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In the
Supreme Court
of the
State of California

SUPREME COURT
FILED

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Deputy

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

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This review proceeding follows a decision of the Court of Appeal affirming in part and reversing in part a trial court order granting a Probate Code §21320 “safe harbor” application. This trust proceeding involves a determination of whether the Court of Appeal correctly ruled that the former no contest law applies to the deceased settlors’ trust and that some of the claims in the beneficiaries’ proposed petition would violate the no contest clauses in the trust.

STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought in the Trial Court

This is a trust proceeding. Annemarie Donkin and Lisa Kim, as potential beneficiaries under their deceased parents' trust, filed a Probate Code §21320 "safe harbor" application for a determination that "the claims of Applicants, as set forth in [the proposed petition attached as] Exhibit A hereto, do not constitute a violation of the 'no-contest' clauses contained in the Trust instrument and the amendments thereto." (AA, at p. 38 ll. 7-9.) Rodney E. Donkin, Jr. and Vicki R. Donkin, as successor trustees, sought preliminary instructions from the court under Probate Code §§3(h) for a determination of which no contest law applies to the settlors' estate planning documents, in order to properly respond to the safe harbor application. (AA, at pp. 126 to 220.)

B. Factual Summary

1. Material Facts

Except as otherwise noted herein, appellants adopt the factual background and procedural history in the opinion of the Court of Appeal. (Donkin v. Donkin, 204 Cal.App.4th 622, 627-631 (2d Dist. 2012), *review granted* (June 13, 2012)(No. S202210)(hereinafter "Donkin").) To be consistent with the Court of Appeal opinion, the deceased parents shall be referred to as "the Settlers," appellants shall be referred to as "the Trustees," respondents shall be referred to as "the beneficiaries," respondents' Probate Code §21320 "safe harbor" application shall be referred to as "the safe harbor application," appellants' petition under Probate Code §§3(h) shall be referred to as "the petition for instructions," and respondents' proposed petition for which safe harbor protection was sought shall be referred to as "the proposed petition."

2. The Trust and the Proposed Petition

For the court's reference, the relevant terms of the Trust and the claims of the beneficiaries in the proposed petition are set forth below:

THE TRUST PROPERTY

The Settlers expressly identify all of the Trust assets as the "Trust Estate" in the TRUST PROPERTY section of the Trust. "The Trust is intended by the Trustors [Settlers] to be the recipient of all their assets, whether community, quasi-community or separate, as well as the named beneficiary of all interests of which the Trustors [Settlers] are, or may become, beneficiaries." (AA, at p. 152.) The Property Transferred to the Trust subsection provides that:

The Settlers have paid over, assigned, granted, conveyed, transferred and delivered, and by this Agreement do hereby pay over, assign, grant, convey, transfer and deliver unto the Trustee their property . . . and any other property that may be received or which has been received by the Trustee hereunder, as invested and reinvested (hereinafter referred to as the 'Trust Estate'), shall be held, administered and distributed by the Trustee as hereinafter set forth.

(AA, at p. 152 (emphasis added).)

THE SUBTRUSTS

Upon the death of either Settlor, the Trustees shall divide the Trust Estate into two separate shares, which become irrevocable as follows: One share, designated Survivor's Trust A, shall become irrevocable upon the death of the Surviving Settlor. The other share, designated as

Decedent's Marital Share shall be divided into Decedent's Trust "B" and Trust "C". Upon creation of such Trust shares, Decedent's Trust "B" and Trust "C" are irrevocable. (AA, at p. 176 (emphasis added).) "Upon the death of both husband and wife, the entire trust becomes irrevocable by its terms." (AA, at p. 151)

Upon the death of either Settlor, the Trustee is directed to allocate to the Decedent's Marital Share Trust B ("Decedent's Trust B") an amount equal to the exemption equivalent amount. Any portion of the Marital Share that exceeds the exemption equivalent amount is allocated to the Decedent's Marital Share Trust C (AA, at pp. 176-78.) The Surviving Spouse is the income and principal beneficiary of the Trust Estate during her lifetime. (AA, at pp. 180 [Trust A], 182-3 [Trust B], 184-85 [Trust C].) Upon the death of the Surviving Settlor, the remaining balance of the Trust Estate shall be distributed in accordance the "Allocation and Distribution" section of the Trust. (AA, at pp. 181 [Trust A], 183 [Trust B], 186 [Trust C], 187.)

Pursuant to these terms, the Trust now consists of two subtrusts - Survivor's Trust A (which owns the separate property of the Surviving Settlor and a one-half interest in the community property of the Trust Estate) and Decedent's Trust B (which owns the separate property of the Decedent Settlor and a one-half interest in the community property of the Trust Estate). (See AA, p. 176.) Trust C was not created

because the value of the Marital Share was under the exemption equivalent amount.

THE ASSET ALLOCATION AND DISTRIBUTION
PROVISIONS OF THE TRUST

The ALLOCATION AND DISTRIBUTION OF TRUST ASSETS section of the Trust (see AA, at pp. 187-92) explains how the Trust Estate is to be held, administered, and distributed upon the death of the Surviving Spouse as follows: “Upon the death of the Surviving Spouse, the Trustee shall hold, administer and distribute the Trust in the following manner.”

In the ALLOCATION AND DISTRIBUTION OF TRUST ASSETS section, the Settlers confer discretionary powers upon the Trustees and give specific directions about the distribution of all of the assets owned by the Trust, regardless of which subtrust owns them. The Trustees are directed to abide by any memorandum by the Settlers directing the disposition of personal and household effects. Thereafter, in the Support and Education subsection, the Trustees are granted discretion to distribute as follows: “[a]t any time prior to the division of the trust into shares as hereinbefore provided [i.e., into Trust A and Trust B], or prior to distribution if divided, the Trustee may, in their sole and absolute discretion, provide such sums as shall be necessary or advisable, for the care and maintenance, medical needs, and education of any primary beneficiary.

This provision shall also apply to the issue of a deceased primary beneficiary.” (AA, at pp. 187-88 (emphasis added).)

The Extraordinary Distribution subsection provides that “[t]he Trustee is further authorized, in their sole and absolute discretion, to provide such sums as shall be necessary or advisable, for the furtherance of worthwhile personal, professional or business goals, and if deemed appropriate by the Trustee, to provide such reasonable sums for a partial or complete down-payment on a home of any primary beneficiary, provided, however, that no such aid or support shall in any way diminish the benefits available to any other beneficiary. Such provision shall also apply to the issue of a deceased Primary Beneficiary of the Settlor.” (AA, at p. 188.)

The Handicapped Beneficiaries subsection provides for the termination, suspension, or reinstatement of “the discretionary rights” of a beneficiary on the happening of future specified events.

Any beneficiary who is determined by a court of competent jurisdiction to be incompetent shall not have any discretionary rights of a beneficiary with respect to this Trust, or their share of portion thereof. The Trustee shall hold and maintain such incompetent beneficiary's share of the Trust Estate and shall, in the Trustee's sole discretion, distribute for and provide for such beneficiary as provided for in this trust for benefits to minors, and under "Support and Education of the Beneficiaries”.

Notwithstanding the foregoing, any beneficiary who is diagnosed for the purposes of governmental

benefits (as hereinafter delineated) as being not competent or as being disabled, and who shall be entitled to governmental support and benefits by reason of such incompetency or disability, shall cease to be a beneficiary of this Trust. Likewise, they shall cease to be a beneficiary if any share or portion of the principal or income the Trust shall become subject to the claims of any governmental agency for costs or benefits, fees or charges.

The portion of the Trust Estate which, absent the provisions of this section "Handicapped Beneficiaries", would have been the share of such incompetent or handicapped person shall be retained in Trust for as long as that individual lives. The Trustee, at the sole discretion of the Trustee, may utilize such funds for the individual as specified under "Support and Education of the Beneficiaries". Upon the death of this individual the residual of this share shall be distributed as otherwise specified in the Trust.

If such individual recovers from incompetency or disability, and is no longer eligible for aid from any governmental agency, including costs or benefits, fees or charges, such individual shall be reinstated as a beneficiary after 60 days from such recovery, and the allocation and distribution provisions as stated herein shall apply to that portion of the Trust Estate which is held by the Trustee subject to the foregoing provisions of this section.

(AA, at pp. 188-90 (emphasis added).)

After the foregoing provisions, the Settlers identify the primary beneficiaries. "Unless otherwise herein provided, upon or after the death of the Surviving Settler, the primary beneficiaries of this trust are Rodney Edward Donkin Jr.,

Lisa Barbara Donkin Kim, and Annemarie Nancy Donkin.”
(AA, at pp. 190, 201.)

The next subsection, Allocation of Trust Assets, dictates how many shares are to be created with the residual of the trust estate after the aforementioned conditions have been satisfied.

When the above conditions are satisfied, the debts and obligations of the Trust Estate have been paid, and any special bequests have been distributed, the Successor Trustees shall allocate and divide the Trust Estate as then constituted into separate shares so as to provide one share for each of the designated Primary Beneficiaries living at the death of the Surviving Settlor, and one share for each deceased Primary beneficiary leaving issue surviving. (AA, at pp. 190.)

The Distribution of Trust Assets subsection further instructs, “After allocating and dividing the residual of the Trust Estate into shares, the Trustee shall distribute the shares allocated to Primary Beneficiaries outright as soon as is practicable. Any share allocated to the issue of a deceased Primary Beneficiary shall be distributed as hereinafter provided.” (AA, at p. 190.)

The Per Stirpes subsection explains the actions to be taken by the Trustees if a primary beneficiary dies after allocation but before the complete distribution of her share:

After division into shares pursuant to the paragraph "Allocation of Trust Assets" above, upon the death of a Primary Beneficiary of the Settlor prior to complete distribution of his or her share, the undistributed balance of such Primary Beneficiary's

share shall be distributed per stirpes to his or her then living issue . . . If a deceased Primary Beneficiary should leave no issue, then said deceased Primary Beneficiary's share shall be distributed per stirpes to the Settlor's then living issue.

(AA, at p. 191 (emphasis added).)

The Intestate Succession subsection specifies contingent alternatives for distribution and begins with “[i]f at the time of the Surviving Spouse’s death, or at any later time prior to final distribution hereunder . . .” (AA, at p. 192.)

TRUSTEE POWERS

In the TRUSTEE POWERS section of the Trust, the Trustees are given various powers and instructions. In the Specific Trustee Powers subsection, the Trustees are authorized and empowered with respect to any property, real or personal, at anytime held under any provision of this Trust, to continue any business of the Settlor, hold, improve, invest, lease, manage, mortgage, repair, make distributions in cash or in kind or partly in each without regard to the income tax basis of such asset and, in general, exercise all of the powers in the management of the Trust Estate which any individual could exercise in the management of similar property owned in its own right, upon such terms and conditions as to the Trustees may seem best. (AA, at p. 165-66.) Under Valuation of Assets, the Settlor's provide that “[a]fter any division of the Trust Estate, the Trustee may

make joint investments with funds from some or all of the several shares of the Trust.” (AA, at p. 171 (emphasis added).) The subsection Discretionary Powers of Trustee identifies two classes of beneficiaries and includes an “incentive” clause.

In exercising its discretion hereunder, the Trustee is to consider the needs of the Surviving Spouse, during his or her lifetime, as the primary purpose of the Trust, even if the satisfaction of such needs requires invasion of the entire Trust Estate.

After the death of the Surviving Spouse, the needs of the children shall be paramount to the conservation of the Trust Estate for the benefit of those who will be entitled to take at its termination. The Trustee shall, in exercising the discretion given herein for the benefit of the children or their issue, do so in such a manner as will encourage thrift, industry, and self-reliance to the maximum extent practicable by the respective beneficiaries, and discourage extravagance or indolence on the part of any such beneficiary. (AA, at p. 162 (emphasis added).)

Thus, the Settlers’ mandate that the Trustees consider this incentive provision prior to exercising their discretion to make distributions to the beneficiaries. The interests of “those who are entitled to take at its termination,” while secondary to the needs of the primary beneficiaries, must be considered too.

The Trust also contains a spendthrift clause. (See AA, at pp. 193-94.)

3. The Trust Amendments

The May 10, 2002 First Amendment, executed by both Settlers, makes various modifications to the Trust. The Successor Trustee paragraph was amended to name Rodney E. Donkin Jr. and Vicki Rose Donkin (i.e the Trustees) to serve as First Successor Trustee(s) and removed Annemarie Donkin and Lisa Kim (i.e. the beneficiaries) from co-equal First Successor Trustee status by moving them to the Second Successor Trustee(s) position. The Allocation of Trust Assets subsection of the ALLOCATION AND DISTRIBUTION OF ASSETS section was modified. The Settlers confirmed and republished the Trust. (AA, at p. 200-03.)

The December 17, 2004 Second Amendment, executed by the surviving Settlor, Mary E. Donkin ("Mary"), again amended the Allocation of Trust Assets subsection, as follows:

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 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 leaving 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 . . . (AA, at p. 205.)

Immediately following these changes, Mary added her no contest clause, and confirmed and republished the Trust. (AA, at p. 206.)

4. The No Contest Clauses

The original Trust contains the “No Litigation” Clause. The Settlers articulate their wishes and provide instructions to the Trustees as follows:

Litigation

The Settlers 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 Settlers 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. . . .

(AA, at p. 156.)

Thus, the “No Litigation” Clause is triggered by petitions filed by beneficiaries that “legally challenge” the Trust, its provisions, or asset distributions. The “No Litigation” Clause is applicable to Survivor’s Trust A and Decedent’s Trust B. The forfeiture is that all asset distributions to the challenging beneficiary shall be retained in trust as if the challenging beneficiary and her issue had predeceased the distribution of the Trust Estate.

The Second Amendment contains "Mary's No Contest Clause," as follows:

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 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.

(AA, at p. 206.)

Thus, Mary's No Contest Clause is triggered by petitions filed by beneficiaries that contest or attack "this instrument [the Second Amendment] or any of its provisions." The forfeiture is that any share or interest given to that contesting beneficiary is revoked.

5. The Beneficiaries' Relevant Claims in the Proposed Petition

In the proposed petition, the beneficiaries allege:

- **FAILURE TO DISTRIBUTE:** “The Successor Trustees have failed to, or indicate an intention to, distribute the trust(s) attributable to Trustor RODNEY E. DONKIN (‘Decedent’s Trusts B’ and ‘C’) which, by the terms of the original Trust Agreement, were to be distributed upon the death of the surviving spouse, MARY E. DONKIN (p.42), nor do they state any reason why said Trust(s) cannot be distributed.” (AA, at p. 30 ll. 18 to 24.)
- **Footnote 2:** “The provisions of the Trust, as they relate to the Decedent’s Trusts, became irrevocable upon the death of RODNEY E. DONKIN and were unaffected by the amendment of December 17, 2004.” (AA, at p. 30 ll. 28.)
- **REQUEST FOR DISTRIBUTION:** “The Decedent’s Trust(s) have not been distributed, although the Trust Agreement requires that they be distributed upon the death of the surviving Trustor [Settlor] on February 5, 2005, and this Court should order them distributed forthwith.” (AA, at p. 32 ll. 20 to 24.)
- **PARAGRAPH J:** “The purported accountings demonstrate that the Successor Trustees are continuing to hold and subjectively value the real estate and other holdings of the Trust and are

including assets in the commission base that are not part of the Trust Estate, or should have been distributed (Par. 6, *infra*), so as to continue to derive commissions therefrom and at excessive rates.” (AA, at p. 30 ll. 7-12.)

- PRAYER: “WHEREFORE, petitioners pray for an Order of this Court as follows:
 1. Sustaining the OBJECTIONS of petitioners and ordering the filing of a proper accounting;
 2. Surcharging the Successor Trustees for damages, waste and other loss suffered by the Trust Estate to be shown at the time of hearing;
 3. Denying compensation to the Successor Trustees and ordering the recovery of amounts paid to them, or in the alternative, fixing their compensation, if any, and removing them as Trustees;
 4. Directing the distribution of the Trust(s) attributable to RODNEY E. DONKIN.”

(AA, at p. 32 l. 25 to p. 33 l. 7.)

C. Ruling Of The Superior Court

The trial court granted the safe harbor application and signed the following order:

The Court, having read and considered the Application and the Response thereto, having reviewed the documents presented in support thereof, including the Trust Agreement and the Amendments thereto, having heard and considered all evidence submitted by the parties in support of and in opposition to said Application, now determines the Application as follows: IT IS ORDERED, ADJUDGED AND DECREED that the matters raised in the proposed Petition do NOT constitute a contest under the terms of the no contest clause(s) of the subject Trust.

(AA, at p. 257 ll.4 to 12.)

D. Ruling of The Court of Appeal

The Court of Appeal affirmed to the extent that the trial court determined that the former no contest law applies and reversed the rest of the trial court decision, concluding that certain of the beneficiaries' claims constitute a contest under the Trust and the Second Amendment, as follows:

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 [sic] the power to amend the Trust also constitutes a challenge to the distributive scheme of the Settlor. 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.

(Donkin, 204 Cal.App.4th at 639-40.)

ARGUMENT

I.

The Court of Appeal Correctly Ruled that the Former No Contest Law Should Apply to the Settlor's Estate Planning Documents.

On January 1, 2010, during the pendency of the safe harbor application, the no contest law changed. The new law applies retroactively “to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.” (Cal. Prob. Code §§21315(a) (Deering 2012).) The Probate Code section implementing new laws permits application of the former law under certain circumstances. Appellants followed the transitional rules under Probate Code §3(h) and filed a petition for instructions to obtain a determination of which no contest law applies to the Settlor’s estate planning documents and whether respondents violated the Settlor’s no contest clauses. On August 16, 2010, the trial court refused the Trustees’ repeated requests for a ruling concerning which law applies; granted the safe harbor application, without giving the Trustees an opportunity to respond to it; and continued the remaining issues in the petition for instructions. Since the safe harbor remedy was eliminated under the new law, it can be implied that the trial court applied the former no contest law in granting the safe harbor application.

The Court of Appeal’s ruling that the former no contest law applies to the Settlor’s estate planning documents is

case qualifies for an exception to the retroactive application of the new law. Under the unique circumstances of this case, it would be grossly unfair to change the rules governing the enforcement of the no contest clauses in the Settlor's estate planning documents. And, Probate Code §3(h) provides a general fairness exception to the retroactive application of new probate laws.

A.

The Parties Have Agreed that the Application of the New Law to the Trust Would Substantially Interfere with the Rights of the Parties and Other Interested Persons in Connection with the Circumstances that Existed Before the Operative Date of the New Law.

Probate Code §3 contains transitional provisions for the implementation of new probate laws. (See Cal. Prob. Code §3 (Deering 2012).) Probate Code §3(h) provides a general fairness exception to the retroactive application of a new law:

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 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 circumstances 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.

reasonably necessary to mitigate the substantial interference.

(Cal. Prob. Code §3(h)(Deering 2012) (emphasis added).)

In Paragraph 51 of the petition for instructions and the beneficiaries' response, the Trustees allege, and the beneficiaries admit, that:

The application of the new no contest statute to the Trust would substantially interfere with the rights of the parties and other interested persons in connection with circumstances that existed before the operative date of the new law. Both of the Trustors [Settlors] died before the new law was even enacted.

(AA, at pp. 141 l.23 to 142 l.3, 226 ll.1-2.)

Thus, all of the parties agree that the application of the new no contest law would substantially interfere with the rights of the parties in connection with circumstances that existed before the operative date of the new law. Under Probate Code §3(h), the former no contest law should be applied to mitigate the substantial interference with the rights of the Settlers.

B.

It Would Be Unfair to Change the Rules
Governing the Enforcement of the No Contest
Clauses in the Settlers' Estate Planning Documents
After Both Settlers Are Deceased.

A person drafting a testamentary estate planning document is presumed to know and rely on the law in existence at the time of executing the estate planning documents. (See, e.g., Newman v. Wells Fargo Bank, 14 Cal.4th 126, 136-142, 59 Cal.Rptr.2d 2, 926 P.2d 969 (1996).)

A retroactive application of the new no contest law to the Settlers' estate planning documents would unfairly defeat the Settlers' expectations when the documents were made. The Settlers executed the Trust and the Wills in 1988. They provided for resolution of disputes by arbitration and included a stern "No Litigation" Clause, evidencing their unequivocal intent to deter litigation by imposing forfeiture on violators. The no contest clauses in the Wills are broadly worded to cover not only challenges to the Wills, but also challenges to the Trust and amendments to the Trust. (AA, at pp. 208-211, 213-16.)

The Trust was first amended on May 10, 2002. The First Amendment was attorney-drafted. Both Settlers confirmed and republished the Trust as amended. The "No Litigation" Clause was not altered, indicating that the Settlers were satisfied with the existing trust provision and

the state of the no contest law. The Settlers' did modify the Trust to name Rodney E. Donkin Jr. and Vicki Rose Donkin as the First Successor Trustees and remove Annemarie Donkin and Lisa Kim from such responsibility.

The Trust was later amended by Mary on December 17, 2004, utilizing the same attorney and verbiage as in the First Amendment to indicate what was subject to the Second Amendment. After expressing her changes, which included granting the Trustees considerably more discretion in distributing the assets of the Trust Estate, Mary added a second no contest clause, Mary's No Contest Clause, to protect the Second Amendment. She confirmed and republished the Trust as amended. The addition of this second no contest clause, without changing the Trust's existing "No Litigation" Clause, presumptively manifests Mary's satisfaction with the existing no contest provisions and law, and more firmly entrenches the Trust in the milieu of the former no contest law. Mary died on February 5, 2005. The new no contest law was enacted three years later, in 2008, after both Settlers were dead and the Trust was irrevocable.

The unfairness of retroactively applying the new no contest law to the Settlers' estate planning documents is obvious. It would defeat the expectations of the Settlers when they executed the documents. The new no contest law significantly limits the situations in which no contest clauses will be enforced and weakens the impact of no

contest clauses in direct contest cases by adding a probable cause exception to enforcement. (See 2008 Cal. Stat. Ch. 174 §2 (codified at Cal. Prob. Code §21311(a)(1), (a)(2), (a)(3)).) There could be various situations where an action would violate the no contest clauses in the Trust under the former law (as clearly intended by the Settlers) but not under the new law. For example, the beneficiaries' challenge to the Settlers' express conditions precedent to distribution clearly contradicts the Settlers' intentions. Yet, this challenge might escape prohibition under the new law. The evidence suggests that if the Settlers had known that the no contest law would be different in the future, they likely would have made different choices in crafting their estate plan. In Paragraph 51 of the petition for instructions and the beneficiaries response, the Trustees allege, and the beneficiaries admit, that

[a]t the time of her death, Trustor Mary E. Donkin was taking affirmative steps to strengthen the no contest provisions and to discourage Annemarie and Lisa from challenging the Trust. Since she died before the enactment of the new statute, Trustor Mary E. Donkin did not have the benefit of the grace period to make adjustments to accommodate the new law.

(AA, at pp. 142 ll.3-8, 226 ll.1-2.)

C.

Probate Code §3(h) Provides a General Fairness Exception to the Retroactive Application of the New No Contest Law.

Probate Code §3(b) states that Probate Code §3 “governs the application of a new law except to the extent otherwise expressly provided in the new law.” (Cal. Prob. Code §3(b) (Deering 2012).) The new no contest law provides that it “applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.” (See Cal. Prob. Code §21315(a) (Deering 2012).) Further, Probate Code §3(d) provides that “any subsequent proceedings taken after the operative date concerning the petition, account, report, inventory, appraisal, or other document or paper, including an objection or response, a hearing, an order, or other matter relating thereto is governed by the new law and not by the old law.” (Cal. Prob. Code §3(d) (Deering 2012).) Under these provisions, the new no contest law would normally apply in this case. The Trust became irrevocable after January 1, 2001. The September 20, 2010 trial court order from which the Trustees appealed was based on “subsequent proceedings” taken after the January 1, 2010 operative date of the new statute. However, upon the application of a party, Probate Code §3(h) gives the court discretion to apply the former law when application of the new law in the manner required by Probate Code §3 or by the new law (i.e., in the manner required by Probate Code §21315(a)) would substantially interfere with the rights of the parties based on

circumstances that existed before the operative date. (Cal. Prob. Code §3(h) (Deering 2012).) According to the California Law Revision Commission, Probate Code §3(h) “provides a general fairness exception to the retroactive application of new law.” (See *Revision of No Contest Clause Statute (Transitional Issues)*, Cal. L. Revision Comm’n First Supplement to Staff Memorandum 2008-3 3-4 (January 15, 2008) (hereafter “*Revision of No Contest Clause Statute*”).) The Commission noted that retroactive application of the new no contest law would be unfair and could invoke constitutional issues when a settlor who relied on the former law died and the trust became irrevocable before the new law was enacted. (Id. at 7, 9-10.) Probate Code §3(h) provided a form of due process that might cure any potential constitutional defects if the retroactive application of the new no contest clause impaired vested property or contract rights. (Id. at 12-13.) In concluding that the trial court did not abuse its discretion in determining that the former no contest law applies, the Court of Appeal relied on “[t]he Law Revision Commission comments to section 3 [which] 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.’ (citation omitted)” (Donkin, 204 Cal.App.4th at 638.) This case complies with the above parameters. Both Settlers died before the new law was even enacted. The impact of the new law on the Settlers’ estate plan was not minor. Preventing costly litigation was a major concern of the Settlers. They included detailed language in the Trust and took specific steps to prevent litigation (e.g., included an arbitration provision, amended the successor trustee section of the Trust, broadened the discretionary authority of the successor trustees, added a second no contest clause). The application of the new law would substantially dilute those efforts. The Trustees were entitled to a judicial hearing and determination of whether fairness requires application of the old no contest law. (See Revision of No Contest Clause Statute, at 12-13.) This is exactly what they sought. The Court of Appeal was right. The application of the new law would substantially interfere with the Settlers “extensive reliance on prior law.” (Donkin, 204 Cal.App.4th at 639.) The former no contest law should be applied to the Settlers’ estate planning documents.

II.

Under the Former No Contest Law in Effect at the
Time of Mary's death, the Proposed Petition
Violates the No Contest Clauses in the Trust
and the Second Amendment.

Under the former no contest law, a "no contest clause" is "a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court." (Probate Code §21300 (Deering 2009) (repealed by S. B. No. 1264, ch. 174, 2007-2008 Reg. Sess., 2008 Cal. Stat. Ch. 174, 2008 Cal. Adv. Legis. Serv. 174 (Deering) (effective January 1, 2009, operative January 1, 2010).) The term "contest" covers both "direct and indirect contests." (Probate Code §21300(a) (Deering 2009)(repealed 2009).) A "direct contest" is a pleading "alleging the invalidity of an instrument or one or more of its terms" based on revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. (Cal. Prob. Code §21300(b) (Deering 2009)(repealed 2009).) No such allegations exist here. Thus, the issue is whether the filing of the proposed petition would constitute an *indirect* contest. An "indirect contest" is a pleading that "indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in [Probate Code §21300] subdivision (b)" (Cal. Prob. Code §21300(c) (Deering 2009)(repealed 2009). See also Johnson v.

Greenelsh, 47 Cal.App.4th 598, 605, ___ Cal.Rptr.3d ___ (2009) (hereafter "Greenelsh") (an indirect contest is one that attacks the validity of an instrument by seeking relief inconsistent with its terms.) A "pleading" is a petition, complaint, response, objection, or other document filed with the court that expresses the position of a party to the proceedings. (See Cal. Prob. Code §21305(f)(Deering 2009)(repealed 2009).)

"An in terrorem or no contest clause in a will or trust instrument creates a condition upon gifts and dispositions provided therein. (citation omitted) In essence, a no contest clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument. (citation omitted) No contest clauses are valid in California and are favored by public policies of discouraging litigation and giving effect to the purposes expressed by the testator. (citations omitted)" (Burch v. George, 7 Cal.4th 246, 254, 27 Cal.Rptr.2d 165, 866 P.2d 92 (1994) (hereafter "Burch").) "Whether there has been a 'contest' within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." (Id. at 254-55 (quoting Estate of Watson, 177 Cal.App.3d 569, 572, 223 Cal.Rptr. 14 (1986)). See also McIndoe v. Olivos, 132 Cal.App.4th 483, 487, 33 Cal.Rptr.3d 689 (2005) (the court considers the circumstances under which the trust was made in order to place itself in the

position of the trustor to interpret the trust document).) “In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it. [citation omitted]” (Scharlin v. Superior Court, 9 Cal.App.4th 162, 168, 11 Cal.Rptr.2d 448 (1992)(hereafter “Scharlin”).) The court “must not rewrite the [trust] in such a way as to immunize legal proceedings plainly intended to frustrate [the trustor’s] unequivocally expressed intent from the reach of the no-contest clause.” (Burch, 7 Cal.4th at 255 (quoting Estate of Kazian, 59 Cal.App.3d 797, 802, 130 Cal.Rptr. 908 (1976)).) The scope and effect of a no contest clause is determined by the settlors’ intent. (See, e.g., Hearst v. Ganzi, 145 Cal.App.4th 1195, 1201 n.6, ___ Cal.Rptr.3d ___ (2d Dist. 2006) (hereafter “Hearst”) (the paramount rule in the construction of testamentary documents, to which all other rules must yield, is that the document is to be construed according to the intention of the testator as expressed therein).)

A.

The Proposed Petition Attacks the Validity of the Second Amendment, Triggering Mary's No Contest Clause.

1.

The Proposed Petition Violates Mary's Second Amendment Under the Old Law.

The language used by Mary in the Second Amendment clearly manifests her intent to amend the provisions of the entire Trust and to control the disposition of all of the assets owned by the Trust. In the same verbiage used by both Settlers in the First Amendment, Mary identifies THE DONKIN FAMILY TRUST by its formal name and then “declares this to be the Second Amendment to said Declaration of Trust, and amends said Trust as follows.” (AA, at p. 205. Compare AA, at p. 201.) Mary revises the distribution plan in the Allocation of Trust Assets subsection. The revised distribution plan affects “the assets of the trust estate” and “any or all of the assets in the trust.” (AA, at p. 205.) By definition in the trust instrument, the term “Trust Estate” encompasses all of the assets received by the Trust (i.e., all of the Settlers’ assets, whether community, quasi-community or separate). (AA, at p. 152.) Mary confers broad discretionary power with respect to all of the assets owned by the Trust, the “Trust Estate,” regardless of which subtrust owns them. She states, “the Trustee shall have the complete discretion whether to keep the assets of the trust estate intact and continue to manage them . . .

[w]hen the trustee determines it is appropriate to liquidate any or all of the assets in the trust. . .” (AA, at p. 205.) Mary’s declaration that she amends “said Trust” (i.e., Trust in the singular) combined with her references to “the assets of the trust estate” and “any or all of the assets in the trust” unequivocally communicate her belief and her intent that her Second Amendment control the disposition of the entire Trust Estate.

The circumstances surrounding the execution of the Second Amendment further indicate that Mary intended that in order to be entitled to distribution a beneficiary must acquiesce to the terms of the Second Amendment. In the Second Amendment, Mary retained the Trust’s conditions precedent to any allocation of shares for the primary beneficiaries (“[w]hen the above conditions are satisfied” and “the debts and obligations of the Trust Estate have been paid”), but then gave the Trustees complete discretion over the distribution of all of the assets in the Trust and added a second no contest clause. The beneficiaries have admitted that Mary was taking affirmative steps to strengthen the no contest provisions and discourage them from challenging the Trust. (AA, at pp. 142 ll.3-5, 226 ll.1-2.) Thus, the language in the Second Amendment and the circumstances surrounding its execution show that Mary intended that a beneficiary must acquiesce to the terms of her amendment or else “any share or interest in the trust given to that

contesting beneficiary under this instrument is revoked.”

(AA, at p. 206.)

In the proposed petition, the beneficiaries express their legal position that “by the terms of the original Trust Agreement,” the Decedent’s Trusts “were to be distributed upon the death of the surviving spouse, MARY E. DONKIN,” and “[t]he provisions of the Trust, as they relate to the Decedent’s Trusts, became irrevocable upon the death of RODNEY E. DONKIN and were unaffected by the amendment of December 17, 2004 [i.e., Mary’s Second Amendment].” (AA, at p. 30 ll.18-24, 28 (emphasis added).) The beneficiaries thus assert that the Second Amendment is invalid with respect to the Decedent’s Trusts (i.e., Decedent’s Trust B). By adopting this position, the proposed petition is a pleading that 1) indirectly challenges the validity of a trust instrument or one or more of its terms (see Cal. Prob. Code §21300(c) (Deering 2009)(repealed 2009)); 2) attacks the validity of the Allocation of Trust Assets provision in the Second Amendment (see Mary’s No Contest Clause (“[i]f any beneficiary in any manner, directly or indirectly, contests or attacks this instrument or any of its provisions ”) (AA, at p. 206.); and 3) “legally challenges” the Mary’s Second Amendment (see the “No Litigation” Clause, which was confirmed and republished in the Second Amendment (“[i]f a beneficiary . . . should legally challenge this Trust, its provisions, or asset distributions”) (AA, at p. 156)).

2.

The Proposed Petition Also Violates Mary's Second
Amendment under the New Law.

Under former Probate Code §21305(a)(2), an action to “determine the character, title, or ownership of property” is a contest if expressly identified in the no contest clause. (Cal. Prob. Code §21305(a)(2)(Deering 2009)(repealed 2009).) Under the new law, “[a] pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer” is a contest “if the no contest clause expressly provides that application.” (Cal. Prob. Code §21311(a)(2)(Deering 2012).) There is no probable cause exception to the enforcement of a no contest clause under this provision. The beneficiaries’ allegations in the proposed petition do challenge a transfer of property [the assets in Decedent’s Trust B] on the grounds that the property was not subject to the transferor’s [Mary’s] control at the time of the transfer [the execution of the Second Amendment]. The wording of Mary’s No Contest Clause (“if any beneficiary attacks this instrument or any of its provisions”) and the “No Litigation” Clause (“if a beneficiary . . . should legally challenge this Trust, its provisions, or asset distributions”) expressly identify the kind of challenge presented in the proposed petition. Thus, the proposed petition contests the Second Amendment under both the former no contest law and the new no contest law.

3.

The Beneficiaries' Arguments Are Not
Consistent with the Settlers' Intent.

In their opening brief, the beneficiaries persist in their argument that the Decedent's Trust became irrevocable on the death of Rodney E. Donkin, citing a paragraph relating to the tax identification numbers for the subtrusts. (OB, at pp. 2, 21-22.) Their position does not comport with the express Trust's terms that "[u]pon the death of both husband and wife, the entire trust becomes irrevocable by its terms" and "[u]pon creation of such Trust shares, Decedent's Trust "B" and Trust "C" are irrevocable" (see AA, at p. 151, 176 (emphasis added)), or with the opinion of the Court of Appeal (See Donkin, 204 Cal.App.4th at 627-28, 639) ("settlers created a revocable Trust on August 15, 1988, which by its terms became irrevocable upon the death of both spouses"; "Upon the creation of Trust B and trust C, such trusts became irrevocable"; the beneficiaries are challenging Mary's failure to create the subtrusts).)

The beneficiaries argue that Mary could not have intended that the Second Amendment affect the Decedent's Trusts because the structure of the Trust evidences intent on the part of the Settlers' to avoid estate taxes. (OB, at p. 4-5, 22, 30-1. See also Scharlin, 9 Cal.App.4th at 169 (argument that the trust was created to take advantage of the tax laws rejected because no evidence was introduced regarding settlers' intent in creating the trust).) The Settlers'

stated purpose for creating the Trust does not mention tax avoidance. (AA, at p. 149.) Also, the circumstances surrounding the execution of the Second Amendment indicate that Mary was primarily concerned about preventing estate litigation among her children after her death. Mary lived for two and a half years after Rodney died. She had the advice of counsel. (See AA, at pp. 203, 206-07 (Stephen G. McKee, an estate planning attorney in Santa Clarita, California, drafted the First Amendment and the Second Amendment).) She could have created the subtrusts. (See AA, at p. 176 (the Survivor's Trust and the Decedent's Trusts could be created upon the death of either Settlor).) She did not. Instead, as the beneficiaries have admitted, Mary took steps to give the Trustees more control over the disposition of the assets of the Trust and to strengthen the no contest provisions of the Trust. As previously discussed, the language of the Second Amendment manifests an irrefragable intention to control the disposition of the entire Trust Estate. And the language of Mary's No Contest Clause is just as plain: "If any beneficiary in any manner . . . contests or attacks this instrument," the prescribed punishment must be imposed. "Had the trustors intended a contest to a particular subtrust result in a contest to all subtrusts, they could have so stated." (McIndoe, 132 Cal. App. 4th at 489.) Mary did so state. The proposed petition contests the Second Amendment. For no contest analysis, the issue is whether Mary intended for her amendment to

apply to the Decedent's Trusts. Mary's intent governs the outcome even if she was mistaken in her belief about the extent of her authority. (See, e.g., Burch, 7 Cal.4th at 254-55, 257.) The issue of whether Mary actually had authority to amend the Decedent's Trust goes to the merits of the proposed petition and is irrelevant in this proceeding. (Cal. Prob. Code §21320(c) (Deering 2009)(repealed 2009).)

B.

The Proposed Petition's Demand for Distribution Legally Challenges the Decedent's Trust's Asset Distribution Provisions, Triggering the "No Litigation" Clause.

In the proposed petition, the beneficiaries express their legal position that "by the terms of the original Trust Agreement," the Decedent's Trusts were "to be distributed upon the death of the surviving spouse, MARY E. DONKIN" and that "the Trust Agreement requires that they be distributed upon the death of the surviving Trustor on February 5, 2005." The beneficiaries insist that "[t]his Court should order them distributed forthwith" and accuse the Trustees of "continuing to hold and subjectively value the real estate and other holdings of the Trust and are including assets in the commission base that are not part of the Trust Estate, or should have been distributed." The beneficiaries pray for an order "[d]irecting the distribution of the Trust(s) attributable to RODNEY E. DONKIN [i.e., Decedent's Trust B]."

The beneficiaries' position is that Mary's amendment was ineffective to amend the Decedent's portion of the trust; therefore, their characterization of the terms as reflected above, apply to the Decedent Trust's assets. In their zeal for immediate outright distribution, the beneficiaries grossly misstate the asset distribution provisions of the original Trust. The Settlers did not want or contemplate, and the Trust does not require, an immediate distribution of the Trust Estate upon the death of the surviving Settlor. The Trustees are given discretionary authority to distribute to any primary beneficiary "at any time" "prior to distribution" for specified allowable purposes subject to a spendthrift clause, asset protection provisions, and an incentive clause. (See THE ASSET ALLOCATION AND DISTRIBUTION PROVISIONS OF THE TRUST and TRUSTEE POWERS in the Factual Summary above. See also Weinberger v. Morris, 188 Cal.App.4th 1016, 1020-21, ___ Cal.Rptr.3d ___ (2d Dist. 2010) (trust provisions, similar to the provisions in the Trust, manifested an intention that the trust be a continuing trust after the death of the settlor).) And now, the Trustees cannot distribute any Trust assets until they obtain a final determination of which no contest law applies to the Settlers' estate planning documents and whether the Court of Appeal correctly ruled that certain claims in the proposed petition would, if pursued, constitute a contest under the Trust, and a resolution of the remaining issues in the petition for instructions, which is still pending in the trial court.

The Trust plainly directs that, upon the death of the Surviving Spouse, all of the assets of the Trust, including the assets in the Decedent's Trusts, shall be combined into a single trust to be held, administered, and distributed according to the ALLOCATION AND DISTRIBUTION OF TRUST ASSETS section of the Trust. (See AA, p. 181 (Distribution of Residual of Trust A), pp. 183 to 184 (Distribution of Residual of Trust B), p. 186 (Distribution of Residual of Trust C.) The proposed petition seeks to eliminate the assets of the Decedent's Trust B from the Trust and remove them from the Trustees' control. The requested relief is for the court to direct the distribution of the Trusts attributable to Rodney E. Donkin. The beneficiaries do not allege that the Trustees have abused their discretion; rather, they allege that the Trustees have no discretion and state that "[T]he Trust Agreement requires that they be distributed upon the death of the surviving Trustor [Settlor] on February 5, 2005." The proposed petition skips over the Trust's conditions precedent to distribution and demands distribution of the assets of the Decedent's Trusts "forthwith." In essence, the beneficiaries' position is that the asset protection provisions in the Settlor's estate plan are invalid, and the Settlor had no right to place conditions in the way of the beneficiaries' asset distributions. 1 The

1 If, as the beneficiaries argue, the Trust became irrevocable upon Rodney E. Donkin's death, on August 26, 2002, Former Probate Code Section 21305(b)'s public policy

Settlors clearly expressed their “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 . . . disbursement of the assets. Furthermore, the Settlers have taken great care to designate, through the provisions of this Trust, how they want the Trust Estate distributed.” (AA, at p. 156 (emphasis added).) The proposed petition is a judicial attempt to force an immediate distribution of the Decedent’s Trust B, which legally challenges the Trust, its provisions and *asset distributions*, and falls squarely within the forfeiture provisions. Under the “No Litigation” Clause, the mere filing of an asset distribution claim is a contest within the plain language of the no contest clause, the purported reason for prosecuting the claim is irrelevant. Through the proposed petition, the beneficiaries seek to invalidate the comprehensive distribution plan the Settlers set out in the Trust and distribute Decedent’s Trust B contrary to the well-defined Trust terms.

exceptions (9) interpretation of the instrument, (11) reformation of an instrument, and (12) petition to compel an accounting would not apply to the Trust as an instrument of Rodney E. Donkin (who died before January 1, 2003).

C.

The Proposed Petition Legally Challenges the
Survivor's Trust Asset Distribution Provisions,
Triggering the "No Litigation" Clause.

In the proposed petition, the beneficiaries express their legal position that "[t]he Decedent's Trust(s) have not been distributed, although the Trust Agreement requires that they be distributed upon the death of the surviving Trustor on February 5, 2005, and this Court should order them distributed forthwith." (AA, at p. 32 ll.20-24.) This position also legally challenges the asset distribution provisions of Survivor's Trust A as set forth in the Second Amendment. Survivor's Trust A is subject to the "No Litigation" Clause (in addition to Mary's No Contest Clause). The request is an asset distribution demand that legally challenges the Trust, its provisions, or asset distributions. If successful, the respondents' lawsuit would remove assets from the Trustees' control, invalidate the comprehensive distribution plan as set forth in the Trust and the Second Amendment, and the Decedent's Trusts would be distributed contrary to their terms.

III.

This is Not a Fiduciary Abuse Case.

The beneficiaries characterize this case as one involving egregious fiduciary abuse, deserving of some landmark ruling from this esteemed court. A closer look at the issues presented by the facts of this case and the resulting opinion by the Court of Appeal reveals that this safe harbor proceeding is not about fiduciary abuse. The beneficiaries' position implies that the safe harbor application should be granted if some of the claims in the proposed petition challenge fiduciary actions. The Trustees are not asserting no contest violations for all of the claims in the proposed petition. They are asserting that specific matters alleged in the proposed petition do constitute contests of the Settlor's estate planning documents under both the former no contest law and the new law. The "No Litigation" Clause is invoked if a beneficiary legally challenges any of the provisions of the Trust or its asset distributions. Mary's No Contest Clause is invoked if any beneficiary contests or attacks her amendment or any of the provisions of the Second Amendment. Thus, the issue is whether any one of the claims in the proposed petition fails no contest scrutiny. Therefore, the safe harbor application is meritorious only if all of the claims in the proposed petition pass no contest scrutiny.

The Court of Appeal correctly concluded that the beneficiaries' claims in the proposed petition that the

Trustees' are required to make distributions and that Mary's Second Amendment was invalid with respect to Decedent's Trust B would constitute contests under the circumstances of this case and the express language in the no contest clauses. The rationale of the Court of Appeal was that those challenges attack the distributive scheme established by the Settlers and therefore advance positions and/or demand actions by the Trustees that are in direct conflict with the provisions and requirements of the Trust and the Second Amendment. (See, e.g., Cook v. Cook, 177 Cal.App.4th 1436, 1440, 99 Cal.Rptr.3d 913 (2009)(proposed pleading that sought to have the trustees instructed to distribute the assets in a way that is in conflict with the plain language of the trust would violate the no contest clause).) First, the beneficiaries demand immediate distribution of the Decedent's Trust B. "The Decedent's Trust(s) have not been distributed, although the Trust Agreement requires that they be distributed upon the death of the surviving Trustor on February 5, 2005, and this Court should order them distributed forthwith." (AA, at p. 46.) This position is contrary to the Settlers' comprehensive plan of distribution. Second, the beneficiaries legally challenge and attack the validity of the Second Amendment as it applies to the Decedent's Trusts. "The provisions of the Trust, as they relate to the Decedent's Trusts, became irrevocable upon the death of RODNEY E. DONKIN and were unaffected by the amendment of December 17, 2004." (AA, at p. 45.) This

position is contrary to Mary's intention that the Second Amendment apply to all of the Trust Estate, including the assets in the Decedent's Trusts.

The beneficiaries want the court to establish a standard that would give beneficiaries free reign to sue trustees for alleged fiduciary abuses even if the claims are frivolous. "The potential of disinheritance for frivolous actions seriously chills the advancement of the salutary public policy of maintaining oversight on fiduciaries." (OB, at 15.) Thus, the door would be open for beneficiaries to sue trustees any time they did not agree with the actions or positions of the trustees (regardless of the terms of the governing document) by simply characterizing those actions or positions as fiduciary abuse. Fortunately, the courts have seen through this argument in the past and enforced in terrorem clauses where the objections, challenges, and demands are a disguised attempt to controvert or alter the decedent's testamentary scheme. (See, e.g., Hearst, 145 Cal.App.4th at 1212 ("Plaintiffs cannot avoid the no contest clause simply by denominating their proposed challenge . . . as a cause of action against the Trustees for breach of fiduciary duty".)) Unfortunately, there is no simple formula that can be applied to every situation. The meandering history of no contest law attests to this fact. Each no contest case is different and no one case has controlling precedential authority for another case. "Determination of whether a prohibited contest has occurred must be made on a case-by-

case basis. (citation omitted.)" (Estate of Lindstrom, 191 Cal.App.3d 375, 381, 236 Cal.Rptr. 376 (1987).) And "[w]hether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." (Burch, 7 Cal.4th at 254-55.) "Each case depends upon its own peculiar facts and thus case precedents have little value when interpreting a trust." (See McIndoe v. Olivos, 132 Cal.App.4th 483, 487, 33 Cal.Rptr.3d 689 (2005).) It is no surprise that the beneficiaries' position ignores the fact that, while fiduciary abuse does occur and needs to be remedied, there is also beneficiary abuse that does occur and needs to be remedied. This case is a classic example. When the Trustees took over the administration of the Trust they inherited an expensive lawsuit to recover two trust properties that had been fraudulently stolen. They successfully fought that lawsuit, but emerged with the Trust owing substantial legal fees. It is undisputed that the Trust's financial condition was explained to respondents prior to the beneficiaries commencing their current litigation against the Trustees. (See Appellants Brief, at pp. 5-6; AA, at pp. 131 l.22 to p. 132 l.16, 218 to 219, 226 ll.1-2, 6-10; Respondents Appendix, at pp. 60-64, 101-107, 364 (fiduciary letters).) Since the inception of the Trustees' administration of the Trust, the Trust has had unsatisfied debt and obligations, such as legal fees from the civil litigation and this probate litigation. And, since the filing of the safe harbor application,

there have been disinheritance issues resulting in uncertainty about the persons entitled to distributions. Yet the beneficiaries have been unrelenting in pressing their demands that clearly conflict with the Settlers' stated intentions. This is exactly the kind of behavior that the Settlers legitimately sought to prevent by including the no contest clauses in the Trust.

IV.

This is Not a Public Policy Case.

A Probate Code §21320 application can be used to determine whether a provision in a testamentary instrument violates public policy. (Tunstall v. Wells, 144 Cal.App.4th 554, 561, 50 Cal.Rptr.3d 468 (2006) (hereafter "Tunstall").) However, in their effort to turn this case into a bellwether no contest case, the beneficiaries have taken a huge detour from the real issues. The Court of Appeal found, and the Trustees concur, that some of the claims in the proposed petition would constitute contests under the particular circumstances of this case and the express language in the "No Litigation" Clause and Mary's No Contest Clause. None of the offending claims implicate public policies that disfavor the enforcement of no contest clauses. The Court of Appeal concluded "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 . . ." (Donkin, 204 Cal.App.4th at 639.) As previously stated, the beneficiaries' demand for immediate distribution of the Decedent's Trust B is contrary to the express terms of the Trust. The Court of Appeal further determined that "[t]he beneficiaries' contention that the Second Amendment does not apply to

the Trust because the surviving Settlor (Mary) lacked to [sic] the power to amend the Trust also constitutes a challenge to the distributive scheme of the Settlers.” (Id.) The beneficiaries legally challenge and attack the validity of the Second Amendment as it applies to the Decedent’s Trust B, contrary to Mary’s intention that the Second Amendment apply to all of the Trust Estate. The resolution of this issue turns on Mary’s intent in enacting the Second Amendment. The beneficiaries do not allege that Mary violated any public policies by enacting the Second Amendment. Nor do they argue that the Second Amendment contains any terms that are objectionable on public policy grounds. They merely assert that Mary did not have any authority to amend the Decedent’s Trusts and, therefore, the Second Amendment is inapplicable to the Decedent’s Trusts (i.e., Decedent’s Trust B). (AA, at p. 30 n.2.) In addition, the beneficiaries have expressed the position that the Settlers pre-conditions to distribution do not apply, even though these conditions are plainly stated in the Trust and the beneficiaries do not argue that they contain any ambiguities or public policy exceptions. The terms and conditions included in the original trust and then reiterated in both amendments do not require allocation of any share for the primary beneficiaries until after the “above conditions are satisfied” and “the debts and obligations of the Trust Estate have been paid.” (AA, at pp. 103, 115, and 118). The beneficiaries simply ignore the Settlers incentive clause, spendthrift

clause, and trustee discretion, but admit that "[t]he provisions of the Trust did condition the right to distribution on various factors, relating to 'extraordinary distributions,' 'handicapped beneficiaries,' etc." (AA, at pp. 101-02.) "None of those conditions apply herein." (Respondents' Brief, at pp. 16-17.) Without any reference to the actual facts and circumstances of this case, or explanation of why the conditions do not apply to them, the beneficiaries gloss over these conditions and demand distribution. (Id.; Petition for Review, at pp. 12-13 ("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 . . . to be ineffective, if not mendacious".)) The beneficiaries insist that the Trustees treat all of the conditions as ineffective, in violation of the clear terms of the Trust. The Trustees have a fiduciary duty to all of the beneficiaries of the Trust to obey all of the Settlor's conditions, as well as a legal duty to pay the creditors of the Trust. (Cal. Prob. Code §16000 (Deering 2012).) The Trustees would breach fiduciary duties owed to the remainder beneficiaries if they yielded to the beneficiaries' threats and litigation and allowed the beneficiaries to dictate distributions not provided for by the Trust.

The beneficiaries are actually contesting actions and decisions made by the Settlor, not by the Trustees. They are contesting the discretion granted to the Trustees to hold, administer, and distribute the Trust assets in both the original trust and the amendments. They are contesting the Settlor's conditions precedent to allocation and distribution, by disavowing the shifting clause provisions contained under the "Handicapped" section, the Settlor's incentive clause provisions, the Spendthrift clause provision, and the condition that the debts of the Trust Estate must be paid prior to allocation. And they are contesting Mary's act of amending the Trust with the intent of controlling the disposition of the entire Trust Estate. As is sadly true but often not readily apparent in contested probate cases, the beneficiaries' "beef" is with their parents, not their co-beneficiaries or the successor fiduciaries. All of these claims affect the beneficiaries' personal interests, not matters that affect society at large. (Tunstall, 144 Cal.App.4th at 564-65 (the court's power to invalidate private instruments on public policy grounds is easily abused and should be used carefully and sparingly; the policy in question should involve a matter that affects society at large rather than the litigants' personal interests; a testator can distribute his property upon such terms as seem just and proper to him as long as the terms are not prohibited by law or in violation of public policy).) Thus, none of the claims present public policy violations. The beneficiaries do not even suggest that the

Settlors' intentions are unclear with respect to any of these claims. Since these matters are clearly stated in the Trust and none of them violate public policies, it is incumbent upon the Trustees to execute these terms of the Trust.

V.

This Opinion of the Court of Appeal is Not Based
on Any Rules of Law that Are in Conflict
Among the Courts of Appeal.

The beneficiaries are grasping for straws that are out of their reach. "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*." (Opening Brief, at p. 30.) Once again, the beneficiaries are focused on the claims in their proposed petition that are not at issue in this proceeding. In Ferber, a beneficiary under a will brought multiple "safe harbor" petitions to determine whether petitions to remove the executor and object to the executor's accounting would violate the no contest clause in the will. The no contest clause at issue in Ferber provided in part, "If any devisee, legatee or beneficiary under this Will, or any legal heir of mine or person claiming under any of them unsuccessfully requests the removal of any person acting as an executor . . . then in that event I specifically disinherit each such person" (See Estate of Ferber, 66 Cal.App.4th 244, 248-49, 77 Cal.Rptr.2d 774 (1998).) The court struck a balance between the public policies favoring enforcement of no contest clauses (i.e., discouraging litigation and giving effect to the purposes expressed by the testator) and the public policies favoring court supervision of probate matters (e.g., to protect the estate and ensure its

assets are properly protected for the beneficiaries). The court held that no contest clauses could be enforced against beneficiaries who seek to remove fiduciaries or who challenge the actions of fiduciaries only if the challenge is frivolous. (Id. at 253-55.) In the present case, the Court of Appeal concluded, as a matter of law, that “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” and “[t]he beneficiaries’ contention that the Second Amendment does not apply to the Trust because the surviving Settlor (Mary) lacked the power to amend the Trust” would constitute contests under the no contest clauses. (Donkin, 204 Cal.App.4th at 639.) The underlying reasoning was that the beneficiaries’ challenges attacked the distributive scheme established by the Settlor. (Id.; See also Greenelsh, 47 Cal.4th at 605 (“an indirect contest is one that attacks the validity of an instrument by seeking relief inconsistent with its terms”).) The no contest violations identified by the Court of Appeal did not have anything to do with the actions of the Trustees, fiduciary abuse, or public policy. Thus, contrary to the beneficiaries’ assertion, there was no “Ferber calculus” involved in the Court’s decision.

The beneficiaries urge the court to use the present case as a vehicle to resolve what the beneficiaries perceive as a conflict among the circuits. This case clearly does not

belong in the fray. There are no fiduciary abuse issues. The terms of the Trust do not infringe upon any public policies that disfavor enforcement of no contest clauses. The Court of Appeal decision was based on “black letter” no contest law set forth in Burch. (Donkin, 204 Cal.App.4th at 632-34.)

In Estate of Parette, the court was faced with a provision in a testamentary trust subject to the continuing jurisdiction of the probate court that “neither original trustee nor any successor trustee shall be subject to the jurisdiction of the court administering the estate of Paul R. Parette” and a provision in an inter vivos trust that “neither original trustee nor any successor trustee shall be subject to the jurisdiction of the Court administering my estate.” (Estate of Parette, 165 Cal.App.3d 157, 159, 159 fn.1, 211 Cal.Rptr. 313 (1985).) The Trustees have never argued that the court lacks jurisdiction over the issues raised in the proposed petition. (Appellants Reply Brief, at 9-10.)

In Fazzi v. Klein, the court faced a dichotomy of issues similar to the present case. (Fazzi v. Klein, 190 Cal.App.4th 1280, ___ Cal.Rptr.3d ___ (2010) (hereafter “Fazzi”).) As the Court of Appeal in the present case explained, “the court [in Fazzi] found that 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.” (Donkin, 204 Cal.App.4th at 635 (emphasis added).) Likewise, the proposed petition presents challenges that violate the Settlor’s estate plan and challenges alleging fiduciary malfeasance. Consistent with Fazzi, the Trustees are seeking application of the no contest clauses only to the challenges that would violate the Settlor’s estate plan. (See Fazzi, 190 Cal.App.4th at 1288 (“[t]he proposed petition directly contravenes an express directive in the Trust”).)

In Hearst v. Ganzi, the beneficiaries’ proposed petition alleged breach of fiduciary duty of impartiality by not earning adequate income for the size of the trust and thus favoring the remainder beneficiaries over the income beneficiaries. (See Hearst v. Ganzi, 145 Cal.App.4th 1195, ___ Cal. Rptr.3d ___ (2006).) Again the issues were similar to the present case, involving allegations of breach of fiduciary duty. Yet the court’s analysis turned on the intent of the Trustors and the terms of the trust instrument. (Id. at 1207, 1212, 1214 (“notwithstanding the income beneficiaries’ claims the Trustees violated their fiduciary duty, abused their discretion, and breached their duty of impartiality, the claims made and relief sought by the Proposed Petition are precluded by the language of the Trust provisions”).) In the instant case, respondents assert that appellants are guilty of “[r]efusing to distribute the Decedent’s Trust according to its terms.” (OB, at 19-20.) On its face, such conduct could be a breach of fiduciary duty, potentially subjecting the Trustees

to personal liability. However, under Hearst, if the beneficiaries are demanding distribution on terms that conflict with the express terms of the trust instrument and the Settlers' intent, then the beneficiaries have overstepped their bounds and they should be penalized by enforcement of the no contest clause. The Court of Appeal correctly concluded that the beneficiaries have overstepped their bounds and that some of the claims in their proposed petition, if pursued, would warrant enforcement of the no contest clause.

In Bradley v. Gilbert, the facts and trust terms were dissimilar to the present case. (See Bradley v. Gilbert, 172 Cal.App.4th 1058, ___ Cal.Rptr.3d ___ (2009).) The petitioning party was both a beneficiary and a successor trustee of some of the subtrusts. The Probate Code §21320 safe harbor petition was brought by the successor trustee in his fiduciary capacity. The successor trustee alleged that the prior trustee intentionally misallocated excessive assets to the Survivor's Trust and that the successor trustee had a fiduciary duty to marshal those assets into the proper subtrusts. The court had to determine if a proposed petition by a successor trustee of a Bypass Trust and a QTIP Trust to marshal assets purported to belong to those trusts would violate the no contest clause in the Survivor's Trust. The successor trustee argued that it would be contrary to public policy if the same law that imposed a duty upon him to marshal assets at risk of surcharge required him to forfeit

his inheritance for complying with that fiduciary duty. In finding that there was no contest, the court relied on Probate Code §21305(b)(6).² “[W]e find as a matter of declared legislative policy the trust provisions in this case must lead this court to conclude that the marshaling of trust assets in Chris’ capacity as successor trustee was an error free decision by the trial court, which must be upheld . . .” (Id. at 1070.) Probate Code §21305(b)(6) was part of the former no contest regime. As the Bradley court explained, Probate Code §21305(b)(6) was enacted to protect challenges to fiduciary misconduct. (Id. at 1069-70.) A comparison of the Bradley decision to the Court of Appeal decision in the present case highlights the fine line between cases alleging fiduciary abuse that cannot be resolved without litigation (precluding no contest enforcement) and cases alleging fiduciary abuse that are disguised attacks on the terms of the testamentary document (warranting no contest enforcement). In Bradley, the successor trustee raised sophisticated allegations relating to whether the prior trustee had intentionally misallocated assets between the subtrusts. These claims could not be sorted out without allowing the beneficiaries to litigate and discover whether

² The instant action is not a Probate Code §21305(b)(6) case. The application of Probate Code §21305(b)(6) to the claims asserted in the proposed petition was not discussed at all in the appellate court opinion. In fact, Probate Code §21305(b)(6) was not even mentioned in any of the briefs submitted in the appellate court.

misallocation had occurred, which could not be discerned from the language of the trust and the circumstances surrounding the creation of the testamentary documents. In contrast, the beneficiaries raise allegations that can be determined without litigation. The beneficiaries are challenging the Settlers' scheme of distribution. Their claims can be measured against the plain language of the Trust and the undisputed evidence of the circumstances surrounding the execution of the Trust and the amendments. There is no fiduciary misconduct when the trustees are following the unambiguous terms of the Trust and those terms do not violate any public policies. The position urged by the beneficiaries to allow frivolous challenges would permit overreaching beneficiaries to hold trustees hostage and deplete trust resources that should be available for non-contesting beneficiaries. Further, under the former no contest law, there is no "Sword of Damocles" hanging over the beneficiaries' heads. If used properly, the safe harbor procedure affords all beneficiaries an opportunity to determine in advance, without risking disinheritance, if a proposed claim would trigger the no contest clause. The opinion of the Court of Appeal is in harmony with all of the "conflicting" decisions cited by the beneficiaries. It is not a suitable candidate for a tiebreaker with respect to any conflict that might exist.

VI.

The Court of Appeal Did Not Have Jurisdiction
to Decide Whether the Beneficiaries Triggered the
No Contest Clauses by Failing to Go to Arbitration Prior to
Filing the Safe Harbor Application.

The Trust contains a mandatory arbitration requirement, which can be invoked on the written request of either party.

Resolution of Conflict

Any controversy between the Trustee or Trustees and any other Trustee or Trustees, or between any other parties to this Trust, including beneficiaries, 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. The parties to such arbitration shall each appoint one person to hear and determine the dispute and, if they are unable to agree, then the two persons so chosen shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties. The cost of arbitration shall be borne by the losing party or in such proportion as the arbitrator(s) shall decide. Such arbitration shall comply with the commercial Arbitration Rules of the American Arbitration Association, 140 West 51st Street, New York, New York, 10200. (AA, at p. 68.)

“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." (Donkin, 204 Cal.App.4th at 632.) Therefore, both the beneficiaries and the Trustees invoked the mandatory arbitration requirement in writing. (AA, at pp. 134 ¶24, 219-20, 226 ¶1.) However, the beneficiaries never initiated arbitration and instead filed the safe harbor application in court. (See Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1122 (9th Cir. 2008)(employee who sent a letter to his employer requesting arbitration but failed to initiate arbitration did not comply with the arbitration agreement and properly initiate arbitration).)

In the petition for instructions, the Trustees asked the trial court to determine if the beneficiaries violated the no contest clauses in the Settlor's estate planning documents when they ignored the Settlor's "Resolution of Disputes" provision and filed the safe harbor application in court. (AA, at pp. 130-39 ¶¶5-38, 144-45 ¶¶1, 3.) The Trust specifically authorizes the trustee only to apply to the court if there is any need for approval of any accounting or interpretation of the trust agreement. (AA, at p. 84.) In the petition for instructions, the Trustees allege that if the beneficiaries violated the no contest provisions, they were disinherited and therefore lacked standing to bring any actions with regard to the Trust. These issues were never decided by the trial court. At the August 16, 2010 hearing, after granting the safe harbor application, the trial court continued and

stayed the petition for instructions, pending the outcome of this appeal. Therefore, the no contest issues relating to the violation of the arbitration requirement have not been adjudicated. (RT, at F-1 ll.21 to 27, F-3 l.27 to F-5 l.7.)

Appellate review is limited to the review of judgments and orders expressly appealable by statutory provision. (See Cal. Civ. Proc. Code §904.1 (Deering 2012).) The notice of appeal defines the scope of the appeal by identifying the particular order being appealed. (See Morton v. Wagner, 156 Cal.App.4th 963, 967-68, 67 Cal.Rptr.3d 818 (2007).) The trial court order from which this appeal was taken granted the beneficiaries' safe harbor application. The issue of whether the beneficiaries violated the no contest clauses in the Settlor's estate planning documents by filing the safe harbor application in violation of the arbitration clause, alleged in the petition for instructions, was not addressed in the order. (AA, at pp. 255-59 [order], 260-62 [notice of appeal].) Thus, there was no order with respect to the consequences for violating the arbitration clause from which an appeal could be taken. The Trustees did not assert that the beneficiaries lacked standing in the Court of Appeal (because that potential no contest violation had not been adjudicated). The issue was not briefed by the parties except to point out that it was not an issue in the appeal. (Appellant's Reply Brief, at pp. 2, 9.) Despite the fact that the arbitration issue was not a part of the appeal, the Court of Appeal held that "[w]e 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.” (Donkin, 204 Cal.App.4th at 632.) This ruling implies that the beneficiaries did not violate the no contest clauses by failing to go to arbitration because there is not a separate no contest clause in the arbitration provision.

The Settlor expressly provide that “the provisions of this Declaration of Trust shall bind . . . Successor Trustees assuming the role of Trustee hereunder, and the beneficiaries of this trust . . .” (AA, at p. 111.) The penalty provided in the Trust for a waiver of arbitration is set forth in the “No Litigation” Clause. That clause mandates forfeiture if any beneficiary should “legally challenge” any of the Trust provisions. The Trustees submit that the arbitration requirement contained in the “Resolution of Disputes” is a trust provision that is subject to the “No Litigation” Clause, is not severable, and should not require a separate no contest provision. The ruling with respect to the arbitration clause exceeded the jurisdiction conferred on the Court of Appeal by the notice of appeal and should be reversed.

CONCLUSION

The Court of Appeal correctly concluded that the trial court did not abuse its discretion in determining that the former no contest law applies to the Settlor's estate planning documents. This case falls squarely within the Probate Code §3h general fairness exception to the application of the new no contest law. The parties agree that the application of the new no contest law in this case would substantially interfere with the rights of the parties and other interested persons in connection with circumstances that existed before the operative date of the new law. The application of the new law would unfairly defeat the expectations of the Settlor when the documents were executed. The Settlor died before the new law was enacted and did not have an opportunity to adjust their estate plan in response to the new law. The application of Probate Code §3h trumps all other provisions of the Probate Code relating to the implementation of the new no contest law.

This is a trust no contest clause construction case. The Trustees are proponents of the intentions of the Settlor as expressed in the Trust, the First Amendment, and the Second Amendment. The Court of Appeal correctly concluded that the beneficiaries' challenges to Mary's intention to amend the entire Trust with the Second Amendment and the Trustees' failure to make distributions would constitute a contest under the no contest clauses because these challenges attack the distributive scheme

established by the Settlers. In the proposed petition, the beneficiaries state point-blank that the Second Amendment is invalid with respect to the Decedent's Trusts, contrary to Mary's clear intent to amend the entire Trust. And they demand distribution in a manner that conflicts with the unambiguous asset distribution terms established by the Settlers. The Trustees do not argue that the beneficiaries will violate the no contest clauses if they seek recourse for fiduciary abuse. And they are not defending any Trust terms that violate public policy. The beneficiaries have conjured up a conflict among the circuits that apparently begs for resolution by this court. The conflict, if it even exists, has nothing to do with this case.

The Court of Appeal exceeded its jurisdiction in ruling that the beneficiaries have standing because the "there is no consequence stated in the Arbitration Clause for failing to submit to arbitration." This ruling implies that the beneficiaries did not violate the no contest clauses by failing to go to arbitration prior to filing the safe harbor application because there is not a separate no contest clause within the arbitration provision. The Resolution of Disputes subsection is a provision of the Trust. The "No Litigation" Clause provides for forfeiture if a beneficiary shall "legally challenge" any of the Trust provisions. The beneficiaries violated that

provision. The Court of Appeal's ruling with respect to the arbitration clause was incorrect and exceeded the jurisdiction conferred on the court by the notice of appeal. It should be reversed.

Dated: September 21, 2012.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Stephen V. Snow", written over a horizontal line.

Stephen V. Snow
Snow Law Corp.

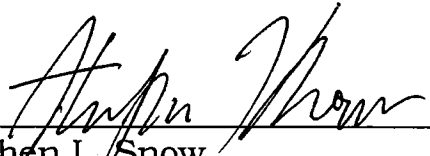
Attorney for Appellants
Rodney E. Donkin, Jr. and Vicki R.
Donkin, as Successor Trustees of The
Donkin Family Trust dated August
15, 1988, Mary E. Donkin and
Rodney E. Donkin, Trustors and/or
Trustees

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Answer Brief on the Merits is produced using 13-point or greater Roman type, including footnotes, and contains 13,949 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 21, 2012.

Respectfully Submitted,



Stephen L. Snow.
Snow Law Corp.
Attorney for Appellants
Rodney E. Donkin, Jr. and Vicki R.
Donkin, as Successor Trustees of The
Donkin Family Trust dated August
15, 1988, Mary E. Donkin and
Rodney E. Donkin, Trustors and/or
Trustees

State of California)
County of Los Angeles)
)

Proof of Service by:
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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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