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PERSPECTIVE

Supreme Court clarifies rules for modification of revocable trusts

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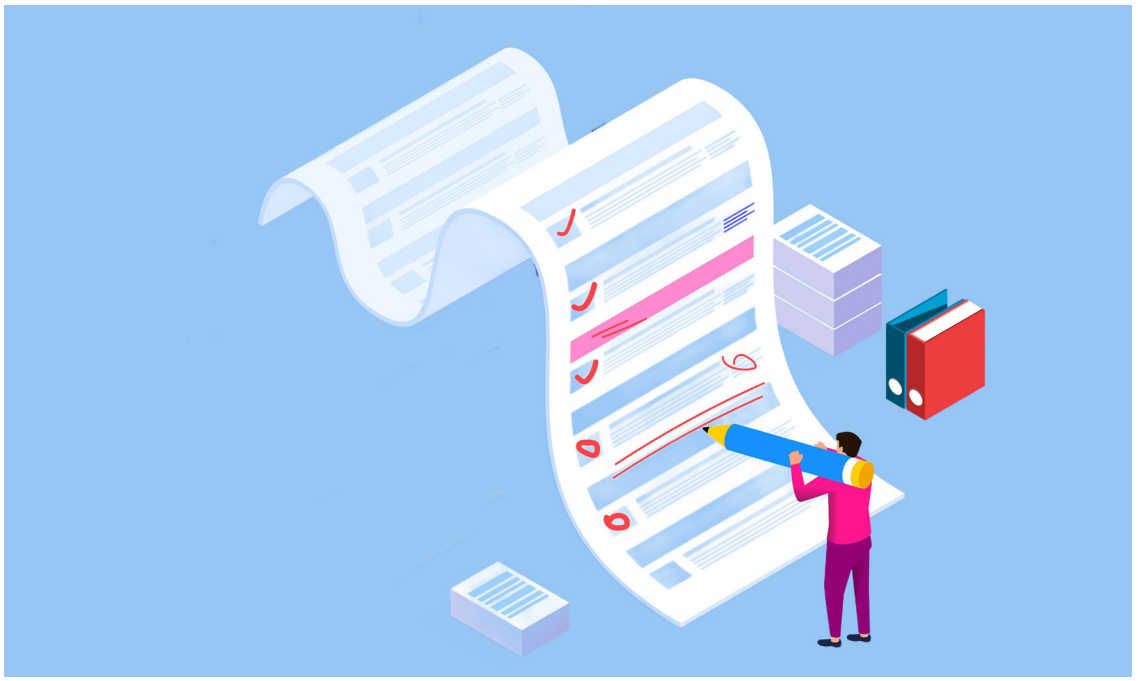

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In these pages we have previously explored the conflicting cases leaving unclear the statutory methods for settlors to modify their revocable trusts, the most prevalent form of estate planning for Californians seeking to put their affairs in order, particularly for larger estates where the costs and delays of formal probate are prohibitive. With the recent decision of the California Supreme Court in *Haggerty v. Thornton* S271483 (Feb. 8, 2024), these rules are now settled.

With the exception of specific estate tax devices that require irrevocability, trusts used by individuals to estate plan are generally revocable and amendable by their settlors, and even where trusts are silent on their face as to their revocability, California law presumes them to be revocable and amendable. Probate Code §§ 15400 and 15402. So, the methodology for revocation and amendment is key to the construction of a trust, and practitioners both experiment with the procedure for making those changes when drafting trusts and grapple with how to exercise those powers in trusts drafted by others.

The current statutes date from 1986 and are found in Probate Code §§ 15401 and 15402, which govern trust revocation and modification, respectively. Revocation procedure is set forth in Probate Code § 15401, which provides that a trust may be revoked either by any method provided in the trust instrument itself (the "stated method") 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" (the "statutory method"). Either method is acceptable unless the trust explicitly states that the instrument's stated method is mandatory. § 15401(a)(2). By contrast, for modification of a trust, Probate Code § 15402 states 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."

Interpretation of the meaning of § 15402 has recently been the subject of substantial litigation, with decisions leaving ongoing uncertainty. In the Fifth District case of *King v. Lynch*, 204 Cal. App. 4th 1186 (Ct. App. 2012), the dispute 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 of them. After Edna was incapacitated following a head injury, Zoel attempted several amendments to the trust on his own, resulting in the dilution of the inheritances of several beneficiaries. After the death of both Zoel and Edna, these injured beneficiaries sued, alleging that the modifications signed by just Zoel were

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ineffective under the trust terms as not signed by both settlors. The parties defending the amendments responded that § 15402 states that unless the trust instrument provides otherwise the procedure provided for revocation was also valid for modification. Thus, they argued, since the trust authorized revocation by one settlor alone, modification by one settlor was also authorized.

The court sided with the injured beneficiaries. Citing the plain language of § 15402, the court reasoned that where a trust instrument provides a specific method for modification that differs from the method for revocation, that constitutes providing "otherwise," and makes the revocation methods unavailable for modification. Any other reasoning, the court stated, would render § 15402 "mere surplusage." *Id*. at 1193.

A forceful dissent, written by Judge Detsen, focused on the original legislative purpose for § 15402: codifying the common law rule that the greater power to revoke includes within it the lesser power to modify. Notwithstanding the restriction on modification, the Settlor could achieve the same result by simply revoking the trust and creating another. 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 does not automatically make it exclusive.

The fact pattern of *King* is anything but uncommon; Trusts frequently provide for revocation in writing by *either* settlor but modification in writing signed by *both* settlors. Yet where neither is described as exclusive, it is easy to conclude that the trust can be modified either by the stated 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 § 15401(c)(2), a reasoning the majority decision in King rejected.

On Sept. 16, 2021, the California Fourth Appellate District decided *Haggerty v. Thornton*, 68 Cal. App. 5th 1003 (Ct. App. 2021), which 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 either revoked or amended "by an acknowledged instrument in writing." Before her death in 2018, Bertsch drafted three additional documents. The first was signed and acknowledged by a notary public. The two subsequent amendments were signed but not notarized.

Beneficiary Haggerty contested the two later documents, arguing that unacknowledged documents did not satisfy the method for modification set forth in the trust, and when the court determined that the documents were valid, he appealed.

On appeal, Haggerty argued two things. First, the language of the trust agreement 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" even where the methodology is not described as exclusive, and thus the alternative, statutory method of § 15401 was unavailable.

Although declining to comment on whether *King* was wrongfully decided on its facts, the appellate court rejected *Haggerty*'s argument, deciding 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 parties appealed.

In 2022, the Fourth District came to the opposite conclusion from Haggerty, agreeing with the King majority. *Balistreri v. Balistreri* (2022) 75 Cal. App. 5th 511. In May of 2023, the Second District also rejected the argument of *Haggerty*, again finding the majority in *King* persuasive, *Diaz v. Zuniga* (2023) 91 Cal. App. 5th 916.

The California Supreme Court has now issued its decision in *Haggerty*, setting aside the decisions in *King*, *Balistreri* and *Diaz*, finding the *King* dissent persuasive, and holding conclusively that a trust may be modified via the provisions of 15401 for revocation, including the statutory method, unless the trust instrument not just provides an alternative method for modification, but explicitly makes this method exclusive or otherwise expressly precludes the use of revocation procedures for modification. The Court writes:

"*[T]he mere fact that a trust instrument distinguishes between modification and revocation by authorizing certain procedures for revocation and other procedures for modification does not suffice to preclude the use of revocation procedures for modification. The legislative history supports the view that the settlor may modify the trust using any procedure for revocation unless the trust instrument says the settlor may not.*" Precision in language will continue to be important for drafters. 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.

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. Under the new Supreme Court ruling in *Haggerty*, simply having a different method does not preclude the methodology for revocation, which includes the statutory method.

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. 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.

For litigators, the new *Haggerty* decision is significant in that it conclusively resolves a jurisdictional split that has undoubtedly led to disputes between beneficiaries with differing interests under subsequent trust amendments. For estate planners, it signals that drafters must continue to use precise, exclusive language where they intend to make the process of amending a trust more difficult, or even just different, from that of revocation. This conclusion may be especially important in the context of joint settlors (like those in *King*) who wish to allow individual settlors to revoke, but not modify, their portion of the trust.

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