

**LITIGATION ISSUES WITH TRUST AMENDMENTS AND
POWERS OF APPOINTMENT**

Southern Arizona Estate Planning Council

Tucson

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A. AMENDING TRUSTS

Trusts may be amended in accordance with the particular language in the Trust. Trusts may also be amended using certain statutory methods that generally require Court approval (See A.R.S. §14-10105(A)(4) and §14-10410 – 14-10416). Trusts may not be otherwise be amended.

The law is well settled that settlors may not amend or revoke a trust unless the right to amend or revoke has been reserved to them under the terms of the trust. “The ability to amend or revoke the trust is governed by its express terms.” *In the Matter of Herbst*, 76 P.3d 888, 206 Ariz. 214 (App. 2003), citing George G. Bogert & George T. Bogert, *The Law of Trusts* § 145 (5th ed.1973). When a trustor specifies a particular method of amending a trust, the trust can be amended only in accordance with that specified method. *In re Herbst*, 76 P.3d 888, 891, 206 Ariz. 214 (App. 2003).

When irrevocable trusts (or subtrusts) are amended or restated or modified, litigation may ensue. There may be litigation to simply confirm the operative terms of the trust. There may be litigation to confirm the operative terms of the trust, void amendments and obtain relief for improper actions taken pursuant to the improper amendment, but in violation of the irrevocable trust. There may also be litigation to confirm whether your client had capacity to sign the amendment and/or was unduly influenced.

- Before you amend a trust, make sure to properly review it and document all the relevant provisions and statutes that relate to the amendment that is sought.
- Cite the provision in the existing trust that allows amendment;

- Confirm the provision applies to the entire trust and/or the portion you are being asked to amend;
- Think about issues of the mental capacity of the trustor and whether the trust is irrevocable;
- If you're concerned, get a note from the doctor!
- Does the client have capacity? Is there a question?
- How well do you know the client and how much time are you spending with them?
- Any issues related to undue influence? Is the amendment consistent with their long standing plan?

DOCUMENT YOUR FILE

B. CAN A POWER OF APPOINTMENT CURE AN IMPROPER AMENDMENT?

You have a situation where a trust amendment is invalid because it violated the trust. Someone wants to effectuate the amended provisions by claiming that the amendment was actually the exercise of a power of appointment.

Powers of appointment must be exercised in accordance with the stated terms of their creation. In cases where someone attempted to exercise a power of appointment but made a mistake in so doing, the complainer would have to establish, among other things, substantial compliance with the method set out in the trust for exercising the power and an intention to exercise the power of appointment. In the absence of these elements, there can be no exercise of a power of appointment. See *In re Strobel* (1986)

717 P.2d 892, 149 Ariz. 213 (1986). See also *Estate and Trust of Pilafas*, 172 Ariz. 207, 211, 836 P.2d 420, 424 (1992).

EXAMPLE 1

In order to ensure their joint intent would be effectuated after the first Trustor died, Husband and Wife 1 unambiguously expressed their intent that, after the death of the first Trustor, **“this Trust Agreement shall be unamendable.” (Paragraph 7.2).**

Wife 1 died first. Pursuant to Paragraph xyz, upon Husband’s death, the Survivor’s Trust was to pour into the Bypass Trust or be distributed as Husband may have designated and appointed in his Will. **To effectively exercise this power as to the Survivor’s Trust, Husband would have to “make specific reference to the herein conferred general power of appointment in his Last Will and Testament.”** Husband signed his Last Will and Testament on the same day as the Trust. The Will provides in Paragraph Third – **“I refrain from exercising any power of appointment that I may have at the time of my death.”** Pursuant to Paragraph qrs, in the absence of the exercise of the power of appointment:

If the surviving Trustor should default in the exercise of the aforesaid power of appointment in his Last Will and Testament, or insofar as such appointment shall not extend or take effect, then the entire remaining principal and accrued and undistributed income of the Survivor’s Trust, or the part of such Trust not effectively appointed, shall, upon the death of the surviving Trustor, be held and administered as provided in Article ABC, below.

The Bypass Trust afforded Husband a more limited power of appointment pursuant to which he could have, under limited circumstances, appointed only his son or

son's spouse (if he had one) as beneficiary. Article qrs provides that the exercise of such a power of appointment be by Will. Specifically,

To effectively exercise this limited power of appointment by Will, the Surviving Trustor must make specific reference to the herein conferred limited power of appointment in his Last Will and Testament.

Husband hooked up with Girlfriend/Wife 2 and then proceeded to amend the Trust 5 times. Each time Girlfriend/Wife 2 got a little more. After Husband died and Wife 2 was administering the Trust, an issue arose and she went to a lawyer who realized the Amendments were invalid. They filed a Petition to Reform the Trust to comport with the Amendments claiming the amendments could have been done through the Husband's exercise of the power of appointment. The Court disagreed.

EXAMPLE 2

Mom and Dad created a Trust. Upon Dad's death, the Trust A remained amendable, but Trust B was irrevocable. Pursuant to the terms of the Trust, the only way for Mom, as survivor, to change the distribution scheme in Trust B was through the exercise of a power of appointment:

Upon the death of the first to die of the Trustors, he or she shall have the power by his or her Will, making specific reference to this power, to dispose of his or her interest held hereunder, and the provisions of this Agreement with respect to the disposition of that property after his or her death shall be applicable only to the extent that this power is not exercised. (Emphasis added)

After Dad died, Mom executed an Amendment to the Trust which purported to amend both Trusts A and B. Son 1 objected because there was only one type of document by which Mom could exercise her power of appointment over Trust B – her

will, with specific reference in the will to the power of appointment. Mom, on advice of counsel, intentionally chose not to exercise her power of appointment over Trust B. That is why there is no specific reference to the power of appointment in her will (or anywhere else).

Daughter wanted the Court to find that Mom effectively and constructively exercised the power of appointment in the Trust A amendments even though the Amendments do not refer to the power of appointment and even though Mom no right to exercise that power through a trust amendment.

The Court found no valid amendment or exercise of the power of appointment. The Trust here specified a particular method of exercising the power of appointment to alter irrevocable Trust B. Absent strict compliance with that method, Mom, as the surviving Trustor, could not change the Trust B distribution scheme.

EXAMPLE 3

Using POA's to act as Trustee.

One of enumerated powers of the Trustee:

To execute, deliver and grant to any individual or corporation a revocable or irrevocable power of attorney to transact any and all business on behalf of the Trust. This power of attorney may grant to the attorney-in-fact all the rights, powers and discretion that the Trustee could, if he so wished, exercise.

Trust says that Trustee cannot serve if he/she is incapacitated. Does incapacity terminate the POA's authority to act too? If not, then you've effectively amended the Trust as to the Successor Trustee.

EXAMPLE 1

MICHAEL K. JEANES
Clerk of the Superior Court
By Naomi Marruffo, Deputy
Date [REDACTED] Time 13:13:37
Description Amount
----- CASE# [REDACTED]
OTHER NEW PROBATES 268.00

TOTAL AMOUNT 268.00
Receipt# [REDACTED]

Attorneys for Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In the Matter of the) NO. [REDACTED]
[REDACTED])
[REDACTED]) PETITION FOR REFORMATION OF
[REDACTED]) TRUST AGREEMENT
[REDACTED])
[REDACTED])

1. This Petition for Reformation of Trust Agreement is made by [REDACTED]
[REDACTED], the surviving spouse of [REDACTED] ("[REDACTED]").

2. Petitioner is currently serving as Trustee of the [REDACTED] Survivor's
Trust (the "Survivor's Trust") and the [REDACTED] Bypass Trust (the "Bypass Trust")
created under the terms of the [REDACTED] Revocable Living Trust executed by [REDACTED] and
[REDACTED] ("[REDACTED]") on April 15, 1992, as amended by First Amendment dated
December 23, 2002 (the "Trust Agreement"). The Survivor's Trust and the Bypass Trust were
created following [REDACTED]'s death and are referred to collectively herein as the "Trusts".

3. Pursuant to A.R.S. §§ 14-10202 and 14-10203, this Court has jurisdiction over
proceedings concerning the internal affairs of the Trusts.

4. Venue in this Court is proper, as the principal place of administration for the
Trusts is in Maricopa County, Arizona.

1 5. The Trust Agreement was signed by both [REDACTED] and [REDACTED] then died
2 on [REDACTED]. After [REDACTED] died, [REDACTED] married Petitioner.

3 6. Following [REDACTED]'s death, [REDACTED] executed the following amendments to the
4 Trust Agreement: (i) Second Amendment dated [REDACTED], 2005 (the "Second
5 Amendment"), (ii) Third Amendment dated [REDACTED], 2009 (the "Third Amendment"), (iii)
6 Fourth Amendment dated [REDACTED], 2010 (the "Fourth Amendment"), (iv) Fifth Amendment
7 dated [REDACTED], 2011 (the "Fifth Amendment"), and (v) Sixth Amendment dated [REDACTED]
8 2013 (the "Sixth Amendment"). The Second Amendment through the Sixth Amendment are
9 referred to herein as the "Amendments". [REDACTED] made two basic changes to the Trust
10 Agreement in the Amendments. He changed the successor Trustee of the Trusts, and he added
11 Petitioner as a beneficiary of the Survivor's Trust.

12 7. Section [REDACTED] of the Trust Agreement provides, in pertinent part, as follows:

13 [REDACTED] **Removal of Trustee.** The Trustors, during their
14 lifetimes, or the surviving Trustor, during his lifetime . . . shall
15 have the right to remove any then acting Trustee . . . If the
16 successor Trustee named in Section [REDACTED] is unable or unwilling to
17 serve or has been removed from his position, then a new Trustee
18 shall be appointed by those causing his removal.

19 8. In the Third Amendment, [REDACTED] modified Section [REDACTED] of the Trust Agreement
20 to name the following persons to serve as Trustee, in the order of priority listed:
21
22
23
24

[REDACTED]

22 9. Section [REDACTED] of the Trust Agreement describes the powers of the Trustors to
23 amend the Trust Agreement. The last sentence of Section [REDACTED] states: "Upon the first Trustor's
24 death, this Trust Agreement shall be unamendable." Based on this language, [REDACTED] did not

1 have the authority to amend the Trust Agreement following [REDACTED]'s death. Thus, any changes
2 included in the Second through Sixth Amendments to add Petitioner as a beneficiary are not
3 valid changes to the Trust Agreement. Because [REDACTED] as surviving Trustor, had the power
4 to remove and appoint Trustees after [REDACTED]'s death, those provisions of the Amendments
5 changing the Trustee are believed to be valid and enforceable.

6 10. Section [REDACTED] of the Trust Agreement grants the surviving Trustor ([REDACTED]) a
7 general power of appointment over the Survivor's Trust. To be effective, the power of
8 appointment must be exercised in the survivor's Last Will and Testament, and the exercise
9 must make specific reference to the general power of appointment. This means that [REDACTED]
10 could have added [REDACTED] as a beneficiary of the Survivor's Trust if he had exercised the power
11 of appointment in his Will, while making specific reference to the power of appointment.

12 11. [REDACTED] signed a Last Will and Testament on [REDACTED] a First Codicil on
13 [REDACTED] and a Second Codicil on [REDACTED] (collectively, the "Will").
14 Nowhere in the Will does [REDACTED] make reference to or exercise the general power of
15 appointment granted in Section 4.1(d) of the Trust Agreement. In fact, the Will, as modified
16 by the Second Codicil, expressly states that [REDACTED] refrained from exercising any power of
17 appointment he may have had at the time of his death.

18 12. The Amendments and the Will were prepared by legal counsel for [REDACTED].

19 13. It is clear from the documents prepared that [REDACTED] intended to add Petitioner
20 as a beneficiary of the Survivor's Trust. Unfortunately, the documents the attorney prepared
21 for [REDACTED] did not accomplish that intent. To add Petitioner as a beneficiary of the Survivor's
22 Trust, [REDACTED] needed to exercise his power of appointment over that Trust; he could not add
23 Petitioner as a beneficiary by amending the Trust Agreement.

24 14. A.R.S. § 14-10415 provides as follows:

The Court may reform the terms of a trust, even if unambiguous, to
conform the terms to the settlor's intention if it is proved by clear

1 and convincing evidence that both the settlor's intent and the terms
2 of the trust were affected by a mistake of fact or law, whether in
expression or inducement.

3 As noted above, Arizona law permits a trust to be reformed if it is proved by clear and
4 convincing evidence that both the settlor's intent and the terms of the trust were affected by a
5 mistake of fact or law, whether in expression or inducement.

6 15. It is clear from the Amendments that [REDACTED] intended to add Petitioner as a
7 beneficiary of the Survivor's Trust. Due to a mistake by the attorney, the Amendments were
8 prepared for [REDACTED] instead of a Will that exercised his power of appointment over the
Survivor's Trust.

9 16. A similar situation was addressed by the Indiana Court in *Carlson v. Sweeney*,
10 *Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E. 2nd 1191 (Ind. 2008). In that case, the
11 Court was asked to reform a testamentary trust that contained a scrivener's error. In permitting
12 the reformation, the Court stated:

13 As a practical matter most trust instruments are drafted by counsel,
14 and the language in the instrument is the testator's only by
adoption. In essence the testator informs counsel what she wants to
15 accomplish and relies on counsel to carry out her wishes. If
counsel makes a mistake in drafting and fails in this effort, then the
16 testator's intent has not been realized. And this is so whether the
mistake is one of fact or one of law. It appears to us that
reformation is appropriate under such circumstances. See John H.
17 Langbein & Lawrence W. Waggoner, *Reformation of Wills on the*
Ground of Mistake: Change of Direction in American Law, 130 U.
18 Pa. L.Rev. 521, 582-83 (1982) (commenting that there is no
principled distinction between a lawyer's mistake involving the
19 "misapprehension of the meaning of a term" [mistake of law] and
"misrender[ing] a name or a sum" [mistake of fact]. "In either case
20 the lawyer's mistake prevented the will from expressing an intent
that the testator formed and communicated, and which a well-
proven reformation case can correct.").

21 *Id.* At 1200.

22 17. Based on the above, Petitioner believes the Trust Agreement should be
23 reformed to permit the surviving Trustor to amend the provisions of the Survivor's Trust
24

1 following the death of the first Trustor, such reformation to be retroactive to November 1,
2 2004.

3 18. If the Trust Agreement is reformed to validate the Amendments, the following
4 persons will be beneficiaries of the Survivor's Trust:

5 a) Petitioner: Lifetime beneficiary and remainder beneficiary if SON
6 [REDACTED] predeceases Petitioner.

7 b) [REDACTED] SON Remainder lifetime beneficiary if he survives
8 Petitioner.

9 c) [REDACTED]

10 d) [REDACTED] [REDACTED]
11 [REDACTED]

12 19. If the Trust Agreement is NOT reformed to validate the Amendments, the
13 following persons will be beneficiaries of the Survivor's Trust:

14 a) SON [REDACTED] Lifetime beneficiary.

15 b) [REDACTED]
16 [REDACTED]

17 c) [REDACTED]
18 [REDACTED]

19 20. The proposed reformation will not affect the Bypass Trust, which is held in trust
20 for SON [REDACTED] during his lifetime and passes to [REDACTED]
21 SON
22 [REDACTED] following [REDACTED]'s death.

23 21. The estimated value of the Survivor's Trust will be provided to all beneficiaries
24 in a cover letter, along with a copy of the Notice of Hearing.

22. The following persons are entitled to notice of this proceeding:

	<u>Name</u>	<u>Age</u>	<u>Status</u>	<u>Address</u>
1				
2	██████████	Adult	Trustee	██████████
3			Potential	
4	██████████	Adult	Beneficiary	██████████
5				
6	██████████	Adult	Successor	██████████
7			Trustee/ Remainder	
8	██████████	Adult	Beneficiary	██████████
9			Successor	
10	SON		Trustee/ Remainder	
11			Beneficiary	

10 ██████████ is currently under guardianship. ██████████

11 ██████████

12 23. Because SON ██████████ has been deemed an incapacitated person and ██████████

13 ██████████ the Petitioner requests that the Court appoint a Guardian ad Litem to

14 represent SON ██████████'s best interests related to this Petition.

15 Petitioner requests that the Court, after notice and hearing, issue a judicial Order which:
16 SON

17 (a) Appoints a Guardian ad Litem to represent ██████████'s best interests
related to this Petition for Trust Reformation; and

18 (b) Reforms Section ██████████ of the Trust Agreement to provide that following the death
19 of the first Trustor, the surviving Trustor retained the power to amend the Trust Agreement as
20 it affects the Survivor's Trust and that amendments Second through Sixth are valid and
21 enforceable.

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DATED this

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Attorney for Petitioner

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Example 1

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Attorneys for [REDACTED]

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

In the Matter of:

Case No. [REDACTED]

**MEMORANDUM OF LAW IN
OPPOSITION TO REFORMATION
OF TRUST**

(Assigned to [REDACTED])

[REDACTED]), a beneficiary under the [REDACTED] Revocable Living Trust dated [REDACTED], as amended (the "Trust"), submits his Memorandum of Law regarding the Petition for Reformation of Trust Agreement ("Petition") filed by [REDACTED]). The Trust should not be reformed to effectuate unauthorized amendments which contradict the Trustors' intent as expressed both in the Trust Agreement and twice in the surviving Trustor's Will. [REDACTED] ("[REDACTED]"), as surviving Trustor of the Trust, had no authority to amend the Trust after the death of the first Trustor, [REDACTED] ("[REDACTED]") and the Petition should be denied.¹

1 I. ORIGINAL TRUST AND AMENDMENT

2 [REDACTED] and [REDACTED], as Trustors, created the Trust on [REDACTED] and,
3 together, amended it in [REDACTED]. [REDACTED] and [REDACTED] had one son, [REDACTED]
4 ([REDACTED]) who is mentally disabled. The expressed intent of the Trustors was to assure
5 for the care of their disabled son after their deaths. Pursuant to Article II, upon [REDACTED]'s
6 death (she died first), the Trust was to have been divided into a Survivor's Trust and a
7 Bypass Trust, both of which were to be administered for [REDACTED]'s benefit during his
8 lifetime and then for [REDACTED].

9 In order to ensure their joint intent would be effectuated after the first Trustor
10 died, [REDACTED] and [REDACTED] unambiguously expressed their intent that, after the death of
11 the first Trustor, "this Trust Agreement shall be unamendable." (Paragraph [REDACTED]).²

12 Pursuant to Paragraph [REDACTED], upon [REDACTED]'s death, the Survivor's Trust was to
13 pour into the Bypass Trust or be distributed as [REDACTED] may have designated and
14 appointed in his Will. To effectively exercise this power as to the Survivor's Trust,
15 [REDACTED] would have to "make specific reference to the herein conferred general power
16 of appointment in his Last Will and Testament." [REDACTED] signed his Last Will and
17 Testament on [REDACTED], the same day as the Trust. The Will provides in Paragraph
18 [REDACTED] -- "I refrain from exercising any power of appointment that I may have at the time
19 of my death." Pursuant to Paragraph [REDACTED], in the absence of the exercise of the power
20 of appointment:

21 If the surviving Trustor should default in the exercise of the
22 aforesaid power of appointment in his Last Will and
23 Testament, or insofar as such appointment shall not extend
24 or take effect, then the entire remaining principal and
25 accrued and undistributed income of the Survivor's Trust, or
the part of such Trust not effectively appointed, shall, upon
the death of the surviving Trustor, be held and administered
as provided in Article [REDACTED], below.

26 ² Articles, Sections or Paragraphs are references to the Trust, unless otherwise indicated.

1 The Bypass Trust afforded [REDACTED] a more limited power of appointment
2 pursuant to which he could have, under limited circumstances, appointed only [REDACTED]
3 [REDACTED] as beneficiary. Article [REDACTED] provides that the
4 exercise of such a power of appointment be by Will. Specifically,

5 To effectively exercise this limited power of appointment by
6 Will, the Surviving Trustor must make specific reference to
7 the herein conferred limited power of appointment in his
8 Last Will and Testament.

9 [REDACTED]'s Will expressly did not exercise this power. Pursuant to Paragraph [REDACTED], in
10 the absence of the exercise this power of appointment in his Will:

11 Upon the death of the surviving Trustor, if he has defaulted
12 in the exercise of the aforesaid power of appointment, or
13 insofar as such appointment shall not extend or take effect,
14 then the entire remaining principal and accrued and
15 undistributed income of the Bypass Trust, or the part of such
16 Trust not effectively appointed, shall be held and
17 administered as provided in Article [REDACTED], below.

18 Pursuant to Article [REDACTED], the un-appointed assets remaining in the Survivor's Trust and
19 Bypass Trust were to be administered solely for [REDACTED]'s benefit.

20 II. [REDACTED]'S DEATH AND IMPROPER AMENDMENTS

21 [REDACTED] died on [REDACTED], and [REDACTED] married [REDACTED]. On [REDACTED]
22 [REDACTED], [REDACTED] signed the Second Amendment which states that the Trust was being
23 amended pursuant to Paragraph [REDACTED] of the Trust, the very provision that prohibited such
24 an amendment. The Second Amendment purports to void that portion of the Trust
25 creating the Bypass Trust and to, instead, administer all the Trust assets in the
26 Survivor's Trust. The Second Amendment also purports to amend Paragraph [REDACTED] with
regard to the appointment of Successor Trustees and deletes one beneficiary.

On [REDACTED], [REDACTED] signed the Third Amendment, again stating the
Trust was being amended pursuant to Paragraph [REDACTED]. The Third Amendment again
attempts to amend Paragraph [REDACTED] to name [REDACTED] as sole Successor Trustee upon

1 [REDACTED]'s death. [REDACTED] signed a First Codicil to his Will on [REDACTED] to
2 name [REDACTED] as Personal Representative.

3 On [REDACTED], [REDACTED] signed the Fourth Amendment again referencing
4 Paragraph [REDACTED]. The Fourth Amendment purports to completely amend Article [REDACTED] by
5 replacing provisions for [REDACTED] with the following provisions for [REDACTED]:

6 5.1(a) Provision for [REDACTED] in the Survivor's
7 Trust: [REDACTED] shall be entitled to a life
8 estate in the home occupied with [REDACTED].
9 [REDACTED] if still living in the residence at the time of
10 death of [REDACTED]. [REDACTED]
11 [REDACTED] will be entitled to a monthly stipend from [REDACTED]
12 [REDACTED] owned by the
13 Survivor's Trust sufficient to provide for [REDACTED].
14 [REDACTED] maintenance and general living expense of the
15 residence during the period of the life estate. The life estate
16 will terminate upon the following events: 1) death of
17 [REDACTED]; 2) cohabitation by
18 [REDACTED] with a non-related person of the
19 opposite sex; 3) [REDACTED] is admitted permanently into
20 a nursing home.

21 The Survivor's Trust shall be distributed in accordance with
22 Paragraph [REDACTED] upon termination of the life estate.

23 5.1(b) Provision for [REDACTED]: Upon the death of
24 the Survivor Trustee, if [REDACTED] is then
25 living, the Trustee shall hold the remaining assets of the
26 Survivor's Trust not subject to [REDACTED] and all of the assets of
the Bypass Trust and administer as set forth in Section [REDACTED]
below.

19 These provisions conflict with the provision in the Second Amendment which purported
20 to completely (and improperly) eliminate the Bypass Trust. The provisions also
21 contradict the stated intent of the Trustors to provide for [REDACTED]'s care.

22 The [REDACTED] Fifth Amendment was created to correct [REDACTED]'s name. On
23 [REDACTED], [REDACTED] signed the Sixth Amendment, again relying on Paragraph
24 [REDACTED]. The Sixth Amendment purports to completely amend Article [REDACTED] of the Trust for
25 [REDACTED]'s benefit, inserting the following:

1 At the same time he signed this Sixth Amendment, ■ signed a Second
2 Codicil on ■. This Second Codicil, like his original Will, confirms
3 his intent not to exercise his powers of appointment. Paragraph Third states: "I refrain
4 from exercising any power of appointment I may have at the time of my death."

5 ■ died on ■. Over a year later, on ■,
6 ■ filed her Petition for Reformation of the Trust seeking to enforce the invalid
7 Amendments, notwithstanding the prohibitions in the Trust to the contrary. ■
8 argues that reforming the Trust to comport with the improper Amendments will
9 effectuate ■'s intent, despite ■'s clearly expressed intent to the contrary
10 and despite clear provisions in the Trust precluding such amendment. ■

11 ■
12 ■. If the Trust is reformed to include ■ the Survivor's Trust
13 beneficiary, the Bypass Trust for ■'s care for the remainder of his lifetime will be
14 funded with only half that amount.

15 III. NO REFORMATION

16 The terms of ■ and ■'s Trust and their intent as Trustors are
17 unambiguous. Upon the death of the first Trustor, the Trust could not be amended.
18 (Paragraph ■). Therefore, on their face, the purported Amendments executed after
19 ■'s death are all invalid. They were not permitted under the terms of the Trust and
20 their creation contradicts the Trustors' expressed intent.

21 Nor are the purported amendments a substitute for a proper exercise of the
22 limited powers of appointment. Exercise of the powers of appointment could only be
23 done in ■'s Will with specific reference to the Trust and to the power of
24 appointment. ■'s Will expressed his intent not to exercise the powers of
25 appointment. In addition, the purported Amendments make no reference to a power of
26 appointment or to the specific Trust provisions governing same.

1 The purported Amendments also attempt to amend the Trust in ways not
2 permitted under the powers of appointment (even if properly exercised). The powers of
3 appointment apply only to beneficiaries, not to any other provision. However, as set
4 forth above, the Second Amendment purports to eliminate the Bypass Trust. [REDACTED],
5 as surviving Trustor, had no power to either eliminate the Bypass Trust or change the
6 beneficiary.

7 The purported Amendments reference Article [REDACTED], Section [REDACTED] as authority for the
8 Trustor to determine Successor Trustees. [REDACTED] alleges [REDACTED] had the power to
9 amend the Trust as to who was to be Successor Trustees after his death. No such power
10 exists. Section [REDACTED] only empowers the Surviving Trustor, during his lifetime, to remove
11 any then acting Trustee. It does not empower [REDACTED] to change Successor Trustees if
12 he is no longer serving. Under no theory, could [REDACTED] ever serve as Successor Trustee.

13 The documents [REDACTED] seeks to enforce through reformation did not comply
14 with the Trust or otherwise reflect the expressed intent of the Trustors. The purported
15 Amendments violate the Trustors' absolute prohibition against amendment of the Trust.
16 The changes attempted by the purported Amendments exceed changes allowed under
17 any powers of appointment. There is no legal or equitable basis to effectuate these
18 documents.

19 IV. LEGAL ARGUMENT

20 Relying on A.R.S. §14-10415, [REDACTED] asks the Court to reform the Trust to
21 conform to the purported Amendments. The statute does not support her argument.

22 The Court may reform the terms of a trust, even if
23 unambiguous, to confirm the terms to the settlor's intention
24 if it is proved by clear and convincing evidence that both the
25 settlor's intent and the terms of the trust were affected by a
26 mistake of fact or law, whether in expression or by
inducement. A.R.S. §14-10415

1 There were two "settlers," [REDACTED] and [REDACTED], and there was no mistake of fact
2 or law in the expression of their intent. They expressed their intent that their Trust not
3 be amended after one of them died. They expressed their intent to provide for care of
4 their [REDACTED] son and not to diminish those assets for a third party. They expressed their
5 intent as to the limited powers of appointment granted to the survivor and as to the
6 restricted method for exercising said powers. [REDACTED] clearly expressed his intent not to
7 exercise said powers. Further, the powers, if properly exercised, did not extend to
8 elimination of the Bypass Trust and/or changing Successor Trustees. The reformation
9 statute does not and cannot apply to the facts here and cannot be used to accomplish
10 what is unambiguously forbidden by the Trust.

11 A trustor may not amend a trust unless he or she has retained the right to do so in
12 that trust and only according to the extent so retained. When the trustor specifies a
13 particular method of amending the trust, the trust can be amended only in accordance
14 with that specified method. *In re Herbst*, 76 P.3d 888, 891, 206 Ariz. 214 (App. 2003).
15 The Trust here eliminated the surviving Trustor's power to amend the Trust.

16 [REDACTED] deliberately chose not to utilize the only mechanism which would have
17 allowed him to alter the distribution scheme for either the Survivor's Trust or the
18 Bypass Trust. He did not exercise his power of appointment, nor did he intend to
19 exercise same.

20 Although there may be instances where a court might enable a defective exercise
21 of a power of appointment, this is not such a case. See *In re Strobel* (1986) 717 P.2d
22 892, 149 Ariz. 213 (1986). The court in *Strobel* identified the elements needed to
23 equitably rescue a defective exercise of a power of appointment. In the absence of these
24 elements, there can be no exercise of a power of appointment.

25 First, the beneficiary of the defectively exercised power should be a favored
26 person. [REDACTED] was not known to or favored by both Trustors and was not a permissible

1 beneficiary of the Bypass Trust. Second, there must be substantial compliance with the
2 method set out in the trust for exercising the power. [REDACTED] did not comply with the
3 method set out in the Trust for exercising such powers. Even if he mistakenly thought
4 he could exercise the powers by an amendment to the Trust, he did not reference the
5 powers of appointment in any of the purported Amendments. Third, there must be an
6 intention to exercise the power of appointment. According to his Will, [REDACTED] avowed
7 his intent NOT to exercise the powers of appointment.

8 In *Schwartz v Baybank* (Mass. App. 1983) 456 N.E.2d 1141 (Mass.App.Ct.
9 1983), cited in *Strobel*, the court held that extrinsic evidence of a testator's intent cannot
10 be used to alter the unambiguous failure by the testator to reference a power of
11 appointment in a will when specific reference is required. Accordingly, here, the
12 Second through Sixth Amendments cannot and should not be treated as an attempted
13 exercise of the power of appointment to effectuate amendment of the Trust. *See also In*
14 *re Herbst*.

15 The case cited in [REDACTED]'s Petition does not support a different result. In
16 *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E. 2nd 1191
17 (Ind. 2008), the court was asked to reform a Will to carry out the Testator's intent by
18 clarifying language intended to avoid federal or state estate taxes. The Court was not
19 asked to approve substantive changes to the dispositive provisions in the Will and/or to
20 validate documents that violated the Will.

21 II. CONCLUSION

22 In order to prevail, [REDACTED] has to prove both the settlor's intent and the terms of
23 the Trust were affected by a mistake of fact or law. She cannot do so here. [REDACTED]
24 and [REDACTED] were not mistaken when they created the Trust. They unambiguously
25 provided that their survivor not have the power to amend the Trust. They
26 unambiguously limited and restricted the exercise of the survivor's powers of

1 appointment. Although [REDACTED] claims that [REDACTED] intended that she be a beneficiary
2 of the Trust, his actions unambiguously expressed his intent otherwise. He and [REDACTED]
3 expressed their intent that the Trust be used for the care of their [REDACTED] son. He and
4 [REDACTED] expressed their intent that the Trust not be amended after [REDACTED]'s death. He
5 twice expressed his intent not to exercise the powers of appointment.

6 [REDACTED] asks the Court to look to rely on defective and invalid documents in
7 order to determine [REDACTED]'s intent, and asks the Court to ignore the proper and valid
8 documents which express his intent and the intent of the other Trustor. Although
9 arguing she is acting in good faith to honor [REDACTED]'s intent, [REDACTED] is only acting in
10 her own self-interest and contrary to the properly expressed intent of the Trustors.

11 Based on the forgoing, [REDACTED] does not have a legal or equitable basis for
12 seeking reformation of the Trust created by [REDACTED] and [REDACTED]. Therefore,
13 the Petition for Reformation should be denied. [REDACTED] is entitled to recover his
14 attorneys' fees and costs incurred in this matter, pursuant to A.R.S. §14-11004(B) and
15 other applicable legal or equitable bases. His efforts here have been for the benefit of
16 the Trust, the Trust estate and the intended beneficiaries of the Trust.

17 DATED this [REDACTED] [REDACTED].

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 ✓ [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
[REDACTED]
[REDACTED]

Attorneys for [REDACTED]

Example 2

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

COMMISSIONER [REDACTED]

CLERK OF THE COURT
P. Valenzuela
Deputy

IN THE MATTER OF

RULING

The court has reviewed and considered [REDACTED]'s Motion for Summary Judgment and Statement of Undisputed Facts in Support of Motion for Summary Judgment, Response in Opposition to Motion for Summary Judgment and Controverting Statement of Facts, Reply in Support of Motion for Summary Judgment, Controverting Statement of Facts Asserted in Opposition to Motion for Summary Judgment, Joinder in Motion for Summary Judgment, Joinder in Reply Re Motion for Summary Judgment, and the Supplemental Response in Opposition to Motion for Summary Judgment.

The court makes the following findings of fact regarding the Trust:

1. On [REDACTED], 1989, [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] ") executed the [REDACTED] Revocable Trust.
2. [REDACTED] had five children: [REDACTED] (" [REDACTED] ").
3. According to the terms of the Trust, upon the death of [REDACTED], the Trust was split into two subtrusts - Survivor's Trust A and the unnamed irrevocable Trust B.

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4. After [REDACTED]'s death, Survivor's Trust A remained subject to amendment by [REDACTED] during her lifetime and [REDACTED] exercised her right to amend Survivor's Trust A several times prior to her death in [REDACTED].
5. On [REDACTED], with estate planning counsel, [REDACTED], [REDACTED] executed a "Fifth Amendment and Complete Restatement of the Survivor's Trust "A" under Article [REDACTED] of the [REDACTED] Revocable Trust Agreement [REDACTED] ("Fifth Amendment").
6. The Fifth Amendment added specific gifts to [REDACTED]' grandchildren and indicated the remainder of the Survivor's Trust was to be distributed to her five children.
7. On [REDACTED], [REDACTED] amended Survivor's Trust A again by executing the "Sixth Amendment to the Survivor's Trust "A" under Article [REDACTED] of the [REDACTED] Revocable Trust Agreement [REDACTED] ("Sixth Amendment").
8. Article [REDACTED] of the Sixth Amendment provides:
 - (b) One (1) share of the Remaining Trust Estate shall be distributed to [REDACTED], outright and free of trust. Notwithstanding the foregoing, Trustor has advanced sums to [REDACTED]. Regardless of whether such advances were from Trustor's personal account, Trust A, or Trust B, the Trustee shall deduct such sums from [REDACTED]'S share, including any additional advances, and such advanced sum(s) shall be added in equal shares to the shares of the other four (4) children of Trustors herein and distributed as part thereof. Trustor is keeping track of the sums advanced. [REDACTED]. All such sums advanced are to be considered as an advance of his share of the Trust Estate upon Trustor's death and are not to be considered a loan that would otherwise be discharged in Bankruptcy.
9. Article [REDACTED] of the Trust applies only to the administration of Trust A. Distribution and administration of Trust B is governed by Article [REDACTED] of the Trust and Article [REDACTED] is not mentioned in the Fifth or Sixth Amendment.
10. Pursuant to Paragraph [REDACTED] of the Trust, [REDACTED] had a limited right to change the distribution of Trust B, by exercising a "power of appointment."
 - Upon the death of the first to die of the Trustors, he or she shall have the power by his or her Will, making specific reference to this power, to dispose of his or her interest held hereunder, and the provisions of this Agreement with respect to the disposition of that property after his or her death shall be applicable only to the extent that this power is not exercised.
11. The Second Amendment indicates that "[u]pon the death of the surviving Trustor, the Trustee shall distribute the remaining unappointed portion of trust B" in 1/5 shares to each of the five children unless the surviving Trustor exercised a power of appointment contrary to this provision in their Last Will and Testament.

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12. The surviving Trustor, [REDACTED], did not exercise a power of appointment in her Last Will and Testament.

The court makes the following findings:

1. Pursuant to the Trust, there was a mechanism available to the surviving Trustor if the surviving Trustor decided to amend Trust B. The mechanism available in order for [REDACTED], the surviving Trustor, to reduce [REDACTED]'s share of Trust B was for [REDACTED] to exercise the power of appointment in her last will and testament. There is no dispute that [REDACTED] did not formally exercise her power of appointment over Trust B in her last will and testament.
2. There is no need for the court to modify the Trust pursuant to A.R.S. §§ 14-10105(B)(12), 14-10411, 14-10412 or 14-10415, as argued by the Trustee, because the best indication of what [REDACTED] wanted is in her Trust and the Amendments to the Trust. The language in the Trust and the Amendments is clear and unambiguous. The Trust sets forth exactly what would need to be done if [REDACTED] wanted to amend Trust B. [REDACTED] had legal counsel to advise her and explain what she would need to do to effectuate her intentions. [REDACTED] had the opportunity to execute a power of appointment over Trust B in her last will and testament yet she did not do so. It is not up to the court to second guess, modify or substitute [REDACTED]'s wishes.
3. There are neither any applicable legal principles nor any applicable equitable doctrines that would cause this Court to modify the Trust or to allow the Fifth or Sixth Amendment to be treated as a valid power of appointment.
4. In order for a Motion for Summary Judgment to be granted, there must not be any genuine issue of material fact. Orme School v. Reeves, 802 P.2d 1000, 1004 (Ariz. 1990). There is no genuine issue of material fact since Frances did not exercise her power of appointment to change the provisions of the irrevocable Trust B as required by the Trust. Therefore, Trust B should be administered and distributed according to its terms.

IT IS ORDERED granting [REDACTED]'s Motion for Summary Judgment.

All parties representing themselves must keep the court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.