LIU, J.

S200210

In the

Supreme Court

of the

State of California

ANNEMARIE DONKIN et al.,

Plaintiffs and Respondents,

v.

RODNEY E. DONKIN, JR., et al., as Trustees, etc.,

Defendants and Appellants.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B228704
SUPERIOR COURT OF LOS ANGELES · HON. REVA GOETZ · NO. BP109463

PETITION FOR REVIEW

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Where a husband and wife executed an Exemption-Equivalent-Bypass Trust for the purposes of minimizing death taxes and easing the transfer of their property to their children after their deaths, and where the surviving trustor amended those portions of the Trust which remained revocable after the death of the first trustor to die so as to make the distribution of those portions discretionary, what actions can the beneficiaries of the Trust take against the successor trustees to enforce the rights provided by law and by those portions of the Trust which became irrevocable at the first death without violating the "no-contest" clauses contained in the Trust instrument?

PRELIMINARY STATEMENT OF WHY REVIEW IS NECESSARY

In ruling that "some" of the claims raised by petitioners would be violative of those clauses, the decision of the Court of Appeal is in direct conflict with that in *Estate of Parrette*, (6th Dist. 1985) 165 Cal. App. 3d 157 and in agreement in part and conflict in part with that in *Estate of Ferber*, (4th Dist. 1998) 66 Cal. App. 4th 244 (cited with approval by *Fazzi v. Klein*, (4th Dist. 2007) 190 Cal. App. 4th 1280, *Colburn v. Northern Trust Co.*, (2nd Dist, 2007) 151 Cal. App. 4th 439 and *Hearst v. Ganzi*, (2nd Dist. 2006)145 Cal. App. 4th 1195); there is a conflict between the three (3) districts and review should be ordered accordingly pursuant to California Rules of Court 8.500(b)(1).

Petitioners have alleged that the successor trustees have engaged in various breaches of their fiduciary obligations under the Trust and seek an order removing the trustees, compelling distribution of that portion of the Trust that could not be amended after the first death, surcharging and removing the trustees and other relief. The Court of Appeal decision states, without explanation, that certain of these claims would violate the clauses in question. Allowing the trustees to be "bulletproof" with regard to violations of their duties to the Trust and its beneficiaries, or to put the beneficiaries to the dilemma of risking their inheritance on prevailing, would divest the courts of jurisdiction contrary to the holding in *Parrette*; further, *Ferber,* holding in part that action to remove a fiduciary can be an attempt to alter the dispositive scheme of the trustor, unduly burdens the salutary public policy of encouraging beneficiaries to bring fiduciary misconduct to the attention of the courts. Finally, as the Court of Appeal's decision herein is certified for publication and can be interpreted to establish that the "old" "no-contest"law applies to any testamentary document or equivalent taking effect before its repeal in 2010, it is reasonable to expect that more cases of this type will be filed in the near future and this conflict between the Districts will continue to affect the decisional law of the State.

PROCEDURAL HISTORY

On March 5, 2008, respondents ANNEMARIE DONKIN and LISA KIM caused to be filed in the Superior Court for Los Angeles County an Application under former Probate Code §21320, seeking a determination that the relief sought in a proposed Petition which was lodged therewith pertaining to their rights under the MARY E. DONKIN and RODNEY E. DONKIN Trust, and alleging various violations of fiduciary duties imposed by law on the part of Appellants RODNEY E. DONKIN, JR. and VICKI R. DONKIN, did not violate the "no-contest" clauses contained in the various documents which comprised the Trust. Appellants' Appendix, ("AA") 1. In May, 2008, respondents agreed to take the initial Petition "off-calendar" after the initial hearing thereon in an effort to resolve the issues raised therein informally.

When an informal resolution was not achieved, petitioners then brought a second §21320 Application (AA 35) on June 29, 2009, which augmented the issues raised in the first Application with those relating to the actions of the Trustees subsequent to the first filing.

On February 23, 2010, after the repeal of former sections 21300 et seq., the trustees filed a "Response" to the second Application, in essence objecting to the legal basis thereof and asserting that it was barred by the repeal of §21320 during the intervening period and that the Application must fail on its face for that and other reasons . AA 51 On March 25, 2010, the trustees filed a Petition seeking a determination,

inter alia, that respondents had violated the "no-contest"clauses by filing the Applications. AA 126 On August 16, 2010, the trial court determined that the Application did not constitute a contest and ordered the Petition lodged therewith filed; a formal Order thereon was entered on September 17, 2010. AA 253

This Appeal followed. AA 260. On March 23, 2012, the Court of Appeal affirmed and reversed, in part, holding that the "old" law applied pursuant to Probate Code §3 and ruling that some of petitioners' claims violated the "no-contest" clauses of the Trust. Petitioners did not seek a rehearing in the Court of Appeal.

STATEMENT OF UNDERLYING FACTS

MARY E. DONKIN and RODNEY E. DONKIN created a revocable Trust on August 15, 1988, naming their four (4) children as equal beneficiaries thereof after both Trustors were deceased. One of the children, CRAIG DONKIN, predeceased the Trustors without issue, leaving as the beneficiaries in equal shares three (3) of the parties to the appeal: RODNEY E. DONKIN, JR., ANNEMARIE DONKIN AND LISA KIM. The other party to the Appeal, VICKI R. DONKIN, is the wife of RODNEY E. DONKIN, JR. and a Co-Trustee of the Trust with her husband.

RODNEY E. DONKIN died on August 26, 2002, and Trustor MARY E. DONKIN died on February 5, 2005. The Trust(s) established

for the "Decedent," the first Trustor to die, became irrevocable upon his death and not subject to amendment. AA 63 The Trust, as it read at the death of Trustor RODNEY E. DONKIN required that the assets of the Trust Estate which were allocated to the Trust(s) established for the Decedent be distributed outright at the death of the survivor. AA 103 Trustor MARY E. DONKIN, amended the Trust, as it applies to the Survivor's portions only, after the death of RODNEY E. DONKIN, on December 17, 2004, less than two (2) months before she died, to make distributions to the beneficiaries at the discretion of the Trustees. AA 118 That Amendment, however, does not purport to, no can it, control the disposition of the Decedent's Trust(s).

In their Petitions before the trial court, petitioners alleged numerous acts amounting to breaches of fiduciary duties by the Trustees, including failures to account properly, engaging in self-dealing and dealing with related parties, inappropriate compensation, failure to allocate assets between the various Trusts after the deaths of the Trustors and failure to distribute the Decedent's portion thereof, AA 7, 41, 234. It was also alleged that the trustees have acted in conscious disregard of the rights of appellants, paying themselves approximately $200,000 in compensation (Respondent's Appendix ("RA") 367-373) and which payments no doubt continue to this day, while distributing only $25,000 to each beneficiary since the death of the survivor, and have refused to provide proper accountings, or to account at all after the

2009 accounting unless ordered to do so. More importantly, appellants have refused to distribute the Decedent's Trust(s) to date, asserting that the amendment of December, 2004, controls the distribution of the entire Trust Estate, which they asserted before the Court of Appeal. Appellants' Brief, p.36

At the first death, the Trust instrument required that the Trust Estate be divided into as many as three (3) separate trusts, the Survivor's Trust "A," consisting of the Survivor's interest in the community property of the Trustors' marriage and the Survivor's separate property. The Decedent's interest in the community property and his separate property were to be allocated to the "Marital Share" and a portion thereof equal to the maximum Federal Estate Tax Exemption was to be allocated to the Decedent's Trust "B." The balance of the Marital Share over and above the Exemption amount was to be allocated to Decedent's Trust "C." AA 89 et seq. It was the Trustors' intent that no estate tax be due at the death of the Decedent, as Trust "B" was to hold the largest amount which could pass without tax and Trust "C" was to hold the balance of the marital share, which would be shielded by the unlimited marital deduction (presumably, requiring an election by the Survivor). AA 89[1]. The trustees' interpretation of the effect of the 2004 amend-

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1 Appellants have indicated that Trust "C" was not establish, due the size of the Marital Share.

ment would destroy the intention of the Trustors that no tax be due at the first death, as Federal law limits the rights of the surviving spouse over a trust which qualifies for the Exemption; the right to amend the disposition thereof not being among them. In particular, the Survivor did not indicate in that Amendment that she was attempting to alter the disposition of the Decedent's Trust(s), nor did she indicate an intention that the beneficiaries be forced to elect between outright distribution of the Decedent's portion and deferred benefits under the Amendment. Further, neither the Survivor nor the trustees have paid any Estate Tax that would have been due at the Decedent's death had they in fact adopted the trustees' interpretation of the effect of the last amendment.

The trustees see only one purpose for which the Trust exists: to pay themselves an annuity for managing it. They have paid, and continue, to pay, themselves commissions based upon the value of assets under management, including the assets of the Decedent's Trust (s) which should have been distributed shortly after the death of the survivor, while making only a single token distribution in over seven (7) years. Further, they have asserted that petitioners' actions in bringing the subject Application has resulted in the forfeiture of their beneficial interests (AA 126) and the trustees have refused to voluntarily account to petitioners thereafter. They have also engaged in numerous acts of self-dealing, dealing with related parties and other acts of malfeasance, as alleged in the Petition before the trial court (AA 234).

Petitioners at no point have sought to challenge the provisions of the Trust or alter its dispositive scheme; rather, they seek to enforce the distribution plan intended by Trustor RODNEY E. DONKIN and to seek the removal of the trustees for their repeated breaches of duty and disregard of petitioners' interests. Those claims do not amount to a challenge of the Trust as defined in the no-contest clauses as a matter of law and the decision of the Court of Appeal must be reversed.

1. REVIEW IS NECESSARY TO RESOLVE A SPLIT IN AUTHORITY AMONG CALIFORNIA COURTS AS TO CLAIMS RELATING TO AND REMEDIES FOR BREACHES OF DUTY BY TRUSTEES VIS-A-VIS THE "NO-CONTEST" CLAUSES.

In a very similar case, *Estate of Parrette*, *supra*, beneficiaries had brought a petition in the Probate Court alleging that the trustee had failed to account and seeking that his fees be fixed, that he be ordered to distribute assets, and that he be surcharged and removed as trustee. The trustee asserted that a clause in the trust, which purported to exempt the trustee from the jurisdiction of the court, insulated him from liability for his actions. The Sixth District Court of Appeal held the clause merely prohibited the court from assuming on-going jurisdiction and that any provision in an agreement which attempts to deprive the court of jurisdiction is void as a matter of public policy. 165 Cal. App. 3d at

161. The decision of the Court of Appeal below would severely inhibit claims against recalcitrant trustees, thereby reducing the most-effective means of enforcing the public policy of insuring compliance with trust obligations.

> [A]s a practical matter, the courts lack the resources to scrutinize every matter for [fiduciary] malfeasance. They must rely on beneficiaries to be aware of the facts and raise cogent points. We cannot allow no contest clauses to significantly increase the odds trial courts will become unwitting accomplices to [fiduciary] malfeasance.
>
> *Ferber*, 66 Cal. App. 4th 254.

In *Ferber, supra*, the clause in question included actions to remove the trustee/executor among those prohibited on pain of disinheritance. The Fourth District ruled that the proposed petition, which sought removal for various violations of duty, would put the interest of the petitioning beneficiary's interest at risk as seeking to alter the dispositive scheme envisioned by the trustor, at least where the claim is "frivolous," while also stating, "[F]ew, if any, beneficiaries would be bold enough to challenge an executor on penalty of disinheritance." 66 Cal. App. 4th 254. The decision below squarely puts the beneficiaries to such a Hobbesian choice.

2. THE PROPOSED PETITION DID NOT VIOLATE THE NO-CONTEST CLAUSES.

The allegations contained in petitioners' Petition (AA 234) all relate to actions of the trustees after the death of the surviving Trustor and seek an interpretation of the 2004 Amendment; they do not "legally challenge [the] Trust, its provisions, or asset distributions" nor "directly or indirectly, [contest] or [attack] [the Trust] instrument or any of its provisions." There is no possible construction of their claims which could be considered as such and the decision of the Court of Appeal should be reversed.

Petitioners have alleged that appellants have submitted inadequate, misleading and/or improper accounts (¶5, AA235), have engaged in self-dealing (¶5E, AA 236), have failed to allocate assets between the various trusts (¶5F, AA 237), have actively concealed transactions between themselves and the trust or trustor(s) (¶5G, AA 237), have paid themselves inappropriate compensation (¶5H, AA 237) have breached their duty to make trust property productive (¶5I, AA 238), have failed to disclose advancements made to them which are not to be forgiven under the terms of the Trust (¶5K, AA 238) and have refused to distribute the Decedent's Trust(s) according to its terms (¶¶5J and 6, AA 238), all of which acts, individually and taken together, constitute breaches of their fiduciary obligations. If this Court were to determine that asserting these claims, by itself, is a violation of the no-contest

clauses, respondents would not be able to address the wrongs of the trustees in any forum. The law does not allow such a construction.

A. The Second Amendment

The Court of Appeal held that seeking a determination of the effect of the Second Amendment as it relates to distribution of the Decedent's Trust would violate the clauses in question. The Decedent's Trust became irrevocable at the first death. However, the Survivor's Trust remained revocable and subject to the Survivor's power of appointment until her death. MARY, as the Survivor, exercised her right to amend the distributive provisions of the Survivor's Trust in the Second Amendment, but that amendment was not effective to control the distribution of the Decedent's Trust, nor did she indicate an intention that it be effective as such. *See, McIndoe v. Olivos*, (4th Dist., 1985)132 Cal. App. 4th 483, 489: "[Appellants'] assertion that the original trust gave the surviving trustor complete control of the deceased trustor's assets, is incorrect. Because the surviving trustor did not retain control of the assets in the [Decedent's] trust and did not have the power to amend, revoke or terminate the [Decedent's] trust, the surviving trustor retained no control over the [Decedent's] trust.

Burch v. George, (1994) 7 Cal.4th 246 is not conflicting with this proposition. There, this Court ruled that where a decedent had specifically indicated his intention to put a beneficiary to a choice between her rights provided by law or those provided in his dispositive

document, the courts would give effect to his stated intention. 7 Cal. 4th 256-257. MARY indicated no such intention, stating simply that she "amended" the Trust to make distributions discretionary. Further, this Court stated therein that a disposition in general terms is to be considered as relating only to that property over which the Trustor had the power of disposition. 7 Cal. 4th at 257-258. Confirming that the Amendment executed after the death of RODNEY does not seek to alter his intended distribution scheme and cannot be considered a violation.

B. The Decedent's Trust

The portion of the Trust attributable to the Decedent had to be distributed consistent with the provisions of the Trust as it read at the first death; those provisions required outright distribution thereof at the second death to each of the Trustors' children. AA103.

The provisions of the Trust did condition the right to distribution on various factors, relating to "extraordinary distributions," "handicapped beneficiaries," etc. (AA 101-102) None of those conditions apply herein. However, one condition bears discussion: the requirement that the debts of the Trust be paid before distribution, stated in "Allocation of Trust Assets" (AA103). Respondents submit that at this point, over seven (7) years after the death of the Survivor, it is inconceivable that a diligent and forthright Trustee would not have paid or provided for the debts of the Trust and this Court should consider any attempt to assert that condition as justification for the refusal to

distribute, as was done before the Court of Appeal, to be ineffective, if not mendacious.

Put simply, the rights of the beneficiaries to the Decedent's Trust(s) became vested at the death of RODNEY DONKIN, SR., which require distribution at the second death. No amendment by the Survivor would be effective to alter those rights. The Second Amendment did not specifically state, as in *Burch*, nor even imply, that the beneficiaries would have to forego their rights to the Decedent's portion in order to receive benefits under the Survivor's portion. The trustees' arguments that the 2004 Amendment were effective to delay indefinitely all distributions to petitioners are patently absurd.

3. CONCLUSION

Inter-vivos, "family" trusts have become a standard vehicle for transferring wealth and reducing taxes at death. A salient point of these trusts is that, to maximize death-tax savings, the portion of the trust attributable to the first trustor must not be subject to change after his death. The actions of the Trustee, and the decision of the Court of Appeal, would defeat the statutory scheme of 29 U.S.C. §2001 et seq. by allowing the surviving trustor to modify the plan intended by the deceased trustor.

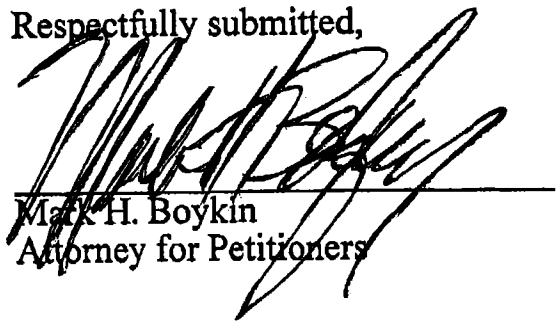
Although not cited by the Court of Appeal, the decision sought to be reviewed is based solidly on *Ferber*. *Ferber* repeatedly praises

the value of beneficiaries being able to challenge the actions of fiduciaries, but limits same based upon the specific terms of the no-contest clause in that case. It's holding, that beneficiaries are effectively forced to either endure misconduct by fiduciaries or risk disinheritance, should be limited to the facts in that case and not be accepted as a general principle of law to preserve the salutary purposes of enforcing fiduciary law.

It has been shown that the face of the Trust documents, and the accounts and reports of the trustees, establish the rights of petitioners to challenge the actions of the trustees and to seek distribution of the Decedent's Trust. Making those claims cannot put their inheritance at risk as a matter of public policy. This Court should grant review and ultimately reverse the decision of the Court of Appeal, affirm the ruling of the trial court and remand the case to the latter for further proceedings.

Dated: May 1, 2012

Respectfully submitted,



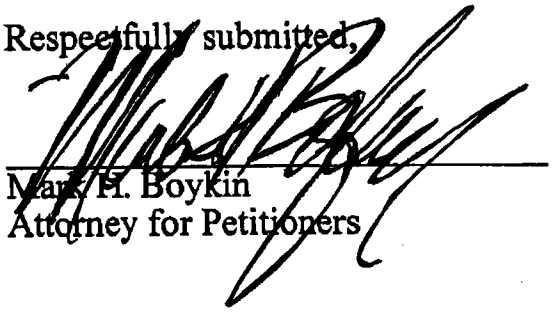
Mark H. Boykin
Attorney for Petitioners

CERTIFICATION OF COMPLIANCE

Counsel for petitioners hereby certifies that, pursuant to Rules 8.204 and 8.504 of the California rules of Court, the attached Petition for Review is produced using at least 13-point Roman type, including footnotes, and contains 3,218 words, which is less than the total number of words permitted, as determined by WordPerfect, the program used to create this Petition.

Dated: May 1, 2012

Respectfully submitted,



Mark H. Boykin
Attorney for Petitioners

ADDENDUM - OPINION

Filed 3/23/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANNEMARIE DONKIN et al., Plaintiffs and Respondents, v. RODNEY E. DONKIN, JR., et al., as Trustees, etc., Defendants and Appellants.	B228704 (Los Angeles County Super. Ct. No. BP109463)

APPEAL from an order of the Superior Court of Los Angeles County, Reva G. Goetz, Judge. Affirmed in part and reversed in part.

Snow Law Corp. and Stephen L. Snow for Defendants and Appellants.

Mark H. Boykin for Plaintiffs and Respondents.

Appellants Rodney E. Donkin, Jr. and Vicki Donkin are successor trustees of the Donkin Family Trust dated August 15, 1988 (Trust), which was created by Rodney Donkin, Sr. and Mary Donkin. The Trust contains a "no contest" clause disinheriting any beneficiary who challenges the Trust, its provisions, or its asset distribution. In 2009, two of the beneficiaries, Annemarie Donkin and Lisa Donkin Kim, filed a "safe harbor" petition pursuant to Probate Code section 21320[1] to determine if their challenge the Trustee's administration of the Trust would constitute a contest under the Trust's no contest provisions. While the beneficiaries' petition was pending, the Probate Code was amended to eliminate the safe harbor mechanism, and the trustees filed a petition for instructions concerning the applicability of the new law. The trial court—apparently applying the former law regarding will contests—ruled on the beneficiaries' safe harbor petition, found the beneficiaries' challenge would not constitute a will contest, and denied the trustee's petition for instructions.

The trustees contend the trial court erred in (1) failing to rule on their petition for instructions prior to the granting of the safe harbor petition; (2) failing to determine whether the new law applied to the Trust; and (3) concluding the beneficiaries' proposed challenge to the trustees did not violate the Trust's no contest provisions. As a consequence, the trustees request that we find as a matter of law the former law applies and the proposed challenges violate the Trust's no contest provisions. We find that the old law applies, and under the old law's safe harbor provisions, certain of the beneficiaries' challenges to a trust amendment would constitute a prohibited contest if they were pursued by the beneficiaries.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

Decedents Mary E. Donkin and Rodney E. Donkin, Sr. (Settlors), husband and wife, as settlors created a revocable Trust on August 15, 1988, which by its terms became

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[1] All statutory references herein, unless otherwise noted, are to the Probate Code.

irrevocable upon the death of both spouses. Mary and Rodney, Sr.[2] were the original trustees of the Trust. The primary beneficiaries of the Trust under its first amendment dated May 10, 2002, were the Settlors' children Rodney E. Donkin, Jr., Lisa B. Kim, and Annemarie N. Donkin. After the death of Rodney, Sr., on August 26, 2002, Mary amended the Trust on December 17, 2004 (Second Amendment). After Rodney, Sr. died, Mary served as sole Trustee of the Trust, and Mary died on February 5, 2005.

The Trust specified that with respect to "Resolution of Conflict," any controversy between the trustees and any beneficiary "involving the construction or application of any of the terms, provisions, or conditions of this trust shall, on the written request of either or any disagreeing party served on the other or others, be submitted to arbitration." (Arbitration Clause).

The Trust further specified with respect to "Litigation" that the Settlors desired that "this Trust, the Trust Estate and the Trust administrators and beneficiaries shall not be involved in time consuming and costly litigation concerning the function of this Trust and disbursement of the assets. Furthermore, the Settlors have taken great care to designate, through the provisions of this Trust, how they want the Trust Estate distributed. Therefore, if a beneficiary, or a representative of a beneficiary, or one claiming a beneficial interest in the Trust Estate, should legally challenge this Trust, its provisions, or asset distributions, then all asset distributions to said challenging beneficiary shall be retained in Trust and distributed to the remaining beneficiaries herein named, as if said challenging beneficiary and his or her issue had predeceased the distribution of the Trust Estate." (No Contest Clause).

The Second Amendment deleted the "'Allocation of Trust Assets'" from the original Trust and replaced it with the following, after Rodney, Sr.'s death:

"Allocation of Trust Assets [¶] When the above conditions are satisfied, the debts and obligations of the Trust Estate have been paid, and any special bequests have been

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[2] As several of the parties share the same last name, to avoid confusion we refer to them by their first names.

distributed, the Trustee shall have the complete discretion whether to keep the assets of the trust estate intact and continue to manage them for the equal benefit of the designated Primary Beneficiaries. When the trustee determines it is appropriate to liquidate any or all of the assets in the trust, the Trustee shall allocate and divide those liquidated assets into separate trust shares so as to provide one share in trust for each of the designated Primary Beneficiaries living at the death of the Surviving Settlor, and one share in trust for each deceased Primary Beneficiary with issue surviving. The trustee may, within its sole discretion continue to manage and invest the liquidated assets as it deems appropriate. The trustee may, within its sole discretion, distribute income and/or principal from the trust share to the individual beneficiaries."

The Second Amendment also added to the provision for asset distribution, a clause entitled "No Contest—Contestant Disinherited," which provided that, "If any beneficiary, in any manner, directly or indirectly, contests or attacks this instrument or any of its provisions, any share or interest in the trust given to that contesting beneficiary under this instrument is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased the settlor."

The Trust confers discretionary powers on the trustee and gives specific directions concerning distribution of Trust assets to the beneficiaries. The Trust gave the trustees power to hold, improve, invest, lease, manage and make distributions of Trust assets. The Second Amendment to the Trust gave the trustees, after the payment of the Trust's debts and obligations, "complete discretion whether to keep the assets of the trust estate intact and continue to manage them for the equal benefit of the designated Primary Beneficiaries."

Under the Trust, the successor trustees had a duty to render an annual accounting to the beneficiaries not more than 120 days after the close of the fiscal year of the Trust.

The Trust provided that upon the death of either Settlor, the trustee would divide the estate into two separate trusts, the Survivor's Trust A and the Decedent's Marital Share (consisting of one-half of the community property of the estate) which would be

divided into two trusts, Decedent's Trust B and Decedent's Trust C. Upon the creation of Trust B and Trust C, such trusts became irrevocable.

Upon Mary's death, Rodney, Jr. and his wife Vicki became successor trustees of the Trust (Trustees).

B. Procedural History

On March 5, 2008, Annemarie Donkin and Lisa Kim, two of the three beneficiaries of the Trust (beneficiaries) filed a "safe harbor" petition under former section 21320[3] to determine whether the filing of their proposed petition to compel a proper accounting from the successor trustees, fix the compensation of the successor trustees, remove the successor trustees, and for distribution of a portion of the Trust assets would violate the No Contest Clause of the Trust. The Trustees responded that the beneficiaries were required to arbitrate pursuant to the Arbitration Clause. The beneficiaries withdrew their petition before the scheduled hearing.

On February 26, 2009, the Trustees wrote to the beneficiaries, requesting arbitration of the dispute over the Trustees' management of the Trust. Thereafter, during the period February 2009 to May 2009, the beneficiaries threatened litigation in order to obtain distributions of the Trust assets pursuant to the Trust, removal of the Trustees, and reduction of the Trustees' compensation. On May 22, 2009, the beneficiaries demanded that the Trustees initiate arbitration.

On June 25, 2009, the beneficiaries renewed their "safe harbor" petition for a determination of whether their proposed petition violated the No Contest Clause of the trust. At the same time they lodged their petition, which again sought to compel a proper accounting from the Trustees, fix the compensation of the Trustees; remove the Trustees,

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[3] Former section 21320, subdivision (a) provided: "If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary . . . would be a contest within the terms of the no contest clause."

and compel a distribution of a portion of the trust assets.[4] The beneficiaries alleged among other things that the accounting failed to segregate the original trust into the separate sub trusts upon the death of Rodney E. Donkin, Sr., or make distributions as required by the Trust; the accounting failed to disclose loans to the Trustees; the successor Trustees had paid themselves legal fees, although Vicki Donkin was not an attorney; the second amendment to the Trust forgave loans to Lisa Kim and Rodney Donkin, Jr., but the accounting failed to reflect such debt forgiveness.

On January 1, 2010, changes to the Probate Code eliminated the "safe harbor" provisions of section 21320, pursuant to which a party could obtain a declaration from the court prior to instituting an action that the proposed action would not violate the no contest clause of the instrument at issue.[5] Pursuant to these changes, a new statutory scheme governs no contest clauses. (§§ 21310–21315.)

On February 23, 2010, the Trustees filed their response to the beneficiaries' safe harbor petition, acknowledging that the law had changed and eliminated the safe harbor process. Nonetheless, they requested pursuant to section 3, subdivision (h),[6] that the court apply the former safe harbor provisions because the beneficiaries' pleadings had been filed under the old law. The Trustees requested that if the court should decide the new law applied, the safe harbor petition would be subject to demurrer under Code of

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[4] The second safe harbor application also contained a petition to compel arbitration which was denied without prejudice on October 30, 2009.

[5] Stats. 2008, ch. 174, § 2, operative January 2010, applied retroactively to all instruments that became irrevocable on or after January 1, 2001. (§ 21315, subd. (a).)

[6] Section 3, subdivision (h) provides that "[i]f a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference."

Civil Procedure section 430.10, subdivisions (a) and (e) because the safe harbor action was not supported under the new law. The Trustees requested further time to respond to the beneficiaries' safe harbor application in order to make an argument that the old law applied.

On March 5, 2010, the beneficiaries responded, reiterating their request that the court find their petition did not constitute a "contest." The court ordered the Trustees to file a petition for instructions regarding applicability of the new law to the beneficiaries' petition.

On March 25, 2010, the Trustees filed their petition for instructions, seeking a determination that (1) the beneficiaries had violated the no contest clauses of the Trust[7] (2) the former no contest law should be applied pursuant to section 3, subdivision (h), and (3) a stay of the pending safe harbor application to determine whether the filing of the safe harbor application violated the no contest provisions of the Trust. The Trustees claimed that in 2004, Mary Donkin had been diagnosed with cancer, and executed the Second Amendment to the Trust on December 17, 2004 in order to clarify the Settlors' intent that the Trust not be challenged, and argued application of the new law to the Trust would substantially weaken the no contest protections in the Trust, and thwart the Settlors' intent. The Second Amendment to the Trust clarified the Settlors' directive that the Trustees have discretion when to make distributions from the Trust. Further, the Trustees contended by filing the safe harbor petition when the Trust obligated them to arbitrate, the beneficiaries had triggered the No Contest Clause, further arguing that if the beneficiaries violated the No Contest Clause, they were no longer beneficiaries and therefore had no standing to pursue a safe harbor petition.

The beneficiaries replied that the Settlors had made provision for application to the court for assistance in interpreting the Trust instrument. They argued the no contest provision in the Trust and its amendments were limited to challenges to the Trust itself,

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[7] On this point, the petition does not specify whether the old law or the new law's provisions relating to contests applied.

its provisions, or asset distributions, which were not the type of challenges they were making. Thus, their safe harbor petition did not constitute a challenge to the Trust within the meaning of its no contest provisions.

On August 10, 2010, the trial court heard the safe harbor application and petition for instructions. The court announced its tentative was to find that the beneficiaries' requested relief did not violate the No Contest Clause, and deny the Trustees' petition without prejudice, noting that the "mandatory arbitration clause . . . would have a priority." The Trustees requested that the court give them more time to brief the issue of which law would apply under section 3, subdivision (h). The court concluded, without making a finding whether the former law applied, that the beneficiaries' challenge to the Trustees' actions would not constitute a contest.

On September 17, 2010, the court issued its written order stating that the beneficiaries' petition to compel a proper accounting and seeking other relief did not constitute a contest under the terms of the no contest clauses of the Trust.

DISCUSSION

Appellants contend the former no contest law should apply to this dispute based on the parties' reliance on the former law, and the proposed petition violates the no contest provisions of the Trust and the Second Amendment because it attacks the validity of the Second Amendment and therefore challenges the Trust's asset distribution scheme. Respondents contend that the old law applied to their safe harbor application, and their petition does not violate the no contest provisions of the Trust because they allege wrongful conduct by a fiduciary and seek a required distribution, and they do not seek to invalidate the Trust or its provisions.

I. STANDING

Both parties assert standing issues. The Trustees contend the beneficiaries' failure to resort to arbitration constitutes a prohibited contest, thereby activating the No Contest Clause, divesting the beneficiaries of any interest in the Trust, and consequently their standing to contest the Trustees' actions. The beneficiaries contend that the Trustees are

not aggrieved by the trial court's ruling either in their individual capacities or in their capacity as trustees because Rodney, Jr.'s interest in the Trust is affected by the outcome of the safe harbor petition; further, they contended Rodney, Jr. used his capacity as Trustee to finance his opposition to the safe harbor petition and Vicki has no beneficial interest in the Trust. We find both parties have standing.

A will contest may be pursued by any "interested person," which is defined as a decedent's spouse, children, heirs, testate beneficiaries, creditors, and "any other person having a property right in or claim against" a trust or estate that may be affected by the proceeding. (§ 48, subd. (a).) Whether a person is "interested" is determined on a case-by-case basis, with reference to the particular purpose of the proceeding and the particular matter involved. (§ 48, subd. (b).) The interest must be a pecuniary interest in the devolution of the estate that may be impaired or defeated by probate of the will or benefitted by having it set aside. (*Estate of Plaut* (1945) 27 Cal.2d 424, 429.)

Here, the Trustees have standing to appeal in their fiduciary capacity the granting or denial of a safe harbor petition pursuant to *Estate of Goulet* (1995) 10 Cal.4th 1074, 1080, which held that "[c]onsiderations of law and policy lead us to conclude a trustee must be permitted to appeal an order determining a trust beneficiary's proposed claim would not violate a trust's no contest clause." Further, as the Trustees have not asserted any individual arguments, we need not consider whether Vicki, who is not a beneficiary, has standing in her individual capacity. We also conclude the beneficiaries have standing notwithstanding the Arbitration Clause in the Trust because the Arbitration Clause contains no language that it operates as an in terrorem clause if arbitration is not pursued. Rather, it states that the parties shall submit to arbitration on the written request of either party; there is no consequence stated in the Arbitration Clause for failing to submit to arbitration.

II. NO CONTEST CLAUSES

A. Law Regarding No Contest Clauses

No contest clauses remain valid and enforceable in California. (*Munn v. Briggs* (2010) 185 Cal.App.4th 578, 592.) A no contest clause "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch v. George* (1994) 7 Cal.4th 246, 265 (*Burch*).) Whether a particular proceeding constitutes a contest under a given instrument depends on the scope of the no contest clause, the circumstances of the particular case, and the language of the instrument. Thus, a proceeding which would constitute a contest under one will would be permissible under another. (*Id.* at pp. 254–255.)

Under the former law governing will contests (§§ 21300 to 21308, 21320–21322), a contest was defined as "direct" or "indirect." A direct contest was any pleading that challenged the validity of a instrument based upon revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. (Former § 21300, subd. (b).) An "indirect" contest involved a pleading that challenged the validity of an instrument based on grounds other than those specified in section 21300, subdivision (b), and was a means of attacking the validity of an instrument by seeking relief inconsistent with its terms. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 605 (*Johnson*); former § 21300, subd. (c).) The prior law contained a list of specified exceptions to enforcement of no contest clauses against indirect actions based upon public policy and other considerations that would violate the no contest clause. (See, e.g., former §§ 21305, 21306, 21307.) The question before the court on a section 21320 petition is not whether the proposed legal challenge will succeed on the merits. Rather, the relevant test is whether asking a court to rule on it would constitute a contest. (§ 21320, subd. (c); *McKenzie v. Vanderpoel* (2007) 151 Cal.App.4th 1442, 1449–1450.)

In *Burch, supra*, 7 Cal.4th 246, the court set forth some basic principles for determining whether a particular proposed action would violate a particular no contest clause. If the action "would effectively nullify or thwart the provisions" thereby challenging the distributive scheme of the estate plan by setting aside the core of the plan, a challenge, whether direct or indirect, would violate the no contest clause at issue. (*Id.* at p. 261.) In determining whether a no contest clause would be violated, the courts consider the language of the clause, other terms of the trust, and extrinsic evidence of the trustor's intent, which may include the testimony of the attorney who drafted the estate plan. (See *Id.* at pp. 256–260.) Such intent can be determined by resort to extrinsic evidence, if necessary. (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.) In general, if the beneficiary's proposed action would "effectively nullify or thwart [a] provision[ ] in the trust instrument" or "result in the nullification of [the trustor's] clearly stated intent," the proposal "would constitute a contest within the meaning of the no contest clause." (*Burch*, at pp. 261, 263; see also *Estate of Pittman* (1998) 63 Cal.App.4th 290, 299 [thwarting of testator's intent determines whether no contest clause is triggered].) "Therefore, even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court 'must not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.' [Citation.]" (*Burch*, at p. 255; see also *Johnson, supra*, 47 Cal.4th at p. 604.)

In *Genger v. Delsol* (1997) 56 Cal.App.4th 1410, the decedent created an "integrated estate plan," consisting of a revocable trust, a pour-over will and a corporate stock redemption agreement. Pursuant to the separate stock redemption agreement, his stock in a family owned corporation would be returned to the corporation in exchange for the corporation giving his wife the corporate owned house in which they had lived and forgiving certain debt he owed to the corporation. (*Id.* at pp. 1416, 1423.) The trust, in which the decedent expressed his intent for the successor trustee and his wife to take all action necessary to have the corporation redeem the stock pursuant to the redemption

agreement, contained a no contest provision applicable to any trust beneficiary who "'contests in any court the validity of this trust or of a deceased settlor's last will or seeks to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such will or any of its provisions is void, or seeks otherwise to void, nullify, or set aside this trust or any of its provisions . . . .'" (*Id.* at p. 1420, fn. 4, italics omitted.) The decedent's spouse contended, relying on the statutory definition of section 21300, subdivision (a) that a "contest" was an attack on an instrument, challenged the redemption agreement under the theory to do so would not constitute a contest under the will's no contest clause. (*Id.* at p. 1420.) In *Genger*, the court rejected the wife's argument that a strict construction of the no contest clause rendered it applicable only where there was an attack on the will or trust itself, not by an attack on a separate instrument. (*Ibid.*) The *Genger* court concluded that, in light of the decedent's intent as expressed in all three of the testamentary documents, the wife's proposed challenge constituted a contest within the scope of the trust's no contest clause despite the fact that the corporate stock redemption agreement which was not a testamentary document, was not specifically mentioned in the no contest clause itself. (*Ibid.*)

In addition, effective in 2001, the legislature restricted the reach of no contest clauses by declaring that certain types of actions could never constitute a contest despite what the no contest clause provided. Former section 21305, subdivision (b), effective January 1, 2003 through December 31, 2009,[8] found that certain actions would not constitute a contest as a matter of public policy. Those actions included (1) a pleading challenging the exercise of a fiduciary power (former § 21305, subd. (b)(6)), (2) a pleading regarding the appointment of a fiduciary or the removal of a fiduciary (former § 21305, subd. (b)(7)), and (3) a pleading regarding an accounting or report of a fiduciary (former § 21305, subd. (b)(8)). (See *Bradley v. Gilbert* (2009) 172 Cal.App.4th 1058,

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[8] Former section 21305, subd. (d) provided: "Subdivision (b) shall apply only to instruments of decedents dying on or after January 1, 2001, and to documents that become irrevocable on or after January 1, 2001." Section 21305 was repealed effective January 1, 2010 (Stats. 2008, ch. 174, § 1).

1069–1071 (*Bradley*).) As explained in *Bradley*, "a beneficiary should be able to question the actions of a faithless fiduciary without being subject to the restrictions of [a no contest] clause: '[T]he Legislature has determined that in furtherance of the public policy of eliminating errant fiduciaries, a beneficiary who believes a fiduciary is engaged in misconduct should be able to bring the alleged misconduct to the court's attention without fear of being disinherited.' [Citation.]" (*Bradley*, at p. 1071; see also *Estate of Ferber* (1998) 66 Cal.App.4th 244, 253 ["No contest clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision"].)

Thus, in *Fazzi v. Klein* (2010) 190 Cal.App.4th 1280, the court found a challenge that sought to disqualify a successor trustee that was named in the trust on the basis the trustee was unfit to serve based upon a lack of education would violate the no contest clause because it would violate the settlors' estate plan by disturbing the decedent's choice of fiduciary, while an action to remove a trustee for cause (malfeasance) would not. (*Id.* at pp. 1288–1289.) Similarly, in *Estate of Hoffman* (2002) 97 Cal.App.4th 1436, the decedent wife's principal asset was her interest in a Chevrolet dealership which was, after her husband's death, transferred to a trust and run by several of her five children. The Trust assets were to be distributed to the five children upon the wife's death, and three of the children became trustees of the trust and executors of the decedent's will. (*Id.* at p. 1439.) The decedent's will contained a blanket no contest clause providing, "if any person shall contest this Will or object to any of the provisions hereof," such person would be entitled to the sum of one dollar in lieu of their share under the Will. (*Ibid.*) Two of the children challenged the other three children's management of the dealership, alleging breach of fiduciary duties, and sought to remove them as executors. (*Id.* at p. 1440.) *Estate of Hoffman* held the proposed challenge was protected from the breach of the decedent's no contest clause by section 21305, subdivision (b)(7) because it sought to remove a fiduciary. (*Id.* at p. 1444.)

B. Safe Harbor Petitions Under Former Law

Under former law, section 21320 provided a "safe harbor" for beneficiaries to seek an advance judicial determination whether a proposed legal challenge would be a contest under a particular no contest clause. (Former § 21320, subd. (a); *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.) Under former law's safe harbor procedure, if the court determined the particular challenge would constitute a contest, the beneficiary would be able to make an informed decision whether to pursue the action. (*Ibid.*) Such clauses serve important public policies, including discouraging litigation and giving effect to the disposition of assets according to the testator's plan. However, because application of a no contest clause against an unsuccessful party resulted in forfeiture, they were strictly construed. (*Munn v. Briggs*, *supra*, 185 Cal.App.4th at p. 592.) A ruling on the beneficiary's proposed action could not involve a determination of the merits of the action itself. (*Estate of Ferber*, *supra*, 66 Cal.App.4th at p. 251.) In the end, "[e]ach case depends upon its own peculiar facts and thus case precedents have little value when interpreting a trust." (*McIndoe v. Olivos* (2005) 132 Cal.App.4th 483, 487.)

However, the safe harbor provisions of the declaratory relief action under section 21320 spawned a substantial amount of litigation, insulated fraud and undue influence from judicial review, and required a cumbersome and unpredictable case-by-case analysis. (*Revision of No Contest Clause Statute* (2007) 37 Cal.L. Revision Com. Reports 359, 382–383 (*Revision Report*).) Therefore, recognizing the need for reform, in 2007 the Legislature directed the Law Revision Commission to prepare a report weighing the advantages and disadvantages of no contest clauses. (*Id.* at p. 363.) The *Revision Report* noted that policies favoring enforcement of such clauses include effectuating the transferor's intent; avoiding costly litigation, discord between beneficiaries, and protecting the transferor's privacy; and using forced elections to avoid ownership disputes of community and separate property. (*Id.* at pp. 364–368.) Policies favoring nonenforcement of no contest clauses include providing access to justice and the courts; avoiding forfeitures; permitting challenges that effectuate the transferor's intent raised by

issues of capacity, ambiguity and the necessity for reformation or modification; judicial supervision of fiduciaries; and abuse of forced elections regarding community property. (*Id.* at pp. 369–374.) In addition, the prior law was exceedingly complex and unpredictable, leading to overreliance on the safe harbor declaratory relief action, while no contest clauses were often used to deprive spouses of community property and shield fraud, undue influence, and fiduciary wrongs from judicial scrutiny. (*Id.* at p. 381.)

The *Revision Report* concluded that "[a] simpler approach would be to limit the enforcement of a no contest clause to a list of specified contest types. Under that approach, any pleading that is not one of the expressly covered types would not be governed by the no contest clause. No further analysis would be required. That would eliminate both the open-ended definition of 'contest' and as well as the lengthy (an inevitably incomplete) list of statutory exceptions." (*Revision Report, supra*, at p. 392.) Further, although the "indirect" contest was eliminated, the Law Revision Commission noted that "[e]xisting law already exempts nearly all types of indirect contests from the operation of a no contest clause . . . . The policy implication of that trend is clear. A beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of the estate plan. Such actions serve the public policy of facilitating the fair and efficient administration of estates and help to effectuate the transferor's intentions, which might otherwise be undone by mistake, ambiguity, or changed circumstances." (*Revision Report, supra*, at p. 395, fn. omitted.) As a result, the new law exempts all indirect contests except for forced elections. (*Ibid.*)

As a result of the Law Revision Commission's recommendations, current law has narrowed the circumstances under which a no contest clause will be enforceable, and specifies three situations in which a no contest clause may be enforced: (1) A direct contest brought without probable cause; (2) a pleading to challenge a transfer of property on the grounds it was not the transferor's property at the time of transfer; and (3) the filing of a creditor's claim or prosecution of an action based on it. (§ 21311, subd. (a); *Johnson v. Greenelsh, supra*, 47 Cal.4th at p. 601, fn. 2.) A "direct" contest under the

new law is a challenge based upon forgery, lack of due execution, lack of capacity, menace, duress, fraud, undue influence, or revocation. (§ 21310, subd. (b).) "There should be no ambiguity about whether a contest is a direct contest. The grounds for a direct contest would be limited and clear." (*Revision Report, supra*, at p. 393.) The new no contest provisions of the Probate Code no longer define "indirect" actions. The Probate Code provisions governing no contest clauses do not supplant the common law, which governs to the extent the statutes do not apply. (§ 21313.)

Thus, for an instrument that became irrevocable on or after January 1, 2001, the no contest clause is thus enforceable against a direct contest unless it is brought without probable cause. (§ 21311, subd. (a).) A direct contest is a pleading filed by a beneficiary that alleges the invalidity of the protected instrument or one or more of its terms on the basis of forgery; lack of due execution; lack of capacity; menace, fraud, or undue influence; revocation of a will (§ 6120) or a trust (§ 15401); or disqualification of a beneficiary under sections 6112, 21350, or 21380. (§ 21310, subd. (b).)

"[P]robable cause exists, if at the time of filing of a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (§ 21311, subd. (b).) The comment to section 21311 states that "reasonable likelihood" means "less than more probable than not" as set forth in *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 653, footnote 4 (construing Penal Code § 938.1), and *People v. Proctor* (1992) 4 Cal.4th 499, 523 (construing Penal Code § 1033). (Cal. Law Rev. Com. com., West's Ann. Prob. Code (2011 ed.) foll. § 21311, pp. 209–210.)

III. THE FORMER LAW APPLIES

Section 3 governs changes to the Probate Code, and provides that the old law continues to apply to any paper filed or action taken before the operative date that was proper at the time the action was taken. (§ 3, subds. (d)–(g).) In addition, if a party shows and the court determines that application of a particular provision of the new law or of the old law in the above manner "would substantially interfere with the effective

conduct of the proceedings or the right of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court may . . . apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference." (§ 3, subd. (h).)

The Law Revision Commission comments to section 3 note that "[b]ecause it is impractical to attempt to deal with all the possible transitional problems that may arise in the application of the new law to various circumstances, subdivision (h) provides a safety-valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests." (Cal. Law Rev. Comm. com., West's Ann. Prob. Code (2011 ed.) foll. § 3, p. 11.) "The Commission's official comments are deemed to express the Legislature's intent." (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 195.)

Section 3, subdivision (c) expresses the Legislature's intent that amendments to the Probate Code apply on their effective date regardless of prior events, with limited exceptions. (§ 3, subd. (c); *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1137.) The provisions of section 3, subdivision (h) allow "a party affected by a new statute to show why, under the circumstances presented, justice requires the application of former law." (*Guardianship of Ann S., supra*, 45 Cal.4th at p. 1137.) "In weighing such a claim, we consider 'the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of the that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which retroactive application of the new law would disrupt those actions.' [Citations.]" (*Id.* at p. 1138.)

We conclude that the trial court did not abuse its discretion in determining the former law applies. The Settlors' estate plan contained numerous no contest clauses and

an Arbitration Clause that evidenced an intent that the beneficiaries avoid litigation with each other and the successor trustees, and thus the Settlors' extensive reliance on prior law is evident. The policy of minimizing costly litigation to the estate will not be served by applying the new law because the beneficiaries would still be obligated, under the new law, to withstand a determination whether their petition was brought with "probable cause." Requiring the beneficiaries to undergo a probable cause determination on remand when we are able to find that the old law applies to their petition conserves the Trust's resources. Finally, applying the new law would penalize the beneficiaries for following the law in effect at the time the petition was filed and place them unnecessarily at risk, resulting in an injustice that we can avoid by applying the former law.

IV. CERTAIN OF THE BENEFICIARIES' CHALLENGES CONSTITUTE A CONTEST UNDER THE TRUST AND SECOND AMENDMENT; OTHERS REQUIRE REMAND FOR A FULL DETERMINATION IN THE TRIAL COURT

Here, the Trustees requested the trial court to permit them to fully brief the matter of whether the old law applied, and whether on the merits the beneficiaries' challenges violated the Trust's no contest clauses. In some instances, we are able to determine as a matter of law that the proposed challenges would violate the no contest clauses of the Trust and Second Amendment; with respect to other challenges, because the trial court did not conduct a full hearing, we remand the matter to the trial court for a full determination, after briefing by the parties should the beneficiaries choose to bring another safe harbor petition, of whether such challenges trigger the no contest provisions of the Settlors' instruments.

We conclude that as a matter of law, the beneficiaries' challenges to Mary's ability to amend the Trust with the Second Amendment, the Trustees' failure to make distributions, and Mary's failure to create the subtrusts required by the Trust would, if pursued, constitute a contest under the no contest clause because these challenges attack the distributive scheme of the Trust by requiring the Trustees to exercise their discretion when they are not required to do so by the Second Amendment. The beneficiaries'

contention that the Second Amendment does not apply to the Trust because the surviving Settlor (Mary) lacked to the power to amend the Trust also constitutes a challenge to the distributive scheme of the Settlors. As the case law demonstrates, each case depends upon its particular facts and the no contest clauses at issue. There may be other elements of the beneficiaries' challenges, if pursued by the beneficiaries, that would trigger the no contest clauses of the Trust and Second Amendment, but we leave such a determination to the trial court on remand.

DISPOSITION

The order is affirmed to the extent that the trial court determined the former law governing will contests and safe harbor petitions applied, and is otherwise reversed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.

State of California)
County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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