

Revocation of a Family Trust without the Knowledge of the Cotrustee

MOST OF US REMEMBER EDWARD L. MASRY AS the crotchety criminal and tort lawyer and principal of Masry & Vititoe who, with self-trained legal assistant Erin Brockovich, filed a class action suit in 1993 against Pacific Gas and Electric Company. Along with two large law firms, four years later they won a \$333 million settlement on behalf of 648 residents of the town of Hinkley, California.

Masry made legal headlines again after his death. In his final days, Masry changed his trust without his wife's knowledge, thereby pitching one last curve ball to the legal system. Edward and his wife Joette¹ had created the Edward and Joette Masry Family Trust, which consisted of the property they acquired during their marriage. Edward and Joette were both the settlors and the trustees. The Masry family trust specifically provided: "[e]ach of the Settlor[s] hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Settlor and to the Trustee."

Not long after the Masry family trust was created and just prior to Edward's death, Edward executed a notice of revocation of interest in the trust and resigned as trustee. The purpose of the revocation was to transfer Edward's assets from the Masry family trust to another trust he had created, the Edward L. Masry Trust (Edward Trust), in which two of his children from a prior marriage were the named successor cotrustees. Edward did not deliver the notice of revocation to Joette during his life; instead, it was delivered to her two weeks after his death.

Edward's most substantial asset was his employment agreement with Masry & Vititoe, which provided that if a termination occurred because of Edward's death, the benefits of the agreement would go "to the legal representatives of Edward's estate" if no valid beneficiary designation were in place. The court found that when Edward revoked his interest in the Masry family trust, his community share of his benefits under the agreement went to the Edward Trust, which stated that its property included Edward's interest in the law firm. As trustee of the Masry family trust, Joette would have received all the benefits of the employment agreement. After Edward executed the revocation of the Masry family trust, however, Joette was no longer a trustee but had become merely a beneficiary of her community interest in the employment agreement. The Edward Trust and its appointed trustees were entitled to Edward's community interest in the employment agreement.

The Arguments

Joette, not having received notice of the revocation until after Edward's death, immediately sought a determination by the court that the revocation was invalid because it had not been completed as required in the Masry family trust (in that the revocation had not been delivered to her during Edward's lifetime). In addition, she sought a determination that Edward had breached his fiduciary duty to his spouse under Family Code Section 1100 because he had not disclosed the revocation to his spouse. Third, she argued that to find the revo-



cation valid would not be good public policy, because the revocation's secrecy allowed one spouse to take advantage of the other.

The trial court found that under Family Code Section 100 one spouse is permitted to dispose of his or her share of the community without the consent of the other and that to dispose of property is only a breach of fiduciary duty when it results in impairment to the claimant spouse's present undivided half interest in the community property under Family Code Section 1101. Most important, the trial court did not agree that the revocation was invalid because it failed under the requirements of the trust. In fact, the trial court found that the trust provisions were not the only way for Edward to revoke his portion of the family trust.² Later, the appellate court found: 1) the revocation provision of the Masry family trust did not preclude revocation by the statutory method of a writing delivered to a trustee, 2) Edward revoked the trust by delivering notice of revocation to himself as trustee, 3) his act of revoking the trust did not violate the statute providing generally that each settlor may revoke as to the portion of the trust contributed by that settlor, and 4) the provisions of the trust did not preclude revocation of the trust by the statutory method of a writing delivered by a settlor to a trustee, since the trust did not state

that the method of revocation it provided was exclusive.

Joette relied upon *Conservatorship of Irvine*,³ which the appellate court found was not persuasive because it relied upon cases interpreting former Civil Code Section 2280 rather than Probate Code Section 15401(a)(2). The court went on to observe that Section 15401(a)(2) was at best a clarification of former Civil Code Section 2280, which was unclear with respect to explicitly exclusive language, as opposed to the implicitly exclusive language in the trust.

Louis Masry, trustee of the Edward Trust, relied on *Huscher v. Wells Fargo Bank*,⁴ which the appellate court, citing dicta, called helpful. *Huscher* analyzes the history of Civil Code Section 2280 before it was replaced by Probate Code Section 15401. The *Huscher* court concluded that revocation language in a trust document is reasonably subject to an analysis under Family Code Section 100 of whether the language explicitly or implicitly makes the method of revocation exclusive.

Both parties relied upon *Gardenhire v. Superior Court*.⁵ Joette found this case to hold that if the language of revocation in the trust is clear and express, the language is the exclusive method to revoke. Louis found *Gardenhire* to support the argument that the trustor had the choice of using either the language in the trust or the method for revocation stated in the Probate Code, because an implicit revocation provision is not explicitly exclusive language.

The *Masry* court ultimately found that *Huscher*'s reasoning, even though it was expressed in dicta, led to the conclusion that, absent language in the trust that its method of revocation is exclusive, the trustor has the option of revoking according to the method provided in Probate Code Section 15401(a)(2), under which Edward's notice to himself was sufficient as notice to the trustee. That there were two trustees did not change the court's view.

In affirming the trial court's order, the appellate court in its review of *Huscher* relied not upon the difference in facts between the cases (whether there was one trustor or two, or an amendment rather than a revocation) but the differences between Civil Code Section 2280 and its replacement, Probate Code Section 15401. *Huscher* makes clear that the rule authorizing either implicit or explicit exclusivity for revocation in the trust instrument only applies with respect to former Civil Code Section 2280. *Huscher* determines that under the current Section 15401(a)(2), a trustor may use either the method of revocation in the trust instrument or the method prescribed by the statute unless the trust instrument explicitly makes exclusive the procedure provided in the trust. *Huscher*

concludes that the distinction was clearly considered when the legislation replaced former Civil Code Section 2280, and as a result, implicit exclusivity does not apply under Probate Code Section 15401.

Probate Code Section 15401(a)(2) represented a change in the prior case law rule. The *Masry* court held that the change could be presumed to have been made to require a statement of explicit exclusivity and thereby avoid the problems of interpretation inherent in determining issues of implicit exclusivity.

The court of appeal also found that the method of revocation did not violate Probate Code Section 15401(b), because, pursuant to Family Code Section 761, "Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone."

The Language in the Trust

Prior to *Masry*, legal practitioners generally placed language in revocable trust documents that was similar to the language in the Masry family trust. In *Masry*, several specific issues in the standard language were addressed: 1) a revocation must be in writing, signed and acknowledged by the settlors and delivered to the trustee, 2) either settlor can revoke that portion of the trust that pertains to his or her community property portion of the trust and to his or her separate property portion of the trust, 3) if only one settlor is revoking his or her portion of the community trust or his or her separate trust, a copy of the revocation should be delivered to the other settlor, and 4) the property distributed back to the settlors will retain its community or separate property character. This language generally did not include exclusivity language regarding the method of revocation.

These standard provisions made certain assumptions that the court in *Masry* was forced to address. For example, if both settlors are the cotrustees, is the revocation required to be delivered to both trustees, or can it be delivered to only one trustee? Does delivery of the revocation by the revoking settlor have to be delivered to the other settlor during the revoking settlor's lifetime? If the trust is not silent about the four points above, is the language of the trust controlling, or can the revoking settlor choose another method of revocation as prescribed in the Probate Code?

Probate Code Section 15401 provides: A trust that is revocable by the settlor 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 and delivered to

the trustee during the lifetime of the settlor. 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.

(b) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code.

The Masry family trust revocation provisions did not state that they were exclusive. Even though the trial court "had serious reservations concerning the inherent unfairness with the manner Ed Masry chose to modify his estate plan," it denied Joette's revocation petition and found no explicit language in the Masry family trust that made the revocation provisions exclusive. Thus, Edward could revoke the trust by delivering the notice of revocation to himself as settlor and trustee, because under Section 15401(b), "[E]ach settlor may revoke the trust as to the portion of the trust contributed by the Settlor, except as provided in Section 761 of the Family Code."

Family Code Section 761(b) provides: "(b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone." The Masry family trust language stated, "Each of the Settlers hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Settlor and to the Trustee." This language did not qualify as "expressly provides otherwise" under Family Code Section 761. In fact, the Masry family trust specifically states that either spouse can revoke the trust.

Further, Edward's revocation did not equate to a breach of his fiduciary duties to his spouse under Family Code Sections 100 or 1100, or Probate Code Section 5020. Edward did not attempt to transmute community property; he merely revoked his interest in the community property that he had initially placed into the family trust.

No Prior Cases

Prior to *Masry*, there was no case on point with respect to a revocation method between married cotrustors and cotrustees regarding their community property. *Masry* puts a mark on the map deciding with certainty the effects of the Probate Code and the lack of exclusive language in the trust instrument. The Masry family trust was missing specific language making exclusive the method of revocation in

the trust. The lack of exclusive language in the trust allows the Probate Code to provide an additional method to revoke a married trust with respect to that settlor's interest in the community property or his or her separate property, without providing notice of the revocation to the other spouse. Had the trust contained the exclusivity language, the revocation, not having been delivered to the other settlor during Edward's life, would have been invalid. The court ruled that Probate Code Section 15401 allows settlors an option with respect to revocation rather than solely relying on a provision in a revocable married trust that may not serve a trustor well in the event the trustor desires to change a testamentary distribution provision as it pertains to his or her spouse. The Family Code certainly allows this flexibility, and the court in *Masry* confirmed that the legislative change from Civil Code Section 2280 to Probate Code Section 15401 allows spouses this option.

In light of *Masry*, the method of revocation of an estate should be addressed with married clients. If Joette had been counseled regarding the effect of the provisions for method of revocation and the ability for either party to revoke the trust without the knowledge of the other, would she have signed the trust instrument as drafted, or would she have requested that the language be written to provide that it was the explicitly exclusive method for revocation? The plain language of the trust appears to provide a clear method of revocation that requires notice to the other spouse. A lay person would probably not think that more specific language is necessary.

Masry confirms, however, that Joette's reading of Probate Code Section 15401 is not in accordance with the Family Code. Family Code Sections 100 and 1100 clearly indicate that a spouse can do whatever he or she wishes with his or her interest in community property without breaching his or her spousal fiduciary duty.

It may therefore be difficult to explain this issue to clients. In counseling parties with respect to what happens if their marriage ends, for example during a divorce, an attorney should generally discuss 1) what can be done with respect to a trust and other assets prior to filing for dissolution, 2) what can and cannot be done once a petition for dissolution is filed, and 3) what can be done after the judgment for dissolution is entered.

In preparing for divorce, clients can be advised to execute new wills, consider severing joint tenancies, and transfer title of property to tenants in common (rather than husband and wife as community property with right of survivorship). Spouses may also decide to remove certain assets from the trust so that if either spouse dies prior to the completion

of the trust, the community property is not automatically passed to the surviving spouse but instead passes to a new will. Once a petition for dissolution has been filed, automatic temporary restraining orders may provide:

- Either party can revoke his or her portion of a revocable trust, but only with notice filed and served on the other party before a change takes place.⁶
- Either party can revoke the transfer to the beneficiary of a “nonprobate transfer” with notice filed and served before the changes take effect.⁷
- Either party can eliminate a right of survivorship for property—e.g., joint tenancy or community property with right of survivorship—but notice must be filed and served before the changes take effect.⁸

It may seem illogical, but when a couple is not in the midst of a dissolution proceeding, one spouse can revoke his or her trust with no notice to the other spouse. And, on the other hand, in the midst of dissolution a spouse must file and serve notice before revoking a trust. Ultimately, however, the effect is the same: one spouse has the right to give notice to the other of revocation of community interest in the trust assets. One spouse also has the right not to give the other notice of revocation, so long as the trust does not have an exclusive method for revocation and the revoking spouse gives notice to him- or herself.

Should attorneys counsel individuals not to make the trust revocation language exclusive? After all, spouses cannot anticipate the manner under which they may need to revoke their interest in their trust and should leave themselves the opportunity to choose at the time. As long as both spouses are aware of the effect of the choice, an attorney may have provided sufficient advice.

Masry confirms the consistencies of the Probate Code and the Family Code, both of which indicate that an individual spouse retains his or her rights with respect to his or her community property interests in the marital assets, whether those assets are in a trust or not. Unless a spouse specifically opts out, he or she may control his or her interests as desired, without notice to the other spouse unless to do so would impair the other spouse’s interest. ■

¹ To avoid confusion, members of the Masry family are referred to by their first names.

² See PROB. CODE §15401(b).

³ Conservatorship of Irvine, 40 Cal. App. 4th 1334, 47 Cal. Rptr. 2d 587 (1995).

⁴ *Huscher v. Wells Fargo Bank*, 121 Cal. App. 4th 956, 18 Cal. Rptr. 3d 27 (2004).

⁵ *Gardenhire v. Superior Court*, 127 Cal. App. 4th 882, 26 Cal. Rptr. 3d 143 (2005).

⁶ FAM. CODE §2040(b)(2), (d)(1).

⁷ *Id.*

⁸ FAM. CODE §2040 (b)(3), (d)(1).