

# Forced Out Nonprofit Directors in California Don't Lose Standing to Sue

08.10.23 | Linda J. Rosenthal, JD



Late last week, after six long years of legal battle, the California Supreme Court gave Plaintiff Debra Turner her first victory against former co-directors at the Conrad Prebys Foundation. See [\*Turner v. Victoria\*](#) (August 3, 2023).

The high court reversed the trial court's dismissal of her case for alleged lack of standing to sue as well as the appellate court's ruling approving that result. The August 3, 2023, action by the high court clears Ms. Turner's path to proceed with claims stemming from what the *San Diego Union-Tribune* describes as "a complicated San Diego Superior Court case [involving family and inheritance](#)."

That's a bit of an understatement. Plaintiff was the "life partner" of the late Conrad Prebys, San Diego billionaire-philanthropist with national name recognition. He died in 2016. At that time, she was president of the Conrad Prebys Foundation and was one of its five long-serving board members.

## ***Prebys Philanthropy***

San Diegans are certainly familiar with Conrad Prebys's impressive philanthropy; his name is on buildings all around town. The rags-to-riches businessman made his fortune here and has generously supported many of the region's arts, education, healthcare, and other civic institutions.

But this name may also ring a bell among the millions of fans of PBS's Sunday night Masterpiece series. The Conrad Prebys Foundation is one of the two primary underwriters of the Masterpiece Trust. Indeed, long-time viewers may recall that for many years this gift was described as "from Conrad Prebys and Debbie Turner."

The Prebys estate plan focused on the Foundation as the vehicle through which his enormous wealth would continue to support the charitable purposes and causes he cherished as well as to meet future civic needs, particularly of his adopted hometown. He had also set up and fully funded an inter vivos trust. The trustee and estate executor, Defendant Laurie Ann Victoria, has served on the Foundation board and as CEO of one of Mr. Prebys's primary businesses.

On his death, the trustee was directed to (and did) pay out a number of specific bequests to named individuals including Plaintiff Debra Turner. The Foundation was named as residuary legatee.

### ***Turmoil at the Foundation***

In the year or so following Mr. Prebys's 2016 death, there was growing conflict among the people who had been closest to him. The monthly Foundation board meetings were "tense."

A key dispute involved a belated claim by son Eric Prebys, from whom Conrad was apparently estranged (for unclear reasons) since about 2014. Eric challenged his disinheritance on alleged grounds of his father's incapacity arising from failing health as well as the purported undue influence of Debra Turner. See, for example, *Prebys Foundation board members in legal fight over settlement with late philanthropist's disinherited son* (September 17, 2017) John Wilkens, *The San Diego Union-Tribune*.

Eric's proposal of settlement was accepted by vote of 4 of the 5 directors of the residuary legatee, the Foundation, on grounds that it was a reasonable way of making the problem go away. Ms. Turner adamantly opposed it, insisting it was contrary to her late partner's express wishes.

She filed a lawsuit in 2017 in San Diego Superior Court against the co-directors alleging breaches of fiduciary duty and other wrongdoing, particularly in connection with their approval of the settlement to Eric.

### ***The Lawsuit***

Long story short: The remaining directors tossed Debra Turner off the board and out of the presidency. They then filed a demurrer to her Complaint on grounds that she – being only a *former* director – had lost legal standing to (*continue to*) sue.

They argued that the governing statute from California's Nonprofit Public Benefit Law, while not addressing this matter of the standing of a former director, could be interpreted to include an implied requirement of "continuous directorship." The situation could be analogized, they argued, to the state's shareholder-derivative lawsuit statute. In a 2008 case from San Diego, the state Supreme court had approved an interpretation of that statute (under the General Corporation Law) to include a requirement that a (for-profit) director continue to be on the board of directors while pursuing a breach of duty lawsuit to conclusion. See *Grosset v. Wenaas* (2008) 42 Cal.4th 1100.

In the *Turner v. Victoria* litigation, the San Diego trial judge accepted as valid the proffered analogy to the shareholder-derivative lawsuit situation under *Grosset*. Defendants' demurrer was granted and the lawsuit was dismissed. On appeal, in 2019, the Fourth Appellate District, Division One (San Diego) affirmed the dismissal of the case on standing grounds, also accepting the 2008 *Grosset* reasoning and analogy.

By that time, however, there was already an opposite result – directly on point – from the Second Appellate District, Division Seven (Los Angeles). See *Summers v. Colette* (2019) 34 Cal.App.5th 361, involving a nonprofit director suing under the California Nonprofit Public Benefit law statutes authorizing a breach of fiduciary duty lawsuit.

The Second District construed the nonprofit corporation statute as *not* including any express or implied requirement of “continuous directorship.” Such an interpretation, that Los Angeles appellate panel ruled, would violate standard rules of statutory construction as well as frustrate the public policy of encouraging whistleblowers.

### ***The Supreme Court Ruling***

Plaintiff Debra Turner’s last chance was the appeal to the state Supreme Court. As with the lower courts, there was just one – purely legal – issue to decide *de novo*: Did the Plaintiff have continuous standing to sue even after she was ousted from the board?

Last Thursday, in *Turner v. Victoria*, the California Supreme Court resoundingly answered “yes.” It was the unanimous decision of the seven justices, made more emphatic by Chief Justice Patricia Guerrero assigning herself the task of authoring the opinion of the court.

The high court justices rejected the rulings by the lower courts in San Diego, instead expressly accepting the reasoning and result of the Second District in *Summers*.

In California, the purely legal issue of standing of a nonprofit director to sue for breach of duty or other wrongdoing is no longer unclear or ambiguous. “[W]e hold that a director of a nonprofit public benefit corporation who brings a lawsuit pursuant to Corporations Code sections 5142, 5233, and 5223 [... under the California Nonprofit Public Benefit Corporation Law ...] does not lose standing to continue litigating the suit if the director subsequently loses that position. Because the Court of Appeal reached a contrary conclusion, we reverse the judgment below.”

*Turner v. Victoria*, of course, revives Plaintiff’s litigation, but also has “... broader implications for charities across California, setting a precedent that judges cannot dismiss a whistleblower’s lawsuit just because the individual loses his or her seat on a charity’s board of directors, as was the case with Debra Turner.”

The key points are:

- Each statute in issue here, arising under the Nonprofit Public Benefit Corporation Law, “...grants a director standing to bring a lawsuit. None expressly requires continued service as a director as a condition for pursuing the lawsuit, and there is no indication that the Legislature intended to impose such a condition.”
- “An examination of the statutory text, its surrounding context, the legislative history, and the overarching purpose of the [nonprofit] director enforcement statutes reveals that the statutes do not impose a continuous directorship requirement that would require dismissal of a lawsuit brought under these statutes if the director-plaintiff fails to retain a director position.”

- A continuous directorship requirement would invite co-directors being sued to “make it difficult for director-plaintiffs to retain their positions” by various shenanigans including: (a) calling elections to remove them; (b) refusing to reelect them when their terms expire; or (c) otherwise erecting barriers to reelection, for example, by making it mathematically more difficult for the plaintiff to be re-elected.
- “If successful, these types of actions would effectively quash the litigation initiated by the director plaintiffs....” A continuous directorship requirement would give directors, “themselves charged with fraud, misconduct or neglect,” the incentive — and power — “to terminate the suit by effecting the ouster of the director-plaintiff.”
- This result promotes rather than subverts public policy: “In enacting the Nonprofit Corporation Law, the Legislature thus broadened standing, allowing more persons to bring suit than was previously possible.”

The Court added: “As the Attorney General, appearing here as *amicus curiae*, acknowledges, he cannot ‘work alone’ to enforce the law governing charities. Currently, there are more than 110,000 charitable organizations registered in California, currently holding assets of over \$850 billion.”

See also, for example: [\*State Supreme Court sides with Conrad Prebys’ ‘life partner’ in whistleblower dispute with foundation\*](#) (August 5, 2023) Alex Riggins, *The San Diego Union-Tribune*; [\*California Law: Removed Director of a Nonprofit and Standing to Sue\*](#) (August 7, 2023) Gene Takagi, Esq., *NEO Law Blog*; and [\*Ousted nonprofit corporation director can continue lawsuit\*](#) (August 3, 2023) David Ettinger, Esq., Horwitz & Levy LLP.

### ***Persuasive Authority***

While this matter is now conclusively decided for California charities, it may remain an open question in other jurisdictions, many of which – like California – have nonprofit law statutes based on the Model Nonprofit Corporation Act, drafted by the American Bar Association.

The California high court’s discussion in *Turner v. Victoria* may be valuable persuasive authority, particularly because it relies heavily on expert commentary: “Insofar as an expert consensus exists, it is to be found in the Model Nonprofit Corporation Act and the Restatement of the Law, Charitable Nonprofit Organizations (Restatement)” both of which support the position adopted by a unanimous Supreme Court.

The justices referred at length to the [\*amicus brief\*](#) by Professors Jill R. Horwitz and Nancy A. McLaughlin and the California Association of Nonprofits. Professors Horwitz and McLaughlin are the Reporter and Assistant Reporter, respectively, of the 2021 Restatement. They took no position on the merits of Plaintiff’s case here; instead, focusing on the purely legal issue of standing.

### ***Conclusion***

For many reasons, *Turner v. Victoria* has been generating considerable buzz since its release on August 3rd, not only here on the West Coast but nationwide.

That will likely continue as the next phase of this lawsuit – the merits of the case – soon opens, highlighted by the mostly fact-driven resolution of the claims of alleged breaches of duty and other

purported wrongdoing.

– *Linda J. Rosenthal, J.D., FPLG Information & Research Director*