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5 Attorney for Plaintiff  
6 FELICIA SMITH

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF REDWOOD

10 In re TRUST OF ALBERT GREEN.

Case No.

11 FELICIA SMITH,

PLAINTIFF'S TRIAL BRIEF

12 Plaintiff,

13 v.

14 CHARLOTTE GREEN, individually and  
15 as trustee of the Albert Green Living Trust,

16 Defendant.

17 \_\_\_\_\_ /  
18  
19 **INTRODUCTION**

20 Defendant's designation of herself as successor beneficiary under her father's  
21 living trust is invalid. Under the only acceptable interpretations of Probate Code § 4264,  
22 an attorney-in-fact may not designate herself a beneficiary or give herself a gift in trust  
23 without the principal's specific authorization. Nor may she act in a manner not solely for  
24 the principal's benefit, or use a trust mechanism to escape the limitations placed on her.

1 **FACTS<sup>1</sup>**

2 On December 2, 2\_\_\_\_, decedent Albert Green executed a will leaving his estate in  
3 equal shares to his four children: plaintiff and petitioner Felicia Smith, defendant and  
4 objector Charlotte Green, Helen Green, and Janice Green. The will named plaintiff  
5 executor. On December 12, 2\_\_\_\_, decedent signed a stationery-store form durable  
6 general power of attorney appointing defendant as holder of the power. Paragraph (f) of  
7 that document grants the power holder the authority to “create, amend, supplement, and  
8 terminate any trust . . . .”

9 On February 19, 2\_\_\_\_, defendant executed a living trust on the decedent’s behalf.  
10 That document called for distribution to each child in equal shares as successor  
11 beneficiaries on the decedent’s death. It also granted defendant a life estate in real  
12 property in Fullerton with the remainder distributed to the decedent’s grandchildren. That  
13 same day, defendant funded the trust by executing a quit-claim deed of the real property  
14 to the trust.

15 On the day defendant executed the trust, the decedent was in a coma and clearly in  
16 a fatal decline. In fact, he died the next day—February 20, 2\_\_\_\_. Plaintiff petitioned to  
17 probate the 2\_\_\_\_ will; defendant filed an objection.

18  
19 **ARGUMENT**

20 **1. Felicia has standing to seek declaratory relief and imposition of a constructive**  
21 **trust.**

22 Felicia is both an intestate heir and a named beneficiary under decedent’s  
23 December 2, 2\_\_\_\_ will. “The heirs or devisees may themselves, or jointly with the  
24 personal representative, maintain an action for possession of property or to quiet title to  
25 property against any person except the personal representative.” Prob. Code § 9654.

26  
27 \_\_\_\_\_

28 <sup>1</sup>In the interests of brevity, citations to the factual record have been deleted from this sample document.

1 In *Olson v. Toy* (1996) 46 Cal.App.4th 818, an heir at law and a will beneficiary  
2 filed an action for declaratory relief and imposition of a constructive trust against the  
3 trustee of the decedent's living trust (who was also the decedent's personal  
4 representative) seeking a declaration that the trust was invalid and unenforceable because  
5 the decedent executed the trust without the requisite mental capacity and under undue  
6 influence. The trial court sustained a demurrer to the complaint without leave to amend  
7 on the ground that the plaintiffs lacked standing. The appellate court reversed. It held  
8 that the plaintiffs' action for a constructive trust was an action for possession of property  
9 as contemplated by Probate Code § 9654. *Id.* at 823. The appellate court concluded that  
10 the action was not barred by the fact that the defendant was the decedent's personal  
11 representative because she was sued in her capacity as trustee, not in her capacity as  
12 personal representative (*id.* at 824), and that it was an action for "possession" even though  
13 the property would first go to the personal representative for administration because a  
14 personal representative does not take title but merely holds property for distribution to the  
15 heirs or devisees. *Id.* at 825. The court also concluded that the plaintiffs had standing to  
16 seek declaratory relief. *Id.* at 824-825.

17 Here, Felicia is both an heir at law and a beneficiary of decedent's will. Like the  
18 plaintiffs in *Olson*, she has standing to assert the instant claims for declaratory relief and  
19 imposition of a constructive trust against Charlotte, the trustee of decedent's living trust.<sup>2</sup>  
20

21 **2. Defendant had no authority to designate herself as beneficiary of a life estate**  
22 **under the trust.**

23 Under the Power of Attorney Law,  
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25 <sup>2</sup> The declaratory relief statute, Code of Civil Procedure § 1060, was amended effective  
26 January 1, 1995, to provide that an action for declaratory relief may no longer be maintained by a  
27 person who seeks a declaration of his or her rights under a will or trust. Thus, Karen has no standing  
28 to seek declaratory relief as a beneficiary of decedent's will, but she also sues in her capacity as an  
heir at law (the will has not yet been admitted to probate). In the latter capacity, she has standing  
under § 1060 to seek "a declaration of . . . her rights or duties with respect to another, or in respect  
to, in, over or upon property."

1 A power of attorney may not be construed to grant authority to an attorney-  
2 in-fact to perform any of the following acts unless expressly authorized in the  
3 power of attorney:

- 4 (a) Create, modify, or revoke a trust. . . .  
5 (c) Make or revoke a gift of the principal's property in trust or otherwise.  
6 . . .  
7 (f) Designate or change the designation of beneficiaries to receive any  
8 property, benefit, or contract right on the principal's death . . . .

9 Prob. Code § 4264.

10 Here, the power of attorney authorized defendant to create a trust. But it did not authorize  
11 her to grant herself a gift of the life estate in the house, create the life estate in the house,  
12 or to designate herself as a beneficiary under the trust.

13 Subdivision (f) must apply to the designation of a beneficiary under a trust. One  
14 can be a beneficiary of a contract, an insurance policy, a will, or a trust. See BLACK'S  
15 LAW DICTIONARY (6th ed. 1990), at 157. By its express terms, subdivision (f) regulates  
16 both the designation of beneficiaries under contract rights and the designation of other  
17 types of beneficiaries. Since a power holder never has the authority to make, amend, or  
18 revoke a will, subdivision (f) cannot regulate the designation of testamentary  
19 beneficiaries. Prob. Code § 4265(a). It therefore must regulate beneficiaries under trusts.

20 Of course, the creation of a trust necessarily involves the designation of a  
21 beneficiary. Prob. Code § 15205(a). The statute is thus internally inconsistent in that it  
22 allows a decedent to create a trust but not to designate a beneficiary. When interpreting a  
23 statute, the court must, if at all possible, give effect to every word, phrase, sentence, and  
24 part of a statute in furtherance of the legislative purpose. *Phelps v. Sostad* (1997) 16  
25 Cal.4th 23, 32. But in this case, the court cannot hold that the subdivision (a)  
26 authorization of creating a trust implicitly includes subdivision (f)'s designation of a  
27 beneficiary. That construction would leave subdivision (f) meaningless. On the other  
28

1 hand, prohibiting designation of a beneficiary without express authorization contradicts  
2 subdivision (a)'s authorization of creation of a trust.

3 Statutes must be construed with reference to the entire statutory scheme of which  
4 they are a part, so as to harmonize them in conformity with legislative intent. *Orange*  
5 *Unified School District v. Rancho Santiago Community College District* (1997) 54  
6 Cal.App.4th 750, 757. In seeking the legislative intent, courts should consider not only  
7 the words used but the object in view, the evils to be remedied, the legislative history, and  
8 the public policy. *Ibid.* The only interpretation that will give the statute any meaning  
9 prohibits the power holder from making a specific designation without express  
10 authorization. The power holder may create a trust but may not designate a beneficiary  
11 other than the principal. This interpretation conforms with § 4264's general purpose of  
12 allowing the principal to determine the power holder's authority appropriate under the  
13 circumstances while prohibiting the latter from abusing her position to strip the principal  
14 of his assets. See Prob. Code § 4264(g) (power holder may not make loan to himself  
15 without express authorization). Under this interpretation, the power holder may create a  
16 trust that designates the principal himself as beneficiary without express authorization.  
17 But plaintiff could not have made a trust naming herself, or any person other than the  
18 decedent, as beneficiary without express authorization to do so.

19 Finally, when two portions of a statute, each passed simultaneously, are  
20 irreconcilably inconsistent, the provision positioned later in the statute controls the earlier  
21 provision. *Russell v. Stanford University Hospital* (1997) 15 Cal.4th 783, 789. This rule  
22 of construction applies to internally inconsistent provisions within each section as well as  
23 to inconsistent sections. See *People v. Moroney* (1944) 24 Cal.2d 638, 640-641, 645.  
24 Subdivision (f), which appears later than subdivision (a) in the statute, controls over it.  
25 As a result, defendant could not have designated beneficiaries without express  
26 authorization, even though she was expressly authorized to write a trust.

27 Subdivision (c) contradicts subdivision (a) for the same reason. One of a trust's  
28 main purposes is to make a testamentary gift without involving the probate courts. Yet

1 subdivision (c) specifically prohibits making a gift in trust without express approval. It is  
2 doubtful that the Legislature would have specifically prohibited making gifts in trust  
3 without express authority if that authority were a necessary part of the general authority to  
4 create a trust. Such an interpretation would render subdivision (c) meaningless. Thus  
5 both subdivision (a) and subdivision (c) have meaning only if subdivision (c) requires  
6 specific authorization for the gift, not just the general authorization inherent in making a  
7 trust. To the extent that subdivisions (a) and (c) cannot be reconciled, the court must  
8 apply (c), which is positioned later in the statute. Even if the decedent had desired that  
9 the plaintiff make a gift to herself, she did not have the authority to do so if he had not  
10 complied with the statute's formalities. *Estate of Hutson* (1997) 51 Cal.App.4th 1721,  
11 1727.

12  
13 **3. Because defendant did not write the trust in the decedent's interest, it is**  
14 **invalid.**

15 An attorney in fact has a duty to act solely in the principal's interest and to avoid  
16 conflicts of interest. Prob. Code § 4232(a). This provision restates an agent's general  
17 duty of loyalty under Civil Code § 2322(c). A principal may always set aside a  
18 transaction the agent concludes with himself, even with no actual fraud, undue advantage,  
19 or injury to the principal. *Burke v. Bours* (1891) 92 Cal. 108, 113, 115; *Sands v. Eagle*  
20 *Oil & Refining Co.* (1948) 83 Cal.App.2d 312, 320. Subdivision (b) of Probate Code  
21 § 4232 modifies this rule by providing that the power holder does not violate the duty of  
22 loyalty solely because he or she also benefits from acting for the principal; has conflicting  
23 interests in relation to the principal's property, care, or affairs; or acts in an inconsistent  
24 manner regarding the respective interests of the principal and the attorney in fact.

25 This provision appears to allow a business partner or other person who holds  
26 property in common with the principal to manage the property without concern for  
27 liability for self-dealing in the absence of fraud. CALIFORNIA DURABLE POWERS OF  
28 ATTORNEY (CEB 1999) §§ 1.11, at 10. It also allows the power-holder to buy the

1 principal's property, keeping it in the family while providing the principal with cash. *Id.*,  
2 § 3.46, at 82-83. It does not allow the power holder, without express authorization, to  
3 give herself the decedent's property. Thus the personal representative may set aside the  
4 transaction defendant engaged in with herself.

5 Even if subdivision (b) allowed self-dealing in the abstract, it would not do so in  
6 this case. Subdivision (a)'s overriding principle that the power holder act at all times in  
7 the decedent's interest remains. When plaintiff created the trust, decedent was in a coma  
8 and clearly approaching death. He could not have benefitted from the creation of a trust,  
9 and defendant did not write the trust in his interest but in her own. By creating this trust  
10 the day before he died, defendant sought to do indirectly what she could not do directly  
11 by making a gift of the property or by leaving it to herself as a testamentary disposition.  
12 *Regents of the University of California v. City of Los Angeles* (1979) 100 Cal.App.3d 547,  
13 550.

14  
15 **CONCLUSION**

16 Although defendant had the abstract authority to create a trust, she had no  
17 authority either to designate herself as beneficiary or to create a gift for herself in trust  
18 without express authorization to do so. Nor did she act solely in the decedent's interest  
19 by executing this trust the day before his anticipated death. This court should therefore  
20 find the trust provision leaving the real property to defendant invalid and allow it to pass  
21 either under the will or by intestate succession.

22  
23 Dated:

Respectfully submitted,

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25 \_\_\_\_\_  
26 Attorney for Plaintiff  
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