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NO. 69608-4-1 (Consolidated with No. 69702-1-I)

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In Re Estate Of

J. THOMAS BERNARD,

Decedent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Linger Parties' objections to the August TEDRA distill into one argument: the March TEDRA created an irrevocable, stand-alone, three-step process, independent of and superior to any statutory or common law applicable to the interpretation of testamentary intent, trusts or TEDRA Agreements. But the Linger Parties fatally undercut their own argument: they correctly note in their Response that "all rules of construction are 'supportive and or subordinate to the court's primary duty of determining the intent of the testator and giving it effect'" and that "the conclusion that the August document was an attempt to exercise [] Tom's modification powers is evidenced by the fact that the August document explicitly attempts to satisfy the requirements of the modification restrictions." Resp'ts Br., Sec. IV. B.2. Once it is acknowledged that the August TEDRA reflects Tom's final expression of his testamentary intent, and that Washington law demands that full effect be given to that final intent, the necessary outcome of this appeal is reversal and remand.

II. LEGAL ARGUMENTS

A. The Court's Paramount Duty is to Give Effect to Tom's Last Intent as Reflected in the August Documents.

The Linger Parties merely cite, but utterly fail to analyze and apply, the bedrock rule declared by Washington's highest Court — that courts must give effect to the testator's last expression of intent—

evidently hoping that this Court will likewise pay it mere lip service. They present no legal authority opposing the rule, because none exists. Rather, they distract from it, first by relying on entirely unproven claims of incompetence and undue influence (which of course are completely irrelevant to this appeal, which assumes Tom's capacity and freedom from undue influence), and then by elevating the form of the March TEDRA over the Court's "paramount duty [] to give effect to the testator's intent." *In re Riemcke's Estate,* 80 Wn.2d 722, 728, 497 P.2d 1319 (1972).

> The right to dispose of one's property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible. ...
>
> It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law.

In re Elliott's Estate, 22 Wn.2d 334, 350-351, 156 P.2d 427 (1945). In fulfilling this "paramount duty" to protect every testator's right, the courts do not look to any and all expressions of the testator's intent, but "the latest and final expression of the decedent's testamentary wishes." *Id.* at 351.

Likewise, in construing trust instruments, the settlor's intent

controls.[1] *Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007). "The *sole* object of the courts is to ascertain the intent and purpose of the settlor, and to effectuate that purpose in so far as it be consistent with rules of law." *Old Nat'l Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943) (emphasis supplied, internal citations omitted). Primarily, the settlor's intent and purpose is derived from the terms of the instrument — construing all the provisions together. *Id.*, *citing In re Peters' Estate*, 101 Wash. 572, 574, 172 P. 870 (1918). If the terms of the trust instrument leave that intent ambiguous, "extrinsic facts are admissible to explain the language in the will...testimony of the drafter, including as to the testator's intent, is one piece of evidence admissible to explain the language." *In re Estate of Sherry*, 158 Wn. App. 69, 82, 240 P.3d 1182 (2010). If a trust's language presents no ambiguity, the trust does not require either interpretation or construction. *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986), *citing* 90 C.J.S. Trusts § 161, at 18–19 (1955).

The Trust Amendment clearly reflects Tom's "latest and final expression" of his testamentary intent: that, should James not survive him,

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[1] Washington courts, recognizing the similarity between wills and trusts which dispose of property at death, apply the same rules of construction and interpretation to both instruments. *See* Restatement (Third) of Trusts § 25(2) & comment e (Tentative Draft No.1, approved 1996); Uniform Trust Code § 112; Appellants' Opening Br. Fn. 18. The Legislature's adoption of RCW 11.97.020 codified the longstanding practice of Washington courts.

the bulk of his trust estate pass to the Appellants and charitable organizations. CP 239-242. The August TEDRA further confirms Tom's intent, that by executing the document and obtaining James' agreement, he would satisfy the three-step process outlined in the earlier March TEDRA and that his Trust Amendment was for all purposes fully effective:

> 5. Amendment. Tom desires, and James desires for Tom, to modify Article 8 in the form of the attached Exhibit A and his Will in the form of the attached Exhibit B. The Parties agree and acknowledge that because the Modification Restrictions are imposed solely by virtue of the Agreement between the Parties, the Parties agree and represent that they are the sole necessary parties and have the power to modify such restrictions by further agreement. Additionally, and in any event, by virtue of RCW 11.96A.230, once this Amended Agreement (or a summary memorandum of such agreement is filed, this Amended Agreement will satisfy the Agreement's requirement to obtain a court order prior to any exercise of Tom's Modification Powers. Accordingly, the Parties agree that this Amended Agreement is a more efficient method of enabling Tom to exercise such powers.

CP 236.

The Linger Parties admit that the August TEDRA states Tom's intent: "[t]he August document … [represents] that 'Tom desires, and James desires for Tom, to modify,'" and that "what is relevant is Tom's intent." Resp'ts Br., Sec. IV. B.3. & C.4. Reading the March and August estate documents together produces no ambiguity regarding Tom's intentions—the March TEDRA recites Tom's and James' initial agreement that a series of steps be taken to modify the estate plan, and the

August TEDRA recites their later agreement that those steps were satisfied, and the estate plan thus properly modified.

If any ambiguity existed among the documents, the testimony of the drafter, Ryan Montgomery, verifies that the August TEDRA recites Tom intent. As Mr. Montgomery testified, Tom "indicated his clear intent that he did not want [the Linger Parties] to inherit a substantial portion of his estate in the unlikely event that James predeceased him leaving no issue." CP 788. "I am certain that the amended documents express Tom's clear testamentary intent, and any finding that refuses to carry out the terms of such documents is a clear frustration of such intent." *Id.*

In its October 19 Order, the trial court failed to read the August and March estate documents together, thus ignoring Tom's latest and final expression of his intent in the August documents. In so doing, the trial court inexplicably and improperly favored the intent expressed in the *earlier* March estate documents, finding:

> Tom's clear and unequivocal intent in March was that he not be allowed to modify the terms of the will and trust without a very expressed specified procedure, including a petition to the court and prior court approval. If this Court gives full effect to Tom's intent as set forth in the March TEDRA agreement, then it cannot enforce the August agreement entered in contravention of the terms of the prior agreement.

RP 9:19 - 10:2.

With this ruling, the trial court failed to honor Tom's last intent

expressed in the August estate documents and exalted the form in which he expressed his intent over its substance. This holding runs directly counter to the law, since "[w]here possible, the last will of a competent testator will be upheld, and courts will not by technical rules of statutory or other legal construction defeat the right of the testator to have effect given to the latest expression of his testamentary wishes." *Elliott's Estate*, 22 Wn.2d at 351; *see* Appellants' Opening Br., Sec. IV. B, C & D.

By disregarding *Elliott*, the Linger Parties attempt a sleight of hand to misdirect the Court away from the August documents as "the latest and final expression of the decedent's testamentary wishes," and toward their bare allegations of incompetence and undue influence.[2] *Elliott's Estate,* 22 Wn.2d at 351. The Linger Parties must establish these disputed issues of fact *at trial* by clear, cogent, and convincing evidence—*proof that the decision appealed here precludes*. *See In re Riley's Estate*, 78 Wn.2d 623, 479 P.2d 1 (1970); *In re Estate of Mumby*, 97 Wn. App. 385, 982 P.2d 1219 (1999). Therefore, Tom's competence is irrelevant to this appeal, having not yet been brought before the proper trier of fact.

B. The Parties At Minimum Substantially Complied with the Modification Process.

While ignoring Washington law confirming that the testator's last

[2] Appellants have countered those allegations with ample evidence of Tom's competence and the events leading to the change in his estate plan in the trial court. See CP 376-378, 382-393, 422-425, 447-450, & 783-789.

expression of intent controls, the Linger Parties spend pages reviewing the minutiae of technical compliance with Tom's and James' earlier agreement, expressed in the March TEDRA. The Linger Parties then cite to *Williams v. Bank of California, N. A.* 96 Wn.2d 860, 867-868, 639 P.2d 1339, 1344 (1982) for the prospect that "substantial compliance requires near strict performance," elevating the importance of such technical requirements, and concluding that Tom failed to substantially comply with the process to amend his trust. However, *Williams* does not support the Linger Parties' primary premise:

> Williams contends, however, that there is no such concept in this state as substantial compliance in amending a trust agreement when the trust instrument provides the method for its amendment. She cites *In re Estate of Button*, 79 Wn.2d 849, 490 P.2d 731 (1971), as authority that only strict compliance will suffice in such an instance. *We disagree*.

Id. (Emphasis added). In *Williams*, the amendment process set forth in the trust agreement clearly was not followed; nonetheless, *the Court found that the parties substantially complied with the process*, despite delays between sharing documents and exchanging signatures over almost a year, ultimately holding that failure to recognize the amendment would "only frustrate intent." *Id.*[3] Clearly, *Williams* does <u>not</u> hold that substantial

[3] *Williams* expressly considered the *Button* case, cited repeatedly by the Linger Parties for the prospect that when a particular method is set for amendment of a trust, no other

compliance requires near strict performance.

The Linger Parties also cite to *Allen v. Abrahamson*, 12 Wn. App. 103, 529 P.2d 469 (1974) in support of their "strict performance" interpretation of substantial compliance. That case analyzed whether a mere oral statement of future intent to change the beneficiary of a life insurance policy was sufficient to effectuate the change. The Court held that the test of substantial compliance in a court of equity was whether "it appears that the insured, during his lifetime, did everything necessary to effectuate the change, nothing remaining for the insurer to do, save purely ministerial acts." *Id.* It is easy to distinguish the facts here from a mere verbalization of future intent. Tom clearly and reasonably believed he had done everything legally necessary to effectuate his desired change. Relying upon the advice of his attorney, he completed the Trust Amendment, the Codicil and the August TEDRA. He sought and obtained the signatures of the trustees on the Trust Amendment. He properly executed the codicil to his Will. He then obtained James' signature on the August TEDRA. Tom did everything that he understood necessary, on the advice of counsel, to change the beneficiaries of his fully revocable trust.

Notably, courts in equity treat generously individuals who believe that they have properly effectuated a change, particularly when a writing

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method will be allowed, and held "we do not believe *Button* forecloses the concept of substantial compliance." *Williams*, 96 Wn.2d at 868, 639 P.2d at 1344.

shows that intent, even if not the type of writing technically required. *See In re Estate of Freeberg*, 130 Wn. App. 202, 207, 122 P.3d 741, 744 (2005) (decedent substantially complied with requirements to change IRA beneficiary where employee remembered oral request, even though no supporting paperwork was found); *Sun Life Assur. Co. of Canada v. Sutter*, 1 Wn.2d 285, 95 P.2d 1014 (1939) (unsigned letter mailed to insurance company requesting change in beneficiary designation was sufficient to support the change, although insured did not complete a change of beneficiary form and did not sign the letter).

Despite the Linger Parties' assertions, substantial compliance does not require near strict performance. Rather, courts in equity consider whether the individual believed that he had taken the necessary steps to effectuate his intent and whether holding those steps insufficient would serve only to frustrate the individual's intent. Tom, in executing his Codicil, Trust Amendment and the August TEDRA, expressed his intent and took all the steps he could reasonably believe necessary to effectuate that intent on the advice of counsel.

C. Because the Trust Does Not Incorporate The March TEDRA, Tom Complied with the Specified Method for Amending the Trust

Although the Court's paramount duty to give effect to Tom's last intent and Tom's substantial compliance with the necessary steps to

effectuate his intent require a finding of error in the trial court's summary judgment decision, Tom's compliance with the specific method for amending the Trust offers an alternative path to the same result. The trial court held, and the Linger Parties argue, that the August TEDRA (and therefore also the Codicil and Trust Amendment) was "null and void" because Tom did not use the modification method set forth in the March TEDRA, as they allege *In re Estate of Button*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971) requires.[4] *See* CP 815; Resp'ts Br. 30. The relevant method of modification under *Button*, however, is that method specified *in the trust itself.* Here, the Trust permitted Tom to amend it by giving notice to the Trustees. CP 208. Tom strictly complied with that requirement and obtained his Trustees' consent.

The Linger Parties' contention that Tom could only amend the Trust by complying with the three-step process identified in the March TEDRA makes sense only if the Trust incorporated that process.[5] By its plain language, however, the Trust did *not* incorporate the March TEDRA,

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[4] While the trial court premised its finding of invalidity of the August estate documents on its initial finding that the three step modification requirement restricted Tom and James from modifying the March TEDRA, the clear language of the March TEDRA applies no such restriction. *See* Appellants' Opening Br., Sec. IV. B.

[5] The issue of whether the Trust incorporated the March TEDRA's three-step process was raised and decided in the trial court. CP 461, 783-89, 868, 943-44. Because the appellate court reviews *de novo* the proper interpretation of trusts, it is also a threshold issue that must be considered by this Court in order to evaluate the Linger Parties' arguments that Tom did not properly modify the Trust. *See, e.g., In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008); *Millican of Wash., Inc. v. Wienker Carpet Service, Inc.*, 44 Wn. App. 409, 413, 722 P.2d 861 (1986).

either directly or by reference. Rather, the March TEDRA is a separate contractual agreement between Tom and James, and that contractual agreement alone is the source of the limitations on Tom's otherwise unfettered rights to amend his Trust.

The Trust itself makes this clear. Articles 3.1 and 3.2 of the Trust give Tom the right to revoke or amend the Trust. Article 3.3 then states that Tom's rights in this regard are also "subject to" a separate agreement, the March TEDRA, which restricts the exercise of those rights unless he "satisfies all of the requirements imposed by" that separate agreement. Notably, that sentence simply provides notice that Tom's rights are "subject to" the March TEDRA, and does not state that the Trust *incorporates* the March TEDRA, for example, by using traditional incorporation by reference language.

The last sentence of Article 3.3 provides that the three-step process described in the March TEDRA "shall be incorporated in this Agreement and shall remain fully enforceable against the Trustor," *but only in certain specified circumstances*. CP 208. Specifically, the March TEDRA's limitations are incorporated into the Trust *only* "if and to the extent such TEDRA is determined to be unenforceable for any reason." CP 208.

Washington law holds that "incorporation by reference must be clear and unequivocal." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 845

n.15, 194 P.3d 221 (2008) (quoting *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000)). "Considerable caution must be exercised in applying the doctrine of incorporation by reference" to testamentary documents. *Baarslag v. Hawkins*, 12 Wn. App. 756, 763, 531 P.2d 1283 (1975). The Trust does not unequivocally incorporate the three-step process of the March TEDRA, *except* when the March TEDRA is found unenforceable. [6]

By specifying one circumstance under which it incorporates the three-step process, the Trust clearly does *not* incorporate the three-step process under any other circumstances.[7] To read this language otherwise renders the last sentence of Article 3.3 superfluous and violates the fundamental principle that one must construe a trust to give meaning to all of its provisions. *First Interstate Bank v. Lindberg*, 49 Wn. App. 788, 794, 746 P.2d 333 (1987) ("We prefer to construe the trust so as to give meaning to all words used."); *see also Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980); *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn.

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[6] Tom also used unequivocal language to incorporate the Trust into the March TEDRA. CP 203. It is clear, therefore, that he intended that the terms of the Trust be incorporated into the March TEDRA but not vice versa.

[7] Where there is an alleged inconsistency between a general and a specific provision in a contract, the specific provision will qualify the meaning of the general provision. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354, 103 P.3d 773 (2004); *Wash. Local Lodge No. 104 of Int'l Bhd. of Boilermakers v. Int'l Bhd. of Boilermakers*, 28 Wn.2d 536, 541, 183 P.2d 504 (1947) (quoting Restatement (First) of Contracts § 236(c)); *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003).

App. 488, 493, 116 P.3d 409 (2005).

Here, the trial court held the March TEDRA enforceable, and the Linger Parties certainly do not claim otherwise. Consequently, by its plain language, the Trust does not incorporate the three-step process, and that three-step process cannot be the method of revocation "specified in the trust" under *Button* (if *Button* is even applicable here).

The language of the March TEDRA confirms the plain meaning of Article 3.3. In particular, in the March TEDRA Tom and James acknowledge that, "although both the trust and the Will remain revocable and/or modifiable by [Tom] during his lifetime," by entering into the March TEDRA, they "agree that no exercise" of Tom's powers under the Trust shall be enforceable unless they satisfy the three-step process. *Id.* (Tom and James later chose to modify the terms of that agreement in the August TEDRA.) A court may use a contemporaneously executed document to determine the intent of a testator. *In re Estate of Drown*, 60 Wn.2d 110, 114, 372 P.2d 196 (1962). The March TEDRA thus provides additional support to this plain-meaning interpretation of Tom's testamentary documents.[8]

[8] The March 20, 2009 summary letter from MPBA to Tom also evidences Tom's understanding and intent. In each instance that it discusses the restrictions, the letter states that Tom reserved the right to modify the Trust under the terms of the Trust itself and that the three-step process is imposed upon him solely by virtue of the March TEDRA. CP 909-10. The August TEDRA likewise confirms that the restrictions on

Finally, this reading comports with the court's obligation to give effect to the testator's intent. *See supra* A. Tom and James chose to rely on a contractual agreement to place limitations on Tom's ability to modify the Trust. Tom's estate plan was deliberately structured *not* to incorporate the three-step process into the Trust, unless the separate contractual agreement was found unenforceable.[9] *See* CP 786. Thus, construing the last two sentences of Article 3.3 in a manner that harmonizes their plain language also effectuates Tom's intent. *See Old Nat'l Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943) ("[S]uch intent and purpose must be derived from the terms of the instrument—construing all the provisions together."); *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007) ("[W]e harmonize clauses that seem to conflict. Our goal is to interpret the agreement in a manner that gives effect to all the contract's provisions."). In sum, Tom strictly complied with the only requirement stated in and imposed by the Trust itself—giving notice to the Trustees and obtaining their consent.

D. The Linger Parties' Technical Arguments are Baseless

For the Linger Parties to prevail, they must show that once the

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Tom's right to amend the Trust "are imposed solely by virtue of the Agreement [March TEDRA] between the Parties." CP 437.

[9] Incorporation only under these circumstances makes perfect sense. If Tom exercised his modification rights without abiding by the three-step process in the March TEDRA, he would subject himself to a breach of contract suit by James. If the March TEDRA were found to be unenforceable, however, James would have had no remedy unless the three-step process were incorporated into and imposed by the Trust itself.

March TEDRA was filed with the court (without the participation of any other party and without judicial review, exactly as the Trust and Estate Dispute Resolution Act contemplates), Tom and James could not change their agreement without court approval. That result makes no sense, as the very purpose of TEDRA is to give parties the flexibility to make estate planning decisions by agreement. The Linger Parties instead continue to nitpick at the language of the August TEDRA with strained interpretations of terms clearly defined by the statute. Although these arguments should be held irrelevant in light of Tom's clear statements of intent, their continuing mention in the briefing demands some attention here.

1. The August TEDRA Addressed a "Matter"

Appellants address TEDRA's expansive definition of "matter" in their Opening Brief. Appellants' Brf., at 18-19. The Act defines "matter" as "any issue, question or dispute" involving a litany of possibilities. RCW 11.96A.030(2). As the Comments to the bill adopting TEDRA explain, the term "is meant to apply broadly" and to include "the resolution an issue or modification of applicable document." Comments to SB5196 (1/28/1999) TEDRA §104(1) RCW 11.96A.030. TEDRA does not require active litigation to apply. *See* RCW 11.96A.300 (notice of mediation may be filed prior to a petition setting a hearing). Rather, TEDRA's purpose is to provide "nonjudicial resolution of matters." RCW

11.96A.010. By definition then, one may initiate a "matter" under TEDRA without an active dispute—the Act incorporates mere "issues" and "questions."

The issue that arose here was Tom's desire to amend his Trust. TEDRA matters specifically encompass an "issue, question or dispute...involving the determination of any question arising in the administration of a...trust." RCW 11.96A.010(2). Modification of a trust is a matter encompassed by TEDRA and, therefore, an issue that a nonjudicial binding agreement could resolve nonjudicially. RCW 11.96A.010(2); Comments to SB5196 (1/28/1999).

Although the Linger Parties contend that there was no *bona fide* issue, question or dispute, they fail to defend the basis for this assertion. Tom certainly had a question or issue with how to amend his Trust to reflect his final intent—no other reason existed for him to reach out to his estate planning counsel, his co-trustees, and James to facilitate and approve his amendment, or to incur the associated fees.

2. All the Necessary Parties Signed the August TEDRA.

a. The Linger Parties Lack Standing to Contest a Revocable Trust During Tom's Lifetime.

The Linger Parties argue that the signatures of the contingent remainder beneficiaries were required to modify a fully revocable trust *during the life of the trustor*. This argument has no merit. Washington

law is clear that a trustor of a revocable trust, a will substitute, may change that trust at anytime prior to his death.[10] Until Tom died, the Linger Parties, as contingent remainder beneficiaries, had no standing to contest his plan and thus could not be necessary parties to the August TEDRA.

Standing to sue requires the potential party to possess sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, i.e., a *legally protected right*. *See Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008), (debtor has no standing to enforce a claim that belongs to his bankruptcy estate); *Mack v. Armstrong*, 147 Wn. App. 522, 195 P.3d 1027 (2008) (property owner was given standing to sue to enforce covenants in the plain language of the covenants). "Absent standing, [the court is] without subject matter jurisdiction to entertain the taking claim." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998). Consistent with standing, albeit a distinct legal theory, CR 17(a) requires that "every action shall be prosecuted in the name of the *real party in interest*,"— the person who possesses the right sought to be enforced. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 982 P.2d 1202 (1999).

TEDRA attends to this fundamental aspect of standing and defines

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[10] Until the death of the trustor, the trustee has no duty to anyone other than the trustor and no other beneficiary has an ascertainable interest. RCW 11.103.040 provides, "While a trust is revocable by the trustor, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the trustor."

"[p]ersons interested in the estate or trust" as "all persons *beneficially interested in the estate or trust...*" (emphasis added). Under Washington law, a "[b]eneficial interest has been defined as the profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." *Christiansen v. Dep't of Soc. Sec.*, 15 Wn.2d 465, 467, 131 P.2d 189 (1942). Washington law holds that, until death, an individual's estate plan is malleable, no contingent beneficiary has a current, beneficial interest in the assets which may or may not exist upon the testator's death, and, consequently, the court lacks jurisdiction over an individual's estate plan:

> [t]he court had no jurisdiction whatsoever, either to 'compel a surrender and cancellation of the will, or to perpetuate testimony as to the mental condition of Miss Pond at the time the will was executed...courts have no power to inquire into the validity of wills prior to the death of the maker, to determine the *incompetency* of the maker.

Pond v. Faust, 90 Wash. 117, 120-121, 155 P. 776, 778 (1916).

The Linger Parties cite in support of their argument that they are "beneficiaries" *during* Tom's lifetime within the meaning of TEDRA *Nelsen v. Griffiths*, 21 Wn. App. 489, 585 P.2d 840 (1978)[11], a case relating to an *irrevocable testamentary trust*. That case noted that the contingent remainder beneficiaries became beneficiaries *immediately upon the death of the testator*—by definition, then, the contingent remainder

[11] Properly titled *Matter of Polson*, 21 Wn. App. 489, 585 P.2d 840 (1978).

beneficiaries were *not* beneficiaries with standing to contest the trust or demand an accounting of it *prior to* the trustor's death. *Id.*, at 492.

This position follows a nationally recognized and critical aspect of the common law applicable to trusts. "[T]he nature of a beneficiary's interest differs materially depending on whether the trust is revocable or irrevocable." *Empire Properties v. County of Los Angeles*, 44 Cal.App.4th 781, 787 (1996). "With the creation of an irrevocable trust, trust beneficiaries acquire a vested and present beneficial interest in the trust property, and their interests are not subject to divestment as with a revocable trust." *Id.* "Revocable living trusts are merely a substitute for a will. The gifts over to persons other than the trustor are contingent; the trust can be revoked or those beneficiaries may predecease the trustor." *Id.* at p. 788. A beneficiary's interest in a revocable trust is "'merely potential' and can 'evaporate in a moment at the whim of the [settlor].'" *Steinhart v. County of Los Angeles*, 47 Cal.4th 1298, 1319 (2010) *citing Johnson v. Kotyck*, 76 Cal. App. 4th 83 (1999). This is the law throughout the nation. *See Lewis v. Star Bank, N.A.*, 630 N.E.2d 418 (Ohio Ct. App. 1993), (trustor's children and grandchildren, as beneficiaries of her revocable trust with interests subject to "complete divestment," had no absolute entitlement to anything prior to her death and were not "vested"); *Ullman v. Garcia,* 645 So. 2d 168, 169 (Fla. Dist. Ct. App. 1994)

(revocable trust is "a unique instrument" that has "*no legal significance until the settlor's death*...the devisees of a settlor's revocable trust do not come into possession of any of the trust property until the event of [the settlor's] death, and even this interest is contingent upon her not exercising her power to revoke. Since she is the sole beneficiary of the trust during her lifetime, she has the absolute right to call the trust to an end and distribute the trust property in any way she wishes." (emphasis added; internal quotations omitted)); *Linthicum v. Rudi*, 122 Nev. 1452, 1455-56 (2006) (dismissing challenge to revocable trust during trustor's lifetime because challengers were not "interested persons" but merely holders of unvested contingent interest until the trustor's death).

The Linger Parties' argument that the March TEDRA immediately made them and the charitable beneficiaries—all unvested, contingent remainder beneficiaries—necessary "parties" to the August TEDRA, executed during Tom's lifetime, ignores the critical distinction that to constitute a "party" for purposes of 11.96A, a person must first have *"an interest in the subject of the particular proceeding*"[12] (i.e., the March TEDRA) and *then must also* be among the RCW 11.96A.030(5) listed

[12] RCW 11.96A.030(5) states: "Party" or "parties" means each of the following persons ***who has an interest in the subject of the particular proceeding***"... After listing a number of persons who potentially may be parties (if they have an interest in the subject of the particular proceeding), it reaffirms that requirement with the catchall: "(i) Any other person ***who has an interest in the subject of the particular proceeding***."

persons. The Linger Parties ignore these concepts and argue that any contract that meets the RCW 11.96A.220 definition of a binding agreement may not, under any circumstances, thereafter be modified by the original signatories thereto, without the consent of all persons who *might,* depending on factors outside their control, acquire an interest in the trust upon the trustor's death. They instead argue unconvincingly that the contract, as a matter of law, and whether or not intended by the original signatories, immediately and irrevocably grants third party beneficiary status upon every potential definitional "party."

The Linger Parties list all potential "beneficiaries" granted standing under TEDRA; however, they fail to analyze the threshold issue—whether such standing arises prior to an individual's death. The answer under Washington law is **no**. Consequently, while the Linger Parties certainly can, and have, made post-death claims to Tom's assets, they had no cause and no standing to complain during his lifetime. Absent such standing then, they cannot now claim that their signatures were necessary, during Tom's lifetime, for him to amend his estate plan.

b. The Doctrine of Virtual Representation Allowed James to Exercise Any Rights Arguably Granted to the Linger Parties.

Even if the March TEDRA somehow made the Linger Parties necessary parties to the August TEDRA (which it does not), they still must

establish that James could not virtually represent them as to the August TEDRA. The Linger Parties spend pages analyzing a small portion of the virtual representation statute, RCW 11.96A.120(2)(a),[13] but ignore the applicable section, RCW 11.96A.120(2)(c), which reads as follows:

> 11.96A.120(2)(c): Except as otherwise provided in this subsection, *where an interest in an estate...has been given to a person* [e.g. James] or a class of persons, or both *upon the happening of any future event* [e.g., Tom's death], and the same interest or a share of the interest is to pass to another person or class of persons [e.g. all contingent beneficiaries], or both, *upon the happening of additional future event* [e.g., James' death], notice may be given to the living person [e.g., James] or persons who would take the interest upon the happening of the first event [e.g., Tom's death] and the living person [e.g., James] or persons *shall virtually represent* the persons or class of persons [e.g. all other contingent beneficiaries] who might take on the happening of the additional future event [e.g., James' death].

The authors of TEDRA discussed the intended effect of RCW 11.96A.120(2)(c), as one of three options for virtual representation, in a series of CLEs created and revised over the years. They summarized their work in the following excerpt from recent CLE materials[14]:

> This last provision is very useful in situations where several contingent beneficiaries have been designated. Usually these beneficiaries have the potential right to receive the same trust interest, but each will receive the trust interest only if the prior distribution has failed. For example, a distribution that is

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[13] The statute has been revised and renumbered since August 2009. These citations refer to the statute in effect in August 2009, which applied to the August TEDRA.

[14] Mr. Thomas acknowledged he drew heavily from the work of Bruce Flynn and Kenneth L. Schubert, Jr. in his materials.

> contingent on a child's death might pass to that child's "issue, per stirpes," and in default of such issue, to the trustor's other then living "issue, per stirpes," and in default of such issue, to a designated charity. In this situation the child's issue can virtually represent the trustor's "other issue," and also the charity. The trustor's "other issue" would be represented by the child under the second situation described above, and *the child's issue could represent the interest of the charity since the charity would receive its interest only on the contingency that none of the child's "issue" were surviving at the trust termination.*[15]

Evan O. Thomas III, *The Washington Non-Judicial Binding Agreement Statute*, Session Five of the Basic Washington Estate Planning Skills Course, May 12, 2000 (emphasis added). This discussion is precisely on point. James was the last contingent remainder beneficiary prior to the Linger Parties and the charities under the original Trust Agreement, and the Linger Parties and charities interests only matured if James survived Tom.[16] James was the vertical virtual representative.

In an attempt to narrow the language adopted in Washington, the Linger Parties cite old common law from California, a state with no

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[15] TEDRA's authors also described vertical virtual representation in CLE materials designed to introduce and interpret the then new 1999 Act. The materials on Virtual Representation had a subsection entitled "First Contingent Beneficiary Can Represent More Remote Contingent Beneficiaries," which stated "if a trust o[r] estate creates successor contingent interests, only the beneficiary with the first contingent interest is required to be a party where the same interest would pass to the other beneficiaries upon the happening of subsequent contingencies." Klobucher, Richard "Doctrine of Virtual Representation and Use of Special Representative" Ch. 3, Part 3-7 & 8. June 1999.

[16] An impediment to James virtually representing the Linger Parties would arise only if his interests conflicted with theirs. No conflict of interest arose here because James was to take his interest outright, which is the "same interest" the Linger Parties and the charities would take in the event James' interest failed. Interestingly, the Linger Parties did not argue that a conflict of interest between James and the contingent beneficiaries existed; consequently, the conflict exception cannot apply.

statutory basis for virtual representation and which relies entirely on the common law. However, California's case law does not restrict the expanded doctrine of virtual representation adopted in Washington. As noted in an American College of Trust and Estate Counsel survey on virtual representation in the 50 states, Washington, unlike California, codified expansive provisions allowing vertical virtual representation and expressly applies it to execution of nonjudicial settlement agreements.[17]

The drafters of TEDRA made this conscious decision, noting that the Legislature enacted RCW 11.96A.120 as part of the Trust Act of 1984/5 to codify the Doctrine of Virtual Representation and to *supplement* the common law doctrine. Comments to SB5196 (1/28/1999) TEDRA §305 RCW 11.96A.110 (Emphasis added). Clearly, the intent behind the codification of the doctrine of virtual representation, and its subsequent expansion through revisions to TEDRA, was to expand the application of the doctrine to situations beyond the common law.

E. By Barring the Personal Representative and Trustees' Appeal of the October 18 Order, the Trial Court Acted as the Court of First and Last Resort.

The Linger Parties argue that Appellants lack standing to challenge the trial court's Revision Order barring the Personal Representative and Trustees from appealing the October 18 Order invalidating the August

[17] *See* ACTEC, *Virtual Representation Statutes Chart* http://www.actec.org/public/Documents/Studies/Virtual_Representation_Statutes%20_Chart_06_17_2013.pdf.

estate documents. Resp'ts Br., Sec. IV. D. Under the Linger Parties' theory, no person or entity may challenge that ruling, as the ruling aggrieves neither of the parties to the appeal and the Personal Representative and Trustees would breach their respective duties in such a challenge. The trial court's Revision Order, they claim, is final and may not be reviewed by any higher court. This cannot be the case.

III. CONCLUSION

Appellants established no less than three legal bases why the trial court's grant of summary judgment was improper here. The Linger Parties' attempts to raise issues of capacity and undue influence on appeal only further support remand to the trial court for determination of those issues of fact. Appellants respectfully request an order remanding this matter to the trial court for resolution of these underlying issues by the proper trier of fact.

DATED this 3rd day of September, 2013.

GARVEY SCHUBERT BARER

By _____
Bruce A. McDermott, Bar # 18988
Teresa Byers, Bar # 34388

TOUSLEY BRAIN STEPHENS

By _____ per telephonic authority
Kim Stephens, Bar # 11984
Shannon Whitemore, Bar # 31530

645 So.2d 168
District Court of Appeal of Florida,
Third District.

Howard F. ULLMAN, as Guardian of the Person and Property of Irene Oldensmith, Incompetent, Appellant,
v.
David GARCIA, Appellee.

No. 94-419. | Nov. 23, 1994.

Guardian of estate brought suit on behalf of ward seeking to disaffirm *Totten* trusts on grounds that trusts were result of undue influence. The Circuit Court, Dade County, Moie J.L. Tendrich, J., dismissed matter. Appeal was taken. The District Court of Appeal held that: (1) trusts, which were revocable, could not be challenged until settlor's death, and (2) guardian was not entitled to award of attorney fees.

Affirmed.

West Headnotes (5)

[1] **Trusts**
Express Trusts in General

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(1)In General

Revocable trust cannot be contested until death of settlor; devisee lacks control over ownership of trust property until settlor's death. West's F.S.A. § 737.206.

4 Cases that cite this headnote

[2] **Trusts**
Revocation

390Trusts
390ICreation, Existence, and Validity
390I(A)Express Trusts
390k59Revocation
390k59(1)In General

Undue influence is not available remedy to revoke settlor's revocable inter vivos trust where settlor is still alive at time action for revocation is initiated.

2 Cases that cite this headnote

[3] **Mental Health**
Rights and Powers of Guardian or Committee in General

257AMental Health
257AIIIGuardianship and Property of Estate
257AIII(B)Property and Management of Mentally Disordered Person's Estate
257Ak216Rights and Powers of Guardian or Committee in General

Guardian of incapacitated person cannot seek to rewrite testamentary plan of ward by contesting validity of revocable trust on basis of undue influence.

2 Cases that cite this headnote

[4] **Mental Health**
Rights and Powers of Guardian or Committee in General

257AMental Health
257AIIIGuardianship and Property of Estate
257AIII(B)Property and Management of Mentally Disordered Person's Estate
257Ak216Rights and Powers of Guardian or Committee in General

Duty of guardian is to protect person and property of ward, and guardian does have right to seek to set aside gifts and conveyances which were procured by undue influence.

[5] **Mental Health**
Costs
Trusts
Costs

257AMental Health
257AVActions
257Ak518Costs
390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k377Costs

Guardian of "*Totten* trust" settlor was not entitled to recover attorney fees incurred in suit alleging that trust was result of undue influence; suit before settlor's death was baseless, did not relate to matter within guardian's duties, and did not benefit settlor or her estate.

Attorneys and Law Firms

***168** Ullman & Ullman, Howard F. Ullman, and Steven J. Glueck, North Miami Beach, for appellant.

Steel Hector & Davis, Clay Craig, and Brian J. Felcoski, Miami, for appellee.

Before HUBBART, GERSTEN and GREEN, JJ.

Opinion

***169** PER CURIAM.

Appellant Howard F. Ullman, as guardian of the estate of Irene Oldensmith, appeals the trial court's order dismissing an action to disaffirm Totten trusts. We affirm based upon our conclusion that the guardian of an incapacitated settlor cannot contest the validity of a revocable trust during the settlor's lifetime on the basis of undue influence.

In February of 1984, 75-year-old Irene Oldensmith executed a will appointing 28-year-old appellee David Garcia as her executor and her sole residuary devisee. Prior to this time, Irene had executed two previous wills leaving her estate to her aunts.

In October of 1986, appellee David Garcia petitioned the court to be appointed as Irene's guardian, asserting that she was no longer competent to handle her own affairs. Although Irene was declared incompetent, the court appointed appellant Howard Ullman, a member of the Florida Bar, as Irene's guardian instead of Garcia.

Ullman filed a three count action in May of 1991 on behalf of Irene, against Garcia. Count I sought to disaffirm the Totten trusts naming Garcia as the beneficiary. Count II sought a declaration that the 1984 will was void. Count III sought to compel an accounting to set aside inter vivos gifts and to impose certain constructive trusts. The petition alleged that Irene was suffering from progressive neurological disorders and had a diminished mental capacity. The petition further alleged that Garcia had exerted undue influence upon Irene, as evidenced by the provision in the will leaving to Garcia practically the entire $1 million estate, and the numerous Totten trust bank accounts.

In April of 1992, during the pendency of the action, the Florida legislature enacted section 732.518, which provides that: "An action to contest the validity of a will may not be commenced before the death of the testator." § 732.518, Fla.Stat. (Sept.1992). The legislature specifically provided that this section was applicable to bar actions contesting the validity of a will which were pending on and after October 1, 1992. The probate court dismissed Count II of the action as barred by section 732.518.

Effective October 1, 1992, the legislature added Section 737.206 which provides that: "An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable." § 737.206, Fla.Stat. (Supp.1992). Ullman then filed a Motion for Instruction regarding his continued prosecution of the action to disaffirm the Totten trusts in Count I. The trial court dismissed Count I on the basis of section 737.206, and Ullman appeals.

[1] We find no basis in law or fact for the guardian's arguments in this appeal. Florida case law, as well as section 737.206, Florida Statutes (Supp.1992), provides that a revocable trust cannot be contested until the death of the settlor. *See Florida Nat. Bank of Palm Beach County v. Genova,* 460 So.2d 895 (Fla.1984); *Paananen v. Kruse,* 581 So.2d 186 (Fla. 2d DCA 1991). The reasoning behind this rule is that the devisee of a revocable trust does not have any control over ownership of the trust property until the settlor's death. *See Seymour*

v. Seymour, 85 So.2d 726 (Fla.1956); *Barnard v. Gunter,* 625 So.2d 56 (Fla. 3d DCA 1993); *Nahar v. Nahar,* 576 So.2d 862 (Fla. 3d DCA 1991). Since the settlor has the absolute right to end the trust at any time and to distribute the trust property in any manner, those named as beneficiaries are merely potential devisees.

[2] Accordingly, as noted in *Paananen,* 581 So.2d at 188, "undue influence is not an available remedy to revoke a settlor's revocable inter vivos trust where the settlor is still alive at the time the action for revocation based upon undue influence is initiated." *See also Freeman v. Lane,* 504 So.2d 1297 (Fla. 5th DCA), *review denied,* 513 So.2d 1061 (Fla.1987); *Genova,* 460 So.2d at 895. Undue influence is not an available remedy because of the unique nature of a revocable trust in that it reserves to the settlor the power to end the trust at any time, and postpones the devisee's enjoyment of the trust until the settlor's death. *Genova,* 460 So.2d at 897.

This retention of control distinguishes a revocable trust from the other types of conveyances to which the principle of undue ***170** influence is applied, such as gifts, deeds, wills, and contracts. For example, in the context of an inter vivos gift, the gift is "completed at the time the gift was made, and the donor no longer retain[s] any control over the ownership of her property. Once the gift is made, the only way that the donor can regain outright ownership of her interest in the property, is to allege undue influence." *Genova,* 460 So.2d at 897.

By contrast, the devisees of a settlor's revocable trust "do not come into possession of any of the trust property until the event of [the settlor's] death, and even this interest is contingent upon her not exercising her power to revoke. Since she is the sole beneficiary of the trust during her lifetime, she has the absolute right to call the trust to an end and distribute the trust property in any way she wishes." *Genova,* 460 So.2d at 897. Thus undue influence has no place in determining the validity of Irene's revocable trust, which by definition may be terminated at any time during her life.

[3] We disagree with Ullman's contention that this line of authority is inapplicable to circumstances involving a settlor who has been declared incapacitated. Ullman asserts that he is entitled to bring this action as part of his duty as a guardian to protect Irene and her assets.

[4] The duty of a guardian is to protect the person and property of a ward, and a guardian does have the right to seek to set aside certain gifts and conveyances which were procured by undue influence. *See Saliba v. James,* 143 Fla. 404, 196 So. 832 (1940); *First Nat'l. Bank of St. Petersburg v. MacDonald,* 100 Fla. 675, 130 So. 596 (1930); *Cohen v. Cohen,* 346 So.2d 1047 (Fla. 2d DCA 1977). However, as discussed above, a revocable trust is a unique instrument which has no legal significance until the settlor's death. *See Genova,* 460 So.2d at 895; *Paananen,* 581 So.2d at 186; Austin Wakeman Scott, *The Law of Trust* § 58.4 (4th ed. 1987); George Taylor Bogert, *Trusts & Trustees* § 47 (2nd ed. rev. 1984). Thus it is not an asset of the ward's estate, and its validity cannot be contested until the settlor dies. *See In re Guardianship of York,* 44 Wash.App. 547, 723 P.2d 448 (1986); *Pond v. Faust,* 90 Wash. 117, 155 P. 776 (1916); *Estate of Du Nah,* 106 Cal.App.3d 517, 165 Cal.Rptr. 170 (1980); *Mastick v. Superior Court of City and County of San Francisco,* 94 Cal. 347, 29 P. 869 (1892).

As noted in *Pond,* in response to a guardian's argument that bringing a will contest was part of his duty to protect the ward:

'The last will and testament of the ward is not an asset. Neither is it an instrument which the guardian could use in the recovery of an asset. It cannot in any way relate to any matter within his power or duties, or in any manner affect his action as a guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so.' *Mastick v. Superior Court,* 94 Cal. 347, 29 Pac. 869.

....

Furthermore, the guardian has, or should have, no interest whatever either in establishing or disestablishing a will of his ward. He has no authority in the matter.

Pond, 155 P. at 778. *See Baumann v. Willis,* 721 S.W.2d 535 (Tex.Ct.App.1986); *Vigne v. Superior Court In and For Los Angeles County,* 37 Cal.App.2d 346, 99 P.2d 589 (1940).

Accordingly, we hold that the guardian of an incapacitated person cannot seek to rewrite the testamentary plan of a ward by contesting the validity of a revocable trust on the basis of undue influence. A finding to the contrary would defeat the evident purpose of the settlor/ward, and interfere with the settlor/ward's vested right to dispose of her property as she pleases. *See Shriners Hospitals for Crippled Children v. Zrillic,* 563 So.2d 64 (Fla.1990); *Skelton v. Davis,* 133 So.2d 432 (Fla. 3d DCA 1961).

[5] Finally, we are compelled to point out that the guardian's continued efforts to change the testamentary plan, only served to deplete Irene's estate and served no

benefit whatsoever to Irene or her estate. This court has previously stated that: " '[I]f the [attorney's] services tend to break down, subtract from or dissipate the estate [the attorney] ***171** cannot be compensated from it.' " *In re Estate of Simon,* 549 So.2d 210, 213 (Fla. 3d DCA 1989), *review denied,* 560 So.2d 788 (Fla.1990), *review denied sub nom Estate of Bertman v. Gastel,* 560 So.2d 788 (Fla.1990) (quoting *In re Gleason's Estate,* 74 So.2d 360, 362 (Fla.1954)). It is the duty of the appellate court to maintain a constant and vigilant eye over the award of attorney's fees for appeals such as this. Here the guardian's actions did not relate to any matter within his power or duties, and were detrimental to the estate in prolonging baseless litigation. Under these facts and circumstances, this court will not countenance an award of attorney's fees to the guardian from the estate coffers.

In conclusion, we affirm the trial court's order dismissing the guardian's action to contest the revocable Totten trusts created by the ward. The trial court is instructed not to award attorney's fees to the guardian for these proceedings.

Affirmed.

Parallel Citations

19 Fla. L. Weekly D2476

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47 Cal.4th 1298
Supreme Court of California

Lorraine STEINHART, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES, Defendant and Respondent.

No. S158007. | Feb. 4, 2010. | Rehearing Denied March 30, 2010.

Synopsis

Background: Taxpayer brought action against county seeking declaratory judgment and a refund of property taxes paid on property to which taxpayer received a life estate following the death of her sister, asserting that transfer of the property was not a change in ownership for tax assessment purposes. County filed a demurrer. The Superior Court, Los Angeles County, No. LC073339, Michael B. Harwin, J., sustained the demurrer and dismissed the action. Taxpayer appealed. The Court of Appeal reversed with directions. County petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:

[1] taxpayer was required to apply for assessment reduction to administratively exhaust her claim;

[2] taxpayer's claim was not within the futility exception to the administrative exhaustion requirement;

[3] notices taxpayer received from county did not estop county from relying on taxpayer's failure to exhaust administrative remedies; and

[4] transfer of equitable estate upon settlor's death was "change in ownership" for tax assessment purposes.

Reversed and remanded.

Opinion, 66 Cal.Rptr.3d 458, superseded.

West Headnotes (31)

[1] **Taxation**
—Equalization Among Taxing or Assessment Districts by County or Other Local Board or Officer

371Taxation
371IIIProperty Taxes
371III(H)Levy and Assessment
371III(H)7Equalization of Assessments
371k2624Equalization Among Taxing or Assessment Districts by County or Other Local Board or Officer
371k2625In general

A county board of equalization is a constitutional agency exercising quasi-judicial powers. West's Ann.Cal. Const. Art. 13, § 16.

4 Cases that cite this headnote

[2] **Taxation**
—Exhaustion of remedies

371Taxation
371IIIProperty Taxes
371III(H)Levy and Assessment
371III(H)10Judicial Review or Intervention
371k2691Review of Board by Courts
371k2698Exhaustion of remedies

The general rule in California is that a taxpayer seeking judicial relief from an erroneous assessment must exhaust his remedies before the administrative body empowered initially to correct the error.

[3] **Taxation**
—Conditions precedent

371Taxation
371IIIProperty Taxes
371III(J)Payment and Refunding or Recovery of Tax Paid
371k2782Actions and Proceedings for Recovery of Taxes Paid
371k2785Conditions precedent

In the property tax context, application of the

exhaustion principle means that a taxpayer ordinarily may not file or pursue a court action for a tax refund without first applying to the local board of equalization for assessment reduction and filing an administrative tax refund claim. West's Ann.Cal.Rev. & T.Code §§ 1603, 5097.

1 Cases that cite this headnote

[4] **Declaratory Judgment**
Statutory remedy
Taxation
Conditions precedent

118ADeclaratory Judgment
118AINature and Grounds in General
118AI(C)Other Remedies
118Ak44Statutory remedy
371Taxation
371IIIProperty Taxes
371III(J)Payment and Refunding or Recovery of Tax Paid
371k2782Actions and Proceedings for Recovery of Taxes Paid
371k2785Conditions precedent

Taxpayer was required to apply for assessment reduction with the assessment appeals board, to administratively exhaust her claim against county seeking declaratory judgment and a refund of property taxes paid on property to which taxpayer received a life estate following the death of her sister, based on the assertion that transfer of the property was not a change in ownership for tax assessment purposes. West's Ann.Cal.Rev. & T.Code §§ 1603, 1605.5(a), 5142(b).

[5] **Declaratory Judgment**
Statutory remedy
Taxation
Conditions precedent

118ADeclaratory Judgment
118AINature and Grounds in General
118AI(C)Other Remedies
118Ak44Statutory remedy
371Taxation
371IIIProperty Taxes
371III(J)Payment and Refunding or Recovery of Tax Paid
371k2782Actions and Proceedings for Recovery of Taxes Paid
371k2785Conditions precedent

Taxpayer's claim against county seeking declaratory judgment and a refund of property taxes paid on property to which taxpayer received a life estate following the death of her sister, based on the assertion that transfer of the property was not a change in ownership for tax assessment purposes, was not within was not within the futility exception to the administrative exhaustion requirement to apply for assessment reduction, even though taxpayer's refund claim had been administratively denied, absent evidence that, at the time an application for assessment reduction would have been timely, the county's assessment appeals board had predetermined its position as to whether a change in ownership had occurred. West's Ann.Cal.Rev. & T.Code §§ 1603, 1605.5(a), 5097.

[6] **Administrative Law and Procedure**
Exhaustion of administrative remedies

15AAdministrative Law and Procedure
15AIIIJudicial Remedies Prior to or Pending Administrative Proceedings
15Ak229Exhaustion of administrative remedies

Futility is a narrow exception to the general rule requiring exhaustion of administrative remedies.

2 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Exhaustion of administrative remedies

15AAdministrative Law and Procedure
15AIIIJudicial Remedies Prior to or Pending Administrative Proceedings
15Ak229Exhaustion of administrative remedies

The futility exception to the general rule requiring exhaustion of administrative remedies

applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case.

3 Cases that cite this headnote

[8] **Estoppel**
Counties and subdivisions thereof

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k62Estoppel Against Public, Government, or Public Officers
156k62.3Counties and subdivisions thereof

Notices taxpayer received from county regarding taxpayer's refund claim, stating that the claim was denied and the Revenue and Taxation Code allowed taxpayer six months from the effective date of the denial of to commence an action in the Superior Court to seek judicial review, did not estop the county from relying on taxpayer's failure to exhaust her administrative remedies by applying to county assessment appeals board for assessment reduction, in demurring to taxpayer's Superior Court action, where taxpayer was represented by counsel in pursuing her refund claim; even if the notices were ambiguous and confusing regarding the exhaustion requirement, they did not mislead taxpayer about any fact. West's Ann.Cal.Rev. & T.Code §§ 1603, 1605.5(a), 5142(b), 5096.

[9] **Estoppel**
Basis of estoppel

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k52Nature and Application of Estoppel in Pais
156k52(2)Basis of estoppel

The doctrine of equitable estoppel is founded on concepts of equity and fair dealing.

1 Cases that cite this headnote

[10] **Estoppel**
Nature and Application of Estoppel in Pais

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k52Nature and Application of Estoppel in Pais
156k52(1)In general

The essence of an estoppel is that the party to be estopped has by false language or conduct led another to do that which he or she would not otherwise have done and as a result thereof that he or she has suffered injury.

3 Cases that cite this headnote

[11] **Estoppel**
Estoppel Against Public, Government, or Public Officers

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k62Estoppel Against Public, Government, or Public Officers
156k62.1In general

The equitable estoppel doctrine ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.

3 Cases that cite this headnote

[12] **Estoppel**
Matters of fact or of opinion

156Estoppel
156IIIEquitable Estoppel
156III(B)Grounds of Estoppel
156k82Representations
156k84Matters of fact or of opinion

In order to work an estoppel, a representation

must generally be a statement of fact.

[13] **Estoppel**
Matters of fact or of opinion

156Estoppel
156IIIEquitable Estoppel
156III(B)Grounds of Estoppel
156k82Representations
156k84Matters of fact or of opinion

It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness under equitable estoppel, except when it is understood to mean nothing but a simple statement of fact.

2 Cases that cite this headnote

[14] **Estoppel**
Application in general
Estoppel
Knowledge of facts

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k52Nature and Application of Estoppel in Pais
156k52(5)Application in general
156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k54Knowledge of facts

In general, the law particularly disfavors estoppels where the party attempting to raise the estoppel is represented by an attorney at law.

6 Cases that cite this headnote

[15] **Estoppel**
Doctrine not favored

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k52Nature and Application of Estoppel in Pais
156k52(6)Doctrine not favored
(Formerly 156k54)

For purposes of analyzing estoppel claims, attorneys are charged with knowledge of the law in California.

5 Cases that cite this headnote

[16] **Estoppel**
Default or wrongful act of person setting up estoppel

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k59Default or wrongful act of person setting up estoppel

Absent a confidential relationship, one asserting estoppel must show that in relying on the alleged misrepresentation, he or she acted as a reasonably prudent person would act, and was not guilty of negligence or carelessness.

[17] **Estoppel**
Knowledge of facts

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k54Knowledge of facts

One who acts with full knowledge of plain provisions of law and their probable effect on facts within his or her knowledge, especially where represented by counsel, may claim neither ignorance of the true facts nor detrimental reliance on the conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel.

3 Cases that cite this headnote

[18] **Estoppel**

⁃Weight and sufficiency of evidence

156Estoppel
156IIIEquitable Estoppel
156III(F)Evidence
156k118Weight and sufficiency of evidence

Where a party asserts estoppel, the facts proved must be such that an estoppel is clearly deducible from them.

[19] **Estoppel**
⁃Essential elements
Estoppel
⁃Representations

156Estoppel
156IIIEquitable Estoppel
156III(A)Nature and Essentials in General
156k52.15Essential elements
156Estoppel
156IIIEquitable Estoppel
156III(B)Grounds of Estoppel
156k82Representations
156k83In General
156k83(1)In general

Where a party asserts estoppel, the representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference.

1 Cases that cite this headnote

[20] **Declaratory Judgment**
⁃Statutory remedy
Declaratory Judgment
⁃Appeal and Error
Taxation
⁃Conditions precedent

118ADeclaratory Judgment
118AINature and Grounds in General
118AI(C)Other Remedies
118Ak44Statutory remedy
118ADeclaratory Judgment
118AIIIProceedings
118AIII(H)Appeal and Error
118Ak392Appeal and Error
118Ak392.1In general
371Taxation
371IIIProperty Taxes
371III(J)Payment and Refunding or Recovery of Tax Paid
371k2782Actions and Proceedings for Recovery of Taxes Paid
371k2785Conditions precedent

The Supreme Court would address the merits of taxpayer's claim against county seeking declaratory judgment and a refund of property taxes paid on property to which taxpayer received a life estate following the death of her sister, based on the assertion that transfer of the property was not a change in ownership for tax assessment purposes, even though taxpayer failed to exhaust administrative remedies by applying for assessment reduction, where the parties and numerous amici curiae had fully briefed the change in ownership issue; the question presented had importance to taxing agencies, state and local governments, and those whose property interests may be subject to taxation. West's Ann.Cal. Const. Art. 13A, § 2(a); West's Ann.Cal.Rev. & T.Code §§ 1603, 1605.5(a).

[21] **Constitutional Law**
⁃Meaning of Language in General
Constitutional Law
⁃Plain, ordinary, or common meaning

92Constitutional Law
92VConstruction and Operation of Constitutional Provisions
92V(A)General Rules of Construction
92k590Meaning of Language in General
92k591In general
92Constitutional Law
92VConstruction and Operation of Constitutional Provisions
92V(A)General Rules of Construction
92k590Meaning of Language in General
92k592Plain, ordinary, or common meaning

In seeking to effectuate the voters' intent in adopting a constitutional provision by initiative, courts look first to the words of the provision in question, giving them their natural and ordinary meaning, unless it appears they were used in some technical sense.

& Asimov, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2009) ¶ 13:74.5 (CAPROP Ch. 13(I)-E); 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 147.

2 Cases that cite this headnote

[22] **Constitutional Law**
Plain, ordinary, or common meaning

92Constitutional Law
92VConstruction and Operation of Constitutional Provisions
92V(A)General Rules of Construction
92k590Meaning of Language in General
92k592Plain, ordinary, or common meaning

The words used in a constitutional provision must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted the provision.

[23] **Taxation**
Limitation of Rate or Amount

371Taxation
371IIIProperty Taxes
371III(B)Laws and Regulation
371III(B)7Limitation of Rate or Amount
371k2161In general

A transfer of the equitable estate in a residence when the revocable trust that held the estate became irrevocable upon the settlor's death, granting a life estate to settlor's sister and directing that upon sister's death the residence was to be sold and the proceeds disbursed to other relatives, was a "change in ownership," within meaning of constitutional provision defining the taxable "full cash value" of real property as the appraised value of real property when a change in ownership has occurred after the 1975 assessment; the entire equitable estate in the residence transferred from settlor to settlor's sister and other relatives. West's Ann.Cal. Const. Art. 13A, § 2(a); West's Ann.Cal.Rev. & T.Code § 60; 18 CCR § 462.160(b)(2).

See Cal. Jur. 3d, Property Taxes, § 170 et seq.; Cal. Transactions Forms, Estate Planning, §§ 5:4, 5:15 (Thomson Reuters 2009); Greenwald

[24] **Trusts**
Express Trusts in General

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(1)In general

Under general principles of trust law, trust beneficiaries hold the equitable estate or beneficial interest in property held in trust and are regarded as the real owners of that property.

10 Cases that cite this headnote

[25] **Trusts**
Extent of Estate or Interest of Trustee

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k133Extent of Estate or Interest of Trustee
390k134In general

The trustee is merely the depositary of the legal title to the property; the legal estate the trustee holds is no more than the shadow following the equitable estate.

[26] **Trusts**
Interest remaining in settlor or creator of trust

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k153Interest remaining in settlor or creator of trust

Property transferred to, or held in, a revocable inter vivos trust is deemed the property of the settlor.

5 Cases that cite this headnote

[27] **Trusts**
→Express Trusts in General

390Trusts
390IIConstruction and Operation
390II(B)Estate or Interest of Trustee and of Cestui Que Trust
390k139Extent of Estate or Interest of Cestui Que Trust
390k140Express Trusts in General
390k140(1)In general

Any interest that beneficiaries of a revocable trust have in trust property is merely potential and can evaporate in a moment at the whim of the settlor. West's Ann.Cal.Prob.Code §§ 15410(a), 15800, 16001.

10 Cases that cite this headnote

[28] **Taxation**
→Limitation of Rate or Amount

371Taxation
371IIIProperty Taxes
371III(B)Laws and Regulation
371III(B)7Limitation of Rate or Amount
371k2161In general

The transfer of bare legal title in a residence, from trust settlor to herself as trustee of revocable trust, did not constitute a "change in ownership" within meaning of constitutional provision defining the taxable "full cash value" of real property as the appraised value of real property when a change in ownership has occurred after the 1975 assessment. West's Ann.Cal. Const. Art. 13A, § 2(a); West's Ann.Cal.Rev. & T.Code § 60; 18 CCR § 462.160(b).

3 Cases that cite this headnote

[29] **Taxation**
→Limitation of Rate or Amount

371Taxation
371IIIProperty Taxes
371III(B)Laws and Regulation
371III(B)7Limitation of Rate or Amount
371k2161In general

In determining whether a "change in ownership," of a residence held by a trust occurred when the trust settlor died, within meaning of constitutional provision defining the taxable "full cash value" of real property as the appraised value of real property when a change in ownership has occurred after the 1975 assessment, it was of little significance that the legal title settlor held as trustee passed upon her death to successor trustees, since the legal title was no more than the shadow following the equitable estate. West's Ann.Cal. Const. Art. 13A, § 2(a).

4 Cases that cite this headnote

[30] **Taxation**
→Limitation of Rate or Amount

371Taxation
371IIIProperty Taxes
371III(B)Laws and Regulation
371III(B)7Limitation of Rate or Amount
371k2161In general

Courts generally accord great weight to the statutes the Legislature has passed and the regulations the State Board of Equalization has promulgated to implement the constitutional provision limiting the ad valorem tax on real property to 1 percent of the property's full cash value. West's Ann.Cal. Const. Art. 13A; West's Ann.Cal.Rev. & T.Code § 60 et seq.

[31] **Statutes**
Subject or purpose

361Statutes
361IIIConstruction
361III(G)Other Law, Construction with Reference to
361k1210Other Statutes
361k1216Similar or Related Statutes
361k1216(2)Subject or purpose
(Formerly 361k223.2(.5))

Insofar as possible, courts must harmonize code sections relating to the same subject matter and avoid interpretations that render related provisions nugatory.

1 Cases that cite this headnote

West Codenotes

Limited on Constitutional Grounds
West's Ann.Cal.Rev. & T.Code § 60.

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Opinion

CHIN, J.

***1303** ****60** Article XIII A of the California Constitution (article XIII A), which the voters adopted in June 1978 as Proposition 13, limits the ad valorem tax on real property to 1 percent of the property's "full cash value." (Id., § 1, subd. (a).) As relevant here, section 2, subdivision (a), of article XIII A (sometimes hereafter section 2, subdivision (a)), defines "full cash value" as the 1975–1976 assessed value of the property ****200** adjusted for inflation, or the appraised value of the property upon a "change in ownership" occurring after the 1975–1976 assessment. The issue this case presents is whether a "change in ownership" occurred within the meaning of this section upon the death of a trust settlor who transferred her residence to ***61** a trust that was revocable during her life, who was the sole present beneficiary of that revocable trust, and who provided in the trust document that upon her death the trust would become irrevocable and her sister would have the right to occupy the residence during her lifetime. Preliminarily, we must determine whether the settlor's surviving sister properly filed this action to challenge an administrative determination that a change in ownership occurred. The Court of Appeal here held that the surviving sister properly filed the action and that no change in ownership occurred. For reasons set forth below, we reverse the Court of Appeal's judgment.

***1304 FACTUAL BACKGROUND** [1]

During her lifetime, Esther Helfrick established a revocable trust, made herself trustee and sole present beneficiary of the trust, and transferred to herself as trustee her residence in Sherman Oaks, California. The trust became irrevocable upon Helfrick's death on March

24, 2001. At that time, under the terms of the trust, Helfrick's sister, plaintiff Lorraine Steinhart, received the right to occupy and use the residence "for so long as she lives," provided she pay all taxes, insurance, and assessments on the property and the costs of utilities and any necessary repairs. Upon Steinhart's death, the trustees of the trust were to sell the residence and disburse the net proceeds to those specified in the trust instrument, i.e., Helfrick's siblings still living at the time of Steinhart's death and the still-living issue of any deceased siblings.

When Helfrick died, the residence's assessed value for tax purposes was $96,638, with total taxes due of $1,105.79. Upon her death, defendant County of Los Angeles (County) reassessed the residence and increased its valuation for tax purposes to $499,000. It then issued a prorated supplemental tax bill for the 2000–2001 tax year in the amount of $1,085.19. For the next three tax years, the County sent property tax bills of, respectively, $5,492.67, $5,764.45, and $6,245.33. Pursuant to the terms of the trust, Steinhart paid these bills.

On July 24, 2004, Steinhart filed a claim with the Los Angeles County Auditor–Controller (County Auditor) seeking a tax refund of $18,587.64.[2] In stating the reasons for her refund claim, she asserted that when she received a life estate interest in the residence, no "change in ownership" occurred within the meaning of section 2, subdivision (a), to trigger reassessment.

Steinhart later received five letters from the County Auditor relating to the challenged tax bills, each dated March 2, 2005, and each stating: "The County has completed ***201** its review of your claim(s) for refund of taxes and/or penalties you filed with us on DECEMBER 21, 2004. [¶] Your claim(s) was reviewed by the ASSESSOR. Based on the documentation you submitted, they [*sic*] determined that your claim does not meet the provisions in the ***1305** Revenue and Taxation Code for granting a refund. For this reason, your claim(s) for refund is denied effective March 2, 2005. [¶] Section 5141 of the State of California Revenue and Taxation Code allows you six months from the effective date of denial of your claim(s) to commence an action in the Superior Court to seek judicial review of this denial. Should you have any questions or need further assistance regarding this claim please contact the Los Angeles County Property Tax System at (888) 807–2111 and press 1 for the OFFICE OF THE ASSESSOR." Steinhart also received a letter from the County Assessor (Assessor) dated March 3, 2005, stating that the reappraisal would "stand" because "[t]he real property transfer is a 'Change in Ownership', as defined by law." The letter provided the name and telephone number of a person Steinhart ***62** could contact "[i]f [she] ha[d] questions." At the bottom, it also included the following: "NOTICE: This notice is your record of our action on your request for investigation. It is your responsibility to pay all billed tax installments. Disputes involving the assessed value of your property should be formally addressed to the Assessment Appeals Board at (213) 974–1471. If we have indicated that a correction is being made, you have 60 days from the date of your corrected tax bill to file an appeal."

Steinhart did not pursue the matter with the Los Angeles County Assessment Appeals Board (Assessment Appeals Board). Instead, on August 29, 2005, she filed an action against the County in superior court contesting the reassessment. She alleged that the County had erred in denying her refund claim because, under the terms of the trust, no change in ownership occurred upon Helfrick's death to trigger reassessment under section 2, subdivision (a). By way of relief, Steinhart sought recovery of the excess real property taxes she had paid on the residence for the years in question. She also requested "a declaration that pursuant to the terms of the trust instrument, no change [in] ownership occurred as of the date of [Helfrick's] death, and hence, defendants were not legally authorized to tax the residence based on a reevaluation of the property as of the date of [Helfrick's] death."

The County responded by way of demurrer, asserting that the complaint failed to state a cause of action for the following reasons: (1) Steinhart did not exhaust her administrative remedies before filing suit; (2) under Revenue and Taxation Code section 60,[3] which defines a "change in ownership" as "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," the transfer of a life estate to a non-spouse third party constitutes a change in ownership under section 2, subdivision (a); and (3) the court lacked power to issue the requested order for declaratory relief, because the requested order would, in violation of section 4807, prevent or enjoin the collection of the tax. In opposition to the demurrer, Steinhart argued the ***1306** following: (1) because her claims present no issues of fact, and the reassessment is a nullity as a matter of law, she was not required to exhaust her administrative remedies; (2) the County is estopped from invoking the exhaustion doctrine, because ***202** the denial letters she received from the County led her to believe the next step in the review process was the filing of an action in superior court within six months of the County's denial; (3) under *Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 2 Cal.Rptr.2d 536, 820 P.2d 1046

(*Pacific Southwest*), no change in ownership occurred upon Helfrick's death; and (4) section 4807 is inapplicable because the complaint seeks a refund of paid taxes, not a prohibition against collection of future taxes. After hearing, the trial court sustained the demurrer without leave to amend, dismissed the complaint with prejudice, and ordered entry of judgment for the County.[4]

On Steinhart's appeal, the Court of Appeal reversed. For two reasons, it first rejected the County's reliance on the exhaustion doctrine: (1) Steinhart's claims present pure questions of law, not factual issues regarding the property's valuation; and (2) the futility exception to the exhaustion requirement applies given the County's "unyielding position," both in the trial court and on appeal, that a change in ownership occurred.[5] The court next rejected the County's reliance on section 4807, finding the statute inapplicable because Steinhart is seeking not to enjoin collection of future taxes, but to obtain a refund of taxes she has already paid. In other words, she is seeking a judicial declaration "only in aid of obtaining a refund, i.e., a ruling from the court to the effect that no change in ownership occurred and therefore the County was not authorized to reassess ****63** the subject real property." On the merits, the court, relying on our decision in *Pacific Southwest,* found that no change in ownership occurred upon Helfrick's death. In reaching this conclusion, the court expressly disagreed with the decision in *Leckie v. County of Orange* (1998) 65 Cal.App.4th 334, 76 Cal.Rptr.2d 426, which reached a different conclusion on analogous facts after finding the relevant discussion in *Pacific Southwest* to be dicta.

We then granted the County's petition for review.

DISCUSSION

As noted above, the County raises both procedural and substantive issues in opposition to plaintiff's refund claim. We begin with the procedural issues: whether plaintiff failed to exhaust her administrative remedies and, if so, whether that failure bars her action.

*1307 I. Exhaustion of Administrative Remedies

[1] Article XIII of the California Constitution (article XIII), which addresses taxation, specifies that "[t]he county board of supervisors, or one or more assessment appeals boards created by the county board of supervisors, shall constitute the county board of equalization for a county." (Art. XIII, § 16.) It further provides, with exceptions not applicable here, that "the county board of equalization ... shall equalize the values of all property on the local assessment roll by adjusting individual assessments." (*Ibid.*) As our courts have observed, in view of these provisions, a county board of equalization "is a constitutional agency exercising quasi-judicial powers. [Citation.]" *****203** (*International Medication Systems, Inc. v. Assessment Appeals Bd.* (1997) 57 Cal.App.4th 761, 766, 67 Cal.Rptr.2d 394; see also *Maples v. Kern County Assessment Appeals Bd.* (2002) 96 Cal.App.4th 1007, 1013, 117 Cal.Rptr.2d 663 ["as a board of equalization," county assessment appeals board "is a constitutional agency exercising quasi-judicial powers delegated to it by the California Constitution"]; *Shell Western E & P, Inc. v. County of Lake* (1990) 224 Cal.App.3d 974, 979, 274 Cal.Rptr. 313 [while sitting as a board of equalization, county board of supervisors is a constitutional agency exercising quasi-judicial powers delegated to the agency by the Constitution].)

Article XIII also specifies that "[t]he Legislature shall pass all laws necessary to carry out [article XIII's] provisions." (Art. XIII, § 33.) Pursuant to this constitutional command, the Legislature has statutorily established a three-step process for handling challenges to property tax assessments and refund requests. The first step is the filing of an application for assessment reduction under section 1603, subdivision (a), which provides: "A reduction in an assessment on the local roll shall not be made unless the party affected or his or her agent makes and files with the county board [of equalization] a verified, written application showing the facts claimed to require the reduction and the applicant's opinion of the full value of the property." The second step, which occurs after payment of the tax, is the filing of an administrative refund claim under section 5097, subdivision (a), which provides in relevant part that "[n]o order for a refund ... shall be made except on" the timely filing of a verified claim for refund. By statute, an application for assessment reduction filed under section 1603 "also constitute[s] a sufficient claim for refund under [section 5097] if" it states that it "is intended to constitute a claim for refund. If [it] does not so state, [the applicant] may thereafter and within the [specified time] period ... file a separate claim for refund of taxes extended on the assessment which the applicant applied to have reduced pursuant to [s]ection 1603 ...." (§ 5097, subd. (b).) The third and final step in the process is the filing of an action in superior court pursuant to section 5140, which provides that a person who paid the property tax may bring an action in superior court "against a county or a city to recover a tax which the board of supervisors of the county or the city council of the city has refused ***1308** to refund on a claim filed pursuant to Article 1

(commencing with Section 5096) of this chapter." A court action may not "be commenced or maintained ... unless a claim for refund has first been filed pursuant **64 to Article 1 (commencing with Section 5096)." (§ 5142, subd. (a).)

[2] [3] As our prior decisions establish, "the general rule" in California is that "a taxpayer seeking judicial relief from an erroneous assessment must ... exhaust[ ] his remedies before the administrative body empowered initially to correct the error. [Citations.]" (*Security–First Nat. Bk. v. County of L.A.* (1950) 35 Cal.2d 319, 320, 217 P.2d 946 [holding that failure to apply to board of equalization for correction of allegedly erroneous assessment precludes action for recovery of taxes].) In the property tax context, application of the exhaustion principle means that a taxpayer ordinarily may not file or pursue a court action for a tax refund without first applying to the local board of equalization for assessment reduction under section 1603 *and* filing an administrative tax refund claim under section 5097. (*Stenocord Corp. v. City etc. of San Francisco* (1970) 2 Cal.3d 984, 986–990, 88 Cal.Rptr. 166, 471 P.2d 966 (*Stenocord*); *Georgiev v. County of Santa Clara* (2007) 151 Cal.App.4th 1428, 1434–1435, 60 Cal.Rptr.3d 752.)

***204 Our prior decisions also establish that, for purposes of the exhaustion requirement, the filing of a refund claim under section 5097 generally does *not* excuse a taxpayer's failure *first* to file with the local board of equalization an application for assessment reduction under section 1603.[6] For example, in *Stenocord,* after receiving a notice of tax deficiency and demands for payment, the plaintiff, without applying to the local board of equalization for review, paid the taxes, filed a refund claim with the board of supervisors and, upon the claim's rejection, filed a court action for recovery of the taxes paid. (*Stenocord, supra,* 2 Cal.3d at pp. 986–987, 88 Cal.Rptr. 166, 471 P.2d 966.) Applying the general rule that "a taxpayer seeking relief from an erroneous assessment must exhaust available administrative remedies before resorting to the courts" (*id.* at p. 987, 88 Cal.Rptr. 166, 471 P.2d 966), we held that the plaintiff's failure to seek review before the board of equalization barred the plaintiff's refund action (*id.* at pp. 987–990, 88 Cal.Rptr. 166, 471 P.2d 966). In reaching this conclusion, we rejected the plaintiff's contention that its filing of a refund *1309 claim with the board of supervisors satisfied the exhaustion requirement. (*Id.* at p. 990, 88 Cal.Rptr. 166, 471 P.2d 966; see also *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 34, 84 Cal.Rptr.2d 715 ["refund process" "is distinct from the process of seeking a reduced assessment by filing an application for equalization"]; *Sunrise Retirement Villa v. Dear* (1997) 58 Cal.App.4th 948, 958, 68 Cal.Rptr.2d 416 [failure to file § 1603 application "will usually result in the dismissal of the [refund] suit for failure to exhaust an available administrative remedy"]; *Osco Drug, Inc. v. County of Orange* (1990) 221 Cal.App.3d 189, 193, 272 Cal.Rptr. 14 [discussing "distinction between the reduction in a base-year value [pursuant to § 1603] and a right to a refund of taxes"].)

In this case, it is undisputed that Steinhart skipped step one of the statutory process, i.e., she did not file an application for assessment reduction under section 1603, subdivision (a), with the Assessment Appeals Board, which acts as the County's board of equalization. Instead, she went straight to step two, filing a refund claim with the County Auditor–Controller. She argues, however, that for three reasons she may proceed with her lawsuit notwithstanding her failure to apply for assessment reduction. Relying on *Stenocord* and *Star–Kist Foods, Inc. v. Quinn* (1960) 54 Cal.2d 507, 6 Cal.Rptr. 545, 354 P.2d 1 (*Star–Kist*), she first asserts that because her claim involves no disputed facts regarding valuation and presents a "pure **65 question of law"—whether there was a change in ownership within the meaning of section 2, subdivision (a)—exhaustion of administrative remedies was unnecessary. She next invokes the so-called "futility exception" to the exhaustion principle, arguing that applying for assessment reduction in this case would have been futile given ***205 the County's "steadfast[ ]" and " 'unyielding' " position "[a]t the trial court level, before the Court of Appeal, and before this Court," that a change in ownership occurred here. Third, and finally, she argues that the County's failure to indicate in any of its correspondence that she had to apply for assessment reduction before seeking judicial relief estops the County from relying on her failure to exhaust administrative remedies. As explained below, none of these arguments has merit.

A. Under the governing statutes, Steinhart had to apply for assessment reduction even though her claim presents a pure question of law.

[4] As noted above, in arguing that exhaustion was unnecessary because her claim presents a pure question of law, Steinhart relies on *Stenocord* and *Star–Kist.* In the latter, the County's assessor, in assessing the taxpayer's leasehold interests, refused to apply a statute requiring certain deductions, believing that the statute was unconstitutional. (*Star–Kist, supra,* 54 Cal.2d at p. 509, 6 Cal.Rptr. 545, 354 P.2d 1.) Without applying for assessment reduction, the taxpayer petitioned *1310 the superior court for a writ of mandate ordering the assessor

to cancel the assessments and reassess the leasehold interests in accordance with the statute. (*Ibid.*) In disagreeing that the taxpayer's failure to apply for assessment reduction precluded its court action, we first noted that assessment reduction applications had "not been required ... in certain cases where the facts were undisputed and the property assessed was tax-exempt [citations], outside the jurisdiction [citation], or nonexistent [citations]." (*Id.* at p. 510, 6 Cal.Rptr. 545, 354 P.2d 1.) We next explained: "The necessity of [an application for assessment reduction] is properly determined by the nature of the issues in dispute, and not by whether an assessment is attacked in part or in toto. [Citations.] [¶] The only substantive issue in the present case is whether section 107.1 is unconstitutional on its face. As in cases involving only the question whether property is taxable, there is no question of valuation that the local board of equalization had special competence to decide. There is no dispute as to the facts and no possibility that action by the board might avoid the necessity of deciding the constitutional issue or modify its nature. [Citation.] Under the circumstances, therefore, recourse to the local board of equalization was not required before seeking a judicial determination of the constitutionality of section 107.1." (*Id.* at pp. 510–511, 6 Cal.Rptr. 545, 354 P.2d 1.) Although rejecting the exhaustion claim, we nevertheless held that mandate relief was unavailable because the taxpayer had a plain, speedy, and adequate remedy at law: "paying its taxes under protest and suing for recovery thereof...." (*Id.* at p. 511, 6 Cal.Rptr. 545, 354 P.2d 1.)

Ten years later, in *Stenocord,* we held that a taxpayer's failure to apply for assessment reduction barred the taxpayer's court action for a tax refund, in which the taxpayer alleged that the assessor had improperly found an understatement in the taxpayer's cost of goods. (*Stenocord, supra,* 2 Cal.3d at pp. 986–987, 88 Cal.Rptr. 166, 471 P.2d 966.) In reaching our conclusion, we noted that "[a]n exception" to the exhaustion requirement "is made when the assessment is a nullity as a matter of law because, for example, the property is tax exempt, nonexistent or outside the jurisdiction [citations], and no factual questions exist regarding the valuation of the property which, upon review by the board of equalization, might be resolved in the taxpayer's favor, thereby making further litigation unnecessary [citations]." ***206** (*Id.* at p. 987, 88 Cal.Rptr. 166, 471 P.2d 966.) We found, however, that the exception was inapplicable, notwithstanding the taxpayer's assertion that the assessor lacked statutory authority to reassess the property and that the reassessment was arbitrary and unconstitutional. (*Ibid.*) We explained: "The fact that the assessor erroneously overvalues property which is otherwise subject to tax **66** does not render the assessment a nullity under the foregoing rule, for disputes regarding valuation are within the special competence of the board of equalization. [Citations.] If any question of valuation exists, it would be irrelevant that plaintiff also challenges the assessment as 'arbitrary' or void on constitutional grounds. [Citations.] If prior recourse to the board on the question of valuation might have avoided the necessity of deciding the ***1311** constitutional issue, or modified its nature, plaintiff's action was properly dismissed. [Citation.] [¶] It is evident from the face of the complaint that the dispute herein involved a question of valuation which, if submitted to the board of equalization, might have obviated [the taxpayer's] action." (*Id.* at p. 988, 88 Cal.Rptr. 166, 471 P.2d 966.)

Steinhart argues that under *Star–Kist* and *Stenocord,* exhaustion was unnecessary here because the assessment is a nullity as a matter of law and there is no question of valuation the Assessment Appeals Board has special competence to decide, no dispute as to the relevant facts, and no possibility that the Assessment Appeals Board's action might avoid the necessity of a court's having to decide the constitutional/statutory interpretation issue, i.e., whether a change in ownership occurred. The County responds that under *Stenocord,* because the property here is not tax exempt, nonexistent, or outside the jurisdiction, the assessment is not a nullity as a matter of law and the exception to the exhaustion rule does not apply.

We need not choose between these divergent interpretations of our precedents because, as the County alternatively argues, since we issued the cited decisions, the Legislature has expressly and definitively settled the exhaustion question insofar as it involves a challenge to a change in ownership determination. In 1986, the Legislature enacted what is now section 1605.5, subdivision (a), which provides in relevant part: "The county board [of equalization] *shall* hear applications for a reduction in an assessment *in cases in which the issue is whether or not property has been subject to a change in ownership,* as defined in Chapter 2 (commencing with Section 60) of Part 0.5 ...." (Added by Stats.1986, ch. 1457, § 21, p. 5232, italics added.) In detailing the purpose of this section, the relevant legislative history explained: "The law is [currently] unclear if taxpayers can appeal the issue of whether or not there has been a change [in] ownership to either [a county board of equalization or an assessment appeals board]. [¶] *This provision* requires county boards of equalization and assessment appeals boards to hear change [in] ownership issues." (Assem. Com. on Rev. & Tax., Analysis of Assem. Bill No. 2890 (1985–1986 Reg. Sess.) as amended Mar. 19, 1986, p. 7.) Thus, section 1605.5, subdivision (a), expressly vests

county boards with "jurisdiction ... to adjudicate change [in] ownership disputes" between assessors and taxpayers and "contemplates" that such disputes will "be resolved by the local appeals board before resort is made to the courts."[7] (*Sunrise Retirement Villa v.* ***207** *Dear, supra,* 58 Cal.App.4th at p. 958, 68 Cal.Rptr.2d 416.)

***1312** Subsequent legislative developments make crystal clear the Legislature's intent to bar taxpayers from challenging change in ownership determinations in court if they fail *first* to apply to their local board of equalization for assessment reduction, even if their challenge presents a pure question of law involving undisputed facts. In 1992, a bill was introduced in the Legislature that would have conditioned the requirement that a local board of equalization hear a change in ownership dispute "upon [a] request by an applicant" for assessment reduction (Sen. Bill No. 1557 (1991–1992 Reg. Sess.) as introduced Feb. 18, 1992, § 5), and would have specified that, to exhaust administrative remedies with respect to such disputes, taxpayers must merely file a refund claim and need not apply for assessment reduction. (*Id.,* § 8.) According to the legislative history, the bill's **67** proponents argued that "change-[in]-ownership issues, often being issues of law, are not appropriately handled by assessment appeals boards." (Sen. Rev. & Tax. Com., Analysis of Sen. Bill No. 1557 (1991–1992 Reg. Sess.) Apr. 8, 1992, p. 4.) Counties objected to the bill, complaining that taxpayers should not "be able to 'jump over' the assessment appeals board and go directly to court if they thought it would maximize their chances of prevailing." (*Id.* at p. 5.) The bill did not pass.

Instead, the next year, the Legislature passed a new provision expressly confirming "the requirement" that a taxpayer apply for assessment reduction "in order to exhaust administrative remedies," but specifying that the filing with the county board of equalization of a stipulation by the taxpayer and the county assessor "stating that issues in dispute do not involve valuation questions," and the board's "acceptance" of the stipulation ("with or without conducting a hearing"), "shall be deemed compliance with [this] requirement." (§ 5142, subd. (b), as added by Stats.1993, ch. 387, § 8, p. 2218.) At the same time, the Legislature specified that "[n]othing" in the new provision "shall be construed to deprive the county board of equalization of jurisdiction over nonvaluation issues in the absence of a contrary stipulation." (§ 5142, subd. (c), as added by Stats.1993, ch. 387, § 8, p. 2218.)[8] These statutes and their legislative history show that the Legislature has made an express and considered decision *not* to eliminate the requirement that taxpayers wanting to contest change in ownership determinations *first* apply for assessment reduction to exhaust their administrative remedies. Accordingly, we need not consider whether a *judicially* declared exception to the exhaustion requirement is warranted under *Star–Kist* or *Stenocord,* which predated the relevant statutes. A contrary conclusion would improperly negate the carefully crafted ***1313** statutory scheme the Legislature has, within its *constitutional* authority, put in place. Thus, by failing to apply for assessment reduction, Steinhart failed to exhaust her administrative remedies.[9]

208 *B. The futility exception to the exhaustion requirement is inapplicable.

[5] Steinhart alternatively argues that the futility exception to the exhaustion requirement applies given the legal position the County has "steadfastly" asserted "[a]t the **68** trial court level, before the Court of Appeal, and before this Court." In this regard, she echoes the analysis of the Court of Appeal, which explained: "[A]t the trial court level and on appeal, the County continues to assert that as a matter of law, the transfer ... of a life estate from her late sister constitutes a change in ownership. In view of the County's unyielding position on this legal issue, an administrative challenge by Steinhart certainly would have been futile."

[6] [7] On the record here, the futility exception is inapplicable. As we have explained, " '[f]utility is a narrow exception to the general rule' " requiring exhaustion of remedies. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418, 194 Cal.Rptr. 357, 668 P.2d 664.) The exception applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case. (*Ibid.*) ***1314** Applying these principles, in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1985) 40 Cal.3d 654, 662–663, 221 Cal.Rptr. 488, 710 P.2d 288, we refused to apply the futility exception where nothing in the record indicated that, "at the time that a request for [administrative] review would have been timely, the [administrative agency] had predetermined its position as to" the issue in question. Similarly, nothing in the record here indicates that, *at the time an application for assessment reduction would have been timely,* the County's Assessment Appeals Board had predetermined its position as to whether a change in ownership had ***209** occurred.[10] Contrary to Steinhart's argument and the Court of Appeal's analysis, the position the County took in the *subsequent court action* Steinhart filed is insufficient alone to invoke the futility exception.[11] Thus, the futility exception does not apply to excuse Steinhart's failure to file an application for assessment reduction.

C. The County is not estopped from relying on Steinhart's failure to exhaust remedies.

[8] Reviving an argument the Court of Appeal did not address, Steinhart argues that the notices she received from the County regarding her refund claim estop the County from relying on her failure to exhaust her administrative remedies by applying to the Assessment Appeals Board for assessment reduction. She relies principally on the five notices from the County Auditor, all dated March 2, 2005 (March 2 notices), which stated in relevant part: "The County has completed its review of your claim(s) for refund of taxes and/or penalties you filed with us on DECEMBER 21, 2004. [¶] Your claim(s) was reviewed by the ASSESSOR. Based on the documentation you submitted, they [*sic*] determined that your claim does not meet the provisions in the Revenue and Taxation Code for granting a refund. For this reason, your claim(s) for refund is denied effective March 2, 2005. [¶] Section 5141 of the State of California Revenue and Taxation Code allows you six months from the effective date of denial of your claim(s) to commence an action in the Superior Court to seek judicial review of this denial." From this language, Steinhart argues, "[i]t appeared that the 'County' had spoken, and its word ***1315** was that [her] claim had been denied, and pursuant to the applicable claim for refund statutory scheme, she had six months in which to commence an action in the Superior Court." Moreover, Steinhart asserts, nothing ****69** in these notices or in the notice from the County Assessor dated March 3, 2005 (March 3 notice) "advised" her " that she should have proceeded by a request for equalization under Section 1601 ... rather than a claim for refund under Section 5096," or that "prior to filing her action in the Superior Court within six months of the denial of her [refund] claim, she must first seek equalization by the Assessment Appeals Board." Estoppel applies, Steinhart contends, because "in filing her civil action ... without first" applying for assessment reduction, she "relied on the advice given by [the] County" in these notices.

[9] [10] [11] As we have explained, "[t]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing." *****210** (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725, 125 Cal.Rptr. 896, 543 P.2d 264.) "The essence of an estoppel is that the party to be estopped has by false language or conduct 'led another to do that which he [or she] would not otherwise have done and as a result thereof that he [or she] has suffered injury.' [Citation.]" (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16, 219 Cal.Rptr. 13, 706 P.2d 1146.) The doctrine "ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. [Citations.]" (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793, 72 Cal.Rptr.2d 624, 952 P.2d 641.)

[12] [13] On the undisputed facts here, Steinhart's estoppel argument fails as a matter of law. (See *Cal. Cigarette Concessions v. City of L.A.* (1960) 53 Cal.2d 865, 868, 3 Cal.Rptr. 675, 350 P.2d 715 (*Cal.Cigarette*) ["When ... the facts are undisputed, the existence of an estoppel is a question of law"].) As we long ago explained in *McKeen v. Naughton* (1891) 88 Cal. 462, 467, 26 P. 354, " 'in order to work an estoppel,' " a representation " 'must generally be a statement of *fact.* It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact.' [Citation.]" In *McKeen,* we applied this principle to reject the claim that a party's opposition to a motion to dismiss an appeal for lack of jurisdiction estopped the party from later arguing that the judgment rendered upon that appeal was void for lack of jurisdiction. We explained: "Every fact in connection with the attempted taking of the appeal was within the knowledge of the [party who moved for the appeal's dismissal], and being chargeable with a knowledge of the law, neither he nor the appellant here, who stands in his place, can be heard to say that he was *deceived* by any contention of the [party who opposed the appeal's dismissal] in [the earlier] action, as to the *law* governing appeals from justices' courts, and involved in the decision of that motion." (*Ibid.*) Similarly, in this case, every *fact* in ***1316** connection with Steinhart's challenge to the County's reassessment was within Steinhart's knowledge. Indeed, Steinhart does not identify any *fact* that was unknown to her; instead, she asserts she was ignorant of the *law* that required her to apply to the Assessment Appeals Board for assessment reduction before filing a refund action in court, and she claims the County's letters misled her regarding this legal requirement.

[14] [15] [16] [17] It is also significant that Steinhart, in filing and pursuing her tax refund claim, was represented by counsel.[12] In general, the law "particularly" disfavors estoppels "where the party attempting to raise the estoppel is represented by an attorney at law." (*Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 757, 44 Cal.Rptr. 707.) For purposes of analyzing estoppel claims, attorneys are "charged with knowledge of the law in California." (*Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 679, 63 Cal.Rptr. 377, 433 P.2d 169 [rejecting claim of estoppel to assert statute of limitations].) Moreover, Steinhart's counsel concedes that

before filing this action in court on Steinhart's behalf, he actually "read ... the applicable claim for refund statutory scheme." **70 Then, as now, that statutory scheme included section 5142, subdivision (b), which, as already explained, expressly ***211 references "the requirement that" the taxpayer "appl[y] for reduction under Chapter 1 (commencing with Section 1601) of Part 3 in order to exhaust administrative remedies."[13] Steinhart's counsel also concedes that before filing this action, he read our decision in *Pacific Southwest.* There, in recounting that litigation's procedural history, we explained: "Plaintiff paid tax bills pursuant to the increased valuation but applied for a reduction of the assessment, which it later amended into a claim for refund under Revenue and Taxation Code section 5097, subdivision (b)." (*Pacific Southwest, supra,* 1 Cal.4th at p. 160, 2 Cal.Rptr.2d 536, 820 P.2d 1046, italics added.) As already explained, section 5097, subdivision (b), provides a taxpayer with two ways to file a proper refund claim: (1) stating in an "application for a reduction in an assessment filed pursuant to Section 1603" that "the application is intended to constitute a claim for refund"; or (2) after applying for assessment reduction, "fil[ing] a separate claim for *1317 refund of taxes extended on the assessment which applicant applied to have reduced pursuant to Section 1603 or Section 1604." Under the circumstances, Steinhart is clearly chargeable with the knowledge that the law required her to apply to the Assessment Appeals Board for assessment reduction before filing a refund action in court. And, as we long ago explained, one who acts with full knowledge of plain provisions of law and their probable effect on facts within his or her knowledge, especially where represented by counsel, may claim neither ignorance of the true facts nor detrimental reliance on the conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel. (*Cal. Cigarette, supra,* 53 Cal.2d at p. 871, 3 Cal.Rptr. 675, 350 P.2d 715.)

[18] [19] Finally, it is significant that the notices on which Steinhart bases her estoppel claim were, at most, ambiguous and confusing regarding Steinhart's need to apply to the Assessment Appeals Board for assessment reduction. It is true, as Steinhart observes, that the March 2 notices, after advising that the County Auditor had rejected her refund claims, stated: "Section 5141 of the State of California Revenue and Taxation Code allows you six months from the effective date of denial of your claim(s) to commence an action in the Superior Court to seek judicial review of this denial." However, neither this statement, which simply advised Steinhart of the applicable statute of limitations, nor anything else in the March 2 notices affirmatively represented that there were no other prerequisites to filing a court action or that Steinhart had met all other prerequisites. At best, this is but one *possible* interpretation that *arguably could* be read into the accurate advisement regarding the applicable statute of limitations. (See *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 530–531, 25 Cal.Rptr.3d 649 [no estoppel where notice that referred only to statutory filing requirement, ***212 and was silent regarding statutory service requirements, did not indicate that timely filing of a petition would be sufficient to obtain judicial review, did not purport to address the requirements for serving the petition, and did not state that failure to comply with any service requirements would be excused]; *Beresford Neighborhood Assn. v. City of San Mateo* (1989) 207 Cal.App.3d 1180, 1186–1187, 255 Cal.Rptr. 434 [same].) It is also true, as Steinhart observes, that the County Assessor's March 3 notice, after advising that "[d]isputes involving the assessed value of your property should be formally addressed to the Assessment Appeals Board," stated: "If we have indicated that a **71 correction is being made, you have 60 days from the date of your corrected tax bill to file an appeal." However, like her reading of the March 2 notices, Steinhart's reading of these statements—that the latter "specified the [only] factual circumstances under which review by the [Assessment Appeals] Board was required," and the former "was not relevant" because no correction was being made—is but one *possible* interpretation that *arguably could* be adopted. It is at least equally, if not more, plausible to read the former statement as a *1318 general advisement that all disputes involving the assessed value of property must be brought before the Assessment Appeals Board, and the latter statement as addressing only one kind of dispute subject to this requirement. Of course, Steinhart's disagreement with the County Assessor's determination clearly qualified as a "[d]ispute[ ] involving the assessed value of" the property. That the notices did not clearly indicate Steinhart could file a court action without first taking her dispute to the Assessment Appeals Board weighs against a finding of estoppel. As we have explained, where a party asserts estoppel, " the facts proved must be such that an estoppel is clearly deducible from them.... [Citation.] [¶] The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels. [Citation.]" (*Wheaton v. Insurance Co.* (1888) 76 Cal. 415, 429–430, 18 P. 758.)

Taking all of the circumstances into consideration, we conclude that Steinhart's estoppel claim fails as a matter of law.

II. There Was A Change in Ownership Within the

Meaning of Article XIII A, Section 2, Subdivision (a).

[20] In the past, we have elected to address the merits of issues that raised "important questions of public policy," despite a party's failure to exhaust administrative remedies. (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 870–871, 226 Cal.Rptr. 119, 718 P.2d 106.) Here, the County asks us to reach the change in ownership issue notwithstanding Steinhart's failure to exhaust administrative remedies, and both the parties and numerous amici curiae have fully briefed the issue. Given these circumstances and the importance of the question presented to taxing agencies, state and local governments, and those whose property interests may be subject to taxation, we now address the merits of the substantive issue the parties raise, despite Steinhart's failure to exhaust her administrative remedies. (Cf. *Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1115, 4 Cal.Rptr.2d 857, 824 P.2d 663 [addressing merits of issue, notwithstanding procedural obstacles, "[b]ecause of the importance of the questions presented in this matter to taxing agencies, local government, and school districts, and the individual and institutions whose property interests may be subject to taxation"].)

***213 [21] [22] Regarding that issue, "our task is to effectuate the voters' intent in adopting article XIII A. [Citations.]" (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 562, 41 Cal.Rptr.2d 888, 896 P.2d 181.) In performing this task, we look first to the words of the provision in question, giving them their natural and ordinary meaning, unless it appears they were used in some technical sense. (*Ibid.;* see also ***1319** *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122, 105 Cal.Rptr.2d 46, 18 P.3d 1198; *ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 865, 210 Cal.Rptr. 226, 693 P.2d 811; *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 863, 167 Cal.Rptr. 820, 616 P.2d 802.) "The words used in a [constitutional provision] 'must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted' " the provision. (*Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 539, 58 P.2d 1278.)

[23] As noted above, the constitutional provision here in question—article XIII A, section 2, subdivision (a)—provides in relevant part that, in applying the 1 percent limit on ad valorem taxes, a property's " 'full cash value' means the county assessor's valuation of real property as shown on the 1975–76 tax **72 bill under 'full cash value' or, thereafter, the appraised value of real property when ... a change in ownership has occurred after the 1975 assessment." Thus, the substantive question before us is whether a "change in ownership" within the meaning of this provision occurred upon Helfrick's death. For reasons that follow, we hold it did.

[24] [25] [26] [27] [28] The starting point for our conclusion lies in the fact that, during her lifetime, Helfrick transferred the residence to a trust of which she was the sole present beneficiary and as to which she held the power to revoke. Under general principles of trust law, trust beneficiaries hold "the equitable estate or beneficial interest in" property held in trust and are "regarded as the real owner[s] of [that] property." (*Title Ins. & Trust Co. v. Duffill* (1923) 191 Cal. 629, 647, 218 P. 14 (*Duffill*).) The trustee is "merely the depositary of the legal title" to the property (*ibid.*); " 'the legal estate' " the trustee holds " 'is ... no more than the shadow ... following the equitable estate....' " (*Id.,* at p. 648, 218 P. 14.) Moreover, "[p]roperty transferred to, or held in, a *revocable* inter vivos trust is deemed the property of the settlor...." (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633, 82 Cal.Rptr.3d 835, italics added; see also *Arluk Medical Center Industrial Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324, 1331–1332, 11 Cal.Rptr.3d 194 ["a settlor with the power to revoke a living trust effectively retains full ownership and control over any property transferred to the trust"].) Any interest that beneficiaries of a revocable trust have in trust property is "merely potential" and can "evaporate in a moment at the whim of the [settlor]."[14] ***214 *1320** (*Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 88, 90 Cal.Rptr.2d 99; see also *Security–First Nat. Bank of Los Angeles v. Wellslager* (1948) 88 Cal.App.2d 210, 214, 198 P.2d 700 [settlor with revocation power "retain[s] the power and control of the trust estate and [can] with a stroke of the pen ... divest[ ] the beneficiaries of their interest"].) Thus, although transferring legal title to the residence to herself as trustee, Helfrick, as sole trust beneficiary and holder of the revocation power, continued to hold the *entire* equitable estate *personally* and effectively retained *full* ownership of the residence; any interest Steinhart (or her siblings or their issue) had in the residence under the terms of the trust was merely potential, and could have evaporated in a moment at Helfrick's whim. Under these circumstances, it cannot be said that the transfer of bare legal title to Helfrick as trustee constituted a "change in ownership" within the meaning of article XIII A, and no one contends otherwise.

[29] Upon Helfrick's death, the trust became irrevocable and the *entire* equitable estate in the residence, which Helfrick had personally held during her lifetime, *transferred from Helfrick* to Steinhart and her siblings (or their issue) as beneficiaries of the irrevocable trust. (See *Empire Properties v. County of Los Angeles* (1996) 44

Cal.App.4th 781, 787, 52 Cal.Rptr.2d 69 [upon settlor's death, revocable trust became irrevocable and "the full beneficial interests in the property transferred to" the "residual beneficiaries of the trust"].) It is true that, under the terms of the trust, the beneficial estate in the residence was divided among Steinhart, who, as life tenant, held the right to immediate possession, and Steinhart's siblings (or their issue), who held only a remainder interest in ****73** any net proceeds that might someday be realized from sale of the residence after Steinhart's death. But that circumstance does not alter the fact that, upon Helfrick's death, the *entire* equitable estate in the residence was *transferred from Helfrick* to, collectively, Steinhart and her siblings (or their issue) as beneficiaries of the irrevocable trust. In other words, upon Helfrick's death, real ownership of the residence—which, as explained above, follows the equitable estate—transferred from Helfrick to Steinhart and her siblings (or their issue) as beneficiaries of the irrevocable trust. For purposes of section 2, subdivision (a), this transfer constituted a "change in ownership" within the common and ordinary understanding of that phrase.[15]

***1321** To the extent the constitutional language, as applied to the facts of this case, is ambiguous, the conclusion that a change in ownership occurred here under section 2, subdivision (a), is consistent with the *****215** "interpretive aids" we use to resolve ambiguities in article XIII A's language: the Proposition 13 ballot materials the voters received and contemporaneous constructions by the Legislature and administrative agencies charged with article XIII A's implementation. (*Amador Valley Joint Union High School Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 246, 149 Cal.Rptr. 239, 583 P.2d 1281 (*Amador*); see also *City and County of San Francisco v. County of San Mateo, supra,* 10 Cal.4th at p. 563, 41 Cal.Rptr.2d 888, 896 P.2d 181.) Regarding the former, in the ballot pamphlet for Proposition 13, the Legislative Analyst explained that under the measure, a property's assessed value "could ... be increased by no more than 2 percent per year *as long as the same taxpayer continued to own the property.*" (Ballot Pamp., Primary Elec. (June 6, 1978), analysis of Prop. 13 by Legis. Analyst, p. 57, italics added.) Here, upon Helfrick's death, when *all* of the beneficial estate in her residence was transferred, Helfrick unquestionably did not "continue[ ] to own the property." (*Ibid.*) Thus, the explanation the voters received regarding article XIII A's effect fully supports the conclusion that a "change in ownership" occurred here under section 2, subdivision (a), such that the assessed value of the residence could be increased by more than 2 percent.

Likewise supporting this conclusion is the contemporaneous construction of article XIII A by the Legislature and administrative agencies charged with the article's implementation. As our prior decisions explain, the year after article XIII A's passage, the Legislature adopted a statutory framework for implementing it. (See *Pacific Southwest, supra,* 1 Cal.4th at pp. 160–162, 2 Cal.Rptr.2d 536, 820 P.2d 1046.) That framework includes section 60, which provides the following "overarching definition" (*Pacific Southwest, supra,* at p. 162, 2 Cal.Rptr.2d 536, 820 P.2d 1046) of "change in ownership" under section 2, subdivision (a): "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." (§ 60.) Section 61 then elaborates on this definition by setting forth a non-exhaustive list of specific transfers that constitute a "change in ownership, as defined in Section 60," "[e]xcept as otherwise provided in section 62." As here relevant, section 61, subdivision (h), provides that "change in ownership, as defined in section 60, includes ...: [¶] ... [¶] ... [a]ny interests in real property that vest in persons other than the trustor (or, pursuant to section 63, his or her spouse) when a revocable trust becomes irrevocable." Complementing this provision, section 62, subdivision (d), provides that a "[c]hange in ownership shall not include: [¶] ... [¶] ... [a]ny transfer by the trustor ... into a trust for so long as (1) the transferor is the present beneficiary of the trust, or (2) the trust is ***1322** revocable...." The Legislature adopted these provisions upon the recommendation of a task force it specially created to study and implement article XIII A's "change in ownership" provision, section 2, subdivision (a). ****74** (*Pacific Southwest, supra,* at p. 161, 2 Cal.Rptr.2d 536, 820 P.2d 1046.) In proposing these provisions, the task force explained: "Revocable living trusts are merely a substitute for a will. The gifts over to persons other than the trustor are contingent; the trust can be revoked or those beneficiaries may predecease the trustor. Transfers into trust are not changes in ownership if either: [¶] (a) The trust is revocable, or; [¶] (b) The creator of the trust is its sole beneficiary during his lifetime. [¶] If the trust is revocable it is excluded because the rights conferred are contingent. If the trustor is the sole beneficiary *****216** during his lifetime, his retained interest is considered to be 'substantially equivalent in value' to the fee interest in any real property covered by the trust. He is therefore the true owner and the change in ownership does not occur *until* the property passes to the remaindermen on the trustor's death." (Assem. Rev. & Tax. Com., Task Force on Prop. Tax Administration Rep. (Jan. 22, 1979) p. 43 (Task Force Report).)

The State Board of Equalization, through an implementing regulation, has also expressly addressed

section 2, subdivision (a)'s application to transactions involving trusts. That regulation begins by stating a "[g]eneral [r]ule" that, for purposes of section 2, subdivision (a), "[t]he transfer by the trustor ... of real property into a trust is a change in ownership ... at the time of the transfer." (Cal.Code Regs., tit. 18, § 462.160, subd. (a).) The regulation then specifies a list of "[e]xceptions" to the general rule—i.e. "transfers" involving trusts that "do not constitute changes in ownership"—including, as here relevant: (1) "[t]he transfer of real property by the trustor to a trust in which the trustor-transferor is the sole present beneficiary of the trust" (*id.*, § 462.160, subd. (b)(1)(A)); and (2) "[t]he transfer of real property ... by the trustor to a trust which is revocable by the trustor" (*id.*, § 462.160, subd. (b)(2)).[16] Regarding revocable trusts, the regulation further provides that "a change in ownership does occur at the time the revocable trust becomes irrevocable unless the trustor-transferor remains or becomes the sole present beneficiary or unless otherwise excluded from change in ownership." (*Id.*, § 462.160, subd. (b)(2).)

[30] We generally accord "great weight" to the statutes the Legislature has passed and the regulations the State Board of Equalization has promulgated to implement article XIII A. (*Amador, supra,* 22 Cal.3d at p. 246, 149 Cal.Rptr. 239, 583 P.2d 1281.) Under both the express language of, and the underlying justification for, section 61, subdivision (h), section 62, subdivision (d), and the administrative ***1323** regulation discussed above, it is clear that upon Helfrick's death, a "change in ownership" under section 2, subdivision (a), occurred in this case. Notably, Steinhart does not even argue otherwise, conceding in her brief that under "a literal application of" section 61, subdivision (h)'s language, "a change in ownership occurred" when Helfrick died, "the revocable trust became irrevocable," and her (Steinhart's) "life estate vested."

Instead, Steinhart argues, and the Court of Appeal held, that insofar as these provisions define a "change in ownership" to include the transfer that occurred upon Helfrick's death, they are in conflict with, and therefore trumped by, section 60's superseding general definition of "change in ownership." In making this argument, Steinhart relies on our conclusion in *Pacific Southwest, supra,* 1 Cal.4th at page 169, 2 Cal.Rptr.2d 536, 820 P.2d 1046, that the "examples" sections 61 and 62 set forth were intended "to be derivative or explanatory, and not to conflict with section 60's general rule," and that courts "are constrained to avoid" constructions of those sections that "would render meaningless" section 60's "preeminent command." She also relies on our discussion in *Pacific Southwest, supra,* at page 165, 2 Cal.Rptr.2d 536, 820 P.2d 1046, of whether a change in ownership occurs under *****217** section 2, subdivision (a), upon "the conveyance of fee simple from parent to child subject to the reservation of a life estate." After noting that the Legislature had expressly included such transfers in ****75** section 62's list of examples of exempt transfers (via section 62, subdivision (e)),[17] we stated: "But even if the Legislature had not done so, reassessment would be barred under the carefully drafted basic test of section 60, not only because the beneficial use would not have transferred, but also because the value of each divided interest in the estate would not approach that of a fee. A purchaser of the reserved estate would be buying a life estate *per autre vie*—a freehold estate, to be sure, but an estate of questionable value because subject to complete defeasance at an unknown time. Rare is the mortgagee willing to lend on the security of an estate so ephemeral. The value of the reversionary or remainder interest would also be reduced because the time of vesting would be uncertain and, depending on the care with which the original conveyance was drafted, the value of the ultimate estate might be less at the time of vesting because of intervening conveyances, creditors' demands, and the like. [¶] By contrast, when the life estate ends and the remainder or reversion indefeasibly vests in the grantees the value of the estate is known and is identical to the value of the fee. It is at that point that a change in ownership has occurred, as ***1324** the Legislature specifically provided in accord with the task force's recommendation. (§ 61, subd. [(g)].)"[18] (*Pacific Southwest, supra,* at pp. 165–166, 2 Cal.Rptr.2d 536, 820 P.2d 1046, fn. omitted.) Based on this discussion, Steinhart argues that "because the value of a life estate is never substantially equal to the value of the fee interest, or alternatively, the value of [her] specific life estate is not[, in light of her age when Helfrick died,] substantially equal to the value of the fee interest in the residence," the transfer here did not satisfy what we have called the "third prong" of section 60—"the value of which is substantially equal to the value of the fee interest." (*Pacific Southwest, supra,* 1 Cal.4th at p. 165, 2 Cal.Rptr.2d 536, 820 P.2d 1046.) And, she continues, because section 60 states "the super[s]eding, general test" for a change in ownership, the result it dictates overrides the result dictated by literal application of section 61, section 62, or the relevant administrative regulations.

Steinhart's argument fails for the simple reason that it erroneously focuses only on the interest *Steinhart received,* rather than the total extent of the interest *Helfrick transferred* when the trust became irrevocable. (See *Pacific Southwest, supra,* 1 Cal.4th at p. 164, 2 Cal.Rptr.2d 536, 820 P.2d 1046 [§ 60's "third prong" focuses on "the value of the interest transferred"].) As

discussed above, at the time of her death, Helfrick *personally* held the *entire* equitable estate in the residence and was regarded as the residence's real owner. Under the terms of the trust, upon her death, Helfrick transferred not just a life estate, but *the entire fee interest*—i.e., the full bundle of rights—to, collectively, Steinhart and her siblings (or their issue). By focusing only on the life estate Steinhart ***218** received, Steinhart improperly ignores the fact that Helfrick, who was the sole beneficial owner of the residence before her death, retained *no* interest in the residence after her death. Moreover, because "the value" of the interest Helfrick transferred in toto was "substantially equal to the value of the fee interest," Steinhart's argument that there was no change in ownership under section 60 fails.[19] (Cf. *Auerbach v. Assessment Appeals Bd. No. 1* (2006) 39 Cal.4th 153, 162, 45 Cal.Rptr.3d 774, 137 P.3d 951 [§ 60's general purpose is to ensure that tax reassessment "follows the fee interest or its equivalent value through various changes in ownership"].)

76 [31] Although it is linguistically possible to construe the language of section 60 as Steinhart does—i.e., as focusing only on whether the value of the "present interest" transferred "is substantially equivalent to the value of *1325 the fee interest," and ignoring the fact that the owner simultaneously transferred all other interests—for several reasons, we decline to do so. First, this construction is not supported by the Task Force Report, which, in discussing section 60's third prong, referred broadly to the value of "[t]he property rights transferred," not to the value of only the present interest transferred.[20] (Task Force Rep., *supra,* at p. 38.) Second, under Steinhart's construction, in certain cases, even though an owner transfers his or her *entire* fee interest in a property, and retains *no* interest of any kind in that property, reassessment would be precluded. In this regard, Steinhart's construction of section 2, subdivision (a), clearly "would defy Proposition 13's mandate that a change in ownership triggers reassessment of California property"[21] (*Pacific Southwest, supra,* 1 Cal.4th at p. 168, 2 Cal.Rptr.2d 536, 820 P.2d 1046), and adopting it would contravene the basic rule that requires us to construe statutes, if reasonably possible given their language, to be consistent, not in conflict, with constitutional provisions. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371, 285 Cal.Rptr. 231, 815 P.2d 304 ["when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted"].) Third, by largely negating section 61, subdivision (h), Steinhart's interpretation would contravene another basic rule of statutory construction: insofar as possible, we must harmonize code sections relating to the same subject matter and avoid interpretations that render related provisions nugatory. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299; cf. *Pacific Southwest, supra,* 1 Cal.4th at p. 169–171, 2 Cal.Rptr.2d 536, 820 P.2d 1046 [applying the rule in interpreting §§ 60 and 62, subd. (e)].) Here, nothing requires us to adopt Steinhart's construction of section 60. Because the *entire* equitable estate in the property was transferred upon Helfrick's death, a ***219 "change in ownership" occurred within the meaning of section 2, subdivision (a).[22]

*1326 CONCLUSION

For the reasons discussed above, we reverse the Court of Appeal's judgment and remand the matter for further proceedings consistent with the analysis in this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, MORENO, and CORRIGAN, JJ.

Parallel Citations

47 Cal.4th 1298, 223 P.3d 57, 10 Cal. Daily Op. Serv. 1586, 2010 Daily Journal D.A.R. 1913

Footnotes

1 Because this appeal challenges a judgment of dismissal entered upon the sustaining of a demurrer without leave to amend, we draw the operative facts from the complaint. (*Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1170, fn. 1, 69 Cal.Rptr.2d 764, 947 P.2d 1301.)

2 The complaint states that Steinhart filed the refund claim on April 4, 2004. The written claim, which is attached to the complaint, indicates that Steinhart signed the claim on July 24, 2004. A handwritten note on the claim appears to indicate that the claim was "mailed 8–4–04." The Court of Appeal opinion states that Steinhart filed the claim on July 24, 2004. The precise date is immaterial.

3 All further unlabeled statutory references are to the Revenue and Taxation Code.

4 The trial court's order did not specify the basis of its ruling. The transcript of the demurrer hearing suggests the court agreed with both the County's procedural (exhaustion) and substantive (change in ownership) arguments.

5 The court did not address Steinhart's estoppel argument.

6 Thus, Steinhart errs in asserting that "[p]roceeding under the refund procedure appears to be an alternative method to proceeding under the equalization method [where] taxes have been illegally assessed or levied." Section 5097, subdivision (b), constitutes further proof of Steinhart's error, by providing, as already noted, that an application for assessment reduction filed under section 1603 "also constitute[s] a sufficient claim for refund" if it states that it "is intended to constitute a claim for refund," and that if it does not so state, the applicant may "thereafter," i.e., after applying for assessment reduction, "file a separate claim for refund of taxes extended on the assessment which the applicant applied to have reduced...." (See also § 5097, subd. (a)(1)(3) [time for filing a refund claim depends on whether the taxpayer's application for assessment reduction "state[s]" that it "is intended to constitute a claim for a refund"].)

7 Although requiring county boards of equalization to hear change in ownership issues in the first instance, the Legislature simultaneously provided that this requirement "shall not be construed to alter, modify, or eliminate the right of an applicant under existing law to have a trial de novo in superior court with regard to the legal issue of whether or not that property has undergone a change in ownership ...." (§ 1605.5, subd. (a)(3), as added by Stats.1986, ch. 1457, § 21, pp. 5232–5233.)

8 Subdivision (c) of section 5142 actually states that "[n]othing in *this subdivision* shall be construed to deprive the county board of equalization of jurisdiction over nonvaluation issues in the absence of a contrary stipulation." (Italics added.) However, the subdivision was added at the same time as section 5142, subdivision (b), and it has meaning only if construed to refer to subdivision (b).

9 In addition to relying on *Star–Kist* and *Stenocord,* Steinhart complains that because a county board of equalization has two years to act on an application for assessment reduction (see § 1604, subd. (c)), and a taxpayer must institute a civil tax refund action in superior court within six months of a county's denial of a refund claim (see § 5141), an assessment appeals board "could defeat the taxpayer's refund lawsuit merely by waiting until after the six-month period expires to render its final equalization decision." Steinhart is wrong. A taxpayer can easily avoid this problem simply by stating that the application for assessment reduction is intended to constitute a section 5097 refund claim. (§ 5141, subd. (c).) Under these circumstances, the refund claim is not "deemed denied" until "the date the final installment of the taxes extended on such assessment becomes delinquent or on the date the equalization board makes its final determination on the application, whichever is later." (*Ibid.*) More generally, a taxpayer may simply wait to file a tax refund claim until *after* the county's board of equalization finally acts on an assessment reduction application. Under the statutes that governed during the time frame at issue here, Steinhart would have had four years from the date of each tax payment to file a refund claim with the County. (§ 5097, former subds. (a)(2) & (b), as amended by Stats.1987, ch. 1184, § 23, p. 4216.) Thus, had she timely filed an application for assessment reduction, even had the Assessment Appeals Board taken two full years to act on that application, Steinhart would still have had ample time to file a refund claim with the County. Under current law, if a taxpayer does not state that the application for assessment reduction is intended to constitute a section 5097 refund claim, after a county assessment appeals board finally acts on the application, the taxpayer has one year to file a refund claim if the county's written notice of its decision "does not advise the [taxpayer] to file a claim for refund" (*id.*, subd. (a)(3)(A)), and six months if the notice *does* advise the taxpayer to file such a claim "within six months of the ... final determination" (*id.*, subd. (a)(3)(B)).

10 Notably, Steinhart does not assert that she declined to apply for assessment reduction because she knew or suspected the Assessment Appeals Board would deny her request. Rather, in her brief, she concedes she simply *overlooked* the requirement, explaining that when she filed her lawsuit, she was "ignorant" of the requirement that she apply to the Assessment Appeals Board for assessment reduction, and that she "first became aware" of section 1605.5 only "[u]pon review of [the] County's demurrer papers filed in the Superior Court."

11 Regarding futility, Steinhart does not, and the Court of Appeal did not, rely on the administrative denial of Steinhart's refund claim. Nor could they, given that, as already explained, the statutory scheme *requires* a taxpayer to file *both* an application for assessment reduction *and* a separate refund claim, unless the application for assessment reduction expressly states that it is intended to constitute a claim for refund (§ 5097) or a stipulation "stating that issues in dispute do not involve valuation questions" is filed with and accepted by the county board of equalization. (§ 5142, subd. (b).)

12 In initially applying for a refund, Steinhart submitted a memorandum entitled "Reason For Refund Claim" and signed by Terran T. Steinhart as "Attorney for Claimant." The March 3 notice was addressed to Terran T. Steinhart.

13 At oral argument, Steinhart's counsel, although confirming he read the statutory scheme governing tax refunds before filing this action, asserted he did not notice section 5142, subdivision (b)'s express reference to the requirement that taxpayers apply for assessment reduction under section 1601 et seq. "in order to exhaust administrative remedies." This assertion does not aid Steinhart, because, absent a confidential relationship, one asserting estoppel must show that in relying on the alleged misrepresentation, he or she "acted as a reasonably prudent person would act, and was not guilty of negligence or carelessness." (*Robbins v. Law* (1920) 48 Cal.App. 555, 562, 192 P. 118.) Thus, Steinhart is wrong in arguing that, "[h]aving read .... the applicable claim for refund statutory scheme," she was "understandably ignorant" of the requirement that she go to the Assessment Appeals Board before going to court.

14 A number of California statutes reflect the Legislature's recognition of these principles. (See Prob.Code, §§ 15800 [holder of revocation power, not beneficiary, has rights otherwise afforded beneficiary under California's Trust Law (*id.*, §§ 15000 et seq.) and is owed duties of trustee], 15801, subd. (a) [holder of revocation power, not beneficiary, has power to consent or withhold consent where beneficiary's consent may, or must, be given before action may be taken], 15802 [holder of revocation power, not beneficiary, shall be given any notice that is to be given to a beneficiary], 15410, subd. (a) [when settlor revokes trust, property shall be disposed of as settlor directs], 16001, subd. (a) [trustee of revocable trust shall follow written directions of holder of revocation power], 16064, subd. (b) [trustee of revocable trust need not report information or account to beneficiary], 18200 [during lifetime of settlor who retains revocation power, trust property is subject to claims of settlor's creditors to extent of revocation power], 19001, subd. (a) [property subject to revocation power at the time of settlor's death is subject to claims of creditors of deceased settlor's estate]; see also *Zanelli v. McGrath, supra,* 166 Cal.App.4th at p. 633, 82 Cal.Rptr.3d 835 [statutes "recognize that when property is held in [a revocable] trust, the settlor and lifetime beneficiary ' "has the equivalent of full ownership of the property" ' "].)

15 Because, as earlier explained, the legal title to trust property a trustee holds is " 'no more than the shadow ... following the equitable estate' " (*Duffill supra,* 191 Cal. at p. 648, 218 P. 14), that the legal title Helfrick held as trustee also passed upon her death to successor trustees is of little significance. (See Cal.Code Regs. tit. 18, § 462.240, subd. (b) ["transfer caused by the substitution of a trustee" does not "constitute a change in ownership"].)

16 Consistent with these provisions, a separate regulation specifies that "[t]he transfer of bare legal title" does not "constitute a change in ownership." (Cal.Code Regs., tit. 18, § 462.240, subd. (a).)

17 Section 62, subdivision (e), provides in relevant part that a change in ownership shall not include "[a]ny transfer by an instrument whose terms reserve to the transferor ... an estate for life. However, the termination of such ... estate for life shall constitute a change in ownership, except as provided in subdivision (d) and in section 63."

18 Section 61, subdivision (g), provides that a change in ownership, as defined in section 60, includes "[a]ny vesting of the right to possession or enjoyment of a remainder or reversionary interest that occurs upon the termination of a life estate ... except as provided in subdivision (d) of section 62 and in section 63."

19 Steinhart does not dispute that the other criteria of section 60's test have been met, i.e., that Helfrick transferred a "present interest in real property, including the beneficial use thereof."

20 Regarding section 60, the Task Force Report stated: "[A] change in ownership is a transfer which has all of the following characteristics: [¶] 1. It transfers a *present interest* in real property; [¶] 2. It transfers the *beneficial use* of the property; and [¶] 3. The property rights transferred are *substantially equivalent in value* to the fee interest." (Task Force Rep., *supra,* at p. 38.)

21 As earlier explained, the ballot pamphlet analysis of Proposition 13 explained that under the measure, property could not be reassessed only "as long as the same taxpayer continued to own the property." (Ballot Pamp., Primary Elec. (June 6, 1978) analysis of Prop. 13 by Legis. Analyst, p. 57.)

22 Under our analysis, we need not address Steinhart's argument that because the value of *only* the life estate she received was not substantially equal to the value of the fee interest, a change in ownership did not occur. Nor need we consider a question the parties and amici curiae discuss: for purposes of section 2, subdivision (a), who, other than Helfrick, is the current owner of the residence. Under the terms of both the trust and Civil Code section 840, it is Steinhart's obligation, as life tenant, to pay the property tax on the residence. Whether a change in ownership would occur should either Steinhart or any of her siblings transfer their interest in the residence is beyond the scope of this case. Finally, in light of our conclusion, we need not consider the County's argument that section 4807 bars Steinhart's request for a declaration that because no change in ownership occurred upon Helfrick's death, the County may not tax the residence based on a reassessment as of the date of Helfrick's death.

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122 Nev. 1452
Supreme Court of Nevada.

Ernette L. LINTHICUM and Myrna L. Linthicum, Appellants,
v.
Arnold RUDI, Individually, and As Trustee of the Claire Linthicum–Cobb Revocable Living Trust, Respondent.

No. 46040. | Dec. 28, 2006. | Rehearing Denied Feb. 13, 2007.

Synopsis
Background: After a guardian was appointed for the person and estate of settlor and trustee of revocable inter vivos trust, purported trust beneficiaries filed complaint against successor trustee alleging amendment to trust was result of settlor's incapacity and/or undue influence. Successor trustee moved to dismiss for failure to state a claim upon which relief could be granted. The Second Judicial District Court, Washoe County, Steven P. Elliott, J., granted the motion. Beneficiaries appealed.

Holding: The Supreme Court, Hardesty, J., held that beneficiaries with only a contingent interest lacked standing to challenge trust amendment while the settlor was still alive.

Affirmed.

West Headnotes (1)

[1] **Trusts**
Complainants

390Trusts
390VIIEstablishment and Enforcement of Trust
390VII(C)Actions
390k366Parties
390k366(2)Complainants

Beneficiaries of revocable inter vivos trust did not have a vested interest in the trust prior to the settlor's death, and thus, they lacked standing while the settlor was alive to challenge a trust amendment by the settlor that purported to remove them as beneficiaries. West's NRSA 153.031, 164.015.

4 Cases that cite this headnote

Attorneys and Law Firms

**747 Hawkins Folsom & Muir and Gordon R. Muir, Reno, for Appellants.

Lance R. Van Lydegraf, Reno, for Respondent.

Before BECKER, HARDESTY and PARRAGUIRRE, JJ.

Opinion

*1453 *OPINION*

HARDESTY, J.

In this appeal, we consider whether revocable inter vivos trust beneficiaries have the right to challenge amendments to the trust, when made by the settlor during the settlor's lifetime. Because we conclude that a beneficiary's interest in a revocable inter vivos trust is contingent at most, we hold that, generally, these beneficiaries lack standing to challenge the settlor's lifetime amendments. Instead, to challenge the settlor's capacity to make amendments, revocable inter vivos trust beneficiaries must follow the procedures set forth in Nevada's guardianship statutes, NRS Chapter 159. Accordingly, we affirm the district court's dismissal of the underlying complaint challenging revocable inter vivos trust amendments.

FACTS

Appellants Ernette and Myrna Linthicum are the brother and sister-in-law, respectively, of Claire Linthicum–Cobb. In 2002, Cobb executed a will and a revocable inter vivos trust. As settlor, Cobb named herself trustee and reserved the power to revoke or amend the trust throughout her lifetime without having to notify any beneficiary. Cobb named Ernette and Myrna the primary beneficiaries of the

trust upon Cobb's death. Additionally, Cobb named Ernette and Myrna successor trustees upon Cobb's death or incapacity. Finally, the trust stated that the trust would become irrevocable upon Cobb's death.

In 2004, Cobb executed a new will and a restatement/amendment to the trust. The amended trust replaced Ernette and Myrna as successor trustees with respondent Arnold Rudi, the nephew of Cobb's deceased husband. Also, the amended trust allegedly named Rudi as the sole beneficiary.[1] Under the amended trust, Cobb remained the current trustee and retained the power to revoke the trust. Thus, the amended trust was still a revocable inter vivos trust.

***1454** After Cobb named Rudi the sole successor trustee, Rudi and Guardianship Services of Nevada petitioned for co-guardianship of Cobb's person and estate because Cobb was possibly delusional and paranoid. Ernette and Myrna objected to Rudi's appointment as a co-guardian; Rudi's petition for guardianship was later withdrawn. The district court granted Guardianship Services' petition for guardianship because it found that some of Cobb's actions had resulted in self-neglect and potential self-harm.

Subsequently, Ernette and Myrna filed a complaint alleging that the amended trust was a product of incapacity and/or undue influence, and they sought a constructive trust and/or cancellation of the amended trust. As to undue influence, Ernette and Myrna alleged that Rudi had a confidential ****748** relationship with Cobb and participated in executing the amended trust.

Rudi filed a motion to dismiss the complaint, under NRCP 12(b)(5), asserting that Ernette and Myrna had failed to state a claim upon which relief could be granted because they lacked standing to challenge the amended trust. Specifically, Rudi argued that a will contest cannot be maintained until the testator dies, and since Cobb was still alive at the time, Ernette and Myrna lacked a present legal interest in the will and the trust. Rudi also argued that Ernette and Myrna could not assert any damages resulting from the amended trust.

Ernette and Myrna simultaneously filed an opposition to Rudi's motion to dismiss and a motion for the appointment of themselves as guardians ad litem. Ernette and Myrna argued that they had standing because the amended trust was presently operative and effectual. Moreover, they argued that even if they could not challenge Cobb's will until after her death, it was necessary to challenge the amended trust during Cobb's lifetime to ensure that her wishes for the administration of her estate were observed while she was incapacitated. Finally, if the court concluded that they did not have standing, they asked that they be appointed as guardians ad litem.

The district court granted Rudi's motion to dismiss, without prejudice, finding that Ernette and Myrna lacked standing to challenge the amended living trust because Cobb was still alive; the court also denied Ernette and Myrna's motion to be appointed guardians ad litem. In denying a subsequent rehearing motion, the district court explained that Ernette's and Myrna's interest was at best contingent and would only vest if they survived Cobb. The district court also granted Rudi's motion for attorney fees and costs. Ernette and Myrna appealed.

DISCUSSION

Ernette and Myrna argue that Nevada statutory law allows them to challenge Cobb's revocable inter vivos trust during Cobb's lifetime ***1455** and that the district court erred by granting Rudi's motion to dismiss. Specifically, Ernette and Myrna argue that NRS 164.015, NRS 153.031(1)(a) and NRS 153.031(1)(d) allow interested persons to challenge the validity of a revocable trust while the settlor is still alive. We disagree.

If a motion to dismiss is made under NRCP 12(b)(5) and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."[2] The district court did consider matters outside the parties' pleadings, such as the guardianship order. Thus, we review Rudi's motion to dismiss as a motion for summary judgment. This court reviews an order granting summary judgment de novo.[3]

NRS 164.015(1) permits "an interested person" to petition the court for proceedings "concerning the internal affairs of a nontestamentary trust" and to obtain "any appropriate relief provided with respect to a testamentary trust in NRS 153.031." NRS 153.031(1)(a) and NRS 153.031(1)(d) allow a trustee or beneficiary of a trust to petition the court to determine the existence of the trust and the validity of a trust provision, respectively. However, neither of these statutes directly addresses revocable inter vivos trusts, such as the trust in this case. Moreover, these statutes specifically refer to petitions by interested persons.[4] Because the trust at issue is a revocable inter vivos trust and Cobb retained the ability to revoke the trust during her lifetime, Ernette and Myrna have at most a contingent interest that has not yet vested. Consequently, Ernette and Myrna are not interested persons within the meaning of NRS 164.015 and NRS

153.031.

In so concluding, we embrace the holdings of other jurisdictions that have considered the matter. In a case from Ohio, *Lewis v. Star Bank, N.A., Butler County,* the beneficiaries of a revocable inter vivos trust sued the trustee for an alleged breach of fiduciary **749 duty for failing to give pre-death tax and estate-planning advice to the settlor.[5] The Ohio Court of Appeals determined that while the settlor was alive, pursuant to the terms of the trust itself, she had reserved the right to modify or revoke the trust.[6] The court further concluded that as long as the settlor had that right and other "indicia of retained ownership" during her lifetime, the beneficiaries did not have an absolute entitlement to any portion of the trust while the settlor was alive.[7] Since the beneficiaries' interests *1456 were subject to complete divestment while the settlor was alive, the court held that the beneficiaries were not in privity with the settlor or the trustee and could not maintain their lawsuit.[8]

Similarly, in *Ullman v. Garcia,* a Florida appellate court cited a Florida statute that prevented revocable trusts from being contested before the settlor's death.[9] Although the court relied in part on a statute, it also elaborated upon the reasoning behind this rule, much of which underlies our holding today. The Florida court noted that the devisee of a revocable trust does not enjoy any control over ownership of the trust until the settlor's death.[10] Because the settlor has an absolute right to terminate the trust at any time and distribute the trust property as he or she sees fit, named beneficiaries to a revocable trust are only "potential devisees."[11] The court also observed that a revocable trust is "a unique instrument" that has "no legal significance until the [settlor]'s death."[12]

Ernette and Myrna cite a California case, *Conservatorship of Estate of Irvine,*[13] to support their argument that they have standing to challenge Cobb's revocable inter vivos trust. In *Irvine*, a California appellate court upheld a lower court's order invalidating an amendment to a revocable living trust.[14] However, *Irvine* is distinguishable from the present case. In *Irvine*, the trust allowed the settlor to amend the trust only upon written notice personally served upon and accepted by the trustee.[15] The court noted that under a California statute, a settlor could bind himself to a specific method of amendment by providing for that method in the trust itself.[16] Since the settlor in the case had not served the trustee with notice of the amendment, the court held that the requirements of the trust had not been satisfied and that the amendment never became effective.[17]

Unlike the situation in *Irvine*, in the present case, Cobb's trust does not contain a notice requirement or similar provision that would grant standing to Ernette and Myrna to challenge the trust *1457 amendment, nor does Nevada have a statute similar to the California statute. Consequently, *Irvine* does not lend support for Ernette and Myrna's position.

Nevada statutes do not contemplate beneficiaries to a revocable inter vivos trust challenging the trust until the settlor's death. Furthermore, such beneficiaries have only a contingent interest, at most, while the settlor is still alive. That interest does not vest until the settlor's death. Other jurisdictions addressing the issue have held similarly. For these reasons, we conclude that Ernette and Myrna lack standing to challenge Cobb's revocable inter vivos trust while Cobb is still alive.

After filing their complaint, Ernette and Myrna requested that the district court appoint them as Cobb's guardians ad litem, **750 under NRS Chapter 159, so that they could prosecute an action against Rudi and the trust on Cobb's behalf. For Ernette and Myrna to serve as Cobb's guardians ad litem under these circumstances—namely, in a matter in which they challenge Cobb's actions in amending her trust to exclude themselves as beneficiaries—would create a conflict of interest. Accordingly, the district court properly denied their request.[18] To the extent that Ernette and Myrna's concerns center on Cobb's capacity, those concerns are more appropriately addressed under Nevada's guardianship statutes, NRS Chapter 159, in the separate action brought under those statutes, rather than through their appointment as guardians ad litem in the litigation against Cobb's trust.

Finally, Ernette and Myrna also argue that the district court erred in awarding costs and attorney fees to Rudi as the prevailing party. We have considered the argument, and based on our holding today, we conclude that it is without merit.

CONCLUSION

Because we conclude that a beneficiary's interest in a revocable inter vivos trust is contingent at most, we conclude that Ernette and Myrna lack standing to challenge Cobb's revocable inter vivos trust during Cobb's lifetime. Additionally, we conclude that Ernette *1458 and Myrna must follow the procedures created by the Legislature when it modified Nevada's guardianship statutes in 2003, if they wish to pursue a remedy in this matter. Accordingly, we affirm the district court orders.

BECKER and PARRAGUIRRE, JJ., concur. 148 P.3d 746

Parallel Citations

Footnotes

1 This is Ernette's and Myrna's contention on appeal, which Rudi calls into doubt. However, the amended trust was not before the district court and is not part of the record on appeal, so this contention cannot be confirmed here.

2 NRCP 12(b).

3 *Wood v. Safeway,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing *GES, Inc. v. Corbitt,* 117 Nev. 265, 268, 21 P.3d 11, 13 (2001)).

4 NRS 153.031(2) requires the petition to identify the name and address of each interested person as well as the grounds for the petition.

5 90 Ohio App.3d 709, 630 N.E.2d 418, 419 (1993).

6 *Id.* at 420.

7 *Id.* at 420–21.

8 *Id.* at 421.

9 645 So.2d 168, 169 (Fla.Dist.Ct.App.1994).

10 *Id.*

11 *Id.*

12 *Id.* at 170.

13 40 Cal.App.4th 1334, 47 Cal.Rptr.2d 587 (1995).

14 *Id.* at 588–89.

15 *Id.* at 589.

16 *Id.* at 593.

17 *Id.* at 594–95.

18 *See In re J.S.C.,* 182 Ga.App. 721, 356 S.E.2d 754, 756 (1987) (noting, in a termination case, that the appointment of a party interested in the litigation's outcome as a guardian ad litem would defeat the purpose of the guardian ad litem statute—to provide the ward "with representation separate from any other interests in the litigation"); *see generally Baker v. Baker,* 59 Nev. 163, 172, 87 P.2d 800, 803 (noting that guardian statutes "are intended as a shield for the protection of [wards], and should not be used as a sword for their injury"), *modified on rehearing in part on other grounds,* 59 Nev. 163, 96 P.2d 200 (1939); *In re Custody of Krause,* 304 Mont. 202, 19 P.3d 811, 814 (2001) (recognizing that the person appointed as a guardian ad litem may not have

interest adverse to those of the ward).

90 Ohio App.3d 709
Court of Appeals of Ohio, Twelfth District, Butler County.

LEWIS et al., Appellants,
v.
STAR BANK, N.A., BUTLER COUNTY, et al., Appellees.*
No. CA92-09-183. | Decided Oct. 18, 1993.

Beneficiaries of trust brought action alleging that bank, acting as trustee, breached its fiduciary duty and against law firm alleging malpractice based on failure to give predeath tax and estate planning advice to settlor and beneficiaries of revocable inter vivos trust. The Butler County Court of Common Pleas dismissed that count. Beneficiaries appealed. The Court of Appeals, Marianna Brown Bettman, J., sitting by assignment, held that beneficiaries lacked standing to bring action against trustee and law firm based on advice given to settlor before her death.

Affirmed.

West Headnotes (4)

[1] **Action**
Persons Entitled to Sue

13Action
13IGrounds and Conditions Precedent
13k13Persons Entitled to Sue

One not in privity cannot sue; vesting gives necessary privity to sue.

1 Cases that cite this headnote

[2] **Action**
Persons Entitled to Sue

13Action
13IGrounds and Conditions Precedent
13k13Persons Entitled to Sue

Status of those seeking to sue must be examined at time claimed mistakes occurred, for purposes of determining standing, when issues of privity and vesting are involved.

5 Cases that cite this headnote

[3] **Attorney and Client**
In General; Limitations

45Attorney and Client
45IIIDuties and Liabilities of Attorney to Client
45k129Actions for Negligence or Wrongful Acts
45k129(1)In General; Limitations

Upon creation of revocable inter vivos trust, interest of beneficiaries was a vested interest subject to complete defeasance and because all of beneficiaries' interests were subject to complete divestment while settlor was still alive, beneficiaries were not in privity with settlor, trustee, or law firm at time trustee and law firm allegedly failed to give settlor tax advice and, accordingly, beneficiaries could not sue for mistakes arising from advice given to settlor before her death.

10 Cases that cite this headnote

[4] **Attorney and Client**
In General; Limitations

45Attorney and Client
45IIIDuties and Liabilities of Attorney to Client
45k129Actions for Negligence or Wrongful Acts
45k129(1)In General; Limitations

Beneficiaries of trust had no standing to sue law firm for advice given to settlor before her death; while settlor was alive, law firm owed her a duty of complete and undivided loyalty and if that duty was owed to both settlor and beneficiaries, law firm would have found itself representing divided and disparate interests which would have been impermissible. Code of Prof.Resp., Canon 5; EC 5-1.

10 Cases that cite this headnote

Attorneys and Law Firms

****419 *710** John A. Lloyd, Jr., Cincinnati, for appellants.

Taft, Stettinius & Hollister, R. Joseph Parker and Michael R. Rickman, Cincinnati, for appellee, Star Bank, N.A., Butler County.

Rendigs, Fry, Kiely & Dennis and Michael E. Maundrell, Cincinnati, for appellee, Parrish, Beimford, Fryman, Smith & Marcum Co., L.P.A.

Opinion

MARIANNA BROWN BETTMAN, Judge.

This case asks us to decide whether Star Bank, N.A., Butler County ("the Bank"), acting as a trustee, breached its fiduciary duty, and whether Parrish, Beimford, Fryman, Smith & Marcum Co., L.P.A. ("the Law Firm") committed malpractice, in failing to give pre-death tax and estate-planning advice to the settlor and the beneficiaries of a revocable *inter vivos* trust. The settlor of the trust is Mrs. Cullen. The beneficiaries of the trust, who are the plaintiffs in this action, are Cullen's daughter, Bonnie Lewis ("Lewis"), and Lewis's children, Cameron Mitrione, Jennifer Lewis and James Lewis (collectively "the Lewis children"). The Lewis children are Mrs. Cullen's grandchildren. The specific advice the Bank and the Law Firm are alleged to have failed to give was to alert the settlor and the beneficiaries to the generation-skipping tax ("GST") which would, the plaintiffs allege, have had significant tax-savings ramifications to them. Key to the plaintiffs' claim is that the Bank and the Law Firm owed this duty of pre-death tax planning advice not only to the settlor but also to them as beneficiaries. For the reasons which follow, we reject this contention and affirm the trial court's dismissal of count one of the plaintiffs' complaint against the Bank and the Law Firm.[1]

***711** Plaintiffs assign two errors which essentially involve the same concepts. The gravamen of both assignments of error is that the trial court erred in dismissing count one on the grounds that there was an absence of ****420** privity among the vested beneficiaries of an *inter vivos* trust which would preclude suit against the Bank and the Law Firm. Central to plaintiffs' claims is their view that once an *inter vivos* trust was created, all of their interests vested, and they therefore were in the requisite degree of privity with the settlor to have standing to sue the Bank and the Law Firm.

Before we analyze the assignments of error, we must fully set forth the mechanics of Cullen's estate plan. In 1974, Cullen established a will and an *inter vivos* trust. The Law Firm served as her counsel in creating the will and the trust. Both were amended several times before her death. The Bank was the successor trustee to Second National Bank, which was the original trustee of the *inter vivos* trust. Although the trust was established and partially funded during Cullen's lifetime, at her death, her will provided that after distribution of personalty to Cullen's daughter Bonnie Lewis, the remainder of the estate would pour over into this 1974 trust. The Bank became the residuary beneficiary of Cullen's will. During her lifetime, Cullen had the absolute right to use up any and all of the assets in the *inter vivos* trust, which was fully revocable. At death, Cullen's residuary estate was divided in half. One half was to be held in trust for Cullen's daughter Bonnie Lewis. The other half was to be divided into equal thirds, in trust, one for Bonnie and Cameron, one for Bonnie and Jennifer, and one for Bonnie and James. Bonnie Lewis had the absolute right to use up not only her own trust, but those of her children as well.

[1] It is interesting to note that all three of the parties to this lawsuit describe the interests of the plaintiffs differently. According to the plaintiffs, as soon as the *inter vivos* trust was created in 1974, all of them had an immediate vested interest in the trust. According to the Bank, the plaintiffs' interests are described as vested remainder equitable interests subject to defeasance. According to the Law Firm, the plaintiffs were nothing more than potential beneficiaries under Mrs. Cullen's will. The reason the parties dispute this point so strenuously becomes clear when we analyze the concepts of "vesting" and "privity" as those terms have been developed in the law. Simply stated, the law in this field has established two fundamental principles: one not in privity cannot sue; vesting gives the necessary privity to sue. *Elam v. Hyatt Legal Serv.* (1989), 44 Ohio St.3d 175, 541 N.E.2d 616; *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 512 N.E.2d 636; *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 10 OBR 426, 462 N.E.2d 158; *Noth v. Wynn* (1988), 59 Ohio App.3d 65, 571 N.E.2d 446.

***712** [2] We believe that in our analysis of the claims of privity and vesting, the status of those seeking to sue must be examined at the time the claimed mistakes occurred. In this case, Lewis and the Lewis children wish to sue the Bank and the Law Firm for mistakes claimed to have been made before Cullen's death.

[3] We hold that upon Cullen's creation of a revocable

inter vivos trust, the interest of Lewis and the Lewis children was a vested interest subject to complete defeasance. *Papiernik v. Papiernik* (1989), 45 Ohio St.3d 337, 544 N.E.2d 664, paragraph one of the syllabus; *First Natl. Bank of Cincinnati v. Tenney* (1956), 165 Ohio St. 513, 60 O.O. 481, 138 N.E.2d 15, paragraph two of the syllabus.

While Cullen was alive, and while she remained the living settlor of the *inter vivos* trust, pursuant to the terms of the trust itself, she reserved the right to change beneficiaries, to use up all the money for herself, to modify the trust or to revoke it absolutely. During her lifetime, not only was Cullen the settlor of the trust, but she was also its sole beneficiary. It is the fact that all the Lewis interests were subject to complete defeasance so long as Cullen retained these rights under the trust that is significant to our analysis. See *Papiernik v. Papiernik,* 45 Ohio St.3d at 343, 544 N.E.2d at 671. According to the Gilmer revision of Cochran's Law Lexicon, "[a] right, or estate, is vested in a person when he [or she] becomes entitled to it." As long as Cullen retained the power to revoke the trust and the other indicia of retained ownership under the trust, which she never relinquished before her ****421** death, Lewis and the Lewis children had no absolute entitlement to anything while Cullen was alive. *Papiernik v. Papiernik,* 45 Ohio St.3d at 343, 544 N.E.2d at 670. Thus, because all of their interests were subject to complete divestment while Cullen was still alive, we hold that neither Lewis nor the Lewis children were in privity with Cullen, the Bank or the Law Firm, and could not sue for mistakes arising from pre-death advice.[2]

[4] We hold that the plaintiffs had no right to sue the Law Firm for pre-death advice to Cullen for another reason. While Cullen was alive, the Law Firm owed her a duty of complete and undivided loyalty. If we were to hold that the duty was owed to Cullen and to all the plaintiffs, as plaintiffs implicitly urge us to do, the Law Firm would have found itself representing divided and disparate interests, which is impermissible. Its sole obligation was one of undivided loyalty to Cullen. This is so both under Canon Five of the Code of Professional Responsibility and its related ethical consideration.

***713 CANON 5**

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

While the precise issues before us on appeal involve only the questions of the Lewis interests for pre-death advice, we continue in a limited fashion our analysis of all the Lewis interests after death because this difference in pre-death and post-death interests is crucial to understanding the basis of our holding today, and to understanding our holding in the context of Supreme Court decisions in this area of law.

At Cullen's death, Lewis's interest became fully vested, not subject to defeasance. She became the sole beneficiary of one half of the estate, held in trust for her. The other half of the estate was divided into three equal trusts for Lewis and each of her children. This vested status gave Lewis privity with the Bank and the Law Firm, but privity with the Bank in its role as executor and trustee of the Cullen estate and privity with the Law Firm as attorney for the Bank in those roles, which relate *only* to post-death matters such as errors in the *administration* of the estate and the trust. We emphasize again that we are matching the status of the person seeking relief with the time the alleged mistake was made. After Cullen's death, Lewis is in privity with the Bank and the Law Firm, as stated above, but only for matters relating to estate and trust administration.

We limit our analysis of the post-death interests in this case to that of Lewis, not the Lewis children. With respect to the five claims remaining before it, we leave it to the trial court to determine whether the Lewis children also possess the requisite degree of privity, post-death, to challenge the Bank and the Law Firm in matters of estate and trust administration while their mother is still alive. In doing so, the trial court will need to focus on the nature of the four trusts and the nature of Lewis's interest in each of her children's trusts.[3]

***714** Our analysis of matching the status of the person seeking relief with the time the claimed error was made is fully supported by the seminal Ohio Supreme Court cases on this subject. In *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 512 N.E.2d 636, the court ****422** held that in the absence of fraud, collusion, or malice,[4] the beneficiary under a will could not sue the testator's lawyer for legal

malpractice in the drafting of the will. The reason was that the beneficiary, the son, was not in privity with the lawyer who drafted his father's will. Under our analysis, the son had no vested rights under his father's will while his father was alive. He had only the expectancy of an inheritance. The mistake alleged was a pre-death mistake. At his father's death, the son's interest did become vested, but in that role he would have privity to sue only for errors in estate administration. That we are correct in this analysis is confirmed by the court's analysis in *Elam v. Hyatt Legal Serv.* (1989), 44 Ohio St.3d 175, 541 N.E.2d 616. *Elam,* in its syllabus, states that "a beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance." The analysis of *Elam* is wholly consistent with our match-up test. The error by the attorney in *Elam* occurred as a post-death error, that is, an error in estate administration. In *Elam,* the beneficiaries had a remainder interest in real estate which passed by will. After the testator died, the attorney for the estate negligently transferred the entire fee to the life tenant. The court found the remaindermen/beneficiaries to be in privity with the lawyer and allowed the suit. The interests of these remaindermen were fully vested *after* the death of the testator and their right to sue the lawyer was for a *post-death* error. When analyzed in this way, *Simon* and *Elam* are actually consistent, and both meet our match-up-of-status test.

Thus, for all of the foregoing reasons, we hold the trial court was correct in finding that the plaintiffs had no cause of action against the Bank and the Law Firm for pre-death advice to the Settlor, and thus was correct in dismissing count one of plaintiffs' complaint.

The judgment of the trial court is affirmed.

Judgment affirmed.

KLUSMEIER, P.J., and DOAN, J., concur.

Harry T. Klusmeier, Rupert A. Doan and Marianna Brown Bettman, JJ., of the First Appellate District, sitting by assignment.

Parallel Citations

630 N.E.2d 418

Footnotes

* Reporter's Note: A motion to certify the record to the Supreme Court of Ohio was overruled in (1994), 68 Ohio St.3d 1473, 628 N.E.2d 1392.

1 The plaintiffs have taken the instant appeal from the trial court's order dismissing count one of a six-count complaint. Since five of those counts remain pending in some capacity below, this court requested supplemental briefs from the parties on whether it had jurisdiction to hear the matter. After a thorough examination of this issue, we conclude that the judgment of the lower court is a final appealable order subject to our immediate review. R.C. 2505.02.

2 Because of our holding on privity, we need not decide whether the Bank's failure to alert the settlor and the beneficiaries to the GST would be considered a breach of fiduciary duty, as plaintiffs allege, or the impermissible unauthorized practice of law, as the Bank urges.

3 We note that a similar issue was reserved but not decided by the Supreme Court in *Papiernik v. Papiernik,* 45 Ohio St.3d at 343, 544 N.E.2d at 671, in regard to remaindermen under a will with a testamentary power of appointment. A similar question was also reviewed in *Pietz v. Toledo Trust Co.* (1989), 63 Ohio App.3d 17, 577 N.E.2d 1118.

4 There is no question that none of these factors is alleged in this case.

44 Cal.App.4th 781, 52 Cal.Rptr.2d 69, 96 Cal. Daily Op. Serv. 2747, 96 Daily Journal D.A.R. 4511

EMPIRE PROPERTIES, Plaintiff and Respondent,
v.
COUNTY OF LOS ANGELES et al., Defendants and Appellants.

No. B095651.
Court of Appeal, Second District, California.
Apr 17, 1996.

SUMMARY

Beneficiaries of a revocable inter vivos trust that became irrevocable upon the death of the beneficiaries' father filed a claim for exemption from tax reassessment based on the parent/child exclusion (Rev. and Tax. Code, § 63.1). The county tax assessor and appeals board denied the claim and the beneficiaries brought suit against the county, seeking a refund. The trial court found for the taxpayers, concluding that the only "change in ownership" occurred when the real property was originally transferred into the trust, so that other reassessments based on the father's death and the trustees' transfer of trust property to the children's partnership were erroneous. (Superior Court of Los Angeles County, No. BC103181, Paul Boland, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that the only "change in ownership" occurred when the real property was originally transferred into the trust. Under the applicable statutory language and regulations, the change in ownership occurred upon the father's death when the trust became irrevocable and the full beneficial interests in the property transferred to the residual beneficiaries of the trust (Rev. and Tax. Code, § 61, subd. (g); Cal. Code Regs., tit. 18, § 462.160, subd. (b)(2)). The court also held that the taxpayers' claim for exemption was barred by the three-year statute of limitations (Rev. and Tax. Code, § 63.1), as the taxpayers' claim was filed thirteen months after the three-year period expired. Although the provision specifying a three-year statute of limitations was passed the year following the father's death, the Legislature expressly stated its intention that the limitations period apply to any and all applicable transfers occurring after November 1986, the date the voters adopted Prop. 58, and the father died on Oct. 5, 1987 (Rev. and Tax. Code, § 63.1, subd. (h)). Furthermore, the beneficiaries had almost two years to file their claim after the provision became effective in 1988. (Opinion by Johnson, J., with Lillie, P. J., and Woods (Fred), J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Property Taxes § 38.2--Reassessment on Change of Ownership--Appellate Review.
The question when a "change in ownership" occurred so as to trigger the reassessment mechanisms of Prop. 13 (Rev. and Tax. Code, § 61) is a question of law. Thus, a trial court's legal conclusions on this issue are subject to independent review on appeal.

([2])
Property Taxes § 38.2--Reassessment on Change of Ownership--Revocable Family Trust--Death of Parent That Renders Trust Irrevocable.
In an action brought by beneficiaries of a revocable inter vivos trust that became irrevocable upon the death of the beneficiaries' father against a county seeking exemption from tax reassessments, the trial court erred in concluding that the only "change in ownership" occurred when the real property was originally transferred into the trust. Under the applicable statutory language and regulations, the change in ownership occurred upon the father's death when the trust became irrevocable and the full beneficial interests in the property transferred to the residual beneficiaries of the trust (Rev. and Tax. Code, § 61, subd. (g); Cal. Code Regs., tit. 18, § 462.160, subd. (b)(2)). A transfer of real property held by a revocable trust is considered a change in ownership when that transfer results in the vesting of a present interest that is no longer subject to being divested.

([3])
Property Taxes § 38.2--Reassessment on Change of Ownership--Parent and Child Exception--Statute of Limitations.
In an action brought by beneficiaries of a revocable inter vivos trust against the county seeking exemption from tax reassessment based on the parent/child exclusion (Rev. and Tax. Code, § 63.1), the beneficiaries' claim was barred by the three-year statute of limitations (Rev. and Tax. Code, § 63.1, subd. (e)(1)), as the taxpayers' claim

was filed thirteen months after the three-year period expired. Although the provision specifying a three-year statute of limitations was passed the year following the father's death, the date of transfer that triggered the beginning of the three-year period, the Legislature expressly stated its intention that the limitations period apply to any and all applicable transfers occurring after November 1986, the date the voters adopted Prop. 58, and the father died on October 5, 1987 (Rev. and Tax. Code, § 63.1, subd. (h)). Furthermore, the beneficiaries had almost two years to file their claim after the provision became effective in 1988.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, § 115.]

COUNSEL
De Witt W. Clinton, County Counsel, and Albert Ramseyer, Deputy Counsel, for Defendants and Appellants.
Harry A. Olivar for Plaintiff and Respondent.

JOHNSON, J.

Taxpayer brought suit to seek a refund of property taxes. It claimed the property was exempt from reassessment under Revenue and Taxation Code section 63.1 as the transfer was between a parent and his children. The trial court found for the taxpayer.

The County of Los Angeles (County) appeals from the judgment and asserts numerous bases why the judgment is erroneous as a matter of law. It claims a "change of ownership" in the real property occurred at the father's death in 1987 and this event triggered the three-year statute of limitations for claiming a parent/child exemption. Thus, the County argues the taxpayer's claim for an exemption from reassessment on the real property based on the parent/child exemption filed in 1991, and more than four years after the father's death, was untimely. In addition, the County claims the taxpayer is not entitled to a refund because it never actually filed a claim for refund. The County also claims this action is invalid because the parent/child exemption from reassessment is only available for transfers of real property between natural persons, and in this case the transferee is a legal entity and not a natural person.

We conclude a "change in ownership" occurred at the father's death in 1987, and not at the time the real property was transferred into the parents' revocable trust in 1975, as found by the trial court. We therefore further conclude the taxpayer's 1991 claim for exemption under the parent/child exclusion was untimely and reverse the judgment in favor of the taxpayer. Consequently, we need not reach the other issues the county raises.

Facts and Proceedings Below

In 1975 Hyman J. Shulman and his wife Rose Shulman established a revocable inter vivos trust known as the Shulman Family Trust. Rose Shulman died in 1984. According to the allegations in the verified complaint, at his wife's death, Hyman Shulman, as trustee of the trust, became ***784** the "sole legal and equitable owner" of a parcel of real property located at 350 East California in Pasadena. This parcel of real property is improved with a 60-unit apartment building. The trust instrument was not introduced into evidence and was not made part of the record on appeal, but apparently the Shulmans' daughters, Evelyn Levitt and Jean Abarbanel, were residuary beneficiaries of the revocable inter vivos Shulman Family Trust.

In August 1987, Levitt and Abarbanel formed respondent, Empire Properties (Empire), a general partnership, to hold title to and to manage approximately 18 income properties to be distributed from the Shulman Family Trust. On October 5, 1987, Hyman Shulman died. The Shulman Revocable Family Trust became irrevocable upon his death. Levitt and Abarbanel and their husbands became successor trustees of the Shulman Family Trust.

In February 1990, the County mailed Empire a notice of assessed value change based on Hyman Shulman's death in October 1987.

After some delay due to an audit of the federal estate tax return and a family dispute over the distribution of assets, on November 22, 1991, the trustees of the Shulman Family Trust transferred title to the properties held by the trust to Empire.

On the same day, November 22, 1991, Empire filed a claim for a reduction of the assessment on the 350 California real property in Pasadena. It claimed the real property was exempt from reassessment based on the parent/child exclusion passed by the voters as Proposition 58 in November 1986.

The county assessor denied Empire's claim for exemption. The reason cited for denial was the three-year statute of limitations for filing such claims had expired in October 1990, or three years after Hyman Shulman's death. Empire sought review with the County Assessment Appeals Board which also denied the claim.

On April 21, 1994, Empire brought suit seeking a refund

of property taxes. The County demurred to the complaint, claiming Empire's claim for a parent/child exclusion from reassessment was untimely because it was filed more than four years after Hyman Shulman's death. The trial court overruled the demurrer, reasoning beneficial interest in the property did not vest in Empire until the deed transferring title from the Shulman Family Trust to the partnership was recorded in November 1991. Based on this reasoning the trial court found Empire's claim for exemption timely.

Trial was to the court which found in favor of Empire, but for reasons different than those employed in its earlier analysis in ruling on the County's ***785** demurrer. This time the trial court concluded the "change in ownership" occurred when the real property was originally transferred into the trust in 1975. Based on this analysis the court found that because Empire's partners were beneficiaries of that trust created in 1975, no change in beneficial ownership occurred, either in 1987 at Hyman Shulman's death, or when the trustees transferred the property to Empire. Following this reasoning, the trial court concluded Empire was entitled to a refund of taxes erroneously assessed since Hyman Shulman's death.

The County appeals from the judgment.

Discussion

([1]) The question when a "change in ownership" occurred so as to trigger the reassessment mechanisms of Proposition 13 is a question of law. (*Shuwa Investments Corp.* v. *County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1644 [2 Cal.Rptr.2d 783]; *Penner v. County of Santa Barbara* (1995) 37 Cal.App.4th 1672, 1676 [44 Cal.Rptr.2d 606].) We independently review the trial court's legal conclusions. (*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578]; *Penner v. County of Santa Barbara* , *supra*, 37 Cal.App.4th 1672, 1676.)

I. A Change in Ownership Occurred When the Revocable Shulman Family Trust Became Irrevocable at Hyman Shulman's Death in October 1987.

Article XIII A, section 1 of the California Constitution limits the maximum amount of any ad valorem tax on real property to one percent of the full cash value of that property. This article was part of Proposition 13 added to the Constitution by vote of the people on June 6, 1978. It limits the assessed value of real property for ad valorem tax purposes to that shown on the 1975-1976 tax bill or to its "appraised value ... when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment." (Cal. Const., art. XIII A, § 2, subd. (a).)

Revenue and Taxation Code section 60 defines a "change in ownership" as "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."[1]

The Legislature added section 61 to define the circumstances constituting a "change in ownership." As relevant to this case, a "change in ownership" ***786** occurs when "[a]ny interests in real property which vest in persons other than the trustor (or, pursuant to Section 63 [interspousal transfers], his or her spouse) when a revocable trust becomes irrevocable." (§ 61, subd. (g).)

This definition is further clarified to emphasize it is the transfer of the present use and beneficial interest in property essentially equivalent to a fee interest which constitutes a change in ownership for purposes of reassessment. Title 18, section 462.001 of the California Code of Regulations provides: "(a) There shall be a reappraisal of real property as of the date of a change in ownership of that property. The reappraisal will establish a new base year full value and will be enrolled on the lien date following the change in ownership.

"(b) A 'change in ownership' in real property occurs when there is a transfer of a present interest in the property, and a transfer of the right to beneficial use thereof, the value of which is substantially equal to the value of the fee interest. Every transfer of property qualified as a 'change in ownership' shall be so regarded whether the transfer is voluntary, involuntary, by operation of law, by grant, gift, devise, inheritance, trust, contract of sale, addition or deletion of an owner, property settlement ... or any other means. A change in the name of an owner of property not involving a change in the right to beneficial use is excluded from the term 'transfer' as used in this section."

The California Code of Regulations gives examples of how the general rules governing "transfer" and "change of ownership" apply in varying contexts. Regarding real property held in trust, the general rule is a "change in ownership" occurs upon creation of the trust by the transfer of real property into the trust. (Cal. Code Regs., tit. 18, § 462.160, subd. (a).) There are several exceptions to this general rule, including an exception for the transfer of real property into a *revocable* trust. Section 462.160, subdivision (b)(2) provides a transfer to a trust is *not* a change in ownership upon the creation of or transfer to a

trust if "[t]he transfer of real property or an ownership interest(s) in a legal entity by the trustor(s) to a trust which is revocable by the trustor(s); *provided, however, a change in ownership does occur at the time the revocable trust becomes irrevocable* unless the trustor-transferor remains or becomes the sole present beneficiary." (Italics added.)

([2]) Thus, under the statutory language and regulations interpreting that language the conclusion is inescapable a change in ownership did not occur upon creation of the revocable Shulman Family Trust in 1975, or when the real property was transferred into the revocable trust. Instead, the change in ***787** ownership occurred when the Shulman Family Trust became irrevocable. The trust became irrevocable upon the death of Hyman Shulman in October 1987 and at that time the full beneficial interests in the property transferred to his daughters as residual beneficiaries of the trust.

The trial court relied on the decision in *Allen v. Sutter County Bd. of Equalization* (1983) 139 Cal.App.3d 887 [189 Cal.Rptr. 101] for its conclusion the change in ownership occurred when the trust was created. The *Allen* court held termination of a trust on land did not constitute a "change in ownership" permitting reassessment for property tax purposes because the beneficiaries of the trust held the same proportional interests in the property both before and after termination of the trust. Therefore, the trial court found section 62, subdivision (a)(2) applied and concluded the real property was not subject to reassessment because the Shulmans' daughters had the same proportional "beneficial" interests in the property both before and after Hyman Shulman's death. Section 62, subdivision (a)(2) excludes from a "change in ownership" any "transfer ... between legal entities ... which results solely in a change in the method of holding title to the real property and in which proportional ownership interests of the transferors and transferees ... remain the same after the transfer." (See also Cal. Code Regs., tit. 18, § 462.160, subd. (d)(5) [termination of a trust does not result in a change in ownership if the termination results in a transfer to the beneficiaries who receive the same proportional interests in the property they held prior to termination].)

Reliance on section 62, subdivision (a)(2) is misplaced because it ignores Hyman Shulman's beneficial interests in the trust property prior to termination of the trust. Reliance on the *Allen* decision is also misplaced because that decision concerned an *irrevocable* trust, the creation of which is expressly made a reassessable event. (§§ 60, 61, subd. (g); Cal. Code Regs., tit. 18, § 462.001.)

With the creation of an irrevocable trust, trust beneficiaries acquire a vested and present beneficial interest in the trust property, and their interests are not subject to divestment as with a revocable trust. Thus, the nature of a beneficiary's interest differs materially depending on whether the trust is revocable or irrevocable. The trial court failed to give due consideration to the distinction between revocable and irrevocable trusts and the different treatment each receives for property tax reassessment purposes.

Moreover, it would raise questions of fairness-to say nothing of administrative difficulties-if real property held by a revocable trust could be ***788** reassessed every time a trustor changed his or her designated beneficiaries or terminated or reinstated the trust. As the tax laws acknowledge, the better approach is to only consider a transfer a change in ownership when that transfer results in the vesting of a present interest, rather than a contingent interest, which is not, or no longer, subject to being divested.

This interpretation of the different treatment of revocable, as compared to irrevocable, trusts is supported by the January 1979 Report of the Task Force on Property Tax Administration commissioned by the Legislature after the voters adopted Proposition 13.[2] The task force report recommended reassessment of real property held by a trust only in the event the trust is or becomes irrevocable. The task force reasoned as follows:

"5. *Trusts*. Revocable living trusts are merely a substitute for a will. The gifts over to persons other than the trustor are contingent; the trust can be revoked or those beneficiaries may predecease the trustor. Transfers into trust are not changes in ownership if either:

"(a) The trust is revocable, or;

"(b) The creator of the trust is its sole beneficiary during his lifetime.

"If the trust is revocable it is excluded because the rights conferred are contingent. If the trustor is the sole beneficiary during his lifetime, his retained interest is considered to be 'substantially equivalent in value' to the fee interest in any real property covered by the trust. He is therefore the true owner and the change in ownership does not occur *until* the property passes to the remaindermen on the trustor's death." (Original italics.)

Consistent with the task force's recommendation, the Legislature enacted section 61, subdivision (g) to provide a "change in ownership" includes "[a]ny interests in real

property which vests in persons other than the trustor ... when a revocable trust becomes irrevocable."

In sum, a change in ownership occurred in this case when the Shulman Family Trust became irrevocable on Hyman Shulman's death in October 1987. (See also 1 Estate Planning Practice (Cont.Ed.Bar 1995) Lifetime Gifts and Transfers for Consideration, § 6.55, pp. 293-294.) Consequently, the real property was subject to reassessment, unless exempted under the ***789** exclusion from reassessment for transfers between parents and their children. (§ 63.1.)

II. *Empire's Request for Exemption Under Section 63.1 for Transfers Between Parents and Their Children Was Untimely. Consequently, Empire Is Not Entitled to the Exclusion or to a Refund of Property Taxes.*

Section 2, subdivision (h) was added to article XIII A of the California Constitution in November 1986 when the voters approved Proposition 58. (See *Larson v. Duca* (1989) 213 Cal.App.3d 324, 328 [261 Cal.Rptr. 559].) It provides the terms "purchase" and "change in ownership" do not include "... the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children, as defined by the Legislature, and the purchase or transfer of the first $1,000,000 of the full cash value of all other real property between parents and their children, as defined by the Legislature...." (Cal. Const., art. XIII A, § 2, subd. (h).)

Operative June 17, 1987, the Legislature added section 63.1 to implement the provisions of California Constitution article XIII A, section 2. (1 Estate Planning Practice, *supra*, Lifetime Gifts and Transfers for Consideration, § 6.54, pp. 283-284.)

The definition of a "transfer" under section 63.1 is consistent with section 60's definition of "change in ownership." A "transfer" includes, "and is not limited to, any transfer of the present beneficial ownership of property from an eligible transferor to an eligible transferee through the medium of an inter vivos or testamentary trust." (§ 63.1, subd. (c)(7).)

Under section 63.1 eligible transferees have three years from the date of "transfer" to file a claim for exemption from reassessment for transfers between parents and their children. Section 63.1, subdivision (e) provides: "Any claim under this section shall be filed:

"(1) For transfers of real property between parents and their children occurring prior to September 30, 1990, within three years after the date of the purchase or transfer of real property for which the claim is filed.

. . . . . .

"(3) Notwithstanding paragraphs (1) and (2), a claim shall be deemed to be timely filed if it is filed within six months after the date of mailing of a ***790** notice of supplemental or escape assessment, issued as a result of the purchase or transfer of real property for which the claim is filed.

"(4) Unless otherwise expressly provided, the provisions of this subdivision shall apply to any purchase or transfer of real property that occurred on or after November 6, 1986." (See also Ross, Cal. Practice Guide: Probate 1 (The Rutter Group 1986) ¶ 1:276.1a, p. 1-92.1, rev. # 1, 1995.)

([3]) Hyman Shulman died on October 5, 1987. At his death the Shulman Family Trust became irrevocable and the beneficial use of the real property held by the trust transferred to his daughters as residual beneficiaries. The three-year statute of limitations for filing a claim for exemption expired on October 5, 1990. Empire filed its claim for exemption on November 22, 1991, or more than 13 months after the time period for filing a claim had lapsed. Accordingly, Empire's claim for exemption from reassessment for transfers between parents and their children was untimely and it is not entitled to a refund of property taxes.

Empire seeks to avoid this conclusion by pointing out the Legislature did not adopt the provision specifying a three-year statute of limitations until 1988, the year following Hyman Shulman's death. For this reason Empire argues the three years should run from the effective date of the provision-January 1989. Empire argues the general principle should apply that in " 'cases of doubt statutes levying taxes are construed most strongly against the government and in favor of the taxpayer.' " (*Larson v. Duca*, *supra*, 213 Cal.App.3d 324, 329, quoting *Dreyer's Grand Ice Cream, Inc.* v. *County of Alameda* (1986) 178 Cal.App.3d 1174, 1181-1182 [224 Cal.Rptr. 285].)

First we note Empire had almost two years to file its claim after the provision enacting the three-year statute of limitations became effective. Moreover, the Legislature has expressly stated its intention for the three-year limitations period to apply to any and all applicable transfers occurring after November 1986, the date the voters adopted Proposition 58. Section 63.1, subdivision (h) provides the provisions of section 63.1 "shall apply to purchases and transfers of real property completed on or

after November 6, 1986, and shall not be effective for any change in ownership, including a change in ownership arising on the date of a decedent's death, that occurred prior to that date."

The enactment of this subdivision amply clarified whatever ambiguity might have existed immediately after adoption of Proposition 58. Moreover, ***791** in the face of this mandatory language, this court is not free to adopt an alternative limitations period to suit the circumstances of this case.

Disposition

The judgment is reversed. Each side to bear its own costs of appeal.

Lillie, P. J., and Woods (Fred), J., concurred.

A petition for a rehearing was denied May 9, 1996, and respondent's petition for review by the Supreme Court was denied June 26, 1996. ***792**

Footnotes

1 All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

2 At the County's request, we agreed to take judicial notice of the January 1979 Report of the Task Force on Property Task Administration commissioned by the Legislature after passage of Proposition 13. (Evid. Code, §§ 452, subd. (h), 459.)

76 Cal.App.4th 83, 90 Cal.Rptr.2d 99, 99 Cal. Daily Op. Serv. 8878, 1999 Daily Journal D.A.R. 11,333

LAURIE COOK JOHNSON, Plaintiff and Appellant,
v.
KARLA E. KOTYCK, Individually and as Trustee, etc., Defendant and Respondent.

No. B127817.
Court of Appeal, Second District, Division 2, California.
Nov. 4, 1999.

SUMMARY

The beneficiary of a revocable inter vivos trust brought a petition under Prob. Code, § 17200, seeking trust accountings from the trustee while the trustor was under the care of a court-appointed conservator. The trustee demurred to the petition, and the probate court sustained the demurrer without leave to amend and dismissed the petition with prejudice. (Superior Court of Los Angeles County, No. BC051916, R. Gary Klausner, Judge.)

The Court of Appeal affirmed. The court held that the beneficiary of the trust was not entitled to receive trust accountings from the trustee while the trustor was under the care of a court-appointed conservator and while the trust remained revocable. The trustee of a revocable trust generally has no duty to report or account to trust beneficiaries (Prob. Code, § 16064). The fact that the trustor had been declared incompetent did not mean that no one had the power to revoke the inter vivos trust. The legal rights of a conservatee, including the right to revoke a trust, pass to the conservator (Prob. Code, § 2580, subd. (b)(11)). The beneficiary, who was the trustor/conservatee's daughter, had two ways to address her concerns that the conservator was doing an inadequate job of supervising the trust. First, the conservator was accountable to the beneficiary and was responsible for preventing the misappropriation of the conservatee's assets. The Probate Code requires that the conservator account for the property of the conservatee (Prob. Code, §§ 2610, 2620, 2629), and any relative of the conservatee may file written objections to the account (Prob. Code, § 2622). The beneficiary, as an interested person, could file a petition under Prob. Code, § 2580, to compel the conservator to take action. Second, Prob. Code, § 2616, authorizes the filing of a petition concerning a conservatee's assets by an interested person, including persons having only an expectancy or prospective interest in the estate. (Opinion by Boren, P. J., with Zebrowski, J., and Mallano, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Trusts § 7--Jurisdiction Over Trusts--Inter Vivos Trusts--Beneficiary's Petition in Probate Court.
Under Prob. Code, § 17200, a trust beneficiary may petition the probate court regarding matters affecting the internal affairs of a trust, unless the trust instrument expressly withholds authority to proceed. Section 17200 makes no distinction between inter vivos trusts and testamentary trusts. Further, case law supports a probate court's jurisdiction under § 17200 to consider petitions regarding inter vivos trusts, and nothing in the statutory scheme indicates any legislative intent to restrict the jurisdiction of the probate court to only those matters arising after the death of a trustor.

([2a], [2b], [2c])
Trusts § 75--Accounting by Trustee--Revocable Trust--Beneficiary's Right to Accounting While Trustor Was Under Care of Conservatorship.
The beneficiary of an inter vivos trust was not entitled to receive trust accountings from the trustee while the trustor was under the care of a court-appointed conservator and while the trust remained revocable. The trustee of a revocable trust generally has no duty to report or account to trust beneficiaries (Prob. Code, § 16064). The fact that the trustor had been declared incompetent did not mean that no one had the power to revoke the inter vivos trust. The legal rights of a conservatee, including the right to revoke a trust, pass to the conservator (Prob. Code, § 2580, subd. (b)(11)). The beneficiary, who was the trustor/conservatee's daughter, had two ways to address her concerns that the conservator was doing an inadequate job of supervising the trust. First, the conservator was accountable to the beneficiary and was responsible for preventing the misappropriation of the conservatee's assets. The Probate Code requires that the conservator account for the property of the conservatee (Prob. Code, §§ 2610, 2620, 2629), and any relative of the conservatee may file written objections to the account (Prob. Code, § 2622). The beneficiary, as an interested person, could file

a petition under Prob. Code, § 2580, to compel the conservator to take action. Second, Prob. Code, § 2616, authorizes the filing of a petition concerning a conservatee's assets by an interested person, including persons having only an expectancy or prospective interest in the estate.

[See 11 Witkin, Summary of Cal. Law (9th ed. 1990) Trusts, § 83 et seq.]

([3])
Guardianship and Conservatorship § 40--Conservatorship--Role of Court.
Under the Probate Code, the legal rights of a conservatee pass to the conservator, under the close scrutiny of the superior court. The court is, in this situation, the conservatee's decisionmaking surrogate because in essence the statute permits the court to substitute its judgment for that of a conservatee. The court must satisfy itself that it is fully and fairly informed about the proposed exercise of the conservatee's legal rights.

([4])
Guardianship and Conservatorship § 41--Conservatorship--Nature and Purpose--Protection of Conservatorship Estate.
The conservatorship statutes and the substituted judgment statutes in the Probate Code are designed to protect the conservatorship estate for the benefit of the conservatee and for the benefit of the persons who will ultimately receive it from the conservatee.

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Weinstock, Manion, Reisman, Shore & Neuman, Marc L. Sallus and Sussan H. Shore for Defendant and Respondent.

BOREN, P. J.

Is a beneficiary of an inter vivos trust entitled to receive trust accountings while the trustor is under the care and custody of a court-appointed conservator? We conclude that the beneficiary is not entitled to an accounting for a trust that remains revocable despite the infirmity of the trustor and the ensuing conservatorship.

Facts

Elisabeth Frudenfeld is the trustor and original trustee of an inter vivos trust created on December 7, 1987 (the Trust). On August 30, 1996, the superior court appointed a professional conservator to manage Frudenfeld's affairs after finding that Frudenfeld is unable to care for herself. The court also appointed legal counsel to represent Frudenfeld in all conservatorship proceedings. The successor trustee of the Trust is respondent Karla E. Kotyck, one of Frudenfeld's daughters.

The Trust and its April 9, 1992, amendment contain the following clause regarding revocation: "This declaration of trust, and the trusts evidenced ***86** thereby, may be revoked at any time by the Trustor, during the lifetime of the Trustor, by the Trustor delivering written notice of revocation to the Trustee." The Trust also provides that it shall become irrevocable upon the death of the trustor.

A petition was brought under Probate Code section 17200 by appellant Laurie Cook Johnson, Frudenfeld's daughter and a Trust beneficiary.[1] Johnson asked the probate court (1) to order the trustee to prepare a report and accounting for the Trust and (2) to review the trustee's activities. Trustee Kotyck demurred to Johnson's petition, maintaining that Johnson has no right to receive accountings or to question the trustee's actions with regard to the Trust. The probate court sustained Kotyck's demurrer to the petition without leave to amend and dismissed the petition with prejudice. This timely appeal followed.

Discussion

1. *Appealability*

The probate court sustained respondent's demurrer to appellant's section 17200 petition without leave to amend. We shall construe the subsequent order of dismissal as a denial of the petition. The order is appealable. (§ 1304, subd. (a).)

2. *Trial Court's Jurisdiction*

([1]) A trust beneficiary may petition the probate court regarding matters affecting the internal affairs of a trust, unless the trust instrument expressly withholds authority to proceed. Among other powers, the court has jurisdiction (1) to interpret the terms of the trust, (2) to determine the existence or nonexistence of any power, privilege, duty or right, (3) to instruct the trustee, and (4) to compel the trustee to report information about the trust or account to the beneficiary. (§ 17200, subds. (b)(1), (2), (6), (7); *Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951-952 [20 Cal.Rptr.2d 433].)

The probate court's jurisdiction extends to the type of trust involved in this appeal. "Section 17200 makes no distinction between inter vivos trusts (i.e., living trusts) and testamentary trusts (i.e., trusts created by a will). Further, case law supports a probate court's jurisdiction under section 17200 to consider petitions regarding inter vivos trusts [citation], and nothing in the statutory scheme indicates any legislative intent to restrict the jurisdiction of the probate court to only those matters arising after the death of a trustor." ***87** (*Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1342 [47 Cal.Rptr.2d 587].)

3. *Rights of a Beneficiary of an Inter Vivos Trust*

([2a]) Appellant Johnson asks this court to determine only one disputed point of law, to wit: Does the Probate Code give Johnson the right to receive trust accountings from her sister Kotyck, so long as their mother is alive and her affairs are being administered by a conservator? The short answer is "No" and the explanation follows.

Johnson agrees at the outset that the trustee of a revocable trust generally has no duty to report or account to the trust beneficiaries and that the beneficiaries have no right to receive such accountings. (See § 16064.) However, she goes on to argue that "since the settlor has been declared incompetent, she no longer has the power to revoke." Johnson reasons that the beneficiaries of the Trust obtained the right to an accounting once Mrs. Frudenfeld became a conservatee, because "No one has the power to revoke" and Johnson's rights to take from the trust are now vested. As we shall see, it is untrue that no one has the power to revoke the conservatee's inter vivos trust.

([3]),([2b]) Under the Probate Code, the legal rights of a conservatee-including the right to revoke a trust-pass to the conservator, under the close scrutiny of the superior court. The conservator may petition the court for an order "Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust ...." (§ 2580, subd. (b)(11).)[2] The court is, in this situation, "the conservatee's decisionmaking surrogate" because "[i]n essence the statute permits the court to substitute its judgment for that of a conservatee." (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1250 [279 Cal.Rptr. 249].) The court must satisfy itself that it is "fully and fairly informed" about the proposed exercise of the conservatee's legal rights. (*Id.* at p. 1254.)

The only limitation on the court's ability to authorize the revocation of a conservatee's revocable trust is if the trust instrument "(i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust." (§ 2580, ***88** subd. (b)(11).) We have examined the Trust in this case and all of its amendments. There is nothing in the Trust or its amendments which expressly or impliedly prevents the conservator from revoking the Trust or which reserves the right of revocation exclusively to Frudenfeld. Thus, the limitations listed above do not apply here.

Johnson relies primarily on section 15800, which postpones the rights of trust beneficiaries "during the time that a trust is revocable and the person holding the power to revoke the trust is competent." Contrary to Johnson's reading of it, this provision does *not* mean that a trust automatically becomes irrevocable when the trustor becomes a conservatee. The Law Revision Commission comment to section 15800 explains: "This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor *or other person holding the power to revoke the trust.*" (Cal. Law Revision Com. com., reprinted at 54 West's Ann. Prob. Code (1991 ed.) foll. § 15800 p. 644, italics added.) It is clear from section 2580 that a conservator, working together with the superior court as the conservatee's decisionmaking surrogate, is a "person holding the power to revoke the trust."[3]

The reading of section 15800 proposed by Johnson would undermine the statutory scheme relating to revocable trusts. So long as a trust is revocable, a beneficiary's rights are merely potential, rather than vested. The beneficiary's interest could evaporate in a moment at the whim of the trustor or, in the case of a conservatorship, at the discretion of the court. Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable. We cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only *hopes* to have upon the death of the trustor, but only if the trust has not been previously revoked and the beneficiary has outlived the trustor. For this reason, we conclude that section 15800 does not give a beneficiary such as Johnson any right to a trust accounting so long as a conservator retains authority under section 2580 to have the trust revoked and to abrogate Johnson's interest in the trust proceeds.

Johnson's primary concern is that the court-appointed professional conservator may be doing an inadequate job of supervising Frudenfeld's estate, including the Trust, thereby enabling Kotyck to engage in mismanagement or misappropriation of Trust assets. Mistrustful of the conservator's abilities or diligence, Johnson wants to

oversee Frudenfeld's estate herself to ensure proper Trust management. *89

There are two ways to address Johnson's concerns, both falling within the Probate Code's conservatorship provisions.

First, the conservator is accountable to Johnson and is responsible for preventing the misappropriation of the conservatee's assets. ([4], [2c]) The conservatorship statutes and the substituted judgment statutes in the Probate Code are designed to protect the conservatorship estate for the benefit of the conservatee *and* for the benefit "of the persons who will ultimately receive it from the conservatee." (*Conservatorship of Hart, supra*, 228 Cal.App.3d at p. 1253.) In other words, the conservatorship is designed to protect persons like Johnson as well as Frudenfeld. If the conservator is concerned that estate's assets are being wasted or misappropriated, the conservator is empowered to ask the court to compel "a person who has possession or control of property in the estate of the ward or conservatee to appear before the court and make an account under oath of the property and the person's actions with respect to the property." (§ 2619, subd. (a).) Kotyck, as trustee of Frudenfeld's inter vivos trust, is a person in control of property in the conservatorship estate and must therefore account for her actions with respect to the Trust property.

The Probate Code requires that the conservator account for the property of the conservatee. The conservator must file an inventory and appraisal of the conservatee's estate within 90 days after the initial appointment. (§ 2610.) The conservator must thereafter account to the court, showing receipts, disbursements, transactions and the balance of property on hand. (§ 2620.) Failure to account subjects the conservator to the risk of punishment for contempt. (§ 2629.) When an account is filed, "any relative" of the conservatee may file written objections to the account. (§ 2622.) Thus, there is already a mechanism in place through which Johnson, as the daughter of the conservatee, can monitor the outflow from Frudenfeld's estate and ensure the diligent performance of the conservator's duties by simply scrutinizing the conservator's accountings and objecting when appropriate. Further, if the conservator breaches its fiduciary duty to Frudenfeld by allowing her estate to be frittered away, the conservator is chargeable for "[a]ny loss or depreciation in value of the estate," with interest. (§§ 2101, 2401.3.) In other words, the conservator ignores misappropriations of the conservatee's property at its own peril.

During oral argument, Johnson asserted that the provisions of section 2585 "immunize" the conservator from liability for wrongdoing. This is not correct. Section 2585 only states that the conservator is not required to propose any action under section 2580; i.e., the conservator is not required, for example, to propose the creation or revocation of a trust for the conservatee, or to enter a contract on behalf of the conservatee, or to provide gifts *90 to charity, relatives, or friends on behalf of the conservatee. (§ 2580, subds. (a)(3), (b)(4), (5), (11).) However, Johnson as an "interested person" may file a petition of her own in the probate court under section 2580 to compel the conservator to take action. (See Cal. Law Revision Com. com., reprinted at 52 West's Ann. Prob. Code, *supra*, foll. § 2585, p. 829 ["The remedy for a person who believes that some action should be taken by the conservator under this article is to petition under Section 2580 for an order requiring the conservator to take such action with respect to estate planning or making gifts as is set out in the petition."]) Section 2585 does not immunize the conservator from wrongdoing or permit the conservator to look the other way if the conservatee's assets are being misappropriated by others.

Second, the conservatorship statutes provide a direct means for a prospective beneficiary like Johnson to investigate wrongdoing by a person holding the conservatee's property. Section 2616 authorizes the filing of a petition concerning a conservatee's assets by an "interested person, including persons having only an expectancy or prospective interest in the estate." (§ 2616, subd. (a)(3).) Johnson is an interested person within this definition. If she chooses, Johnson may charge that Kotyck "has wrongfully taken, concealed, or disposed of property of the ward or conservatee." (§ 2616, subd. (b)(1).) The court may then order that Kotyck answer interrogatories or appear in court to be examined under oath, or both. (§§ 2616, 2617.) In particular, a trustee who has wrongfully misappropriated the funds of a ward is subject to citation and examination under section 2616. (*In re Ochoa* (1942) 50 Cal.App.2d 457, 458-459 [123 P.2d 106] [applying former § 1552, the predecessor statute to § 2616].) Anyone who wrongfully takes the property belonging to a conservatee, including a trustee, is personally liable for twice the value of the misappropriated property. (§ 2619.5.)

In short, there are satisfactory means by which Johnson can monitor the Trust and the trustee's activities during the pendency of the conservatorship. Much as Johnson would like to have a court declare the Trust to be irrevocable during Frudenfeld's lifetime, contrary to the terms of the Trust, it is unnecessary to do so to protect Johnson's interest. The Legislature has devised the methods we have described above to protect the rights of

persons interested in the estate of a conservatee. The Legislature has also determined that the conservator should retain the right to seek revocation of an inter vivos trust during the conservatee's lifetime. Johnson cannot be accorded all the rights of a vested beneficiary before the death of the trustor.[4] ***91**

Disposition

The judgment is affirmed.

Zebrowski, J., and Mallano, J.,* concurred.

A petition for a rehearing was denied December 6, 1999, and appellant's petition for review by the Supreme Court was denied February 23, 2000. ***92**

Footnotes

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

1 All future undesignated statutory references are to the Probate Code.

2 The conservator may also ask the probate court to authorize the *creation* of a revocable trust "for the benefit of the conservatee or others" which "may extend beyond the conservatee's disability or life." (§ 2580, subd. (b)(5).)

3 Sections 2580 and 15800 both became operative on the same day, July 1, 1991, and are both part of the same enactment. (Stats. 1990, ch. 79, § 14, p. 463.) This only underscores the need to read the two sections harmoniously.

4 Respondent attempts to argue the issue of undue influence, an issue which the trial court never reached. The argument exceeds the limited scope of the appeal.

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

NO. 69608-4-I (Consolidated with No. 69702-1-I)

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In re Estate of

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Decedent.

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