 15402 are not congruent.

- The Legislature altered the former statutory scheme to regulate revocations and modifications separately;
- Sections 15401 and 15402 have very different texts;
- Section 15401 offers a fallback method to supplement the prescribed method, whereas section 15402 does not;
- Section 15401 has an "explicitly exclusive" requirement but section 15402 does not;
- The legislative history that explained the policy rationale for the fallback method referenced only revocation, not modification;
- The Legislature revised a portion of section 15401, adding "modification" to a provision that formerly addressed only revocation, to "make clear that the rule applicable to revocation by an attorney in fact applies to modification," yet did not thus clarify any other part of section 15401, including the need to expressly exclude the fallback method.

Though statutory language is the most reliable guide in discerning the meaning of legislation (*McHugh v. Protective Life, Ins. Co.* (2021) 12 Cal.5th 213, 227), respondent Union of Concerned Scientists (UCS) attempts to explain away the textual contrast by contending section 15402, according to its "plain meaning," encompasses both section 15401's fallback method and its requirement that exclusion must be explicit. (UCS Brief (UCSB) 21-22.) Respondent Galligan contends section 15402 "expressly incorporates" section 15401's revocation procedure, including its explicitly exclusive condition. (Galligan Brief (GB) 24, 42.) There would be such express incorporation if section 15402 referenced "the method prescribed in section 15401, subdivision (a)(2)" or described the method of delivering a signed writing to a trustee. But section 15402 makes neither reference. As it stands, if the Legislature incorporated the terms of section 15401 into 15402 "expressly," so the fallback method would presumptively apply without an explicit exclusion, then, a fortiori, Bertsch's instant exclusion of other methods of modification was likewise "explicit."

Section 15402 is not a carbon copy of section 15401; the Legislature created disparate rules for regulating revocations and modifications. This Court should recognize and respect the difference between the two provisions.

Statement of Facts

Several issues in respondents' statements of facts warrant clarification. First, respondent Kolsrud asserts Jeane Bertsch disinherited her niece, appellant, due to "a well-documented falling out with Jeane on account of Appellant's greed." (Kolsrud Brief (KB 4).) Far from being "well-documented," it is not documented at all; the brief cites page 3 of the Court of Appeal Opinion, but that mentions neither any "falling out" nor Appellant's "greed," let alone any connection between the two. (Opn. 3.)

Kolsrud and respondent Galligan further cite the Opinion as evidence that Bertsch advised "her prior estate planning attorney [respondent Galligan] that [Bertsch] had revoked the First Amendment." Op. at 5, n. 1." (KB 6; (Galligan's Brief (GB) 11).) The Opinion did not confirm Galligan's self-interested account; it *described* it.

> Galligan's brief also asserted that the 2016 amendment had been expressly revoked. It stated that Bertsch told Galligan she had a dispute with Haggerty in late 2017 and Bertsch had "destroyed the [2016 a]mendment with the intent to revoke it. Neither the original nor any copy of the [2016 a]mendment was found among [Bertsch's] estate planning documents in her possession following her death and the original has never been found.

(Opn. 5, fn. 1.)[1]

Finally, respondent UCS contends Bertsch had "the express, unrestricted, unilateral authority to both revoke and amend the trust." (UCSB 7.) The authority was not unrestricted, as the trust reserved the right to revoke or amend by an *acknowledged instrument*. (Opn. 2.) It did not reserve any other method. The prerequisite of an acknowledgement was specially added for this provision. By contrast, other provisions regarding written instruments did not require acknowledgement. (See 1CT 24: "Each individual Trustee (including successors) shall have the right to appoint an individual successor trustee by an instrument in writing"; see also 1CT 27, allowing the trustee to allocate capital gain to income "by the execution by the Trustee of an instrument in writing . . . .")

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[1] Though section 15401, subdivision (a)(2) authorizes both the trustor's prescribed method and the fallback method of delivering a signed writing to the trustee as valid means to revoke a trust, no party's brief asserts that physically destroying a document is also a valid method.

Argument

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

A. The case presents a legal question not a factual one.

The petition for review presented a legal question:

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

Respondents' briefs seem to assume otherwise. After rewriting the Question Presented to render it more argumentative (but see Rule of Ct., rule 8.504, subd. (b)(1)), respondent Kolsrud characterizes appellant's argument against recognizing Bertsch's 2018 action as a factual one. Kolsrud describes appellant's position as "the June 10, 2018 amendment was not 'acknowledged,' . . . and purportedly must fail for lack of notarization." (Kolsrud Brief (KB) 4-5.) To the contrary, appellant's argument is a legal one: the section 15401 rule, which provides the trustor's prescribed method of revocation must be explicitly exclusive to preempt the subdivision (a)(2) fallback method, does not likewise govern modifications under section 15402. It was this fallback

method, by which the trustor signs a writing and delivers to the trustee---not an "acknowledgement"---on which the Court of Appeal relied in validating Bertsch's 2018 action. (Opn. 17-18.)

UCS offers another factual argument. They contend this Court should affirm the change to the trust purportedly effected by the 2018 writing because Bertsch (1) signed the writing; (2) she had the capacity to do so; and (3) there is no proof of undue influence. (UCSB 18, 21.) UCS thus contends affirmance is compulsory because the writing manifested "Bert[s]ch's clear intentions." (UCSB 18, 21.)

Such reasoning flies in the face of the entire scheme created by the Legislature to regulate trusts. Other than exceptional cases of undue influence or incapacity, a trustor's writing will *always* manifest the trustor's intentions regarding the outcome of a modification, i.e. which beneficiaries stand to gain or lose by the change. But as the opening brief observed, a modification must also conform to the trustor's expressed intention regarding *how* the trust will change, not just *who* will benefit. (AOB 9, fn. 1, citing *Pena v. Dey* (2019) 39 Cal.App.5th 546, 555.)

The facts of *Pena* foreclose the argument that the court must implement Bertsch's 2018 writing if it reflected her "clear intentions." In *Pena*, a trustor (Anderson) reached out

to counsel for assistance in modifying his trust, and personally made handwritten interlineations that expressed his intent for Dey to receive seven percent of the remainder of the trust estate. (*Pena*, *supra*, 39 Cal.App.5th at p. 550.) Counsel incorporated this change into an amended trust and prepared the document for Anderson to sign, but he died before he could do so. (*Ibid.*) The Court of Appeal concluded "[T]here is no dispute in this case that Anderson intended Dey to receive a portion of his trust estate." (*Id.* at p. 549.)

That undisputed intent was not enough, however, because the trust itself required the trustor to sign any amendment. (*Pena*, *supra*, 39 Cal.App.5th at p. 555.) Though Anderson made handwritten interlineations, and intended to sign a document incorporating them, he never actually did so. (*Ibid.*) The *Pena* court explained that the "intent of the settlor," to which it must give effect, included " 'the whole of the trust instrument, not just separate parts of it." (*Ibid.*, internal citation omitted.) Or as the opening brief put it, courts must "give effect to the trustor's intent regarding the *process* of modification as well as its *outcome*." (AOB 9, fn. 1.)

That principle governs here. Bertsch expressed her intent in devising a method of modification that required an acknowledged written instrument. Such a restriction is not necessary (or unusual)**,** and Bertsch could have omitted it, as

she did in prescribing that any written instrument could effect other functions. (1CT 24, 27.) Moreover, she re-affirmed its importance when she complied with it in amending the trust in 2016. Though respondents repeatedly emphasize an imperative of maximizing flexibility (KB 7-8, 10; UCSB 45; GB 28), it was Bertsch herself who prescribed the use of an acknowledged written instrument, and she complied with it in 2016. Such choice and compliance also demonstrated her "clear intentions."

The specific facts of Bertsch's personal actions are not the determinative consideration in this case. Rather, this Court must decide whether section 15402 tracks section 15401 and authorizes the fallback method wherever the prescribed method is not explicitly exclusive. It does not.

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

1. The Legislature did not "expressly incorporate" section 15401, subdivision (a)(2) into section 15402.

Section 15402 provides "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." The parties dispute the meaning of "the procedure for revocation." Appellant asserts the procedure for revocation is the one prescribed by the trustor, whereas respondents assert "the procedure" is actually two procedures: the one prescribed by the trustor *and* the one prescribed by the Legislature in section 15401, subdivision (a)(2). UCS thus contends "it could not be any clearer" as to the meaning of "the procedure":

> "[T]he settlor may modify the trust by the procedure for revocation" (that is, by specifying a particular manner of modification pursuant to section 15401, subdivision (a)(1), or by the 'statutory method of subdivision (a)(2) by delivering a signed writing to the trustee).

(UCSB 21-22.)

Appellant would agree section 15402 could not be clearer—if it included all the language in respondent's parenthetical. But that language comes from UCS, not the Legislature.

Galligan likewise insists the Legislature "incorporated section 15401's language by reference in section 15402." (GB 42.) She insists not only that the Legislature incorporated the fallback method into section 15402, but also that the "plain language" of section 15402 "*expressly* incorporates it." (GB 24, emphasis added.) She further asserts the Legislature incorporated not just the fallback method of section 15401, subdivision (a)(2) but also its requirement that a trustor wishing to preempt the fallback method make her prescribed method "explicitly exclusive." (GB 32.)

In a case where it could be dispositive whether a method's exclusivity is explicit/express or only implicit/implied, it is essential that the parties correctly use these terms. Under no understanding of the word does section 15402 "*expressly* incorporate" the fallback method of section 15401, subdivision (a)(2). The Legislature could have expressly incorporated that method by adding to section 15402 a reference to "the revocation procedure described in section 15041, subdivision (a)(2)," or by describing the method by which a trustor "delivers a signed writing to the trustee," but it did neither. Any supposed incorporation of section 15401's terms into section 15402 was less "express" than the exclusivity of Bertsch's prescribed method of modification. Accordingly, if the supposed incorporation was

express, so too was the exclusivity of the acknowledged-instrument method, rendering the fallback method unavailable.

2. The Legislature equated the revocation and modification method for *individual trusts* (that were silent as to modification), not the *statewide rules* governing revocation and modification.

The first question to ask in construing section 15402 is why the Legislature would even indicate that the modification method was presumptively the same as the revocation method (unless the trust "provides otherwise"). If the trustor prescribed the same method for revocation and modification, such prescription would render superfluous section 15402's equating the method for revocation and modification. And if the trustor prescribed a different method for modification, that prescribed method would override the presumptive congruence between revocation method and modification method (it would be an instance where "the trust instrument provides otherwise") so again section 15402 would serve no purpose. The trustor's prescribed method will always control.

A need for the Legislature to prescribe a method for modification arises only where the trust *does not prescribe its own*. This was the factual predicate in *Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 781-82, where the Court

of Appeal recognized the trustor had the power to modify the trust (derived by implication from the power to revoke), but she had not prescribed a method for that modification. On this reading, therefore, the purpose of section 15402 is to implement the principle that a revocable trust is also a modifiable trust (even if the trustor does not prescribe a method for modification) *by supplying a modification method for such a "silent" trust*. (See AOB 12, 16.)

Appellant's opening brief highlighted the textual differences between sections 15401 and 15402; the "explicitly exclusive" condition for preempting the fallback method appears only in the former. (AOB 13, 21.) Galligan, however, offers what she seems to characterize as unambiguous evidence that compels congruent construction of the two sections. Galligan asserts "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.)" (GB 41, emphasis added.) Careful analysis of this supposed proof text reveals this is another questionable use of the adverb "expressly."

The relevant paragraph on page 568 of the California Law Revision Commission Reports provides as follows:

> Under general principles the settlor or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. See Restatements (Second) of Trusts § 331 (1957); *Heifetz v. Bank of America*, 147 Cal.App.2d 776, 781-82, 306 P.2d 979 (1957) (citing the First Restatement of Trusts).] The proposed law codifies this rule and also makes clear that the *method* of modification is the same as the method of termination, barring a contrary provision in the trust.

(Recommendation Proposing the Trust Law (Sept. 1986) 18 Cal. Law Revision Com. Rep. at p. 568, emphasis added.)

The parties now differ on the meaning of the word "method" in that paragraph. Appellant favors its plain meaning: the manner in which revocation or modification will be effected. It is no coincidence that the Commission's report cited *Heifetz*, *supra*, 147 Cal.App.2d 776; the quoted paragraph essentially fills the vacuum created by a *Heifetz*-like "silent trust," which lacks a prescribed modification method. The second sentence thus authorizes the trustor's prescribed revocation method to effect modification too. The trustor presumably would be comfortable with this method, as it was the one she herself prescribed for revocation.

Galligan's argument, by contrast, revises "method" to mean "rule," so it is not the same *method* for both revocation and modification but the same *rule*. (GB 41: "the Commission expressly stated its intent was to maintain the same rule for

both revocation and modification by codifying the common law rule.") Under her theory, what is the "same" for revocation and modification is not just the particular *method* to modify a particular trust but a broader *rule* of law applicable statewide: For both revocations and modifications, a prescribed method must be explicitly exclusive to preempt the fallback method.

As her brief argues,

> 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*. . . .

(GB 22, emphasis added.)

The result of this "same treatment," according to Galligan, is that, like revocation, "modification can be accomplished by the statutory method unless the trust makes another method explicitly exclusive." (GB 22.)

Galligan's construction is problematic. It stands to reason that an individual trustor may provide a different method for revocation and modification for *her own trust* if she chooses to "provide otherwise" from a presumptive congruence between the two. But if the *same method* refers to a congruent construction of the statewide *rule* governing revocations (in section 15401) and modifications (in

section15402), an individual trustor would have no authority to create a contrary provision in her trust to subvert a state statute.

In sum, the better reading of the quoted page 568 paragraph is that it presumptively equates an individual trust's revocation and modification method, not the statewide rule regarding whether a trustor must render a prescribed method explicitly exclusive to preempt the fallback method.[2]

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[2] Similarly, this Court should find appellant's construction of "the procedure for revocation" in section 15402 more persuasive than Galligan's, even if it is not "indisputabl[e]." (GB 21.) Appellant construes "the procedure for revocation" to refer to the trustor's prescribed method, whereas Galligan contends it encompasses *both* the method provided in the trust *and* a signed writing delivered to the trustee. (GB 21; see also UCSB 21-22.) That expansive understanding of "the procedure" sits uneasily with the statute's use of the singular "procedure" rather than plural "procedures." Galligan's interpretation also raises the question of why the Legislature was so cryptic, as section 15402 could have "expressly" referenced the method described in section 15401, subdivision (a)(2), or summarized it as delivering a signed writing to a trustee. By contrast, it is apparent why the Legislature did not describe the "procedure for revocation" in greater detail if appellant is correct in asserting it refers to the trustor's specifically prescribed method, because that would vary from case to case.

3. The rule codified in section 15402 protects the power to amend a trust, not a congruence between revocation and modification law.

As the quoted paragraph indicated, the Legislature intended to codify a rule.

> Under general principles the settlor or other person holding the power to revoke, may modify as well as terminate a revocable trust. [Fn. See Restatements (Second) of Trusts § 331 (1957); *Heifetz v. Bank of America*, 147 Cal.App.2d 776, 781-82, 306 P.2d 979 (1957) (citing the First Restatement of Trusts).] The proposed law *codifies this rule* and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.

(18 Cal. Law Revision Com. Rep. at p. 568, emphasis added.)[3] The reference to codifying appears at the start of the second sentence, and recalls the rule of the first sentence: a trustor "may modify as well as terminate a revocable trust." The report directly cited *Heifetz*, *supra*, 147 Cal.App.2d at pp. 781-782, which embraced the principle that "the power to amend is included in the power to revoke." Appellant accepts this principle, and agrees that trustors need not explicitly indicate the trust can be modified for it to be so.

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[3] The paragraph shows the Commission used "revocation" and "termination" synonymously.

The Law Revision Commission comment following section 15402 thus explains,

> This section codifies the general rule that a power of revocation implies the power of modification." See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, 147 Cal.App.2d 776, 781-82, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 331 comment g (1957).

(California Law Revision Commission commentary, West's Ann. Prob. Code (2022 ed.) foll. § 15402.)

The "rule" simply provides that where a trust is revocable, it presumptively may be also modified.

Respondent Galligan offers a far broader construction of the rule hereby codified. She contends the "common law rule" codified in section 15402 provides for a congruence between rules governing revocation and modification. (GB 25-26, 32.) The single sentence should suffice to refute this claim, as it references the prior sentence's rule (enabling the trustor "to modify as well as terminate a revocable trust") before treating the congruence of revocation and modification as a *separate principle*.

> The proposed law codifies this rule *and also makes clear* that the method of modification is the same as the method of termination, barring a contrary provision in the trust.

(18 Cal. Law Revision Com. Rep. at p. 568, emphasis added.)

Neither *Heifetz* nor any "common law rule" it embraced can support Galigan's broader assertion, that both a prescribed method and the fallback method can effect modification (unless the trustor explicitly excludes the fallback method). Prior to recodification, even *revocation* could occur through only one method, either the prescribed one (*Hibernia Bank v. Wells Fargo Bank* (1977) 66 Cal.App.3d 399, 404; *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300, 304), or, if none was prescribed, the fallback method. (*Fleishman v. Blechman* (1957) 148 Cal.App.2d 88, 95.) But no fallback method was available where the trustor prescribed her own. It was not until the 1986 recodification that the law authorized even revocation by multiple methods. A fortiori, the common law rule did not formerly authorize *modification* through multiple methods.[4]

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[4] Galligan cites an excerpt from the Third Restatement on Trusts that requires explicit exclusivity to preempt the fallback method. (GB 37.) This citation does not aid Galligan, because the Legislature codified 15402 two decades before the Restatement was revised. (See Prob. Code, § 15002, emphasis added: "Except to the extent that the common law rules governing trusts are *modified by statute*, the common law as to trusts is the law of this state.") Nonetheless, the Third Restatement is instructive for showing how the Legislature could have phrased its 1986 enactments to achieve the result Galligan now desires.

The concept of nonexclusive prescriptions was hardly contemplated by the Restatement. Though Galligan accuses appellant of mischaracterizing the Second Restatement by recalling where the "trust specified a modification method . . . only that method could validly modify the trust" (GB 36, citing AOB 12), there were only two paragraphs commenting on the subject. The heading for comment c was "Where **no method** of modification specified," and the heading for comment d was "Where **method** of modification specified," and that latter section indeed provided, "If the settlor reserves a power to modify the trust only in a particular manner . . . he can modify the trust only in that manner." (Restatement (Second) of Trusts § 331(c), (d) (1957) (emphases added).) So far as the Restatement was concerned, every prescribed method was at least implicitly exclusive.

Section 15402 codifies the "power to amend," not the power to amend through the fallback method where the trustor prescribed her own method.

4. The Law Revision Commission Reports reflect disparate treatment of revocations and modifications.

Throughout her brief, Galligan insists the legislative history proves the Legislature *stated* its intent to establish

congruent regulation of revocations and modifications. (See GB 22: "all the Commission's statements about modification declare that modification should be treated the same as revocation"; GB 29: "Despite using two statutes [sections 15401 and 15402], though, the Commission stated its intent to maintain the same rule for both.") UCS similarly asserts a "clear legislative intent to liberalize and make more flexible the power to both revoke and modify a trust instrument." (UCSB 26-27.) As shown in Arguments (B)(2), *ante*, the presumptive congruence between revocation and modification concerns the method for a *particular trust* that did not prescribe a modification method, not the rules governing state law in sections 15401 and 15402, which an individual trustor has no power to "provide[] otherwise." For all of respondents' emphasis on the "compromise" policy that favored loosening restrictions on revocations, they cannot show the analysis favored the same loosening of restrictions on modifications.

To the contrary, the analysis offered to justify trustor flexibility referenced revocation only.

> [T]he settlor may wish to establish a more complicated manner of **revocation** than that provided by statute where there is a concern about "future senility or future undue influence while in a weakened condition." On the other hand, the case-law rule may be criticized as defeating the clear intention of the settlor who attempts to **revoke** a revocable trust by the statutory method, in circumstances that do not involve undue influence or a lack of capacity. . . [¶.] The proposed law adopts 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.

(18 Cal. Law Revision Com. Rep. at p. 568, emphasis added.)

It is clear from the paragraphs following the expression of this "compromise" position governing revocation that the Commission was not using "revocation" as shorthand to encompass both revocation and modification, because it then addressed termination of an irrevocable trust and modification, and diligently referenced both functions every single time.

> Under existing law, if the settlor and all beneficiaries are legally competent and seek the **termination or modification** of an otherwise irrevocable trust, it can be **terminated or modified** even though the purposes of the trust have not been accomplished . . . . This rule stands on the firm footing that if everyone with an interest agrees to a **modification or termination**, there is no reason not to allow it. . . . [¶.] There are situations where the beneficiaries may wish to **modify or terminate** an irrevocable trust but the consent of the settlor is not forthcoming . . . . Under exiting case law the beneficiaries may **modify or terminate** if they all consent and and a material purpose of the trust would not be defeated thereby.

(18 Cal. Law Revision Com. Rep. at p. 569, emphasis added.)

Contrary to respondents' claims, the evidence does not show the Commission stated an intent to establish the same statutory rule to govern revocations and modifications, or that the Commission intended for the flexibility it favored for revocation to extend likewise to modifications.

5. The Probate Code uses the term revocation when regulating revocations, not when regulating revocations and modifications, as it separately regulates modifications.

The Probate Code reifies the contrasting treatment of revocations and modifications. The opening brief asserted the Legislature's decision to create separate Probate Code

sections to govern revocation and modification, with substantially disparate texts, signaled the rules governing revocation and modification were no longer coterminous. (AOB 14, see also *King v. Lynch* (2012) 204 Cal.App.4th 1186, 1193: "[T]he Legislature no longer intended the same rules to apply to both revocation and modification.") Appellant further observed that whereas section 15401, subdivision (a)(2) refers to only revocation, other provisions like subdivision (c) and (d) (and sections 15403 and 15404) refer to both procedures. In fact, what is now section 15401, subdivision (c) originally referenced only revocation, but the Legislature revised the provision to (expressly) encompass both revocation and modification, to "make clear that the rule applicable to revocation by an attorney in fact applies to modification." (AOB 32, citing Stats. 1988, ch. 113, § 19, p. 481; Cal. Law. Revision Com. com., West's Ann. Prob. Code (2022 ed.) foll. § 15401.) Section 15401, subdivision (a)(2) includes the term "revocation" four times (and "revoked" once), and the Legislature could have likewise clarified that all the subdivision (a)(2) provisions applicable to revocation also apply to modification, but it did not.

To disprove that the Legislature intended to distinguish between revocation and modification, respondents UCS and Galligan both contend modification is just a subspecies of

revocation — a revocation "in part." (UCSB 20; GB 30.) The two functions are not the same; the *Heifetz* trust could be revoked "in whole or in part," yet the Court of Appeal still needed to determine whether the trustor could "amend" it. (*Heifetz*, *supra*, 147 Cal.App.2d 776, 781.) Partial revocation would occur if the trustor revoked a gift to her daughter, but it would be a modification if the trustor changed beneficiaries or the scheme of distribution. (*Id*. at p. 782.)

In any event, respondents' reasoning proves too much. If revoking in part is coterminous with modification, why did the Legislature need to authorize modification through the revocation method in section 15402? Why revise section 15401 to "make clear that the rule applicable to revocation by an attorney in fact applies to modification" if the rules for modification are subsumed within those for revocation? Most fundamentally, why create a section 15402 at all?

Appellant noted this Court takes statutory disparities seriously. (AOB 33, citing *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726: "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show a different intention existed.") Alone among respondents, Galligan addresses *Rashidi*, but not appellant's actual argument.

The *Rashidi* court included the above quotation just after it recalled the Legislature limited attorney fees in medical malpractice cases, regardless of "whether the recovery is by settlement, arbitration, or judgment," as provided by *Business and Professions Code* section 6146. (*Rashidi*, *supra*, 60 Cal.4th at p. 726.) By contrast, Civil Code section 3333.2, which concerned the plaintiff's own recovery, did not include a "similar provision"; it limited only damages in an "action," and thus its limits did not apply to settlements. (*Id.* at pp. 725-726.) It was only after contrasting Business and Professions Code section 6146 and Civil Code section 3333.2 that this Court recalled the principle that "[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show a different intention existed." (*Rashidi*, at p. 726.)

This Court thus observed that "the Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform," yet it chose not to impose such a limit on plaintiff's noneconomic damages. (*Rashidi*, *supra*, 60 Cal.4th at p. 726.) Appellant therefore analogized this distinction to the *King* court's observation that the Legislature "knew how to limit the exclusivity of a revocation method provided in a trust and

chose not to impose such a limitation on modifications in section 15402." (*King*, *supra*, 204 Cal.App.4th 1186, 1193.)

> *Rashidi* concluded the Legislature intended to exclude *settlements* from the rule limiting noneconomic damages, so different rules governed settlements and judgments. Likewise, this Court should conclude the Legislature intended to exclude *modifications* from the rule authorizing the fallback method unless the prescribed method is explicitly exclusive, so different rules govern modifications and revocations.

(AOB 34.)

Rather than confront this analogy, Galligan modifies it in two different ways to avoid the full parallel. First, although the contrast this Court described before quoting the cited canon was that between the inclusion of "settlement" proceeds in Business and Professions Code section 6146 and the absence of any "similar provision" in Civil Code section 3333.2, Galligan omits any reference to the Business and Professions Code and describes only the textual difference within section 3333.2 between "noneconomic losses" and "damages for noneconomic losses." (GB 31, citing *Rashidi* at p. 726.) (The Court noted those terms also warranted disparate construction, a point that also furthers appellant's argument.) Second, Galligan claims appellant cited *Rashidi* only regarding the reference to section 15401, subdivision (c)'s reference to an attorney in fact. (GB 30.)

But the opening brief made a broader contrast. Appellant did not reference the contrast within Civil Code section 3333.2 between "noneconomic losses" and "damages for noneconomic losses" but the contrast between the inclusion of the term "settlement" in Business and Professions Code section 6146 and the absence of the term from Civil Code section 3333.2, which parallels the Legislature's including the "explicitly exclusive" requirement in section 15401 and omitting it from section 15402. (AOB 33.) *Rashidi* inferred from this contrast that the Legislature "knew how to include settlement dollars when it designed limits [regarding] medical malpractice litigation reform," so the absence of the term "settlement" from section 3333.2 established the Legislature did not wish to include settlements in the limits on damages. (*Rashidi*, at p. 726.) In the same way, the Legislature's inclusion in section 15401 of the requirement that a revocation method be explicitly exclusive to preempt the fallback method, combined with the omission of that requirement from section 15402, establishes the Legislature did not wish to impose that requirement on modifications. It knew how to do so, and chose not to.

Only by recharacterizing appellant's argument can Galligan can distinguish *Rashidi*. She asserts the Legislature added the contrasting provisions in *Rashidi* contemporaneously, whereas the section 15401, subdivision (c) revision came after the initial enactment. That distinction fails, however, when the contrast concerns not section 15401, subdivision (c) specifically but sections 15401 and 15402, which were enacted contemporaneously. In any event, Galligan's contemporaneity point holds minimal significance. The Legislature "knew how to" make clear that section 15401 references to revocation also encompassed modification, and could have revised subdivision (a)(2) at the same time it revised what is now subdivision (c), but declined to do so.[5]

The Legislature created separate and disparate provisions for revocations in section 15401 and modifications in section 15402. It knew how to create the congruence respondents desire, but did not.

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[5] Galligan also makes an argument regarding legislative history (GB 31), which appellant will address in Argument D, *post*.

C. The congruence between the instant trust's revocation and modification procedure does not support importing section 15401, subdivision (a)(2)'s rule into section 15402, because the trustor prescribed modification by an acknowledged instrument, not by *any* method authorized by the Legislature for revocation.

The Opinion below noted this case is factually distinguishable from *King*, *supra*, 204 Cal.App.4th 1186, as the instant trust prescribed the same method for both revocation and modification. (Opn. 10.) The panel suggested this congruence could support respondents' position even if *King* correctly discerned an intent by the Legislature to regulate revocations and modifications differently, because Bertsch's prescribing the same method could show she wanted to treat the two the same. "Because the trust does not distinguish between revocation and modification . . . the trust may be modified by *any* valid method of revocation." (Opn. 11, emphasis added.) The opening brief disputed any imputed intent to authorize the fallback method for modification; Bertsch authorized the particular method of an acknowledged instrument (which the Legislature supplemented with the fallback method for *revocation*), not a full congruence between revocation and modification options.

Respondent Galligan contends it would be strange if a trustor who prescribed the same method for both revocation

and modification could use the fallback method for revocation but had to use the prescribed method for modification. (GB 24.) But that is the result of the Legislature's including the fallback method in section 15401 but not 15402. What would be really strange is if, as Galligan contends, because the trust prescribed revocation and modification through an acknowledged instrument, Bertsch could use the fallback method for modification, but if Bertsch had prepared a trust that *accurately described California law* by indicating the trust could be modified by an acknowledged instrument and could be revoked by an acknowledged instrument or a signed writing delivered to the trustee (in accordance with section 15402 subdivision (a)(2)), then it could *not* be modified through the fallback method because the prescribed methods for revocation and modification would not be congruent.

Galligan's argument depends on the Legislature's supposed decision to equate the procedures for revocation and modification, not Bertsch's doing so in this particular trust. Galligan agrees it would "make sense" for Bertsch's available methods to differ (regardless of her congruent prescription) if "the Commission indicated an intent to treat modification" differently from revocation. (GB 24.) As appellant has shown in Argument B, *ante*, both the text of the statutes and the legislative history show that it did.

The Legislature decided to authorize the fallback method for revocation, but made no such authorization for modification. There is nothing strange about giving effect to those enactments.

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

The opening brief compared the Legislature's disparate treatment of revocations and modifications to the disparate treatment of verdicts and settlements described in *Rashidi*, *supra*, 60 Cal.4th 718; just as the Legislature could harbor more concern about excessive jury verdicts than excessive settlements, it could harbor more concern about coerced modifications than coerced revocations. (AOB 42-43.) In attempting to distinguish *Rashidi*, Galligan contends appellant's construction, which declines to import the explicit exclusivity requirement into section 15402, "contradicts the express legislative intent." (GB 31.) But Galligan nowhere shows an "express legislative intent" favoring a congruent construction of sections 15401 and 15402, and their express texts are considerably different.

Notwithstanding Galligan's contention that *Rashidi* is distinguishable because its construction "aligned with the legislative purpose," the two cases are similar. (GB 31.) *Rashidi* observed the legislative history concerned the effort to cap jury awards, as there was nothing to show legislative concern over settlement recoveries, just as the legislative history here concerned the goal of providing more flexibility

for revocations, not modifications. (See Argument (B)(4), *ante*, citing 18 Cal. Law Revision Com. Rep. at p. 568.) The impact on settlements in *Rashidi*, like the impact on modifications here, was at most "collateral." (*Rashidi*, *supra*, 60 Cal.4th at p. 726.)

Appellant offered a reasonable ground for explaining why the Legislature might choose a looser policy for revocations than modifications, as there is less risk that parties will unlawfully abuse their influence to induce truust revocations. (AOB 42-43.) Galligan faults appellant for speculating about which policy choices the Legislature could have made, rather then prove its motivations with certainty. But it is not appellant's burden to prove conclusively *why* the Legislature differentiated between revocations and modifications; it is enough for her to show the Legislature did so, and this decision will not produce absurd results. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.) Certainty as to the legislative motive is not required; *Rashidi* itself endorsed the theory that speculated "the Legislature *may have felt* that the fixed $250,000 limit would promote settlements." (*Rashidi*, *supra*, 60 Cal.4th at p. 726, emphasis added.)

Finally, Galligan contends special guardrails around modification are not necessary because there are other means of protecting against elder abuse. (GB 34-35.) There are

likewise other protections against excessive jury verdicts (such as jury instructions), yet the existence of one protective measure does not foreclose the use of another. Galligan cites to section 21380, but that is a measure designed to protect living elders from abuse (by only specified parties) not the integrity of posthumous distributions. In any event, section 21380 was not enacted until 2010; the Legislature would not have considered it superfluous to limit modification methods more than revocation methods due to a provision that would not appear for another quarter-century.

Providing additional protections against modifications would not lead to absurd results.

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

The opening brief urged this Court to apply *King*, *supra*, 204 Cal.App.4th 1186, as it was the prevailing precedent when Bertsch first devised her trust. (AOB 44.) Galligan first opposes this position by asserting the issue is not cognizable before this Court (GB 53), but how to apply a new rule—retrospectively or only prospectively—is always within the Court's control, and implicit in any grant of review. (See *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1265.) Galligan is also incorrect in disputing *King* was the prevailing precedent when Bertsch devised her trust. (GB 54.) Though she cites *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, that decision evaluated former Civil Code section 2280, not the post-recodification law.[6]

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[6] As *King, supra,* 204 Cal.App.4th 1186, 1192, thus observed,

> *Huscher* was applying the pre-1986 law. At that time, there was no statute addressing modification. Rather, the rules on revocation were applied to modification by implication. Under current law, trust modification is governed by section 15402. Accordingly, *Huscher* does not provide authority for appellant's position.

Galligan stands on stronger ground in noting this Court ordinarily does not confine its statutory interpretations to prospective effect. (GB 54, citing *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878.) But sometimes it does. (*Williams & Fickett*, *supra*, 2 Cal.5th 1258, 1282.) *Williams & Fickett* is a more apposite precedent than *Ferra*.

There was no prevailing precedent for the Court to disapprove in *Ferra* ("We neither overrule nor disapprove any decision"), and there were conflicting extant federal court opinions, so no one could claim reasonable reliance on a contrary interpretation of how to construe Labor Code section 226.7, subdivision (c) in calculating an employee's "regular rate of compensation." (*Ferra*, *supra*, 11 Cal.5th at p. 878.) By contrast, the Court did disapprove a prior precedent in *Williams & Fickett*. Contrary to Galligan's insistence that appellant must prove Bertsch's mental processes specifically (GB 53), *Williams & Fickett* found it was enough if "plaintiff and others in its position could reasonably have relied" on that precedent." (2 Cal.5th at p. 1258; see also at p. 1282: "[A] taxpayer in plaintiff's position might have reasonably relied" on the precedent.) In other words, the Court did not require any showing about the plaintiff's mental processes; it was enough if the plaintiff—or any similarly-situated plaintiff—*could* have relied on it.

Whether or not Bertsch subjectively relied on *King*, *supra*, 204 Cal.App.4th 1186, she (and other trustors whose trusts will be affected by this Court's decision) could reasonably have done so. Any disapproval of *King* should be prospective only.

F. The instant modification method was as exclusive as that used in *Balistreri*.

The concurring opinion in *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, review granted May 11, 2022, S273909, suggested it might be enough for a modification method to be implicitly exclusive to preempt the fallback method. (*Id*. at p. 524, conc. opn. of Tucher, J.) Respondent Kolsrud asserts such a rule would not aid appellant, because unlike the modification provisions in *King*, *supra*, 204 Cal.App.4th 1186, and *Balistreri*, which were "expressly exclusive," Bertsch's trust was not even "implicitly exclusive." (KB 15.) To the contrary, the instant trust provision was at least as exclusive as the one in *Balistreri,* and more exclusive than the one in *King*. If those trust provisions were exclusive (explicitly or implicitly), then so was Bertsch's.

The trust in *Balistreri* provided any amendment or revocation *shall be made* by written instrument signed [and] acknowledged by a notary public, by the trustor(s) . . . and delivered to the trustee." (*Balistreri*, *supra*, 75 Cal.App.5th at p. 515, emphasis added.) Of course, the trust did not compel either trustor to amend or revoke the trust, but if one wished to do so, that trustor needed to sign, acknowledge, and deliver it. Although the trust did not *explicitly* say this method was exclusive, its singling out a particular method at least

implicitly prescribed that method; if modification/revocation would occur through signing/acknowledging/delivering, it would not occur through *any other method*.

This condition resembles the one imposed below. Bertsch reserved the right "by an acknowledged instrument in writing to revoke or amend" the trust. (Opn. 2.) In other words, Bertsch reserved the right to revoke or amend by an acknowledged instrument; she did not reserve the right to use *any other method*. Though neither the *Balisteri* nor Bertsch trust explicitly excluded other methods, their singling out one authorized method rendered each implicitly exclusive.

A finding of exclusivity is especially warranted here. The trust imposed a requirement that a written instrument be "acknowledged" for revoking or amending the trust, whereas other purposes, such as appointing successor trustees or imputing income, could be effected by a written instrument that was not acknowledged. (1CT 24, 27.) To paraphrase *King*, *supra*, 204 Cal.App.4th 1186, 1193, the addition of "acknowledged" to modify "instrument" in the amendment provision indicates Bertsch knew how to authorize more flexible procedures but chose to impose a greater restriction on the particular function of *amending* the trust. Or to paraphrase *Rashidi*, *supra*, 60 Cal.4th 718, 726: As the trustee and income provisions lacked a requirement for an

acknowledged instrument, the inclusion of that requirement for amendment "is significant to show a different intention existed."

Both the instant and *Balistreri* trust were more restrictive than the one in *King*, *supra*, 204 Cal.App.4th 1186. That trust provided it "may be amended . . . by an instrument in writing signed by both Settlors and delivered to the Trustee," and "may be revoked . . . by an instrument in writing signed by either Settlor and delivered to the Trustee and the other Settlor." (*Id*. at pp. 1188-1189.) Unlike *Balistreri*, it used "may" instead of "shall." Kolsrud contends this method was exclusive because if amendment needs both trustors' signatures, it "necessarily implies" that one trustor's signature is not a valid method. (KB 15.) By that logic, however, Bertsch's reserving the method of an acknowledged instrument would "necessarily imply" an unacknowledged instrument was not a valid method.

Appellant's argument, of course, is that there is no exclusivity condition for modifications in section 15402. If, however, this Court is inclined to favor Justice Tucher's position holding an implicitly exclusive method suffices to preempt the fallback method, then the instant trust should surely qualify.

G. This Court should reverse because section 15402 does not authorize the fallback method for modification.

The Court of Appeal rested its decision on its construction of the Probate Code. "Bertsch complied with the statutory method by signing the 2018 amendment and delivering it to herself as trustee. It was **therefore** a valid modification of the trust agreement." (Opn. 11-12, emphasis added.) Galligan contends, however, that if her legal position is incorrect, because sections 15401 and 15402 are not congruent and do not govern revocations and modifications in the same way, that she will be "entitled to argue on remand" that her 2018 attempted amendment complied with her prescribed method of an acknowledged instrument. (GB 55.) The Court of Appeal would have deferentially reviewed such a finding if there had been one. Moreover, if Bertsch had complied with her prescribed method, neither court would have had any reason to examine the statutes and their legislative history to evaluate the availability of the fallback method. Indeed, courts routinely offer multiple grounds to insulate their decisions from reversal, but neither the lower court nor the Court of Appeal did so, despite respondents' requests.

This Court should reverse based on the legal invalidity of the fallback method below.

Conclusion

The 1986 legislation codified two distinct principles of *Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 781-82: A trustor's power to revoke includes within it a power to modify, and "also," if the trust provides no method for modification, the prescribed method for revocation can be used. (18 Cal. Law Revision Com. Rep. at p. 568.) In clarifying "the method of modification is the same as the method of termination, barring a contrary provision in the trust," the Commission presumptively equated the methods for a particular trust, though the trustor could provide to the contrary *for her own trust*. This provision did not, as respondents contend, "expressly state [an] intent" to equate California law on revocation and modification (GB 41), which an individual trustor would have no authority to override.

The Legislature thus enacted two different provisions, sections 15401 and 15402, with substantially different texts. Section 15401 authorizes a fallback method of delivering a signed writing to the trustee, and requires explicit exclusivity to preempt it, whereas section 15402 has no reference to that or any other fallback method, and includes no reference to exclusivity.

Due to this textual disparity, respondents must rely on the "arc" of history to preempt the trustor's prescribed

modification method. (UCSB 45.) But the legislative history recognizes there are competing interests, and insofar as the Commission favored a provision of explicit exclusivity, that analysis concerned revocation only. (18 Cal. Law Revision Com. Rep. at p. 568.) It was not as if the Commission used "revocation" as shorthand encompassing "modification"; the very next page of the report used "modification" alongside "termination" repeatedly. (*Id*. at p. 569.)

The Legislature then did the same, omitting "modification" from section 15401, subdivision (a)(2) but including it in sections 15401, subdivision (d) and sections 15403 and 15404. Most notably, the Legislature then added the term "modified" to subdivision (c) to "make clear" that the provision addressed both functions. (Cal. Law. Revision Com. com., West's Ann. Prob.Code (2022 ed.) foll. § 15401.) If the Legislature's initially omitting modifications from subdivision (a)(2) had been an oversight, the subsequent revision to subdivision (c) provided an opportunity to correct it. This is a textbook case of *expressio unius est exclusio alterius*, or, as this Court explained in *Rashidi*, *supra*, 60 Cal.4th 718, 726: "'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed."

The Court of Appeal applied that reasoning to the instant legislation and reached a conclusion this Court should adopt: "[T]he Legislature knew how to limit the exclusivity of a revocation method provided in a trust and chose not to impose such a limitation on modifications in section 15402." (*King*, *supra*, 204 Cal.App.4th 1186, 1193.)

Respectfully submitted,

Dated: July 20, 2022 _____

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

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Dated: July 20, 2022

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Mitchell Keiter
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