S202210

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

OPENING BRIEF ON THE MERITS

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To what extent, if at all, can trustees assert a no-contest clause in a trust in response to an action for violation of various fiduciary obligations?

INTRODUCTION

Respondents ANNEMARIE DONKIN and LISA KIM[1] seek the affirmance of the ruling of the Superior Court of California for the County of Los Angeles, the Honorable REVA R. GOETZ, Judge, determining that issue in their favor and rejection of the Decision of the Second District Court of Appeal, Division One affirming in part and reversing in part the ruling of the Superior Court and holding that the former Probate Code §§21300 et seq would apply to virtually any trust which became irrevocable prior to the repeal of the former code sections.

STATEMENT OF THE CASE

Statement of Facts

MARY E. DONKIN and RODNEY E. DONKIN created a revocable Trust on August 15, 1988 ("the Trust"), naming their four (4)

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1 The parties are referred to herein by their designation before the Court of Appeal.

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 ("Decedent") died on August 26, 2002, and Trustor MARY E. DONKIN ("Survivor") 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 the Decedent, 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 The Survivor amended the Trust, as it applies to the Survivor's portions only, after the death of the Decedent,, 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).

The original Trust instrument, dated August 15, 1988, and the Second Amendment dated December 17, 2004, each contain what are

commonly referred to as "no-contest" clauses. The former, contained in the original Trust instrument on page 8 (Respondent's Appendix ("RA") 8) states:

> Litigation
>
> The Settlors desire 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.

The latter, contained in the Second Amendment on page 2 (RA 58), states:

> No-Contest - Contestant Disinherited
>
> 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 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.

In their Petitions before the trial court, respondents 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 respondents, paying themselves approximately $200,000 in compensation (Respondent's Appendix ("RA") 367-373), 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 January, 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[2]. The trustees' interpretation of the effect of the 2004 amendment would destroy the intention of the Trustors that no tax be due at the first death, as Federal law specifies 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)

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

which should have been distributed shortly after the death of the survivor, while making only a single token distribution in over seven (7) years. They have also asserted that respondents' 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 respondents 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).

Respondents have 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 the Decedent and to seek the removal of the trustees for their repeated breaches of duty and disregard of respondents' 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.

2. Procedural History

On March 5, 2008, caused to be filed in the Superior Court for Los Angeles County an Application under former Probate Code §21320,[3] seeking a determination that the relief sought in a proposed Petition which was lodged therewith pertaining to their rights under the

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3 Unless otherwise specified, all statutory references herein are to the Probate Code.

Trust, and alleging various violations of fiduciary duties imposed by law on the part of appellants, 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, respondents 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[4]

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(h) and ruling that some of respondents' claims violated the "no-contest" clauses of the Trust. Respondents did not seek a rehearing in the Court of Appeal. Respondents petitioned for Review by this Court on May 2, 2012. Review was granted on June 13, 2012.

3. The Ruling of the Trial Court

After reviewing the allegations in the proposed Petition (AA 234), the trial court ruled that the claims sought to be made by respondents did not constitute a contest, as all relate to actions of the trustees after the death of the surviving Trustor and seek an interpretation of the 2004 Amendment; in other words, 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 that ruling was correct as a matter of law.

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4 The trial court also ordered the matter submitted to arbitration pursuant to the arbitration clause in the Trust. The enforcability of such clauses is before this Court after its grant of review in *Diaz v. Bukey*, review granted August 11, 2011, S194150.

Respondents 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. Both the decisional and statutory law of this State establish affirmatively that any construction of an instrument which would deprive the courts of jurisdiction to hear such claims is void, which principals the trial court recognized and implemented in its ruling.

4. The Decision of the Court of Appeal

The Court of Appeal affirmed in part and reversed in part. Commencing on page 10 of its Decision, that Court went through a rather lengthy review of the law regarding no-contest clauses and, commencing on page 13, a similar review of the law regarding "safe-harbor" applications, including the 2010 repeal of the section under

which the Application was brought (former§21320) and the statutory scheme concerning such clauses enacted concurrently therewith (§§21310-21315) . It then held that the "old law" of former §§21300-21308 would apply to the Application and Petition (pp.16-18) Without explanation, it was also held that several of respondents challenges to the actions of appellants, including challenges to the application of the Second Amendment to the Decedent's Trust, the Trustees' failure to make distributions, and the survivor's failure to create the subtrusts required by the Trust[5], would violate the no-contest clauses and ordered the matter remanded for further proceedings. (pp.18-19).

5. The Petition for Review

Respondents petitioned this Court for review in this matter on May 2, 2012. The asserted grounds for review were the conflict between the decisions of the districts of the Court of Appeal with regard to public-policy considerations in the enforcement of no-contest clauses and the fact that none of the claims asserted by respondents against appellants violated the terms of those clauses in the Trust as a matter of law. This Court granted review on June 13, 2012

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5 The Petition assigned that failure to appellants, not the Survivor. AA237

STANDARD OF REVIEW

The ruling of the trial court is reviewed on appeal *de novo*. *Bradley v. Gilbert*, (2nd Dist, 2009) 172 Cal. App. 4th 1058, 1068.

RELEVANT CASE LAW REGARDING NO-CONTEST CLAUSES

Burch v. George

The leading California case on no-contest clauses is this Court's decision in *Burch vs. George*, (1994) 7 Cal 4th 246. The trustor in that case had placed various items of community property of his marriage in a trust by means of both inter-vivos and testamentary transfers and affirmatively declared in the trust document that all assets transferred thereto were his separate property. The clause at issue in that case read:

> In the event that any beneficiary under this Trust . . . seeks to obtain in any proceeding in any court an adjudication that this Trust or any of its provisions . . . is void, or seeks otherwise to void, nullify or set aside this Trust or any of its provisions, then the right of that person to take any interest given to him or her by this Trust shall be determined as it would have been determined had such person predeceased the execution of this trust instrument without issue.

7 Cal. 4th at 256.[6]

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6 The wills of the Trustors contained disinheritance clauses which applied only to "challenges" to the terms of the Wills or Trust. AA 211, 216.

The opinion of the Court, authored by Justice Baxter, recognized the long-standing validity of such clauses in California and the right of a testator/trustor to put a beneficiary to a forced election between asserting rights to the property of the decedent provided by law and the benefits provided in a testamentary document. The Court held that the above language, when read in the context of the declaration of the trustor that the property of the trust was his separate property, evinced the trustor's intention to put his wife to an election between the rights provided for her under the trust and her community-property rights under California law, including her concomitant rights to the trustor's pension under Federal law, which forced election was valid and would be enforced via the no-contest clause if she chose to pursue proposed actions in State and Federal court. *Id.* at 273-274. *Burch* does not, however, address the main issue is this case: to what extent can a fiduciary assert a no-contest clause as a bar to an action on his misconduct.

The dissent of Justice Kennard, joined in part by Justice Mosk, asserted that the law refuses to enforce no-contest clauses when doing so would be violative of public policy (as discussed below) and that to allow such a clause to force the spouse to an election would effectively give the trustor the power to dispose of property which did not belong to him, a result which should not be countenanced. *Id.* at 284-285.

Estate of Parrette

In *Estate of Parrette*, (1985) 165 Cal. App. 3d 157, the Sixth District Court of Appeal held that a clause in a trust, or an asserted interpretation thereof, which would render a trustee immune from judicial oversight was void. The clause in question merely indicated that the court administering the trustor's probate estate could not assume on-going jurisdiction over the trust; the trustee asserted that that language divested the probate court of Monterey County, which court also presided over the administration of the estate, of jurisdiction to decide the propriety of his accountings and compensation. The Court of Appeal refused to accept this interpretation, stating,

> Such a construction of the provision in question is not only, as we shall see, contrary to its plain terms, but against public policy. A term in an agreement ousting the court of jurisdiction is void. (citation omitted)

165 Cal. App. 3d at 162.

Estate of Ferber and Subsequent Law

The Fourth District dealt with the public-policy issue very differently in *Estate of Ferber*, (1998) 66 Cal. App. 4th 77. There, a beneficiary sought a ruling under former §21320 with regard to seeking to remove an executor for alleged dereliction of duty and other matters, to object to his accounting and to interpret a term ("co-owners") used in the Will, which was opposed by the executor on the ground that the proposed action would violate the no-contest clause in the Will, at least

if the action were unsuccessful. The clause in question disinherited any beneficiary who, *inter alia,*

> (d) objects in any manner to any action taken or proposed to be taken by my Executor, whether my Executor is acting under court order, advice of proposed action or otherwise, (e) objects to any construction or interpretation of my Will, or any provision of it, that is adopted or proposed by my Executor, (f) unsuccessfully requests the removal of any person acting as an executor...

66 Cal. App. 4th 248.

The trial court ruled that the executor's attempt to interpose the expansive clause as a bar to the claims against him violated public policy and ruled in favor of the applicant; however, the Court of Appeal reversed, despite paying homage to the principles espoused in cases like *Parrette*. Apparently, review by this Court was not sought.

While acknowledging that a ruling adopting the executor's interpretation would render such clauses "virtually impenetrable to public policy attacks, something we could not countenance" and that "[b]eneficiaries must be free to raise public policy issues so the court may address them" (66 Cal App. 4th at 252-253), the Court of Appeal balanced the competing interests of insuring fiduciary integrity and giving effect to the intentions of the trustor and held that the clause would not violate public policy if applied only to *frivolous* attempts to remove the executor and to object to his accountings. *Id.* at 255.

The potential of disinheritance for frivolous actions seriously chills the advancement of the salutary public policy of maintaining oversight on fiduciaries. It is inconceivable that a trustor would countenance shielding a feckless and/or mendacious trustee from being forced to answer for his actions upon a proper showing, even where the trustor at the time of the creation of the trust reposed ultimate confidence in the selected trustee. The law provides ample remedies for frivolous actions by a litigant; the mechanical application of the *Ferber* rule adds nothing to the public policy of discouraging such tactics and gives a recalcitrant fiduciary, who controls the access to relevant information and is always in a position to use a beneficiary's money to fight him, a powerful weapon to avoid judicial scrutiny of wrongful acts.

As opposed to the axiomatic statement of judicial policy embodied in *Parrette*, which almost does not require citation, *Ferber*'s chilling of legitimate inquiry into fiduciary conduct has generated substantial response from the legislature and the courts:

A. Statutory Limitation

In response to *Ferber*, the Legislature in 2000 banned the enforcement of no-contest clauses in response to any action brought with reasonable cause to challenge the exercise of a fiduciary power, to appoint or remove a fiduciary or to challenge an accounting. *See*, former §21305, subdivisions (b)(6)-(8), former §21306; *cf.* current

§21311; *See, also, Fazzi v. Klein*, (4th Dist. 2010) 190 Cal. App. 4th 1280, 1289, *fn.* 5.

B. Selected Case Law Interpreting *Ferber*

Hearst v. Ganzi, (2nd Dist. 2006) 145 Cal. App. 4th 1195, 1213-1214, ignored §21305 and applied the *Ferber* balancing test and found the proposed action alleging a breach of a trustee's duty of impartiality between remainder and income beneficiaries would violate the no-contest clause in the trust, in light of a specific provision in the trust authorizing the trustee to continue to hold stock in a corporation founded by the deceased testator. The Court of Appeal also held that the proposed action would violate the disinheritance clause in the Will, as the testator exempted the trustee from liability for anything other than "gross neglect or fraudulent misconduct." It is one thing to summarily dispose of an action for ordinary negligence in such a situation, but it is quite another to hold that merely asking the question invokes a forfeiture. As with *Ferber,* review of *Hearst* by this Court was apparently not sought.

Bradley v. Gilbert, (2nd Dist. 2009),172 Cal. App. 4th 1058. 1067, cited *Ferber* and impliedly came to the opposite conclusion after conducting the balancing test, holding that a successor trustee would not lose his entitlements as a beneficiary as a result of filing a petition to marshal assets in the decedent's portions of a trust similar to the Donkin

Trust (requiring division into Survivor's, Decedent and Qualified-Terminable-Interest-Property Trusts), although such action could be interpreted as challenging the allocation of assets by the former trustee, an action barred by the no-contest clause.

Fazzi v. Klein, supra, 190 Cal. App. 4th at 1289, held that a proposed petition to remove a trustee for other than cause would violate the clause in question. Like *Ferber* and *Hearst*, review of the decision in that case was apparently not sought.

The latest interpretative decision of *Ferber* is the instant case, citing it for the proposition that errant fiduciaries may not be insulated "completely" by such clauses (p. 13), but effectively doing exactly that, as the Decision does not indicate a single claim made by respondents that would not run afoul of its interpretation of the no-contest clauses. With no record of comment from this Court on the substantial impact on fiduciary oversight created by *Ferber*, *Hearst* and *Fazzi*, this matter presents a unique opportunity for a definitive statement of the importance of enforcing that substantial public policy.

STANDARDS OF TRUSTEE CONDUCT

The standard of conduct imposed upon fiduciaries, such as the appellant-trustees, are well-known and do not require extensive

discussion. *Inter alia*, the Probate Code imposes the following obligations upon trustees:

A. To administer the Trust in accordance with its terms (§16000);

B. To administer the trust solely in the interest of the beneficiaries (§16002);

C. To deal impartially with beneficiaries (§16003);

D. To avoid conflict of interest (§16004);

E. To make trust property productive (§16007);

F. To use any special skills possessed by the trustee (§16014);

G. To report information and to account in such a way as to inform the beneficiaries of the status of the trust and its corpus (§§16061, 16062, 16063); and

H. To exercise discretionary powers reasonably (§16080).

A review of the Petition demonstrates that respondents obtain a favorable ruling on the safe-harbor application because their claims fall under one or more of the above provisions of the law and are privileged under former §21305.

ARGUMENT

1. SUMMARY.

The claims sought be brought by respondents are privileged by the Probate Code and by the decisional authority of this State. The Second Amendment to the Trust cannot control the disposition of the Decedent's Trust and does not demonstrate an intention in the Survivor that the beneficiaries be put to a forced election between the benefits provided under that Trust and the Survivor's Trust. The Court is requested to reconsider its holding in *Burch v. George, supra,* and set definitive requirements for such a forced election to be effective. The Decision of the Court of Appeal effectively requires that all actions relating to trusts that became irrevocable before 2010 be adjudicated under the "old" law and directly contravenes Probate Code §3 and should be reversed.

2. RESPONDENTS DID NOT VIOLATE THE NO-CONTEST CLAUSES IN SEEKING TO CHALLENGE THE ACTIONS OF APPELLANTS NOR IN SEEKING AN INTERPRETATION OF THE EFFECT OF THE SECOND AMENDMENT.

A. Fiduciary misconduct

The claims asserted against the Trustees relate to the foregoing provisions of the Code as indicated:

A. Submitting inadequate, misleading and/or improper accounts (¶5, AA235), §§16061, 16062 and 16063;

B. Self-dealing and dealing with related parties (¶5E, AA 236), §§16002, and 16004);

C. Failing to allocate assets between the various trusts as required by the Trust documents (¶5F, AA 237), §§16002 and 16080;

D. Concealing transactions between themselves and the trust or trustor(s) (¶5G, AA 237), §§16002, 16004, 16061, 16062 and 16063;

E. Paying themselves inappropriate compensation (¶5H, AA 237), §§16002, 16004 and 16014;

F. Failing to make trust property productive (¶5I, AA 238), §16007;

G. Failure to disclose advancements made to them which are not to be forgiven under the terms of the Trust (¶5K, AA 238), §§16002, 16004, 16061, 16062, and 16063; and

H. Refusing to distribute the Decedent's Trust according to its terms (¶¶5J and 6, AA 238), §§16000 and 16080.

Respondents contend that appellant-trustees committed these acts of misfeasance and malfeasance for the purpose of inappropriately increasing their compensation from the trust, which is a violation of each of the cited code sections.

Former §21305 conclusively excluded these claims from the reach of even a no-contest clause which specifically includes them. *See, e.g.*,, *Bradley, supra*, 172 Cal. App. 4th at 1071, *Tunstall v. Wells* (2nd Dist.

2006) 144 Cal.App.4th 554, 560 and *Hermanson v. Hermanson* (4th Dist. 2003) 108 Cal.App.4th 441, 444-445, *mod., rehg. den.* 2003 Cal. App. LEXIS 797. Specifically, *Bradley* states,

> [A] beneficiary should be able to question the actions of a faithless fiduciary without being subject to the restrictions of such a 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." ... To place barriers to a court's review of alleged fiduciary misconduct would, moreover, be contrary to well-established policy to ensure that estates are properly administered. (citations omitted)

172 Cal. App. 4th at 1071.

B. The Effect of the Second Amendment

The Amendment executed by the Survivor on December 17, 2004, more than two (2) years after the Decedent's Trust became irrevocable, was ineffective to alter the distribution of that Trust. Respondents have sought a determination of this fact and an order requiring the distribution of that Trust. This does not violate the no-contest clauses.

Initially, petitions to interpret an instrument containing such a clause were excluded from the definition of "contests" as a matter of public policy by former §21305 (b)(9). *See, e.g., Cory v. Toscano*, (5th Dist. 2009) 174 Cal. App. 4th 1039. Further, analysis of the proposed allegations of the Petition demonstrate that respondents did not seek to challenge the terms of the trust in anyway.

The Trust gave to the Survivor the following rights in the Decedent's Trust "B": income, support and "discretionary" payments limited to five percent (5%) of the corpus thereof of $5,000.00. AA 95 This is in keeping with Federal law; the granting of greater rights, including the right to amend, would be considered a general power of appointment which would cause the entire Decedent's Trust to be included in the Survivor's estate at her death. 26 U.S.C. §§2041, 2056. Appellants' obliquely demonstrated that the Decedent's Trust(s) were funded with $1,460,000 and the Survivor's Trust with over $1,600,000, and the inclusion of the former in the latter would have put the Survivor's Trust, after deductions, well over the Exemption Amount for 2005 of $1,500,000. RA 372; 26 U.S.C. 2010. The accountings also disclose no payment of Estate Taxes being made, which would have been due at the Survivor's death, had she had the power to control the disposition of the Decedent's portion. Were this Court to determine that the Survivor could control the disposition of the Decedent's Trust, a substantial amount of additional Estate Taxes, penalties and interests would be due.

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. The Survivor exercised her right to amend the distributive provisions of the Survivor's Trust, 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. The Court of Appeal in *McIndoe v. Olivos*, 132 Cal. App. 4th 483, 33 Cal. Rptr. 3d 689 (Cal. App. 4th Dist. 2005), Modified and Rehearing denied, 2005 Cal. App. LEXIS 1476; Review denied, 2005 Cal. LEXIS 13085, confronted a very similar situation and held,

> [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.

Id. at 489.

Respondents here seek in their Petition before the trial court a determination of this fact and the distribution of the Decedent's Trust. The relief sought would not challenge the Trust, but rather enforces it against appellants, who seek to retain as many assets as possible in trust for the purpose of generating compensation for themselves. Appellants' argument that the distribution of the Decedent's Trust would alter the distribution provisions of the Trust (Appellants' Brief p.44) is unavailing, as it is appellants who are thwarting the intentions of the Trustors by refusing to distribute, thereby keeping the assets thereof under their "control" and part of their compensation base.

Burch, supra, is distinguishable on its face from the present case. In that case, the Trustor affirmatively stated his intention to control the disposition of the property in the Trust without regard to any community-property rights of the surviving spouse; in this case, the clause in question indicated only that the provision relating to Allocation of Assets was deleted in its entirety and replaced with the stated provisions. It does not state that the Survivor owned all the Trust property personally, nor that she believed she had the power to control the disposition of the Decedent's portion, nor that she was attempting to do so. This Court's citation of Witkin to the effect 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, versus an affirmative statement that the Trustor intends to dispose of all property in the Trust, whether he has that right or not (7 Cal. 4th at 257-258) controls and is dispositive.

3. THIS COURT IS REQUESTED TO TAKE THIS OPPORTUNITY TO RESOLVE DISPARATE RULINGS OF THE COURTS OF APPEAL ON VARIOUS ISSUES OF PUBLIC POLICY AS THEY RELATE TO THE ADMINISTRATION OF TRUSTS.

The freedom of a testator/trustor to control the administration and disposition of his estate is delimited by various public-policy

considerations. A review of the cases cited herein, and dozens not cited, demonstrates an extensive, and somewhat inconsistent, valuation and application of what each reviewing court considered the public policy of this State in preventing or punishing fiduciary misconduct in the face of the expressed desires of a decedent to avoid or control litigation challenging his stated preferences. This Court's decision in *Burch*, being its latest decision to address the legal effect of such clauses, does not address this issue, dealing rather with such clauses in the context of a potential spousal election to take against the trust.

While the Sixth District in *Parrette, supra*, set forth a clear, if somewhat simplistic, statement of the public policy of allowing no bar to addressing fiduciary misconduct through legal action, the Fourth District in *Ferber, supra*, blessed a trustor's intention that his named trustee be immune to redress for acts asserted to be in violation of the standards imposed upon him. While the legislature acted quickly to strike that outcome from the law, *Ferber* continues to influence decisions from the various Courts of Appeal, most recently the Second District's Decision in this case.

Here, that Court held that virtually any attack on the alleged serious misconduct of the appellant-trustees would be a contest. This is simply not the law of California and only this Court can issue a

definitive ruling to prevent further decisions of this type. Different divisions of that Court, in *Hearst v. Ganzi* and *Bradley v. Gilbert,* performed the *Ferber* calculus and came to diverse valuations of the importance of the stated public policy. Similarly, the Fourth District in *Fazzi v. Klein,* held that a trustee cannot be removed other than for cause and potentially bars the removal of even an obviously-unqualified trustee who is nominated by the trustor.

Undoubtedly, at times, individuals are named as trustees precisely because divisive disputes between beneficiaries are thought to be probable and the person named to the office is considered best able to carry out the trustor's wishes. However, the confidence of the trustor in the fidelity of the trustee cannot be allowed to override the legitimate interest of the law, upon a proper showing, in preventing the appointment to a trusteeship to become the equivalent of the proverbial license to steal. It simply is incongruous that claims of fiduciary misconduct, alleged to be in direct violation of the terms of the trust from which the trustee's office arises, the standards imposed by the Probate Code and the decisional authority of this State, cannot be addressed by beneficiaries, who have a direct interest in the matter, without having the disinheritance Sword of Damocles hung over their heads by a trustee who may have every incentive to see that his misconduct is not brought to light. Only this Court, as the ultimate authority on California law, can

issue a statement of public policy which will resolve the dispute between the Districts (and, indeed, the Divisions within a District) and give full effect to the fundamental truth espoused, but then devalued, in *Ferber*:

> [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.

66 Cal. App. 4th 254.

4. THIS COURT IS REQUESTED TO RECONSIDER OR CLARIFY ITS RULING IN *BURCH*.

Burch v. George, supra, as previously stated, is the leading case in this State on no-contest clauses. Appellants herein cited it in support of their assertion that the general language used by the Survivor in the Second Amendment was intended by her to, in effect, force respondents to elect between the benefits provided for them by the Decedent and the benefits left to the discretion of their adversaries in this action. Appellants' Brief, p.36. It is respectfully requested that this Court reconsider or clarify its holding therein and establish that the intention of the trustor to put a beneficiary to such an election must be specifically stated in such a manner as would leave no doubt of that intention in the trustor. Specifically, respondents submit that language describing the nature of

the interest possessed by the beneficiary which would have to be waived ("any community-property interest in trust property my wife could claim" - *Burch*; "the benefits provided in the Decedent's Trust" - the instant case) be included, along with a statement by the trustor that the beneficiary must forego that interest as a condition of accepting the benefits provided in the trust document. Such a construction would avoid the potential of future protracted litigation involving trusts and estates and would resolve that issue in this case conclusively.

5. THE DECISION OF THE COURT APPEAL WOULD OBVIATE THE TRANSITIONAL RULES OF PROBATE CODE §3.

As respondents filed their Application in 2009, before the repeal of the "old" law, subdivision (d) of §3 requires that same apply to the Application and the underlying Petition. The Decision of the Court of Appeal created an exception that would swallow the rule in stating that subdivision (h) of §3 requires the application of the "old" law based upon the fact that the Trustors amended the Trust multiple times after the effective date of the "old" law (former §21305(d)) and before the effective date of the repeal thereof. (pp. 16-18). This analysis of the Court of Appeal would effectively make it the law of this State that the "old" law always applies to any testamentary disposition executed

during that time frame, which is clearly contrary to the requirements of §3, which indicates that the general, filing-date-related rule is to be followed except in extraordinary cases and only upon the affirmative request and demonstration by a party. No such request, nor any demonstration of the factors set forth in subsection (h), was made by any party, nor was there a ruling thereon by the trial court, which simply applied the mandate of §3(d). The Legislature made it clear that actions and papers filed before 2010 would be determined under the "old" law, while those actions and pleadings filed thereafter (including the response and petition of appellants) would be subject to the "new" law, except in unusual situations. The Court of Appeal, in effect, rewrote §3 to make the exception the rule. This Court should uphold the transitional provisions stated in that section which were evaded by the Court of Appeal. (For further analysis on this subject, *see Request to Depublish,* submitted in this matter by Matthew P. Matiasevich, Evans, Latham & Campisi and Marc L. Sallus, Oldman, Cooley, Sallus, Gould, Birnberg & Coleman, LLP, by letter dated May 16, 2012.)

6. CONCLUSION

Although not cited by the Court of Appeal in support of its conclusion that the proposed challenges would violate the no-contest clauses in the Trust, same 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 clause in that case. Its holding, that beneficiaries are effectively forced to either endure misconduct by fiduciaries or risk disinheritance, should be rejected or limited to its facts and not be accepted as a general principle 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 respondents 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.

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 interpretation of the Second Amendment advanced by appellants, and the decision of the Court of Appeal, would defeat the

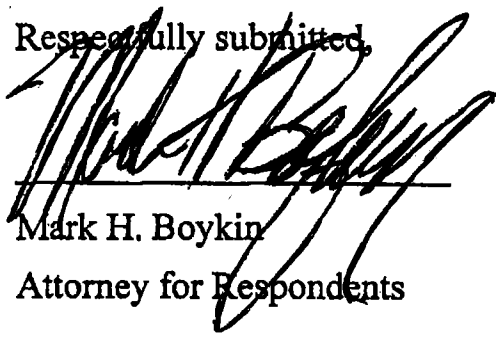
statutory scheme of 29 U.S.C. §2001 et seq. by allowing the surviving trustor to modify the plan intended by the deceased trustor. That would put the estate-tax treatment of hundreds of thousands, if not millions, of trusts, and the intentions of the creators thereof, in this State at risk.

Finally, the Court of Appeal's interpretation of the transitional rules stated in Probate Code §3 is simply at odds with the plain meaning of the statute and must be reversed; coupled with *Ferber*, it would perpetuate the "frivolous" standard for determining the reach of no-contest clauses indefinitely, which is clearly contrary to the intent of the legislature.

Accordingly, this Court is respectfully requested to 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: July 13, 2012

Respectfully submitted,



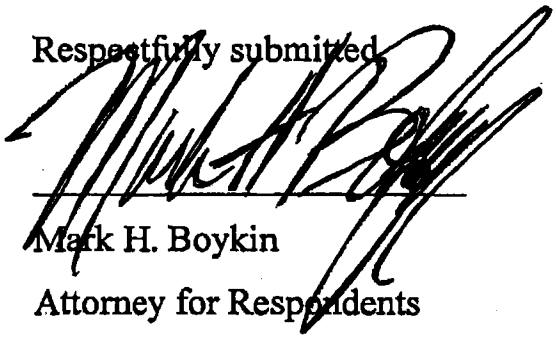
Mark H. Boykin
Attorney for Respondents

CERTIFICATION OF COMPLIANCE

Counsel for respondents hereby certifies that, pursuant to Rule 8.520(c)(1) of the California Rules of Court, the attached **RESPONDENTS' OPENING BRIEF ON THE MERITS** is produced using at least 13-point Roman type, including footnotes, and contains 6,813 words, which is less than the total number of words permitted, as determined by WordPerfect, the program used to create this Petition.

Dated: July 13, 2012

Respectfully submitted,



Mark H. Boykin
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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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Signature: