

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TAYLOR SUSAN NEDERLANDER, a
Minor, etc. et al.,

Plaintiffs and
Respondents,

v.

NEIL PAPIANO, Individually and as
Trustee, etc.,

Defendant and
Appellant.

B223129

(Los Angeles County
Super. Ct. Nos. BP092252, BP092253)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT*

It is ordered that the opinion filed March 6, 2012, be modified as follows:

1. “(*Heifetz*)” is inserted after the citation to *Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776 in the first full paragraph on page 9, and the following text is inserted after that paragraph:

“In the petition for rehearing, appellant argues that *Heifetz, supra*, 147 Cal.App.2d 776 mandates a contrary result. We do not agree. The trust instrument in that case allowed the settlor to revoke the trust but did not expressly reserve a right to amend. (*Id.* at p. 778.) A later amendment made irrevocable a trust corpus of up to \$150,000. (*Id.* at p. 779.) The appellate court implied the settlor’s power to amend from her reserved power to revoke the trust. (*Id.* at p. 782.) The court held the amendment that made the

trust irrevocable up to \$150,000 left the settlor free to revoke the trust in other respects, such as by subsequently eliminating all beneficiaries except her daughter. (*Id.* at p. 785.) She was then free to revoke the trust with the consent of the sole remaining beneficiary. (*Ibid.*)

It is important to point out not only what *Heifetz* involved, but also what it did not. The case did not involve a conditionally revocable trust that required the trustee's consent to revocation as a protection against the settlor's subsequent improvident change of mind. The *Heifetz* court's reasoning about the settlor's freedom to change her mind applied to a trust revocable in all respects other than the corpus amount. (*Heifetz, supra*, 147 Cal.App.2d at p. 785.) The implied power to amend was coextensive with that partial power to revoke. (*Ibid.*) In contrast, Scott did not have an unfettered right to change his mind if the change would result in a full or partial revocation.

Additionally, appellant assumes that, like the settlor in *Heifetz*, Scott first amended the trusts to deprive the beneficiaries of their rights and then drew down the trust corpus. But as we have explained, the amendments, as drafted, did not change the beneficiaries' rights or the trustees' duties. Rather, they allowed Scott to withdraw funds, notwithstanding the beneficiaries' unaltered rights, the trustees' unaltered duties to the beneficiaries, and the requirement that the trustees consent to any full or partial revocation. They affected the corpus of the trusts and nothing else. It is important to recall that the provision requiring the trustees' consent for any revocation was included for the express purpose of protecting the beneficiaries from the kind of action Scott took against their interests.

In the two other cases appellant cites, the courts declined to imply a general power to amend or revoke expressly irrevocable trusts from either the settlor's right to withdraw trust assets or from the settlor's subsequent conduct. (See *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1209; *Laycock v. Hammer* (2006) 141 Cal.App.4th 25, 30–31.) Like *Heifetz*, these cases do not involve conditionally revocable trusts, and their reasoning does not support appellant's position.

2. The following footnote, footnote 4, is added at the end of the full paragraph on page 14:

“⁴In the petition for rehearing, appellant takes issue with our holding that he acted in bad faith with respect to the trust funds that were used to pay attorney fees to his firm for services unrelated to the trusts. But as we have discussed, the trial court expressly found that these funds were withdrawn in bad faith, and that finding is amply supported by the evidence.”

The petition for rehearing is denied. There is no change in judgment.