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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOM ANDERSEN,

Plaintiff and Appellant,

v.

JOAN B. ANDERSEN, Individually and  
as Trustee, etc. et al.,

Defendants and Respondents.

D068716

(Super. Ct. No. 37-2014-00038380-PR-  
TR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Reversed.

Law Offices of David K. Kroll and David K. Kroll; Law Offices of Beth A. Atuatasi and Beth A. Atuatasi for Plaintiff and Appellant.

Law Offices of Harvey M. Payne III and Harvey M. Payne III for Defendants and Respondents.

## I. INTRODUCTION

Following the death of her mother, Alice Stowe, Joan B. Andersen<sup>1</sup>, acting as trustee for the Alice Stowe Trust (the trust) and with the assistance of her daughter Connie Bargeron, sent a notice to her son and Alice's grandson Tom Andersen, pursuant to Probate Code section 16061.7<sup>2</sup> informing him of certain information regarding the trust, that she was the successor trustee and that he had 120 days to contest the trust. More than 120 days later, Tom filed a petition against Joan, both in her capacity as trustee and as an individual, and Connie. The petition alleged that the notice failed to include a second amendment to the trust that Alice had executed prior to her death, and requested the removal of Joan as trustee, the appointment of a replacement trustee, an accounting, an order requiring the successor trustee to prepare a new notice pursuant to section 16061.7 that would include the second amendment, and damages for breach of the trustee's duties. Respondents filed a motion for judgment on the pleadings, asserting that the petition constituted a contest to the trust and was therefore time-barred under section 16061.8. The court granted the motion, concluding that the section 16061.7 notice was valid despite failing to include the second amendment to the trust, that the petition constituted a contest, and that the petition was therefore time-barred under section 16061.8.

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<sup>1</sup> We use the first names of the parties herein to avoid confusion. No disrespect is intended.

<sup>2</sup> Unless otherwise stated, all further statutory references contained herein are to the Probate Code.

On appeal, Tom argues that the notice that Joan provided in accordance with section 16061.7 was either void or subject to being set aside for failing to include the second amendment to the trust, that his petition does not constitute a contest to the trust under section 16061.8, or in the alternative, that certain causes of action therein are "self-standing" and do not constitute a contest to the trust, and that respondents are estopped from invoking section 16061.8 due to their own fraud.

We conclude that the allegations in the petition, taken as true, do not establish as a matter of law that the petition was a contest to the trust that was time-barred by section 16061.8. We further conclude that it was not within Joan's discretion as trustee to define the terms of the trust by including only certain documents in the section 16061.7 notice and excluding a properly executed amendment to the trust. We therefore reverse the judgment and remand the matter for further proceedings in accordance with this opinion.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from an order granting judgment on the pleadings, we treat all properly pleaded factual allegations in the operative pleading as true.

*(Kapsimallis v. Allstate Ins. Co. (2002) 104 Cal.App.4th 667, 672.)*

Alice executed the Alice Stowe Trust in 1990, naming herself as trustee. Alice executed a restatement of the trust in 1996, providing that upon her death, 10 percent of the net proceeds of the sale of her home would go to her church, and that the remaining estate would be divided equally among her three daughters, of which Joan is one. Alice executed a first amendment to the trust in 1999, changing the gift to the church to a set

amount of \$5,000 as long as the church is still in existence at the time of her death. Alice executed a second amendment to the trust in April 2013, removing the gift to the church and leaving her real property residence to Tom. The second amendment refers to the original trust as well as the January 11, 1996 restatement, explicitly amends certain sections of the restatement, by section number, and was signed and notarized by Alice months before her death. Neither the first nor the second amendment altered the provision indicating that the remainder of Joan's estate was to be divided equally among her three daughters, although each altered the size of the remainder.

Alice died in December 2013. On January 9, 2014, Joan, as successor trustee and acting with the assistance of her daughter, Connie, sent Tom a notice pursuant to section 16061.7. The notice stated that it included a "true and complete copy of the trust agreement." The notice included a copy of the January 11, 1996 restatement and the 1999 amendment, but did not include a copy of the second amendment executed in 2013, though Joan and Connie were in possession of a notarized copy of the second amendment at the time the notice was prepared. The notice also included language required by section 16061.7 indicating that any action to contest the trust must be brought within the later of 120 days from the date of the notice or 60 days from the date a copy of the terms of the trust was mailed or personally delivered.

After receiving the notice and trust documents, on April 7, 2014, Tom, who had a notarized copy of the second amendment in his possession, sent a letter through his attorney to Joan's attorney enclosing a copy of the second amendment and asserting its validity. Joan's attorney did not respond until October 6, 2014. In his response, Joan's

attorney asserted that the second amendment was invalid and that any assertion that the second amendment was part of the trust would constitute a contest to the trust and would be barred by section 16061.8 because more than 120 days had passed since Joan served Tom with the section 16061.7 notice.

Shortly after receiving the letter from Joan's attorney, Tom filed a petition to remove Joan as successor trustee, to appoint a replacement successor trustee, for an accounting, for an order requiring the replacement successor trustee to prepare a complete 16061.7 notice, and for damages for breach of trustee's duty. The petition alleged that the notice that Joan served on Tom improperly omitted the second amendment and was therefore insufficient to start the running of the limitations period, that Joan was not mentally competent to serve as trustee and Connie had improperly assumed Joan's trustee duties, and that in doing so, Connie was acting in furtherance of her own personal interest.<sup>3</sup> Joan and Connie objected to the petition, asserting that Tom did not have standing because he is not a beneficiary under the trust, that his petition was a contest and was therefore time-barred under section 16061.8, and that the second amendment was invalid due to undue influence and lack of mental capacity. They also filed a motion for judgment on the pleadings, again asserting that Tom did not have standing and that the petition was time-barred under section 16061.8.

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<sup>3</sup> Although the petition does not expressly state why or how Connie was acting in furtherance of her own personal interest, we assume that the reason is that she, as Joan's daughter, stood to receive a share of Joan's interest in the residence.

Following oral argument, the court granted the motion for judgment on the pleadings. The court explained that it focused on substance over form when determining whether a petition is a "contest" to the trust within the meaning of section 16061.8 and that by asserting that the second amendment was part of the trust, Tom was necessarily challenging the validity of the trust documents as included in the section 16061.7 notice. Because Tom filed his petition more than 120 days after Joan served the notice on him, the court concluded that the petition was time-barred. The court also denied Tom's request for leave to amend, made during oral argument, reasoning that no amendment to the petition could change the fact that the time to contest the trust had run.

### III. DISCUSSION

#### A. *Standard of review and relevant legal principles*

A motion for judgment on the pleadings serves the same purpose as a demurrer. The court properly grants such a motion when the facts on the face of the pleading, even if true, are not sufficient to state a cause of action, (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 145-146), or when the allegations in the petition, taken as true, establish as a matter of law that the statute of limitations for the asserted causes of action has run. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912 (*County of Los Angeles*)). We review an order granting a motion for judgment on the pleadings de novo. (*Smiley v. Citibank*, at p. 146.)

A trustee has a duty to administer the trust according to the Probate Code and the trust instrument in order to carry out the wishes of the settlor as stated therein, to administer the trust solely in the interest of the beneficiaries whom the settlor named, and

not to take part in any transaction in which he or she has an interest adverse to that of a trust beneficiary. (§§ 16000, 16002, 16004; *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1706.) When the status of the trust itself or the trustee changes as a result of the death of the settlor, the successor trustee must serve a notice on each heir and beneficiary of the trust—and may also serve the notice on any additional individuals—that includes information regarding the settlor, the trust, and the trustee. (§ 16061.7.) The notice must include a notification that the recipient is entitled to a true and complete copy of the terms of the trust or, alternatively, the trustee must provide an actual true and complete copy of the terms of the trust together with the notice. (§ 16061.7, subd. (g)(5); *Germino v. Hillyer* (2003) 107 Cal.App.4th 951, 955-956 (*Germino*)). The code defines the "terms of the trust" in this context as the provisions of a written trust instrument in effect at the settlor's death including, but not limited to, signatures, amendments, disclaimers and instructions to the trustee. (§ 16060.5.) Finally, the section 16061.7 notice must also contain express statutory language, in not less than 10-point boldface type, setting forth the time limitations for contesting the trust. (§ 16061.7, subd. (h).) Pursuant to section 16061.8, any individual on whom the trustee serves the section 16061.7 notice must bring any action contesting the trust within 120 days after the trustee serves the notice on the individual or within 60 days after the trustee mails or personally delivers a copy of the terms of the trust to the individual, whichever is later. (§ 16061.8.)

## B. *Analysis*

There is no dispute that Tom filed his petition more than 120 days after Joan served the section 16061.7 notice on him. Notwithstanding this fact, Tom asserts that the

court erred in determining that his petition is time-barred under section 16061.8, on several grounds. First, Tom contends that the section 16061.7 notice is either void or voidable because: (1) the notice failed to include the "presumptively valid" second amendment, (2) Joan breached her duties as trustee by failing to include the second amendment with the notice, (3) Joan lacked mental capacity to serve as trustee at the time she served the notice, (4) the incomplete notice is the result of undue influence exerted on Joan by Connie, (5) the incomplete notice is the product of fraud, and (6) Joan lacked mental capacity at the time of Alice's death and thus was never able to assume the duties of trustee in the first instance. Next, Tom contends that his petition is not a contest to the trust because the trust, by definition, includes the second amendment. In the alternative, Tom argues that at least certain causes of action in the petition are "self-standing" and do not constitute a contest to the trust. Finally, Tom contends that respondents should be estopped from invoking the 120-day limit based on their own fraudulent conduct.

For the reasons set forth below, we conclude that the court erred in granting judgment on the pleadings. We therefore reverse the judgment and remand the matter for further proceedings. We also address Tom's request to amend the petition.

1. *The court erred in implicitly finding that the second amendment is not part of the trust*

In granting the motion for judgment on the pleadings, the court concluded that the petition is a contest to the trust that is time-barred by section 16061.8. In reaching this conclusion, the court implicitly determined that the second amendment is not a part of the trust, since, as a matter of law, the section 16061.7 notice that Joan sent to Tom would be

sufficient to start the running of the limitations period only if the second amendment were not a part of the "terms of the trust" as defined by the code, and thus need not be included in the copy of the terms of the trust provided along with the notice. However, the petition alleges that the second amendment *is* a "presumptively valid" part of the trust and, in the context of a motion for judgment on the pleadings, the court must view that allegation as true. (See, e.g., *County of Los Angeles, supra*, 150 Cal.App.4th at p. 912.) If the court had done so, it could not have concluded as a matter of law that the petition is a contest to the trust that is time-barred by section 16061.8. Because the trial court's reasoning is instead premised on an implicit finding that is inconsistent with the allegations in the petition, we conclude that the court erred in granting respondents' motion for judgment on the pleadings.

a. *The court erred in concluding that the petition is a contest*

We first address the court's determination that the petition constitutes a contest to the trust. Taking the allegations regarding the second amendment in the petition as true, as we must in this context, we conclude that the court erred in making this finding.

When determining whether a petition constitutes a contest to a trust, the court looks to the practical effect of the petition. (*Estate of Stoker* (2011) 193 Cal.App.4th 236, 241 (*Stoker*)). A petition that seeks to "thwart or nullify or unravel the testator's express wishes" may be considered a contest. (*Estate of Davies* (2005) 127 Cal.App.4th 1164, 1175. In *Stoker*, for example, the court determined that a petition to probate a will, executed after the trust at issue, that would have completely revoked and replaced the trust, was a contest since it was effectively a challenge to the terms of the trust. (*Stoker*,

at p. 240.) However, a petition that does not question the validity of a trust but rather, seeks to determine and implement the settlor's express wishes—such as a petition asking the court to construe an ambiguous passage within the trust—is not a contest.

(*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1602.)

Respondents assert that the trust is comprised of only the restatement and first amendment, and that the petition is a contest to the trust because the second amendment would change a key provision of the trust by leaving the residence to Tom rather than to Alice's three daughters—thereby thwarting Alice's intentions as expressed in the first amendment. Tom, contends that, unlike the will at issue in *Stoker*, the second amendment is properly part of the trust, that the section 16061.7 notice was legally insufficient for having omitted it, and that the petition, therefore, is not a contest to the trust but rather, an attempt to carry out Alice's express testamentary wishes.

The court's determination that the petition constitutes a contest to the trust relies on an implicit finding that the trust is in fact comprised of the restatement and first amendment, only, and that the second amendment is *not* a part of the trust, despite the factual allegations in the petition that the second amendment *is* a valid part of the trust. Because the court was required to take the allegations in the petition as true in the context of a motion for judgment on the pleadings, the court erred in concluding, in this context, that only the restatement and first amendment comprise the trust, and that the petition constitutes a contest to the trust as a matter of law. (See *County of Los Angeles, supra*, 150 Cal.App.4th at p. 912.)

Respondents assert that *Straley v. Gamble* (2013) 217 Cal.App.4th 533 establishes that a petition to determine the validity of an amendment to a trust constitutes a contest to the trust. However, the court in *Straley* was not deciding a motion for judgment on the pleadings and did not directly address the question of whether the petition constituted a contest. The issue before the court in *Straley* was whether timely filing of a petition, without service, was sufficient to preclude a bar under section 16061.8. (*Id.* at p. 538.) There is no indication that either party argued that the petition did not constitute a contest to the trust, and the court concluded only that timely filing of the petition was sufficient to fall within the limitations period. (*Ibid.*) Moreover, in contrast to the second amendment in the present case, the "amendment" at issue in *Straley* did not mention the trust nor indicate that it was an amendment to the trust, was typed by an unknown individual while the settlor was on her deathbed, was signed only with a shaky "R" as opposed to a full signature, and was not notarized. (*Id.* at p. 536.)

Finally, Tom also argues that at least certain of the causes of action in his petition—for removal of Joan as the trustee and appointment of a successor trustee and for damages for breach of the trustee's duty—are "self-standing" causes of action that are not covered by the 120-day limitation of section 16061.8. Tom may be correct that these causes of action do not constitute a contest to the trust because resolution in Tom's favor would not necessarily alter the terms of the trust. However, Tom has standing to file a petition under section 17200 to assert these causes of action only if he is a beneficiary to the trust, and Tom is a beneficiary to the trust only if the second amendment is part of the terms of the trust. As such, resolution of these causes of action also necessarily depends

on a determination of whether the second amendment is a part of the terms of the trust, an issue that we expect the parties will litigate on remand.

- b. *It is not within the Trustee's discretion to define the terms of the trust by including only certain documents in the section 16061.7 notice*

Respondents maintain that the petition is a contest and that the section 16061.7 notice was sufficient to begin the running of the limitations period, despite the allegations in the petition, because the trustee has the discretion to define the terms of the trust by choosing to include only certain testamentary documents in the notice. Tom asserts that the Probate Code does not confer such discretion on the trustee and that respondents' theory would result in a perversion of established trust law by allowing the trustee to frustrate the express wishes of the settlor. He contends that the section 16061.7 notice that Joan served on him was void for failing to include the properly executed second amendment. We agree that the Probate Code does not confer such discretion on the trustee and conclude that respondents have not shown as a matter of law that, taking the allegations in the petition as true, the section 16061.7 notice was sufficient to start the running of the limitations period despite its omission of the second amendment.

The 120-day statute of limitations under section 16061.8 begins to run only once the trustee serves a notice that is compliant with section 16061.7. (§§ 16061.7 & 16061.8; *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 215 (*Harustak*).) In *Harustak*, for example, the court determined that a section 16061.7 notice was not sufficient to start the 120-day statute of limitations because certain express statutory language was not in boldface print in the notice, as required by section 16061.7, subdivision (h).

(*Id.* at pp. 216, 219.) The court reversed the trial court's determination that the petition was time-barred and remanded the matter for further proceedings. (*Id.* at p. 219.) Subdivision (g)(5) of section 16061.7 requires that the notice inform the recipient that he or she is entitled to a complete copy of "the terms of the trust" or that the trustee provide the recipient with an actual complete copy of "the terms of the trust". (See *Germino, supra*, 107 Cal.App.4th at pp. 955-956.) Section 16060.5 defines "the terms of the trust" to include all amendments in effect at the time of the settlor's death.

The petition alleges that the notice Joan served on Tom did not comply with section 16061.6, subdivision (g)(5) because it stated that a "true and correct copy of the trust agreement is provided with this notice," but the copy provided did not include the second amendment to the trust. The petition also alleges that the second amendment is presumptively valid because the settlor's attorney prepared it, the settlor executed it, a notary notarized it, and it was in the trustee's possession at the time the section 16061.7 notice was prepared. Finally, the second amendment, attached to the petition as an exhibit, references the title and date of the original trust instrument and the restatement of the trust and amends certain provision by reference to the section numbers as set forth in the restatement. Thus, according to the factual allegations in the petition, the notice did not contain a true copy of the terms of the trust because it did not include all amendments to the trust. As such, the allegations in the petition, taken as true, indicate that the notice did not comply with section 16061.7, subdivision (g)(5) and, therefore, was not sufficient to begin the running of the limitations period. (§ 16061.7, subd. (g)(5); *Harustak, supra*, 84 Cal.App.4th at p. 219.)

Respondents argue that we should view the holding in *Harustak* narrowly to preclude the running of the limitations period only where the section 16061.7 notice contains deficiencies in the specific language and typeface required by section 16061.7, subdivision (h), in light of the court's conclusion in *Germino* that a section 16061.7 notice *was* sufficient to begin the running of the limitations period even though it did not include language specifying that the recipient was entitled to a copy of the terms of the trust pursuant to section 16061.7, subdivision (g)(5). (See *Germino, supra*, 107 Cal.App.4th 951 at pp. 955-956.) In *Germino*, however, the trustee provided an actual, and presumably complete, copy of the terms of the trust instead of stating in the notice that the recipient of the notice was entitled to a copy upon request. (*Id.* at p. 955.) The court explained that unlike section 16061.6, subdivision (h), subdivision (g)(5) does not require the inclusion of express statutory language and thus, a deviation from the specific language of section 16061.7, subdivision (g)(5) would not render the notice insufficient where the recipient actually received a complete copy of the terms of the trust and, thus, was not prejudiced. (*Id.* at pp. 956, 958.)

Unlike in *Germino*, Tom does not take issue with the inclusion of an actual copy of the terms of the trust in place of the notice required by section 16061.7, subdivision (g)(5). Rather, he asserts that the copy of the terms of the trust that the trustee provided was incomplete and thus, insufficient to meet the requirements of the statute. Further, Tom asserts that he was prejudiced by the omission of the second amendment from the notice because the omission effectively, and improperly, shifted the burden to him to attempt to prove the validity of the second amendment.

Respondents assert that the notice was compliant with section 16061.7 because sections 15600 and 15601 give the trustee discretion to define the terms of the trust by choosing to include only certain documents in the notice. We do not read those sections as conferring such broad discretion on the trustee. Section 15601 is titled "Rejection of trust; nonliability." The language of that section indicates that it allows a named trustee to reject the trust, or a modification to the trust, by doing so in writing and that the trustee will be deemed to have rejected the trust, or a modification to the trust, if they do not accept the trust by a method provided in section 15600, such as by knowingly exercising powers or performing duties under the trust instrument. The law revision commission comments indicate that the purpose of this provision is to allow a trustee to reject *new duties* while not resigning altogether, remaining subject only to the duties and liabilities associated with the trust as it existed prior to the modification. (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15601, p. 600.) The comments also explain that such notice is required so that the beneficiaries may seek appointment of a new trustee. (*Ibid.*) If the person named as trustee rejects the trust, or a modification to the trust, there becomes a vacancy in the office of trustee that the beneficiaries can then fill in accordance with the procedures set forth in the code. (§§ 15643, 15660.) The plain language of the statute, together with the law revision commission comments and associated sections of the code, indicate that the purpose of section 15601 is *not*, as Joan maintains, to permit a trustee to thwart the settlor's wishes by rejecting a properly executed modification to the trust, thereby rendering it void, but rather, to allow the trustee to refuse to take on additional liabilities as trustee that result from a modification.

(See, Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15601, p. 600.) Neither these sections, nor any other portion of the Probate Code, would permit the trustee to unilaterally invalidate an otherwise valid amendment to the trust by simply refusing to acknowledge it, and respondents are unable to point us to any authority indicating otherwise.<sup>4</sup> Respondents' interpretation is not only inconsistent with the statutory language, but would entirely undermine the fundamental purpose of the code, i.e., to carry out the wishes of the deceased as expressed in the testamentary documents. (See *Estate of Cleveland, supra*, 17 Cal.App.4th at p. 1706 [fundamental purpose of the 1982 revision of the Probate Code was " 'to simplify administration of an intestate estate and to more effectively carry out the intent of a decedent who dies leaving a will' "].)

Further, the facts in this case indicate that the trustee, Joan, and perhaps Connie as well, stood to gain in her personal capacity by omitting the second amendment, because her share of the remainder of the estate would be significantly greater absent the second amendment, which leaves the residence to Tom rather than to Joan and her two sisters. Among the most fundamental principles of the Probate Code are that the trustee is to administer the trust according to the trust instrument and solely in the best interests of the beneficiaries, and that the trustee is not permitted to take part in any transaction in which he or she has an interest adverse to the interests of a trust beneficiary. (§§ 16000, 16002, 16004; see *San Diego, O.T. & P.B.R. Co. v. Pacific Beach Co.* (1896) 112 Cal. 53, 61

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<sup>4</sup> Respondents also argue that such a reading of the code would render section 16061.8 meaningless. This position is without merit. In order to trigger the limitations period in section 16061.8, a trustee would simply have to serve a complete and accurate notice under section 16061.7, including all known, executed amendments.

[noting that it is a "fundamental principle of the law of trusts that a trustee cannot deal with the trust property for his own individual benefit"], *Stack v. Welder* (1934) 137 Cal.App. 647, 652 ["a trustee is bound to act in the highest good faith towards his beneficiary in all matters connected with his trust"].) It would go against the fundamental purpose of a trust to allow the trustee to select for inclusion in the section 16061.7 notice only those documents that serve his or her best interests, thereby placing the burden on the beneficiaries to file a petition to seek the inclusion of any omitted trust documents.<sup>5</sup>

The only appropriate course of action for a trustee is to include *all* properly executed trust documents and amendments in the section 16061.7 notice. If the trustee questions the validity of any amendment, then the trustee may file his or her own petition asking the court to determine the validity of certain of those documents. The code expressly permits the trustee to submit a petition to determine the validity of a trust provision. (§ 17200.)

Finally, respondents assert that Tom forfeited his contentions that the notice is void due to fraud, undue influence or Joan's mental capacity by failing to raise these contentions in the trial court, and by focusing instead on his theory that the petition does not constitute a contest to the trust. We disagree. The petition asserts that Joan is not

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<sup>5</sup> Moreover, allowing the trustee to unilaterally decide which amendments to include in the notice, thereby establishing which amendments define the terms of the trust, would be even more problematic in the case in which the beneficiaries are unaware of their status as such under an omitted amendment and do not become aware of that status until after the running of the 120-day period. Although that is not the case here, we are not aware of any exception under respondents' analysis that would allow a late contest in such a scenario.

mentally competent to serve as trustee, that Connie has been acting on behalf of Joan, that the second amendment is a "presumptively valid" part of the trust, and that Joan breached her duty as trustee by failing to include the second amendment in the section 16061.7 notice. In his opposition to the motion for judgment on the pleadings, Tom argued that the petition is not a contest and is not time-barred under section 16061.8, based on the allegations in the petition. We base our decision on these allegations and arguments, which Tom has not waived. To the extent respondents intend to assert that Tom has forfeited, on appeal, arguments that arise from the additional facts that he asserts he would allege if permitted leave to amend, we need not reach those arguments because we conclude that the petition alleges facts sufficient to overcome the motion for judgment on the pleadings without any amendment.<sup>6</sup>

Based on the foregoing, we conclude that the court erred in granting the motion for judgment on the pleadings. We remand the matter with directions to the superior court to vacate that decision and enter a new order denying the motion and for further proceedings as appropriate. To be clear, we are not required to and do not decide whether the second amendment is in fact part of the terms of the trust and thus, whether the petition is a contest that is time-barred by section 16061.8. Instead, we determine only that the allegations in the petition, taken as true, do not establish as a matter of law that the petition is a contest to the trust that is time-barred by section 16061.8. We expect that the parties will litigate the validity of the second amendment and the related issue of

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<sup>6</sup> Our conclusion is without prejudice to Tom raising these additional arguments in further proceedings before the trial court.

whether the petition is a contest and therefore time-barred under section 16061.8, on remand. Our decision does not preclude either party from asserting its respective position regarding those issues or the underlying facts on remand.

2. *Motion for leave to amend*

Finally, we address Tom's request for leave to amend. The trial court abuses its discretion when it grants a motion for judgment on the pleadings without leave to amend if it is reasonably likely that the proposed amendments would allow the petitioner to state a valid claim. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876-877.)

After reviewing the court's tentative ruling granting the motion for judgment on the pleadings, during the hearing on the petition, Tom requested leave to amend. The court denied the request, concluding that no additional facts could overcome the time bar under section 16061.8. In his briefing on appeal, Tom includes a number of additional factual allegations regarding fraud related to the 16061.7 notice at issue that he would include if permitted leave to amend his petition. These additional factual allegations were not before the trial court when it granted the motion for judgment on the pleadings and denied the request for leave to amend. Because we have determined that the court erred in granting the motion for judgment on the pleadings for the reasons discussed above, we need not consider Tom's remaining arguments based on these additional facts. However, because we reverse the court's decision with respect to the motion for judgment

on the pleadings and remand the matter, we also instruct the trial court to consider any future motion to amend in light of this opinion.<sup>7</sup>

#### IV. DISPOSITION

The judgment is reversed and the matter is remanded with directions to the superior court to vacate its order granting respondents' motion for judgment on the pleadings and dismissing the petition and to enter a new order denying that motion. The court shall conduct further proceedings, as appropriate, and in accordance with this opinion. Appellant is entitled to recover costs on appeal.

AARON, J.

WE CONCUR:

O'ROURKE, Acting P. J.

PRAGER, J.\*

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<sup>7</sup> We also decline to address Tom's argument that respondents are estopped from asserting that the petition is barred by section 16061.8 due to their own fraudulent actions, without prejudice to Tom asserting such arguments upon remand.

\* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.