Case No. S251574

IN THE SUPREME COURT OF CALIFORNIA

JOAN MAURI BAREFOOT,

Petitioner,

v.

JANA SUSAN JENNINGS, et al.,

Respondents.

On Grant of Petition For Review of a Decision by the
Court of Appeal, Fifth Appellate District
Case No. F076395

Affirming Judgment of Dismissal Following an Order Dismissing Petition
Tuolumne County Superior Court, Case No. PR11414
Honorable Kate Powell Segerstrom, Judge Presiding

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE EXECUTIVE COMMITTEE OF THE TRUSTS AND ESTATES SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, the Executive Committee of the Trusts and Estates Section of the California Lawyers Association ("TEXCOM") respectfully requests that it be permitted to file the accompanying amicus curiae brief on the issue before the Court of whether a former beneficiary of a trust has standing under section 17200 of the Probate Code to challenge the validity of amendments to the trust that resulted in her disinheritance. While TEXCOM advocates for a result that favors Petitioner Joan Mauri Barefoot in this matter and disagrees with the main arguments raised by the Respondents, TEXCOM also has concerns regarding many of the arguments advanced by the Petitioner. TEXCOM's goal is to assist the Court in understanding the nature of trust contests, the applicable law, and the practical effects of conferring or denying standing to contestants such as Petitioner who wish to challenge modifications to a trust that had the effect of disinheriting them.

A. Statement of Interest of Amicus Curiae

The Board of Governors of the State Bar of California established the Estate Planning, Trust & Probate Section in 1976. In 2002, the Section changed its name to the Trusts and Estates Section. As of January 1, 2018, the California Lawyers Association ("CLA") is the new home of all of the Sections formerly governed by the State Bar, along with the California Young Lawyers Association. The Trusts and Estates Section has approximately 6,500 members throughout the State of California and includes attorneys who specialize in drafting testamentary instruments and administering trusts and estates, trusts and estates litigators, superior court staff attorneys, and law professors.

TEXCOM's mission is to further the knowledge and enhance the competence of practitioners in the areas of trusts and estates laws through educational programs and opportunities; to monitor and actively participate in the development of laws and regulations that impact the field of trusts and estates; and to provide educational programs to advance the knowledge and enhance the general welfare of seniors in the state.

In furtherance of its educational mission, TEXCOM publishes the *Trusts and Estates Quarterly*, a respected peer-reviewed scholarly publication on topics of interest to trusts and estates practitioners. It also publishes the *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel*, which is currently in its third edition. Additionally, TEXCOM analyzes every published decision of the state's appellate courts and the federal tax courts that relates to any substantive or procedural matter or issue relevant to Section members, and disseminates to the membership "new case alerts" summarizing these opinions. TEXCOM also organizes, sponsors, and presents regular in-person educational seminars throughout the state related to trusts and estates law and practice, as well as live webinars, all of which qualify for Mandatory Continuing Legal Education credits. TEXCOM also maintains a website and presents an annual educational symposium designed to educate seniors on elder law.

TEXCOM initiates its own proposals for legislative changes, many of which have been enacted into law, provides technical input on proposed and pending legislation and rules of court that relate to trusts and estates law, and works with the California Law Revision Commission, the California Commission on Uniform State Laws, and other interested stakeholders on the development of trusts and estates law in California.

Members of TEXCOM are appointed on the basis of their professional reputation, the quality of their work, their commitment to the Section's mission, and their ability to reflect the diversity of the profession.

Shortly after the Court of Appeal decided the matter now before the Court, TEXCOM received a considerable number of comments from Section members regarding the Court of Appeal decision. The overwhelming majority of the comments expressed significant concerns and urged TEXCOM to take action. After carefully reviewing and analyzing the complete record of the proceedings below, the briefs submitted by the parties, and all the issues raised, TEXCOM voted to submit this proposed amicus curiae brief to assist the Court in deciding the matter.

B. Statement of How the Proposed Amicus Curiae Brief Will Assist the Court in Deciding the Matter

The proposed amicus curiae brief will assist the Court in its deliberations by addressing three main issues at the center of this controversy that TEXCOM believes are not fully developed by the briefs before the Court. First, this brief discusses the scope and application of Probate Code sections 17200 and 17202 and the standard that should apply to a lower court's ruling on motions to dismiss brought thereunder for lack of standing at the pleading stage.

Second, the brief will review the plain language and legislative history of Probate Code section 850 *et seq*. and demonstrate that there is no basis for Respondents' argument that the Legislature intended this statutory scheme to be the primary means by which a petitioner may challenge the validity of a trust instrument. TEXCOM's view is that section 850 is not available to contestants such as Petitioner who seek to challenge the validity of modifications to a trust but not the validity of the trust itself.

Finally, the brief will demonstrate that the superior court's statutory and inherent authority to supervise the administration of trusts in proceedings

before it, including powers to regulate the order of adjudication of all incidental issues necessary to carry out this function, protects against the sort of "chaos" that Respondents argue will inevitably result if a would-be beneficiary is allowed to challenge a trust instrument under Probate Code section 17200. This brief will show that Respondents' dire prediction that "strangers will be allowed to meddle in a trust's internal affairs" has no foundation in fact or law. TEXCOM respectfully believes that its insight and analysis of these issues will aid the Court in its deliberations.

C. Statement Regarding Preparation of the Brief

No party or counsel for any party in the pending appeal authored the proposed amicus curiae brief in whole or in part. Neither counsel for a party, nor a party, made any monetary contribution directly or indirectly to fund the preparation or submission of this brief. No monetary contributions were made to TEXCOM, any member of TEXCOM, or the authors of this brief.

D. Conclusion

Because TEXCOM and the members of the Trusts and Estates Section have an important interest in the outcome of this case, and because TEXCOM's proposed brief will assist the Court in its deliberations, TEXCOM respectfully asks that the Court consider the attached brief.

DATED: June 3, 2019

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BRIEF OF AMICUS CURIAE EXECUTIVE COMMITTEE OF THE TRUSTS AND ESTATES SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

INTRODUCTION

The issue before this Court is whether a former beneficiary of a trust has standing under section 17200 of the Probate Code[1] to bring a petition challenging the validity of amendments to the trust that resulted in her disinheritance. (Petitioner's Opening Brief on the Merits ("OB") p. 10; Respondents' Answer Brief on the Merits ("AB") p. 8.) The plain language of section 17200 states that only "a trustee or beneficiary of a trust may petition the court . . . concerning the internal affairs of the trust or to determine the existence of the trust." Further, under section 24(c), a "beneficiary" is "a person who has any present or future interest, vested or contingent" in a trust. The Court of Appeal read this statutory language to preclude a petition under section 17200 by a person who was formerly named as a trust beneficiary but whose interests in the trust were eliminated by subsequent amendments executed by the settlor before her death. (*Barefoot v. Jennings* (2018) 27 Cal.App.5th 1, 6 (*Barefoot*).)

However, where a petition filed under section 17200 sets forth a prima facie basis on which a would-be beneficiary has a "present or future interest" in the trust, due to the invalidity of trust amendments or any other grounds, the trial court should not dismiss the petition for lack of standing without according the petitioner an evidentiary hearing on the issue.

Long-established procedures for will contests, and for civil proceedings more generally, can guide the probate court[2] in resolving

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[1] All subsequent statutory references are to the Probate Code, unless otherwise noted.

[2] For ease of reference, TEXCOM refers to the superior court having jurisdiction to hear proceedings under the Probate Code as the "probate court."

standing issues raised in trust contests at the pleading stage. These procedures require the court to accept as true all factual allegations contained in the petition. If the allegations cannot support the would-be beneficiary's standing claim, the court may dismiss the petition under section 17202. If the allegations make a prima facie showing of standing, the court must hold an evidentiary hearing on the issue.

Contrary to the Respondents' assertion, a petition under section 850(a)(3) is not a vehicle for would-be beneficiaries to challenge a trust amendment that disinherited them. Both the statutory language and the legislative history of section 850(a)(3) reveal that it concerns property conveyances or transfers and was intended as a vehicle for quieting title to property held or claimed by a trust. While it confers standing on all classes of interested parties, which could include would-be beneficiaries, the express language of section 850(a)(3) limits its reach to property disputes and cannot be read to encompass a challenge to a trust amendment that disinherits a beneficiary.

Without the ability to establish standing under section 17200, a would-be beneficiary's sole recourse is to bring a separate civil action. Yet it is unclear what relief the trial court could provide in a civil action, given that the probate court has "exclusive jurisdiction" over "the internal affairs of the trust[]." (Prob. Code, § 17000(a).)

Respondents voice a misplaced concern that chaos will result if disinherited beneficiaries are allowed to plead and prove their standing to contest trust instruments in section 17200 proceedings. Not so. The probate court can exercise its inherent power and statutory power under section 17206 (authority to make necessary orders) and Code of Civil Procedure section 597 (trial of special defenses) to fashion any order that is necessary to protect the interests of beneficiaries, trustees, and those claiming to be beneficiaries during the pendency of the proceedings. This

authority fully endows the probate courts with the power to prevent any feared meddling in the internal affairs of trusts by persons whose standing to pursue remedies under section 17200 has been challenged but has not yet been established.

CONTEXT ON INTER VIVOS TRUSTS

This case arises from a dispute regarding the validity of amendments to a revocable inter vivos trust. (*Barefoot*, 27 Cal.App.5th at p. 5.) In general, "[a] trust is a fiduciary relationship with respect to property in which the person holding legal title to the property—the trustee—has an equitable obligation to manage the property *for the benefit of another*—the beneficiary." (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1133–1134, italics in original.) The hallmark characteristic of a common law trust is the division of legal and equitable title to trust assets: "the trustee holds legal title to the property, but the beneficiaries have equitable or beneficial ownership." (Sitkoff & Dukeminier, Wills, Trusts and Estates (10th ed. 2017) Ch. 7, p. 466.) As the Court of Appeal recognized, a revocable inter vivos trust can be amended at any time during the settlor's lifetime. (*Barefoot*, 27 Cal.App.5th at p. 5.)

The revocable inter vivos trust has been described by commentators as the will substitute that "most resembles a will in nature and function." (Feder & Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute* (2016) 24 The Elder Law Journal 1, 15.) Notwithstanding its similarities to a will, however, the revocable trust has advantages over a will, such as avoiding mandatory court supervision over the administration of the assets (known as "probate avoidance"), privacy, continuity in asset management, and flexibility. (*Id*. at pp. 15–17.) These advantages may "explain the revocable trust's displacement of the will as the centerpiece instrument in contemporary estate planning." (*Id*. at p. 16.) As discussed in greater detail below, the manner in which standing challenges are resolved in

will contest cases can provide guidance as to how standing challenges are to be resolved in trust contests.

ARGUMENT

A. Under Sections 17200 and 17202, the Court Should Assess the Would-Be Beneficiary's Claim Through Demurrer-Type Review, Similar to the Procedures for Will Contests and for Civil Suits Generally

Based on the Court of Appeal's decision, a would-be beneficiary lacks standing to bring a petition under section 17200 even if she could prove that she is, in fact, a beneficiary. However, TEXCOM holds the view that a would-be beneficiary, who has made a prima facie case of standing in her petition, should be afforded an evidentiary hearing if another party moves to dismiss the petition for lack of standing under section 17202. This demurrer-type procedure already exists for will contests, and civil cases more generally, and could easily be applied to standing disputes in trust proceedings.

As an initial matter, TEXCOM disagrees with Petitioner's argument that there is "no rule in the Probate Code regarding standing," thus requiring the probate court to apply "the ordinary rules of civil procedure to test for standing" in accordance with section 1000.[3] (OB, p. 31.) Similarly, TEXCOM does not share Petitioner's views that the "Probate Code is very flexible with regards to standing" (OB, p. 32), or that "standing is a federal concept and there is no correlating state standing requirement." (OB, p. 33.)

To the contrary, in the context of probate proceedings, the Probate Code is studded with specific standing requirements and limitations

[3] Probate Code section 1000(a) provides: "Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code."

depending on the type of relief being sought.[4] For example, focusing solely on will contests brought under the Probate Code, "[a]ny interested person" has the right to contest a will, either before or after it is admitted to probate. (Prob. Code, §§ 1043, 8004, 8250, 8270.) Further, as discussed in greater detail in Sections B(1)-B(3), *infra*), "[t]he trustee or any interested persons" can petition under section 850(a)(3) seeking the transfer or conveyance of trust property.

Finally, TEXCOM also disagrees with Petitioner's argument that would-be beneficiaries have standing to pursue a petition under section 17200 as an "interested person" within the meaning of section 48. (OB, p. 45.) Section 48 provides, in relevant part, that an "interested person" includes an "heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding" and "may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding." (Prob. Code, § 48.)

While there are respected commentators who may agree with this expansive view that any interested person should be able to bring a petition under section 17200,[5] TEXCOM agrees with the Court of Appeal that under

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[4] Some examples of the many standing provisions set forth in the Probate Code are found in Section 1510(a) [petitions for establishment of guardianships]; Section 1820(a) [petitions for establishment of conservatorships]; Section 3203 [petitions to determine capacity/lack of capacity to make health care decisions]; Section 4540 [petitions re financial powers of attorney]; Section 4765 [petitions re health care powers of attorney]; Section 8000 [petitions for probate]; and Section 11700 [petitions to determine persons entitled to distribution from a decedent's estate].

[5] For example, the practice guide published by the Continuing Education of the Bar states, "Those who would gain a pecuniary benefit from invalidating the trust should have standing to bring a trust contest." (California Trust and Estate Probate Litigation (Cont.Ed.Bar 2018) § 20.6.)

the plain language of section 17200, only "a trustee or beneficiary of a trust" is entitled to proceed under section 17200. Nevertheless, this does not end the inquiry regarding a would-be trust beneficiary's standing under section 17200. Rather, as a threshold matter, a court cannot and should not dismiss a 17200 petition without a determination as to whether the petitioner is able to establish that she is in fact a trust beneficiary or trustee with standing to bring the petition.

1. In Analogous Contexts, the Trial Court Must Take the Allegations as True and, If They Establish a Prima Facie Basis for Relief, Allow the Petitioner an Evidentiary Hearing

In the analogous situation of will contests, there is a "long-established procedure" that courts apply to resolve standing challenges. (*Estate of Lind* (1989) 209 Cal.App.3d 1424, 1434.) If the contestant's standing is challenged, the court must "hold an evidentiary hearing upon the standing question before proceeding with the trial of the contest." (*Ibid.*) At the hearing, "[t]he contestant bears the burden of proof on the issue." (*Ibid.*) "If the contestant fails to establish standing, the contest should be dismissed." (*Ibid.*; see also *Estate of Plaut* (1945) 27 Cal.2d 424, 426 ["[T]he court may require proof of the contestant's interest before proceeding with the trial of the contest."].) The court is also empowered to dismiss for want of standing, as a matter of law, if the contestant's petition fails to state a prima facie case. In other words, the court may dismiss if, taking the facts pled in the petition as true, the contestant cannot establish standing to contest a will by showing a direct pecuniary interest in the devolution of the estate that would be impaired or defeated by enforcement of the challenged estate plan. (See, e.g., *Estate of Molera* (1972) 23 Cal.App.3d 993, 1002.)

This procedure is consistent with a long line of United States Supreme Court cases regarding the due process rights of litigants whose standing to

pursue various federal remedies is challenged. For example, in *Warth v. Seldin* (1975) 422 U.S. 490, 501–502, the Court stated:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. . . . At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

California Courts of Appeal have applied the same procedure with regard to demurrers. (See, e.g., *Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 955, 957 [reversing dismissal because plaintiff's allegation that she was a third-party beneficiary of a sales contract was sufficient to overcome demurrer based on lack of standing]; *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427–430 [affirming demurrer to beneficiaries' action because beneficiaries were not real parties in interest with standing to sue agents hired by trustee].)

Section 17202 allows for the same procedure. It provides, "[t]he court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the trustee or beneficiary." (Prob. Code, § 17202.) "[A] dismissal under section 17202 invokes the discretion of the trial court," but must be within the legal principles governing the subject of the court's action. (*Gregge v. Hugill* (2016) 1 Cal.App.5th 561, 567–568.) As described above, the trial court in this case was bound to assume the truth of all properly pleaded allegations in the petition to determine the issue of standing.

Respondents concede that their section 17202 motion to dismiss related *solely* to the Petitioner's lack of standing under section 17200. (See Respondents' Answer, Clerk's Transcript ("CT") 65-67, 115-116.) Based only on the pleadings and oral argument, and without resort to extrinsic evidence, the trial court determined that Petitioner lacked standing to pursue her petition and dismissed the petition under section 17202. (CT 60:4-7.) The Court of Appeal affirmed based solely upon the fact that Petitioner was not a named beneficiary in the challenged trust amendments. (*Barefoot*, 27 Cal.App.5th at p. 6.) The court did so without having considered whether Petitioner could prove that the challenged amendments were invalid and, thus, that she is, in fact, a trust "beneficiary" within the meaning of section 17200. Yet, if Petitioner were able to establish the allegations that she is a beneficiary of the trust, she would have standing to pursue any relief available under section 17200. The trial court erred by denying her the opportunity to prove her standing. [6]

2. The Case Cited by the Court of Appeal, *Drake v. Pinkham*, Supports the View That a Would-Be Beneficiary Can Establish Standing Under Section 17200

The Court of Appeal concluded that its rejection of Petitioner's standing was consistent with the decision in *Drake v. Pinkham* (2013) 217 Cal.App.4th 400 (*Drake*). (*Barefoot*, 27 Cal.App.5th at p. 7.) Like Petitioner here, in *Drake* one of the surviving trustor's two daughters, Gina, petitioned under section 17200 to invalidate trust amendments that completely disinherited her and deleted her nomination as a successor co-trustee in favor of her sister. (*Drake*, 217 Cal.App.4th at pp. 402–403.)

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[6] Application of the demurrer standard to the issue of standing eliminates any need to address the parties' disagreement as to whether the Court of Appeal applied too narrow a construction of the term "beneficiary" as used in section 17200.

Under the original trust instrument and the first three amendments, all executed by Gina's parents Theodore and Josephine, Gina and her sister Janice were co-equal remainder beneficiaries and successor co-trustees. (*Id.* at p. 403.) However, after Theodore's death, Josephine amended her survivor's trust twice, with a fourth amendment that completely eliminated Gina as a beneficiary and revoked her nomination as successor co-trustee, and a fifth amendment that designated Janice as acting co-trustee and sole successor trustee. (*Id.* at pp. 403–404.)

During Josephine's lifetime, Gina petitioned the court to confirm her appointment as an acting co-trustee under the two subtrusts as amended by the first three amendments, alleging Josephine's incapacity and the invalidity of the fourth and fifth amendments. (*Drake*, 217 Cal.App.4th at p. 404.) But Josephine disputed Gina's allegations that she lacked capacity, as well as Gina's claim that the fourth and fifth amendments were invalid. (*Ibid.*) Gina eventually entered into a settlement agreement with Josephine agreeing to withdraw her claims. (*Ibid*.)

After Josephine's death, Gina again petitioned under section 17200 to invalidate the fourth and fifth amendments. (*Drake*, 217 Cal.App.4th at p. 404.) The trial court granted summary judgment dismissing Gina's claims on grounds they were barred either by the applicable statutes of limitations or by principles of collateral estoppel. (*Id*. at p. 403.) The Court of Appeal affirmed on the alternative ground of laches. (*Ibid*.)

Gina argued on appeal that she did not delay in asserting her rights because she had lacked standing during Josephine's lifetime to challenge the validity of the fourth and fifth amendments. (*Drake,* 217 Cal.App.4th at p. 403.) Gina asserted her standing under section 17200 was subject to the restrictions in section 15800, which prevent beneficiaries from asserting any rights under a trust while the holder of a power to revoke is alive and competent. Gina argued that because Josephine was living and competent

when Gina's earlier proceeding was settled, she had lacked standing at that time to assert the invalidity of the fourth and fifth amendments, so her claims following Josephine's death should not be barred. (*Id.* at pp. 407–408.)

The Court of Appeal rejected Gina's argument, concluding that "nothing in sections 17200 or 15800 precluded [Gina] from bringing the underlying action prior to Josephine's death." (*Drake,* 217 Cal.App.4th at pp. 408–409.) The *Drake* court observed Gina "*would have had the burden of proving Josephine's incompetence to establish her standing* to pursue [her] claims" that the fourth and fifth amendments were invalid, but the Court stated that this burden did not excuse her delay in asserting those claims. (*Ibid.*, italics added.)

Here, the Court of Appeal concluded that *Drake* "stands for the unremarkable position that an allegation of incompetence provides sufficient grounds for a beneficiary of a trust to proceed with a petition under section 17200, while noting that the beneficiary will ultimately have to demonstrate incompetence to maintain their standing." (*Barefoot*, 27 Cal.App.5th at p. 7.) "What *Drake* does not do," the Court of Appeal continued, "is suggest a former beneficiary can proceed under section 17200." (*Ibid.*)

However, the opinion in *Drake* certainly does *suggest* that a former trust beneficiary has standing to petition under section 17200 to invalidate a trust amendment that eliminates her as a beneficiary—as long as she meets her burden of proof. The *Barefoot* court attempted to distinguish *Drake,* stating that while a trustor is alive, section 15800 confers standing on a former beneficiary who alleges the trustor lacked capacity, but after the trustor's death, the former beneficiary lacks standing under section 17200.

TEXCOM respectfully disagrees with this reasoning. Section 15800 is not a statute that *confers* standing; rather, it is a statute that *limits* the standing of a beneficiary that may be *conferred elsewhere* to assert the rights of beneficiaries, including rights conferred under section 17200. (See

Selected 1990 Trust and Probate Legislation, 20 Cal. L. Comm'n Reports 1001 (1990) ["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."].)

In TEXCOM's view, it is significant that the *Drake* court did *not* hold that Gina, a disinherited trust beneficiary, lacked standing under section 17200 to invalidate the amendments that disinherited her after Josephine's death. The Court held *only* that she was precluded from doing so by the doctrine of laches because she could have asserted those very claims in the earlier proceeding under section 17200—based on her *allegation* that the trustor lacked capacity—because under those circumstances section 15800 was not a bar to her rights under section 17200.

Applying this reasoning to the case at bar, Petitioner should have been allowed to assert the invalidity of the 17th through 24th trust amendments under section 17200, subject to an evidentiary hearing to determine whether she could substantiate these allegations and proceed to a trial on her claims. Again, it was error to dismiss Petitioner's claims without an evidentiary hearing.

3. Application of the Demurrer Standard Promotes Judicial Economy and Avoids the Risk of Conflicting Rulings

Affirming the ruling of the Court of Appeal could have drastic, unforeseen consequences. Under the court's reasoning, a party receiving any bequest (however insignificant) in the final version of a trust would have standing to pursue a section 17200 contest seeking to invalidate amendments that resulted in a diminished trust share, whereas a contestant such as Petitioner who was completely disinherited by the same amendments may not do so, but instead must pursue their contest in a separate civil proceeding. In other words, parties who share the same litigation objective

of invalidating a suspect trust instrument would be prevented from pursuing their claims in the same proceeding, with the avenues available to them wholly dependent on whether they are completely disinherited or are left some nominal bequest.

With the inevitable increase in the filing of multiple proceedings with different procedural requirements to accomplish the same litigation objective comes a corresponding increase in judicial inefficiency as well as increased risk of inconsistent rulings. Demurrer-style review of standing issues under section 17200 will help mitigate these risks by ensuring that would-be beneficiaries with valid claims can proceed in probate court. (See *Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th 1490, 1498–1499 [affirming denial of motion to compel arbitration of claims of some but not all plaintiffs to avoid risk of conflicting rulings on common issues of law or fact].)

B. Section 850 Was Intended to Address Title and Transfer Issues, Not Create a General Procedure for Trust Contests

Respondents contend that the Legislature created section 850 to serve as a vehicle for trust contests. (AB, p. 17.) However, the plain language of the statute and its legislative history belie this assertion.

1. The Plain Language of Section 850 Demonstrates It Was Intended to Address Title and Transfer Issues, Not Create a General Procedure for Trust Contests

The language concerning litigating trust matters under section 850 is set forth in subparagraphs (a)(3)(A), (B), and (C). These subparagraphs provide that a trustee or an interested person may bring a petition requesting an order from the court:

> (A) Where the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another.
> (B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another.

(C) Where the property of the trust is claimed to be subject to a creditor of the settlor of the trust.

(Prob. Code, §§ 850(a)(3)(A)–(C).)

By its text, subparagraph (B) is applicable to an action in which the trustee of a trust seeks an order establishing title to real or personal property that is not in the trust. This subparagraph is used when filing what is commonly referred to as a "Heggstad Petition." (See *Estate of Heggstad* (1993)16 Cal.App.4th 943.) Subparagraph (C) is applicable to an action by a creditor asserting a claim against the settlor's property which is in a trust, and does not apply to a beneficiary challenging a trust instrument. Thus, the only subparagraph left that could address a trust contest is subparagraph (A).

However, an action to set aside an allegedly invalid trust amendment does not fit within the language of subparagraph (A) either. A beneficiary removed by an invalid trust amendment is not challenging title to trust assets. Nor is the litigant seeking an order to remove certain assets from the trust, establish the beneficiary's interest in specific assets, or compel conveyance of real or personal property. Instead the action is brought challenging the validity of the instrument under which the trust is being distributed, essentially asking the court to determine the settlor's true testamentary intent. By contrast, section 850 is the probate court's version of a quiet title action.

2. The Legislative History of Section 850 Demonstrates the Same

As background, the Legislature revised the Probate Code in 1990, in accordance with recommendations from the California Law Revision Commission. The changes gave the superior court sitting in probate new authority to adjudicate quiet title actions involving estates of decedents, wards, or conservatees. (Sen. Com. on Judiciary, com. on Sen. Bill No. 669 (2001–2002 Reg. Sess.) March 20, 2001.) Previously, property claims

involving the different estates had been governed by various statutes, causing confusion and inefficiency. To remedy this problem, TEXCOM (which was then under the umbrella of the State Bar of California) sponsored Senate Bill 669 to create Section 850 in 2001. The bill was intended to "consolidate the provisions regarding determination of property claims against different estates, now scattered in various parts of the Probate Code, into one chapter applicable to all probate matters." (Sen. Com. on Judiciary, com. on Sen. Bill No. 669 (2001–2002 Reg. Sess.) March 20, 2001, p. 3.)

While Respondents rely on the fact that the legislative history to section 17200 has "no mention of trust contests" (AB, pp. 14–15), the same is true for section 850. As described above, the statute was aimed at bringing conformity to procedures for adjudicating claims to real and personal property between third parties and the estates of decedents, conservatorships, guardianship estates, and trusts. The standing provision created by the defined term "interested person" in section 850—which is broader than the standing provision in section 17200—makes sense in this context, as it allows anyone with an interest in the property in question to seek relief or participate in the action. There is nothing in the legislative history which suggests the broader standing provision in section 850 was meant to encompass claims of beneficiaries disenfranchised by modifications to a trust.

Respondents also mistakenly rely on the language of section 17200.1 to argue that section 850 encompasses trust contests. (AB, p. 17.) Section 17200.1 specifies that "all proceedings concerning the transfer of property of the trust shall be conducted" under section 850, *et.seq*. The legislative history indicates that section 17200.1 was inserted so that "a person who wished to file a property claim petition concerning a trust would know where

to find the new procedure."[7] There is no indication of an intent to drive all trust contests to section 850 proceedings.

3. *Estate of Young* Does Not Support Using Section 850 for Trust Contests

Respondents also cite *Estate of Young* (2008) 160 Cal.App.4th 62, in support of their assertion that section 850 allows for trust contests generally (AB 17 & fn. 4), but that is not at all what the case stands for. In *Estate of Young*, a proceeding under section 850 was brought by a decedent estate to reclaim property held in a trust alleged to be invalid. On the basis of undue influence and fraud, the trial court found no valid trust was created and issued an order nullifying the trust and directing that the property be re-conveyed to the estate. (*Estate of Young,* 160 Cal.App.4th at p. 80.) The appellate court affirmed. (*Ibid*.)

While the basis for invalidating the trust was fraud and undue influence (as Petitioner has alleged here), the gravamen of *Estate of Young* was the wrongful conveyance of property (not disinheritance, as here). The *Estate of Young* action sought an order to restore property to a decedent estate, and thus fit within the plain language and legislative intent of section 850. Here, by comparison, if Petitioner's trust contest were successful, it would not result in a transfer or reconveyance of any property from the trust. Thus, *Estate of Young* and section 850 are inapplicable.

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[7] "Because this bill would repeal Sections 17200.1 and 17200.2 of the Probate Code but preserve the other provisions under Chapter 3 of Part 5 (Judicial Proceedings Concerning Trusts) there should be a reference left in the chapter so that a person who wished to file a property claim petition concerning a trust would know where to find the new procedure." (Sen. Com. on Judiciary, com. on Sen. Bill No. 669 (2001–2002 Reg. Sess.) March 20, 2001, p. 7.)

4. The Notice Provision Does Not Support Using Section 850 for Trust Contests

Respondents additionally rely on the notice provisions in section 851 to assert that section 850 is the proper vehicle for a trust contest. (AB, p. 19.) But the notice provision gives no indication of the Legislature's intent in this regard.

Section 851(c) was enacted in 2017 under Assembly Bill 308, which was sponsored by TEXCOM, again while it was part of the State Bar. Section 851(c) was meant to address the fact that a Notice of Hearing for a section 850 action might fail to convey the seriousness of the proceeding and the possible loss of property rights to the recipient. (Sen. Com. on Judiciary, com. on Assem. Bill No. 308 (2017-2018 Reg. Sess.) March 9, 2017.) For example, the Judicial Counsel form DE-120 entitled "Notice of Hearing—Decedent's Estates or Trust" states: "This notice does not require you to appear in court, but you may attend the hearing if you wish." TEXCOM was concerned that recipients may not understand that the failure to appear could result in a default and loss of rights to the property in question.

Section 851 now requires that notice of an action under section 850 include a description of the subject property for which an order is sought, a description of the relief requested if property was taken wrongfully, and a statement that the recipient may file a response. (Prob. Code, § 851(c).) Contrary to Respondents' contention, there is no requirement or authority for issuance of a summons in a section 850 proceeding. (AB, p. 18–19.)[8]

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[8] Nowhere in section 850 or 851 is reference made to issuance of a summons or the need to establish personal jurisdiction over any persons. In fact, section 851(a) states that a "notice of the hearing" and copy of the petition should be served, and provides different service methods depending upon the nature of the recipient's interest in the property. Section 853 provides that a respondent may object "at or prior to the hearing" if the petition is not filed in the proper court. This is inconsistent with the language on the face of a summons, which requires a response

Neither the language of section 851, nor its legislative history, supports the notion that it is meant to address all trust contests, and certainly not those that don't involve property.

Quite the opposite, the notice provisions contained in section 851 would make no sense for a trust contest that did not involve a property dispute. As mentioned, the notice of hearing must include specific identifying information of the property in dispute "sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice shall state the street address or, if none, a description of the property's location and assessor's parcel number." (Prob. Code, § 851(c)(1).) But a beneficiary removed by an allegedly invalid trust amendment has no means to obtain the necessary information to identify the property in the trust estate. It is inconceivable that the Legislature would have enacted these enhanced notice provisions if the intent was that all trust contests, regardless of whether they involve a property dispute, are to be litigated under Section 850.

C. Section 17206 Gives the Court Wide Discretion to Control the Proceedings and Prevent the Meddling that Respondents Fear

Respondents warn of the "chaos" that would ensue if would-be beneficiaries have standing under section 17200 to petition the court concerning the internal affairs of a trust. (AB, p. 9.) These fears do not withstand scrutiny because section 17206 gives the court wide latitude to "make any orders and take any other action necessary or proper to dispose of the matters presented by the petition." (Prob. Code, § 17206.) By its plain terms, this statute means that in proceedings under section 17200 the trial

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within 30 calendar days, and that if a response is not filed "you may lose your right to participate in the proceeding or present your evidence." (Judicial Counsel form DE-125.)

court can fashion any order it deems necessary to dispose of the matters before it. (See, e.g., *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427 [when "[p]resented with a section 17200 petition," the "court has wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters presented' by the section 17200 petition" (quoting Prob. Code, § 17206)].)

Commentators agree that section 17206 is very broad and flexible. (See, e.g., California Trust and Probate Litigation (Cont.Ed.Bar 2019), § 13.24 [if a trustee fails to comply with a court order requiring an account, the remedies the court can fashion under section 17206 include contempt, removal and surcharge]; § 13.47 [remedies under section 17206 for breach of fiduciary duty include reduction of compensation, contempt, charging the trustee's beneficial interest]; § 20.23 [the court has very broad powers to adjudicate a petition brought under the Trust Law]; California Trust Administration (Cont.Ed.Bar 2018), § 15.40 [in court proceedings under the Trust Law, section 17206 gives the court "broad and flexible power to do what it considers appropriate"].)

In light of the broad and flexible powers that section 17206 grants the court, it is axiomatic that the section would allow for adjudication of standing first, and the substance of the petition later, if it were in the interests of the trust and the beneficiaries to do so. The decision in *Schwartz v. Labow*, *supra*, presents a good example of how courts can bifurcate proceedings, as needed.

In *Schwartz*, the trial court decided to suspend Schwartz as trustee and appoint Labow as successor trustee after various objections were made to Schwartz's accounting, and especially to his use of trust funds on enforcing a judgment with a questionable likelihood of recovery to the trust. (*Schwartz*, 164 Cal.App.4th at p. 422.) Schwartz nonetheless persuaded the court that collecting the judgment was still possible, and that he was uniquely situated

to pursue it. (*Id*. at p. 423.) The court and the parties agreed, and so while the court confirmed Labow's appointment, it nevertheless reappointed Schwartz for the limited purpose of pursuing the judgment. (*Ibid*.) Thus, the court continued administration of the trust on one track, under Labow's trusteeship, while it placed pursuing recovery in the lawsuit on another track, under Schwartz's limited trusteeship. The Court of Appeal approved of the trial court's actions as part of its wide discretion to control the proceedings. (*Id.* at pp. 427–428.)

In similar fashion, the trial court could, and indeed should, first require a petitioner to prove her standing *before* it allows her any rights to intrude further into the internal affairs of the trust. For example, it could bar her, until her standing is proven, from petitioning for removal of the trustee or seeking an accounting, as Respondents fear. The court can fashion any necessary and appropriate orders, to preserve trust assets and protect the rights of the beneficiaries (even if they are yet to be determined), while the standing issue is adjudicated.

Even if it could be argued that section 17206 does not specifically give trial courts the authority to adjudicate the petitioner's standing before allowing her to "meddle" in the trust's internal affairs, the rules of civil practice grant that authority, and thus may also be utilized by the court to prevent Respondents' hypothetical "chaos."

Section 1000(a) provides:

> Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions . . . apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

(See also, California Trusts and Probate Litigation (Cont.Ed.Bar 2019) § 10.1 ["With few exceptions, the fundamental rules of civil procedure and evidence apply in probate matters just as they do on general civil

litigation."].) In other words, when the Probate Code is silent with respect to a procedural rule or issue, the rules of civil procedure apply in proceedings brought under the Probate Code.

And there is no question that under the rules of civil practice, a trial court's ability to bifurcate is explicit, and is enshrined in various statutes. (See, e.g., Code Civ. Proc. § 1048(b) ["[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . separate issue . . ."]; *id*., § 128 [the court has the power "[t]o amend and control its process and orders so as to make them conform to law and justice"]; Evid. Code § 320 ["Except as otherwise provided by law, the court in its discretion shall regulate the order of proof"].) Even if the court did not order bifurcation on its own motion, a trustee or beneficiary in Respondents' position can request that the issue of standing be tried first, before having to litigate relief concerning the internal affairs of a trust. (See, e.g., Code Civ. Proc. § 597 [allowing the court to proceed to trial of special defenses before trial of other issues, "either upon its own motion or upon the motion of any party"].)

The foregoing sections applicable to civil procedure, as incorporated into the Probate Code by section 1000(a), give the trial court in probate proceedings the power to adjudicate standing challenges before the petitioner may pursue any relief available in section 17200(b). This would completely prevent any "chaos" or "meddling" that Respondents fear will occur if contestants such as Petitioner were allowed to pursue their claimed interests in a trust in section 17200 proceedings.

D. If the Court of Appeal's Opinion Were to Stand, an Entire Class of Trust Beneficiaries who are the Victims of Invalid Trust Instruments Would be Without a Remedy Under the Probate Code

The Court of Appeal decision has the practical effect of shutting the courtroom doors to a whole class of victims: those whose interests in a trust are eliminated—not just reduced—by an invalid amendment. By the court's reasoning, a would-be beneficiary cannot file a petition to invalidate the amendment in a probate proceeding under section 17200 because the contestant is no longer a beneficiary of the trust (by virtue of the amendment). Rather, the would-be beneficiary's only recourse is to bring a civil action to invalidate the amendment. (*Barefoot*, 27 Cal.App.5th at pp. 7–8 & fn. 2.) However, the court does not expressly address the sorts of claims Petitioner (or those similarly situated) can bring in a civil complaint seeking to invalidate a trust amendment in light of the "exclusive jurisdiction" over "the internal affairs" of the trust accorded to the probate court. (Prob. Code, § 17000(a).)

While "internal affairs of trusts" is not expressly defined in the Probate Code, a non-exclusive list of types of proceedings that are included is set forth in section 17200(b). For example, "the *validity of a trust provision*" is expressly listed as a proceeding concerning the internal affairs of a trust. (Prob. Code, § 17200(b)(3), italics added.) At the same time, section 17000 explains that a superior court has "concurrent jurisdiction of . . . [a]ctions and proceedings to determine the *existence of trusts*." (Prob. Code, § 17000(b), italics added.)

By structuring the jurisdictional provisions in this way, the Probate Code establishes a framework whereby challenges to the existence of the trust (i.e., the trust *as a whole*) may be commenced by a petition under the Probate Code or by filing a civil action. But a proceeding under the Probate Code is the exclusive forum for challenges to a trust provision, which would

necessarily include contests to the validity of amendments or restatements that modify its provisions but do not threaten its existence (e.g., whether a subsequent modification to the distribution provisions is valid).

This distinction was illustrated in *David v. Hermann* (2005) 129 Cal.App.4th 672 (*David*). Like the case at bar, *David* involved a trust contest petition brought under section 17200 by one of the daughters of the deceased trustor who was disinherited by an amendment to her mother's trust, which favored petitioner's sister. (*Id.* at p. 679.) Although the issue of petitioner's standing to contest the trust amendment that disinherited her was not specifically raised on appeal, the respondent did argue that the court lacked subject matter jurisdiction to preside over the proceeding. (*Id.* at p. 680.) The Court of Appeal, in affirming the decision of the probate court invalidating the challenged trust amendment, rejected the jurisdictional challenge. (*Id.* at p. 683.)

The *David* court expressly held that, because the proceeding involved a challenge to the validity of a trust amendment that altered the disposition of the trust, it was a proceeding "to determine the validity of a trust provision" within the meaning of section 17200(b)(3) and thus "concern[ed] the internal affairs of the trust." (*David*, 129 Cal.App.4th at p. 683.) This being so, the probate court had "exclusive jurisdiction" over the trust contest proceeding under section 17000(a). (*Ibid.*)

Thus, under the reasoning in *David*, contests brought by a former beneficiary to invalidate the trust amendments that caused the disinheritance indisputably "concern" the trust's "internal affairs" and thus, fall within the "exclusive jurisdiction" of the court having jurisdiction over the trust. It would absolutely defy all logic and reason for contestants under these circumstances to be denied access to the very court having exclusive jurisdiction to adjudicate their contests by determining that those contestants lack standing to do so.

The practical effect of the Court of Appeal's decision is that would-be beneficiaries who are disinherited by an amendment may very well have to proceed in two different forums, civil court and then probate court, sequentially, to get full relief. And the trust may be fully administered or terminated while the civil action is pending, complicating or even precluding ultimate relief. To wit, if the would-be beneficiary is required to file a civil action seeking to invalidate the disputed trust amendment (based on an undue influence theory, for example), the civil court could not grant the type of relief that is within the exclusive jurisdiction of a court acting under the provisions of the Probate Code. For example, the court in the civil proceeding could not restrain the trustee from terminating and distributing the trust while the would-be beneficiary's civil action is pending. In such a situation, even if the would-be beneficiary succeeds in the civil action in invalidating the challenged trust amendment and thus obtains standing to petition as a beneficiary with respect to the internal affairs of the trust in a subsequent probate proceeding, it may very well be too late to obtain the further relief she seeks under section 17200, such as an accounting of the trust, removal of the trustee, and enforcement of her rights as a beneficiary, etc.

The contestant's predicament is further complicated by section 16061.8. Under this provision, a party who has been served with a notification of a change in the trust pursuant to section 16061.7 must bring an action to contest the terms of the trust within 120 days from the date the notification is served. (Prob. Code, § 16061.8.) The practical effect of this strict filing deadline is that a disinherited contestant may be required to file protective proceedings in both the probate and civil courts just to be safe. It is inconceivable that the Legislature intended to force litigants to simultaneously pursue a two-track system as a means to ensure their trust contests are heard in the proper forum.

CONCLUSION

Based upon the forgoing, TEXCOM respectfully requests that this Court reverse the decision of the Court of Appeal, with directions to the probate court to set an evidentiary hearing on whether Petitioner has standing as a beneficiary of the trust under Probate Code section 17200.

DATED: June 3, 2019

ARTIANO SHINOFF

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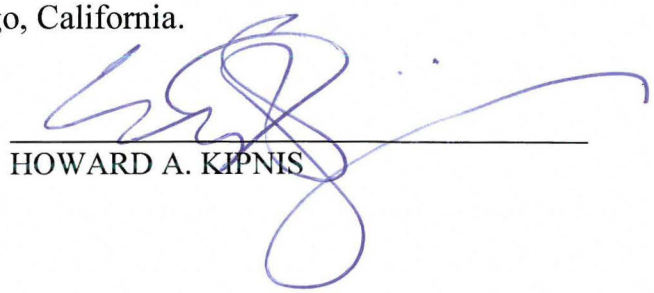
CERTIFICATE OF WORD COUNT

I, Howard A. Kipnis, hereby certify that word count as indicated in my computer is 8,447 words.

Signed under the penalties of perjury of the State of California this 3rd day of June 2019, at San Diego, California.



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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I electronically filed the foregoing APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE EXECUTIVE COMMITTEE OF THE TRUSTS AND ESTATES SECTION OF THE CALIFORNIA LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER with the Clerk of the Court for the Supreme Court of California, by using the Court's TrueFiling system.

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