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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JEANNE TYLER LARSON, as Trustee,
etc.,

Plaintiff and Respondent,

v.

COUNTY OF MONTEREY,

Defendant and Appellant.

H039029
(Monterey County
Super. Ct. No. MP 20732)

I. INTRODUCTION

The issue presented by this appeal is whether the trial court was authorized to modify a trust to limit a life estate to an estate for 15 years, as requested by the estate holder and all the trust beneficiaries, in order to avoid reassessment of the subject property based on a change in ownership effected by the trustor's death.

After the trial court granted the beneficiaries' ex parte application to modify the trust, the County of Monterey objected to the beneficiaries' later request to construe the modification as retroactive to the execution of a trust amendment. The County now appeals the order construing the modification as retroactive.

Citing *Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457 (*Moxley*), the County contends that trust modification is only warranted when there is evidence the change is what the trustor wanted or at least when there are exceptional circumstances not present

here. As we will explain, *Moxley* has been superseded by Probate Code sections first enacted in 1986.¹ When one of these statutes applies, a court can modify a trust without finding an emergency or other exceptional circumstances. When all trust beneficiaries consent, as here, section 15403 allows modification so long as a material purpose of the trust is not unnecessarily thwarted.

In this case, the trial court in 2012 retroactively modified a 2006 trust amendment to create an estate for 15 years instead of a life estate to fulfill the trustor's intent of providing his elderly sister with a cost-free residence for the rest of her life while allowing his daughters to inherit the residence without the significant property tax increase associated with a change in ownership. The modification is supported by the face of the trust documents as well as admissible extrinsic evidence. There being no evidence that the trustor intended to benefit the County at the expense of his sister and daughters, we will affirm.

II. FACTS

A. TRUST DOCUMENTS

In 1989, Frederick C. and Helen B. Tyler had attorney Roger Poyner draft the Tyler Family Living Trust for them as trustors and cotrustees, into which they transferred certain property. Trust A was defined to be the surviving trustor's share and Trust B was the remaining part of the trust estate. Trust A included the surviving trustor's separate property and his or her share of the community property, life insurance proceeds, and "so much of the community and separate property of the first spouse to die that would equal the minimum pecuniary amount necessary as a marital deduction to entirely eliminate any federal estate tax which may become due and payable as a result of the first spouse's death." There were additional provisions for calculating what parts of the decedent's

¹ Unspecified section references are to the Probate Code.

property could be allocated to Trust A without causing “the marital deduction to be disallowed in whole or in part” The surviving spouse was designated the successor trustor upon the death of either trustor. The surviving Trustor reserved a general power of appointment over the principal and income of Trust A. Exhibit B to the trust designated the successor trustee.

Exhibit B was modified by the trustors in 1994 to name their daughter Tobi Lynn Tyler the successor trustee upon the death of the surviving trustor. The successor trustee was directed to divide the trust into equal shares and distribute a share to each child of the trustors upon the death of the surviving trustor.

Helen died in 1996 at the age of 76.² Frederick and his sister Jeanne began spending considerable time together after her husband died later the same year. In 2003, Jeanne moved into Frederick’s principal residence in Pacific Grove, the property at issue here (the residence).

In April 2006, Frederick, as surviving trustor, signed a document prepared by Poyner that appointed Jeanne as the successor trustee and exercised Frederick’s power of appointment over the trust property as follows: Article I, Part B stated:

“If JEANNE desires to continue to reside in the residence following the death of the Trustor, the Trustee shall continue to hold the residence in trust according to the following terms and conditions:

“1. The Trustee shall give exclusive use and possession of the residence to JEANNE without any rent or similar charge until the earliest of any one of the following events occurs:

“a. JEANNE ceases to use the residence as her principal residence.

“b. JEANNE dies.

“c. JEANNE ceases to maintain the residence in a proper condition.”

² Due to the common surname, we will refer to Tyler family members by their first names, intending no disrespect.

The trust amendment also required the trustee to divide the remainder of the trust estate into equal shares and to distribute equal shares to the trustors' four children, Lucinda Ann Tyler, Andrea Marie Tyler, Tobi Lynn Tyler, and Teresa Jo Tyler. One recital in the amendment was, "The Trustors established the Trust to avoid the costs and administrative delays of a formal probate proceeding and to minimize federal and state transfer taxes."

Frederick died in May 2007 at the age of 88. His sister Jeanne, then 84, elected to continue living in the residence.

B. ADMINISTRATIVE AND COURT PROCEEDINGS

Jeanne reported Frederick's death to the Monterey County Assessor in September 2007. The Assessor sent Jeanne a supplemental assessment for the residence in May 2011 based on a change of ownership occurring in the property tax year 2006–2007. The reassessment was based on the taxable value of the property increasing from \$102,731 to \$1,165,000. In June 2011 Jeanne applied to the Monterey County Assessment Appeals Board (AAB) to change the assessment.³ A hearing on her

³ In the trial court the County filed a request for judicial notice of documents in the AAB's files related to Jeanne's application for reassessment, attaching about 230 pages of documents. Jeanne filed an objection to judicial notice under Evidence Code section 352, asserting the documents were more time-consuming or prejudicial than probative. The court did not expressly rule on either request. On appeal we take judicial notice of the existence of the contents but not the truth of documents which do not appear to be reasonably subject to dispute. (Evid. Code, §§ 452, subd. (g); 459, subd. (a) ["The reviewing court may take judicial notice of any matter specified in Section 452."].)

Among the documents in the AAB files is a letter dated August 10, 2011, from Roger Poyner resigning as attorney for Jeanne as trustee of the trust. His letter articulated his positions that he was retained to create a life estate for Jeanne by Frederick in April 2006 and that the creation of a life estate was not a change in ownership upon Frederick's death, despite the view of the State Board of Equalization.

application was originally scheduled for February 2012, then continued to April and then to June 2012.

Meanwhile, on May 11, 2012, Jeanne petitioned ex parte as trustee to modify the trust pursuant to section 15403. The petition alleged that all beneficiaries consented to modify the trust to provide that Jeanne's interest in the residence would continue for as long as she remains in the residence and properly maintains it until her death or 15 years after Frederick's death, whichever occurs first. The modification also named the four children as successor co-trustees in the event Jeanne is unwilling or unable to serve as trustee. The petition alleged that it was Frederick's intent to preserve the residence for his daughters by avoiding any change of ownership that would not preserve the property's tax base. The County had no notice of the petition.

On May 25, 2012, the court granted the proposed trust modifications. Specifically, the order reworded Article I, Part B.1, to give Jeanne's full name, reverse the order of provisions b and c, and add the following underlined language. Jeanne was to have exclusive use and possession of the residence without any rent or similar charge until "c. JEANNE TYLER LARSON dies or the period of 15 years from the date of death of FREDERICK C. TYLER expires, whichever occurs first." This court order was presented to the AAB in connection with Jeanne's application for reassessment at the hearing in June 2012. The hearing was continued to November 2012.

On August 10, 2012, Jeanne filed a petition as trustee seeking construction of the order modifying the trust to determine whether it was prospective or took effect on April 4, 2006. This petition was served on the Monterey County Assessor.

On August 31, 2012, Jeanne and beneficiaries Andrea, Lucinda, and Tobi filed declarations with the trial court regarding Frederick's intent to preserve the tax basis in the residence for his daughters and to have the parent-child property tax exemption

apply.⁴ Andrea declared that she accompanied Frederick and Jeanne when they met with attorney Poyner about amending the trust to provide “a safety net” for his sister “for coming to care for him in his last years.” “My father made it clear to Mr. Poyner that the house should remain the daughters’ home after his death and that the parent/child property tax exemption should apply to that transfer. He was concerned that a reassessment to current market value would make it impossible for the family to keep the Residence.” Jeanne similarly declared that Andrea accompanied her and Frederick to meet with Poyner, and Frederick “was very clear than he intended that there would be no change in the assessed value for his transfer of the properties to his daughters.” Frederick told Jeanne that if she wanted to live in the residence, she would need to maintain it “so that his daughters would not need to worry about the condition of things.” Daughters Tobi and Lucinda did not attend the meeting with Poyner, but Lucinda declared that after their mother died, their father called his daughters every night and talked about everything. Her father “talked about being grateful that there was a parent-child exclusion that would allow his daughters to keep the Residence in the future.” Tobi declared that her father discussed with her “that, when he passed, the property was going to his daughters without any tax increases.”

The AAB hearing was continued until November 2012. In October 2012, the County filed an objection to retroactive modification of the trust.

C. TRIAL COURT RULING

The trial court took no testimony at the November 2012 hearing on Jeanne’s petition. At the outset the court stated, “we see all the time these postdeath applications for characterization of property interest all the time. It’s something as simple as a

⁴ On June 26, 2013, this court granted Jeanne’s request to augment the record with copies of the declarations filed in the trial court.

Heggstad^[5] petition, or modification of terms of the trust by consent of the beneficiaries, or as a result of changed circumstances. And 99.9 percent of the time it's done for purposes of achieving the settlor's intent to minimize the cost of probate and taxation on death."

The County objected to the declarations of the beneficiaries and Jeanne as self-serving hearsay. After hearing the County's argument, the court stated, "I think I understand your position, which seems to be that only if there is some mistake on the face of the document, or fraud, or inherent ambiguity on the face of the document, only then can the Court modify the trust. But I don't think the [P]robate [C]ode limits me to that."

Jeanne and the beneficiaries argued their statements were admissible under Evidence Code section 1261. The court did not expressly rule on the objections to their declarations or on the County's request for judicial notice. After hearing argument, the trial court ruled: "I'm going to grant the petition. I think the Court has the power, both under the [P]robate [C]ode and under common law principles because the [P]robate [C]ode leaves that open independently of fraud or ambiguity to reform the terms of the trust. And I will grant it. [¶] I think, in fairness, notice should have been given to the County that this petition was being sought. But, you know, I certainly gave the County the opportunity to be heard on this and invited their comments because I wanted to hear what their position was. So I will grant it. [¶] I think, based on the evidence before the Court, it was a peculiar exceptional circumstance, and that some modifying the trust was appropriate to carry out the settlor's intentions. So I will grant the petition."

⁵ *Estate of Heggstad* (1993) 16 Cal.App.4th 943 held that a probate court was authorized to determine whether certain realty belonged to an estate or a trust whether the question was presented by a petition for instructions to the trustee or by seeking an order to convey property held by the decedent. (*Id.* at pp. 951–952.)

The court construed the trust modification filed on May 25, 2012, as having an effective date of April 4, 2006.

III. DISCUSSION

A. TAXABILITY OF A LIFE ESTATE

Revenue and Taxation Code section 60 states: “A ‘change in ownership’ means a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest.” Many code sections are devoted to describing what does (e.g., Rev. & Tax. Code, §§ 61, 65, subd. (a)) and does not qualify as a change of ownership (e.g., Rev. & Tax. Code, §§ 62, 62.1, 62.2, 62.3, 62.5, 62.11, 63, 64, 65, subd. (b)). One exception excludes as a taxable change of ownership interspousal transfers (Rev. & Tax. Code, § 63), while another excludes a transfer of a principal residence between parents and children. (Rev. & Tax. Code, § 63.1.)

As to transfers in trust, it is usually considered a change of ownership when an interest in real property vests in someone other than the trustor when a revocable trust becomes irrevocable. (Rev. & Tax. Code, § 61, subd. (h).) However, it is not a change of ownership when the terms of the instrument “reserve to the transferor an estate for years or an estate for life.” (Rev. & Tax. Code, § 62, subd. (e).) The change of ownership occurs when the reserved estate for years or for life terminates. (*Ibid.*) These statutes imply that the transfer of a life estate to “a nonspouse third party should constitute a change of ownership.” (*Leckie v. County of Orange* (1998) 65 Cal.App.4th 334, 339 (*Leckie*).)

This interpretation is consistent with regulations adopted by the State Board of Equalization when Revenue and Taxation Code sections 60 et seq. were enacted in 1979. (*Leckie, supra*, at p. 339.) “The creation of a life estate in real property is a change in ownership at the time of transfer unless the instrument creating the life estate reserves such estate in the transferor or the transferor’s spouse, pursuant to Revenue and Taxation

Code section 63, or registered domestic partner, pursuant to Revenue and Taxation Code section 62, subdivision (p).” (18 Cal. Code Reg. § 462.060, subd. (a).) “The creation or transfer of an estate for years for less than 35 years is not a change in ownership.” (*Id.* at subd. (b).) *Leckie* concluded that a trust transfer of a life estate to a person neither a spouse, parent, or child upon the trustor’s death qualified as a change of ownership. (*Leckie, supra*, at p. 339; *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1320, 1324–1325 [creation of life estate in sister on trustor’s death amounted to change in ownership].)

B. JUDICIAL AUTHORITY TO REFORM OR MODIFY A TRUST

1. Standard of Review

The extent of a trial court’s authority to modify a trust is a question of law involving interpretation of the trust statutes enacted in 1986 and their interplay with the common law of trusts. (*Boys and Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1057 (*Walsh*).) Interpretation of a trust instrument presents a question of law for independent review on appeal when its meaning does not depend upon resolving a conflict in extrinsic evidence. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.) It is proper to resolve an ambiguity in a trust instrument by consideration of extrinsic evidence surrounding the execution of the document. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 74 (*Ike*); *Kolb v. City of Storm Lake* (Iowa 2007) 736 N.W.2d 546, 558 [in determining whether settlors had general charitable purposes, court “must evaluate all the relevant facts and circumstances, which may include extrinsic evidence not included in the trust document”]; cf. § 6111.5 [extrinsic evidence is admissible to clarify the meaning of a will]; Code Civ. Proc., § 1860; *Estate of Russell* (1968) 69 Cal.2d 200, 206–207.) If there is conflicting extrinsic evidence regarding a trustor’s intent, an appellate court must defer to express and implicit factual findings that are supported by substantial evidence. (*Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 931.)

2. Case Law Preceding the 1986 Revision of the Probate Code

In *Adams v. Cook* (1940) 15 Cal.2d 352 (*Adams*), the California Supreme Court considered judicial authority to modify the terms of an irrevocable trust in realty. The court explained that the trust was designed to have the trustee sell the property at a specified minimum price and to split the proceeds into 250 shares to be distributed to the trust beneficiaries. (*Id.* at p. 354.) “At the time the trust was created, it was the intention of those creating the trust to sell the property, but no purchaser could be found who would pay the price fixed in the trust instrument. It was not known at that time that the property was oil property” (*Id.* at pp. 354–355.) Once oil was discovered on the property, a number of oil companies offered to lease the property from the trustee, but the trustee believed it was not authorized to do so unless the lease was made subject to the sale of the property. The beneficiaries sought declaratory relief. (*Id.* at p. 355.)

The court noted that courts have greater authority to modify trusts than contracts. “That a court of equity has the power to change the method of administering a trust estate, when it is shown that such a change is necessary to prevent loss or destruction of the trust property, is well settled by the authorities.” (*Adams* at p. 358.) “It was the intent of the trustors that the unit holders or beneficiaries under the trust should secure the largest return possible on their investment.” (*Id.* at p. 360.) “It seems only reasonable to assume that had the trustors, at the time the trust was created, any knowledge that oil and gas could be produced from the trust property, they would have had the declaration of trust provide for a lease thereof for that purpose. In giving to the trustee this right to lease the trust property for the production of oil and gas, the court is only doing what the trustors would have done had they had the same facts before them then that were before this court at the trial of this action. [¶] ‘Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the

place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency.’ (*Curtiss v. Brown* [(1862)] 29 Ill. 201.)” (*Adams* at pp. 360–361.)

“It is perfectly clear from the above authorities that the rule against courts modifying the terms of a contract, and that they should construe it precisely as the parties had made it, does not apply to declarations of trust, where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and that when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by ‘a slavish adherence to the terms of the trust,’ the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors.” (*Adams* at p. 361.)

Six years after *Adams*, the California Supreme Court considered limitations on this doctrine in *Moxley, supra*, 27 Cal.2d 457. Parents created a trust providing for the support, care, and education of their then 15-year-old daughter until she reached the age of 35, at which time the trustees were to transfer the trust estate to her. (*Id.* at pp. 459–460.) At the age of 26, the daughter brought an action to terminate the trust, alleging the trustors intended to terminate the trust earlier if necessary to relieve her from undue hardship and unexpected contingencies. (*Id.* at pp. 460–461.) The court applied several general principles. “Ordinarily, the function of the court with reference to active trusts is not to remake the trust instrument, reduce or increase the size of the gifts made therein or accord the beneficiary more advantage than the donor directed that he should enjoy, but rather to ascertain what the donor directed that the donee should receive and to secure to him the enjoyment of that interest.” (*Id.* at pp. 462–463.) “Except under circumstances not shown here, courts cannot substitute their judgment for that of the trustor.” (*Id.* at p. 464.)

Moxley distinguished several cases in which a beneficiary was given an advance in income to effectuate the donor's intent without terminating the trust. (*Moxley* at pp. 466–467.) It distinguished *Adams* as involving a modification rather than a termination of the trust. *Moxley* concluded: “It is only under peculiar circumstances such as those exemplified in *Adams v. Cook*[, *supra*,] 15 Cal.2d 352, that a court has the power to modify an active trust. (See, also, *Whittingham v. Californi[a] Trust Co.* [(1931)] 214 Cal. 128; [citation].) In the cited cases, the courts were dealing with exceptional situations in which modification was decreed in order to carry out, rather than to defeat, the primary purpose of the trustor as expressed in the trust instrument. Plaintiff's allegations in the present case have been heretofore considered and we find no such peculiar circumstances alleged here. Plaintiff does not allege facts showing anything in the nature of an emergency or any peculiar circumstances which were not reasonably within the contemplation of the testatrix when she expressly directed that the corpus of the trust should be withheld from plaintiff until plaintiff should attain the age of 35 years.” (*Moxley, supra*, 27 Cal.2d at p. 468.)

Stanton v. Wells Fargo Bank & Union Trust Co. (1957) 150 Cal.App.2d 763 (*Stanton*) summarized the law in terms of “when a court may permit a deviation from the provisions of a trust” (*Id.* at p. 770.) “Except in unusual or emergency situations the courts will limit the trustees to the powers conferred. But the courts will not permit the main purpose of a trust to fail by compelling slavish adherence to the administrative limitations of the trust instrument. Where the main purpose of the trust is threatened the courts will and should grant permission to deviate from restrictive administrative provisions. But the court should not permit a deviation simply because the beneficiaries request it where the main purpose of the trust is not threatened and no emergency exists or is threatened. It must be remembered that it is the theory of this rule that, by the exercise of this power, the court is not defeating the trust, but in fact is furthering it. The equity court is simply doing what the testator, presumably, would have done had he

anticipated the changed conditions. In other words, the specific intent of the testator is disregarded in order to enforce his general intent.” (*Ibid.*)

Stanton reviewed *Adams* at length (*id.* at p. 772–773) and *Moxley* more briefly (*id.* at p. 774), before concluding that the trial court erred in allowing the trustees to invest in stocks rather than the bonds specified in the trust instrument when there was no evidence of an emergency threatening the failure of the “settlor’s main trust purpose.” (*Id.* at p. 776.)

Cases have followed *Moxley* and *Stanton* in recognizing that a deviation from a trust should only be allowed in unusual or emergency circumstances. (*Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, 211 [cotrustees were not authorized to make a conditional appointment of a trust beneficiary as a third trustee] ; *Estate of Gilliland* (1974) 44 Cal.App.3d 32, 37 [court was not authorized to implement agreement of all beneficiaries and distribute principal of trust estate to income beneficiaries to pay taxes on their income].)

3. The 1986 Revision of the Probate Code

In 1986, based on the recommendation of the California Law Review Commission (Commission), the Legislature enacted a comprehensive trust law which reorganized and consolidated existing trust law in the Probate Code. (*Estate of Wernicke* (1993) 16 Cal.App.4th 1069, 1075.)⁶

⁶ The statutory “Trust Law” is located in Division 9 of the Probate Code. (§ 15000.) Chapter 3 of Part 2 of Division 9, including sections 15403 and 15409, pertains to modification and termination of trusts.

In 1990, the Legislature repealed (Stats. 1990, ch. 79, § 13, p. 463) and reenacted the Probate Code, much of it without change. (Stats. 1990, ch. 79, § 14, pp. 463–972.22; *Estate of Joseph* (1998) 17 Cal.4th 203, 211.) Sections 15403 and 15409 were reenacted with the same wording as enacted in 1986. (Stats. 1986, ch. 820, § 40, pp. 2756–2758; Stats. 1990, ch. 79, § 14, pp. 934–936.)

Courts have recognized that the 1986 revision was designed to change case law in several respects. (E.g., *Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1115 [§ 18100 was “expressly intended to give greater protection to the rights of a third-party purchaser of trust property.”]; *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 858 [“Section 16460 effected a change not only in the duration of the statute of limitations on actions by beneficiaries against trustees, but also in the events that triggered the running of the statute ... ”]; *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1347 [§ 18000 relieved trustee of personal liability on a contract].)

Section 15403 states: “(a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court. [¶] (b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary’s interest as provided in Chapter 2 (commencing with Section 15300).”

A Commission comment explained that section 15403 was partly designed to relax the restrictions of *Moxley*. “This section is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary’s interest is restrained, such as by a spendthrift provision. See Section 15300 (restraint on transfer of beneficiary’s interest). Section 15403 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary’s interest. The discretionary power provided in

subdivision (b) also represents a change in the prior California caselaw rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal.2d 457, 462, 165 P.2d 15 (1946). Section 15403 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained.” (20 Cal. Law Revision Com. Rep. (1990) p. 1876.)

Comments by the Commission are regarded as persuasive, if not conclusive, evidence of the legislative intent in adopting the Commission's recommendations. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

4. Case Law After the 1986 Revision of the Probate Code

Only one case decided after the 1986 Probate Code revision has considered what trust modifications may be effected under section 15403 when all beneficiaries consent. *Walsh, supra*, 169 Cal.App.4th 1049 directly presented the scope of the material purpose restriction in section 15403, subdivision (b), on modifying a trust when all beneficiaries consent. (*Walsh* at p. 1051.) Under the trust, successor cotrustees were authorized to determine what amounts to give to each of five named beneficiaries (each a charitable organization) and to add as beneficiaries other charitable organizations. (*Id.* at pp. 1052–1053.) At the same time as the trustor executed a trust amendment, the trustor also prepared a disbursement schedule identifying a number of additional beneficiaries. (*Id.* at pp. 1053–1054.) Between the schedule and the trust, 20 beneficiaries were named. (*Id.* at p. 1054, fn. 3.) To settle litigation, all the beneficiaries named in the trust and in the distribution schedule agreed to a trust modification that specified what percentage each beneficiary should receive, and the trial court ordered the trust modified accordingly. (*Id.* at pp. 1055–1056.)

The appellate court indicated that section 15403's requirement of unanimous beneficiary consent was satisfied by the consent of the five beneficiaries named in the trust, although they had not been selected by the successor trustees. (*Walsh* at p.1058.) As to whether the modification affected a material purpose of the trust, the appellate

court reasoned that even if a material purpose of the trust was to allow the successor trustees to designate additional beneficiaries, “the reasons for modifying the Trust clearly outweigh the interest in permitting appellants to exercise their discretion.” (*Id.* at p. 1061; fn. omitted.) “The modification unquestionably accomplishes [the trustor’s] overriding goal of dedicating the Trust to charity.” (*Ibid.*) Due to litigation, no beneficiary had yet received a distribution.

Walsh discussed *Estate of Gilliland, supra*, 44 Cal.App.3d 32, which had held that a deviation from a trust is only justified when an emergency threatens the main purpose of the trust. (*Walsh, supra*, 169 Cal.App.4th 1049, 1062.) “*Gilliland* is inapposite for two reasons. First, it was decided before section 15403 was enacted and, as a result, it is of limited value here. Second, and unlike *Gilliland*, there were ‘recognizable justification[s]’ for the modification at issue here, specifically avoiding the cost, delay, and potential for further litigation associated with permitting appellants to exercise their discretion to select different or additional beneficiaries.” (*Walsh, supra*, at p. 1062.) From the Commission’s comment on section 15403, *Walsh* quoted, “Section 15403, subdivision (b) ‘gives the court some discretion in applying the material purposes doctrine ...’ and was ‘intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary’s interest is not restrained.’” (*Walsh, supra*, at p. 1062.) *Walsh*’s quotations of the Commission’s comment omitted its statement, “The discretionary power provided in subdivision (b) also represents a change in the prior California case-law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal.2d 457, 462, 165 P.2d 15 (1946),” though it quoted from sentences preceding and following that statement.

5. Trust Modification Does Not Require an Emergency

The County relies on *Moxley* and *Ike* as establishing, “Only under the most peculiar and egregious circumstances can a trust be modified to reflect the original intent of the Trustor. [Citations.] That modification must be based on a mistake, fraud, or

inherent ambiguity or conflict on the face of the document itself.”⁷ However, as Jeanne notes in reliance on the Commission’s comment on section 15403, *Moxley* has been superseded by 1986 enactments of the trust law.

County relies on *Ike, supra*, 61 Cal.App.4th 51, 83, as preserving the restrictive rules articulated in *Moxley* for when a trust modification is authorized, despite the 1986 revisions of the Probate Code. *Ike* relied on *Moxley* after finding those revisions, including section 15403, irrelevant to the court’s concern about a probate court’s equitable authority to modify patent drafting errors in a trust. (*Id.* at p. 84.) As *Ike* did not discuss what modification authority the Legislature intended to create by enacting section 15403, we find its reasoning unpersuasive and inapplicable to a situation involving the consent of all the beneficiaries to modify a trust.

Section 15403 does not limit trust modification to the circumstances described by the County. The only limitation contemplated by section 15403 when all beneficiaries consent is that the reasons for the modification must outweigh any material purpose of the trust affected by the modification. When trust modification is authorized by section 15403, a trial court need not also find the existence of an emergency or other exceptional or peculiar circumstances.

⁷ The County asserts as it did in the trial court, “Probate Code sections 15409(a) and 17200(b)(13) permit a prospective modification of a trust to correct for a mistake or fraud.” Section 15409 authorizes modification of “the administrative or dispositive provisions of the trust” to fulfill the settlor’s probable intent when continuing “the trust under its terms would defeat or substantially impair” accomplishing the trust’s purposes due “to circumstances not known to the settlor and not anticipated by the settlor” We need not determine the applicability of section 15409, as the original petition to modify the trust was based on the consent of all the beneficiaries under section 15403. It does not appear from the comments of the Commission that section 15409 was intended to restrict a court’s authority when acting under section 15403 or to perpetuate the *Moxley* holding. (20 Cal. Law Revision Com. Rep., *supra*, p. 1880.)

Applying section 15403, when all beneficiaries consent to a trust modification the trial court is authorized in ordering the modification so long as the modification does not defeat a material purpose of the trust or, if it does, the reasons for the modification outweigh that purpose of the trust. Under this statute, a court must determine the purpose or purposes of a trust and which purposes are material.

Here, it is apparent from the face of the trust and incorporated Exhibit B that the trust was designed, first, to provide for whichever spouse survived the other, and second, to distribute the entire remaining estate to their four daughters. Neither the 1989 trust document nor the 1994 revision of Exhibit B made any provision for Frederick's sister Jeanne. However, after Helen's death in 1996, Frederick spent more time with Jeanne and she eventually came to live with him. It was under these circumstances that he exercised his powers of appointment as surviving trustor in 2006 to provide for Jeanne, by naming her successor trustee and providing that the trustee should give Jeanne exclusive use and possession of the residence "without any rent or similar charge" until her death, so long as she maintained it and used it as her principal residence. In the same document that exercised his powers of appointment, Frederick stated, "The Trustors established the Trust to avoid the costs and administrative delays of a formal probate proceeding and to minimize federal and state transfer taxes."

The County asserts, "although the Trust might have been intended to avoid probate and probate estate/death taxes, it is clear that the primary purpose of the Trust was to provide the Settlor's sister with a life estate. There was no stated intent to avoid any and all taxes or to manipulate the estate assets in order to maximize the interests of the residual beneficiaries." The County emphasizes that Frederick had the same attorney prepare the original 1989 trust and the 2006 trust amendment, suggesting that the amendment must have accurately reflected Frederick's intent. This was the same attorney who maintained in a letter to Jeanne in 2011 that creation of a life estate was not a taxable change of ownership.

The County insists on adhering to those provisions of the trust amendment that created a life estate in Jeanne. Doubtless, Frederick wanted to provide his sister with a residence for the rest of her life, but it is equally apparent that he wanted her to reside rent-free, paying no costs for continuing to live in the residence after his death. Due to Jeanne's advanced age,⁸ Frederick could have equally accomplished this objective by giving her an estate for more years than she was likely to live. So long as the estate for years was under 35 years, it would not be regarded as a taxable change of ownership upon Frederick's death, and his children would receive their shares of the estate after termination of Jeanne's estate subject to the property tax exemption of the transfer of a principal residence from a parent to his children.

It would be unreasonable to conclude that Frederick had a primary purpose of giving Jeanne a life estate and thereby subjecting her to a ten-fold increase in property taxes. Instead, from the face of the 2006 trust modification it appears his dominant plan was to provide his sister with a cost-free residence for as long as she lived.

The County asserts the trial court "utilized improper judicial notice of the purpose of trusts generally and the intent of the settlor of this trust in particular." (Emphasis omitted.) The County made no such objection in the trial court. Further, the County mischaracterizes what occurred. At the outset of the hearing, the court stated that "99.9 percent of the time" that trusts are modified at the request of all beneficiaries, "it's done for purposes of achieving the settlor's intent to minimize the cost of probate and taxation on death." There was no judicial notice taken of the purpose of trusts generally or Frederick's intent specifically. The trial court was charged with determining the material purposes of the trust and it was appropriate for the trial court to observe that one

⁸ At the November 2012 hearing on Jeanne's petition, her counsel stated without contradiction that Jeanne was then age 89.

objective of most trusts is to minimize taxation of the trust property, preserving the estate for the trust beneficiaries. This general observation was also supported by the language of the trust agreements, particularly the concern in the original trust about maximizing the federal marital estate tax deduction and the recital in the 2006 trust amendment about minimizing state and federal taxes.

Absent any evidence that Frederick intended to benefit the County at the expense of his sister and four daughters, we conclude based on the trust documents that a material purpose was to structure the trust amendment so as to avoid an increase in property taxes.

The County argues that “unreliable hearsay statements” by Jeanne and Frederick’s daughters “were clearly insufficient to be the sole basis for determining that the Settlor had a different intent than what was set forth in the written Trust documents.”

“The statements of Petitioner were, at most, a representation of what she believes was her brother’s intent and desires, not what he said, not what his intent really was, not what he did, and not based on what he asked his attorney to do or what was actually discussed between the attorney and Settlor. As such, they are not properly statements of the deceased and, as such, are not an admissible exception to the hearsay rule under Evidence Code section 1261.”⁹

There is no indication that the court relied on the declarations by Jeanne and the beneficiaries. Frederick’s intent is apparent from the face of the trust documents and may be determined as a matter of law.

⁹ Evidence Code section 1261 states: “(a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear. [¶] (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.”

In any event, as Jeanne contends on appeal, “evidence of a statement of the declarant’s then existing state of mind ... (including a statement of intent, plan, motive, [or] design ...)” is admissible when “offered to prove the declarant’s state of mind ... at that time or at any other time when it is itself an issue in the action” (Evid. Code, § 1250, subd. (a)(1).) “[W]hen intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule.” (*Watenpaugh v. State Teachers’ Retirement System* (1959) 51 Cal.2d 675, 680.) Frederick’s statements to attorney Poyner in front of his sister Jeanne and daughter Andrea at the time of drafting the trust amendment and his later statements to daughters Lucinda and Tobi are consistent and admissible as showing his state of mind in executing the trust amendment. He wanted to provide a safety net for Jeanne in terms of a residence, which he also wanted her to maintain for his daughters, and he wanted to take advantage of the property tax exemption applicable to parent-child transfers of a principal residence. To the extent the trial court relied on this evidence, there was no error in doing so.

6. Retroactive Modification Fulfills the Trust’s Purposes

The County’s final contention is that “there is no legal basis for retroactive modification under California” law. (Emphasis omitted.) We acknowledge that section 15403 is not as clear about the power to modify as section 416 of the Uniform Trust Code (2000), which states: “To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.” (7C West’s U. Laws Ann. (2000) U. Trust Code, § 416, p. 516.)

Jeanne accurately points out that the trust modifications in *Ike, supra*, 61 Cal.App.4th 51 were made retroactive to the date of the creation of the trust. For example, the appellate court upheld the trial court’s rewriting of the trust to make the

decedent's trust irrevocable upon the death of the first trustor, thereby realizing the tax advantages desired by the trustors. (*Id.* at pp. 68, 71, 87.) However, in upholding this and other trust modifications, *Ike* did not expressly discuss the trial court's authority to rewrite the trust as of the date of its execution and prior to the deaths of the trustors.

The modification at issue here fulfilled two material purposes of Frederick, the surviving trustor, namely to provide a cost-free residence to his elderly sister for the rest of her life and thereafter to allow his children to receive the property subject to the parent-child property tax exemption for transfer of the principal residence. Precluding retroactivity of such a modification would itself thwart the trust's material purposes. Construing section 15403 to authorize retroactive modification when necessary to accomplish trust purposes serves the legislative intent of giving courts more flexibility. We need not read section 416 of the Uniform Trust Code into California law to conclude that the trial court was authorized to modify the trust amendment as of the date of its execution.

The County asserts that the court's order does not affect reassessment of the property as of the date of the surviving trustor's death based on the facts in existence at that time. We are not reviewing any tax assessment by the Monterey County Assessor or the Monterey County Assessment Appeals Board. We determine only that the probate court was authorized to modify the trust retroactively as it did. The effect of that order on the County's ability to reassess the residence is not currently before us.

IV. DISPOSITION

The order making the trust modification retroactive is affirmed.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

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