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GUEST COLUMN

Tangled rules for modification of revocable trusts

By Mark J. Phillips and Jake V. Phillips

Over the last 40 years, trusts have become the most prevalent form of estate planning for Californians seeking to put their affairs in order, particularly for larger estates where the costs and delays of a formal probate are prohibitive. With the exception of specific estate tax devices that require irrevocability, these trusts are revocable and amendable by their settlors. Even where trusts are silent on their face, the law in California presumes them to be revocable and amendable. Probate Code Sections 15400 and 15402.

The methodology for revocation and amendment is key to the construction of a trust, causing practitioners to experiment with how to make changes when drafting trusts and grapple with how to exercise those powers in trusts drafted by others.

Last year, *Haggerty v. Thornton*, 68 Cal. App. 5th 1003 (Sept. 16, 2021), clarified some 30 years of conflicting caselaw on the procedure for amending trust documents, but the ruling left some aspects unresolved.

Prior to 1986, trust revocation was governed by former California Civil Code Section 2280. Pursuant to that section, trust revocation could occur either by the method described in the statute or, if different, the method described in the trust instrument itself. If the instrument's method was either explicitly or impliedly exclusive, the statutory method was not available, but defining those terms was difficult for judges. In *Huscher v. Wells Fargo Bank*, 121 Cal. App. 4th 956 (2004), the court stated "[W]e conclude that under section 2280, a trust's modification procedures must be followed if they are explicitly exclusive *or if the provisions are so specific and detailed that they implicitly preclude resort to any other method.*" (Emphasis added.) Language like this underscored the latitude courts could exercise in determining if a method was impliedly exclusive.

During this time, there was also no statute governing trust modification, and the power to modify a trust was implied from the power of revocation. *Heifetz v. Bank of America*, 147 Cal. App. 2d 776, 781 (1957). Between the possibility of implied exclusivity in revocation procedure and the thoroughly derivative authority for modification, former Civil Code Section 2280 led to a complicated set of cases defining the contours of these rules.

In 1986, California replaced this statute with the current law found in Probate Code Sections 15401 and 15402, which govern trust revocation and modification respectively. Building from the prior Civil Code regime, new Probate Code Section 15401 states that revocation may occur either by any method provided in the trust instrument itself or "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." Further, Section 15401(a)(2) simplified the issue of exclusivity by requiring an explicit statement if the instrument's specified method is mandatory, eliminating implied exclusivity.

At the same time, Section 15402 clarified the rule for trust modification. It stated simply: "Unless a trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." The Law Revision Commission Comments note that Section 15402 codifies the common law rule that "the power of revocation implies the power of modification."

While the process of revocation is better understood, modification under Section 15402 continues to be the subject of court decisions, leaving ongoing uncertainty. *King v. Lynch*, 204 Cal. App. 4th 1186 (2012), involved a trust created by settlors Zoel and Edna Lynch, the terms of which called for different methods for trust revocation and modification respectively. While the trust could be revoked by either settlor without the signature of the other, it could only be amended by written instrument signed by both settlors. After Edna was incapacitated following a head injury, Zoel made several amendments to the trust on his own, which resulted in the dilution of the inheritances of several beneficiaries. After the death of both Zoel and Edna, these beneficiaries sued, alleging that the modifications signed by just Zoel were ineffective under the trust terms as not signed by both settlors. The parties defending the amendments responded that Section 15402 states that unless the trust instrument provides otherwise the procedure provided for revocation were also valid for modification. Thus, since

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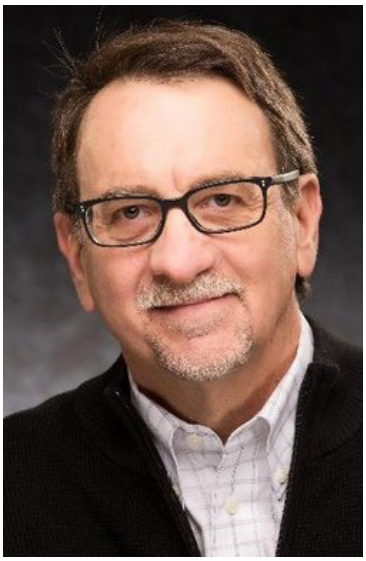

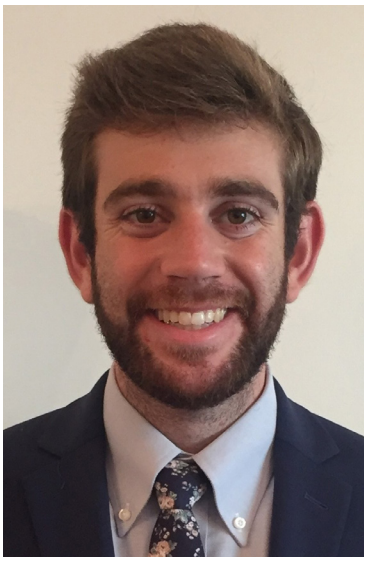

the trust authorized revocation by one settlor alone, modification by one settlor was also authorized.

The court sided with the petitioner. Citing the plain language of Section 15402, the court reasoned that where a trust instrument provided a specific method for modification that was different from that for revocation, that constituted providing "otherwise" and made the revocation methods not available for modification. Any other reasoning would render Section 15402 "mere surplusage."

A forceful dissent by Justice Jennifer Detjen focused on the original legislative purpose for Section 15402: codifying the common law rule that power to revoke includes within it the power to modify. Read in this light, any method available for revocation is also available for modification — unless the trust instrument explicitly stated otherwise. Simply stating a different method for modification did not make it exclusive.

Estate planning practitioners will tell you that the fact pattern of *King* is common — the trust at issue calling for revocation by the writing of either settlor but modification by written instrument signed by both settlors. Yet where neither are described as exclusive, it is easy to mistakenly conclude that the trust can also be modified either by the method set forth for revocation, or by the statutory method of a writing signed by the settlor and delivered to the trustee as permitted in Section 15401(c)(2), a reasoning the majority decision in *King* rejects.

Haggerty brought some additional but limited clarity to this issue. The case concerned a 2015 revocable trust created by settlor Jeane M. Bertsch. Unlike the trust in *King*, the trust agreement in *Haggerty* called for the same procedure for both revocation and modification, stating that it could be revoked or amended "by an acknowledged instrument in writing."

Before her death in 2018, Bertsch drafted three additional documents. The first, in 2016, was an amendment to the trust naming her niece as both trustee and residual beneficiary. That document was signed and acknowledged by a notary public. In 2017, Bertsch drafted an amended beneficiary list which did not include her niece. In 2018, Bertsch handwrote an additional amendment to the trust in favor of beneficiaries which did not include her niece. Neither of these documents were acknowledged by a notary.

Bertsch's niece, Haggerty, contested the 2017 and 2018 documents, arguing that unacknowledged documents did not satisfy the method for modification set forth in the trust. When the court determined that the documents were valid, Haggarty appealed.

On appeal, Haggerty argued first that the trust agreement's language required that any modifications be acknowledged, which she interpreted to mean that they needed to be notarized. Second, citing the majority position in *King* for the proposition that where specific methodology is provided for modification, that constitutes providing "otherwise," only that methodology must be utilized and the alternative methods of Section 15401 unavailable. Therefore, although the documents complied with the statutory method for revocation in Section 15401, the documents were nonetheless invalid because they were not "acknowledged instrument[s] in writing" as "otherwise required" by the trust agreement.

In response, Thornton, the original successor trustee in the event of Bertsch's death, argued that the trust's stated method of amendment by acknowledged instrument was not explicitly exclusive, so the trust could be modified either by acknowledged instrument or by any method available for revocation. Because the trust agreement contained no explicit statement of exclusivity, this included the statutory method found in Section 15401(a)(2), notwithstanding the holding in *King*.

The court found Thornton's argument persuasive. Although declining to comment on whether *King* was wrongfully decided on its facts, the court found that the *King* dissent "more accurately captures the meaning of § 15402." In doing so, the court returned to the purpose behind the statute: to codify the common law rule that the power to revoke includes the power to modify, and thus the procedure for modification is the same as that of revocation "unless the trust agreement instrument distinguishes between revocation and modification." Because there is no such differentiation, all methods available for revocation are available for modification, including the statutory method.

The court found it unnecessary to determine the meaning of what it means to be acknowledged, since under its holding the statutory method was also effective for modification, and no acknowledgment is required thereunder.

Recall that in *King* the methods for revocation and modification were different, while in *Haggerty* the methods were the same. *Haggerty* held that where they were the same, the statutory method of modification was available unless the method set forth in the instrument was expressly made exclusive. Because the *Haggerty* court declined to comment on *King's* interpretation of its instrument, it left unresolved is the availability of the statutory method of revocation when the methods for revocation and modification are different.

Consider the following:

Hypothetical 1: The trust agreement provides Method A for both revocation and modification. In that case, the trust may be revoked or modified either by Method A as provided in the trust or by the statutory method. This is the decision in *Haggerty*.

Hypothetical 2: The trust agreement provides Method A for revocation and Method B for modification. In that case, the trust may be revoked either by Method A as provided in the trust or by the statutory method, and modified by Method A, Method B or by the statutory method. This is the rationale set forth in the *King* dissent, endorsed by *Haggerty*, that "an available method of revocation is also an available method of modification — unless the trust instrument provides otherwise." Simply having a different method does not preclude the methodology for revocation, which includes the power of modification.

Hypothetical 3: The trust agreement provides Method A only for revocation and Method B for modification. In that case, the trust may be revoked only by Method A, but may be modified by Method A or Method B, but not by the statutory method. This similarly is an extension of the rationale set forth in the *King* dissent, endorsed by *Haggerty*, but since the statutory method is not available for revocation it is also not available for modification.

Hypothetical 4: The trust agreement provides Method A for revocation and Method B only for modification. In that case, the trust may be revoked by Method A or by the statutory method, but may be modified only by Method B. Where it is clear that the method for modification is intended to be exclusive, that method must be employed.

The apparent simplicity of the language of Section 15402 belies its complexity when applied to the actual language of a trust, and the lack of standards among drafters of trusts makes the problem more difficult. Hypothetical 2, where different method for revocation and modification are employed, is common in trusts, yet practitioners believed even after *King* that unless the method for revocation was exclusive that the statutory method was available. That problem is alleviated by *Haggerty*, but drafters need to focus on the language used for modification to determine if the methodology includes words like "shall" or "only" that make the method for modification exclusive.

Legal drafting continues to require precision.