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PERSPECTIVE

# Courts can order trust and probate cases to mediation

By Glen Reiser, Mark Lester and Eric Hirschberg *Daily Journal Staff Writer*

California Probate Code Section 17206 provides broad discretion to the probate court to "make any orders and take any other action necessary or proper to dispose of the matters presented." In Breslin v. Breslin, 2021 DJDAR 869 (Jan. 26, 2021), the 2nd District Court of Appeal majority specifically affirmed the probate court's authority under Section 17206 to order all interested parties to mediation.

Expanding upon the principles set forth in its earlier decision in Smith v. Szeyller, 31 Cal. App. 5th 450 (2019), the Breslin majority held that parties who have received a notice of mediation with the opportunity to participate, but who elect not to attend, are bound by the settlement agreement reached at the mediation and forfeit their right to object to settlement terms, even if the settlement is unfavorable to the non-participant.

In Breslin, Don F. Kirchner died with no surviving spouse and no children. Kirchner's estate was held in a revocable living trust. The trust provided that the residuary estate was to be distributed to the "persons and charitable organizations listed on exhibit A." At the time of Kirchner's death, the trust document was found, but no exhibit A was located. The notebook containing the trust, however, contained a one-page worksheet that identified 24 charities with handwritten numbers next to their names, many of which had been crossed out and changed. Nowhere on the worksheet was there any reference to "exhibit A." The handwritten numbers across the 24 charities on the worksheet added up to 100.

Confronted with a trust agreement that may have lacked the requisite distribution document, the trustee, Kirchner's nephew, filed a petition for instructions seeking directions from the court. The trustee asked the court for directions on how to distribute the trust, or whether Kirchner's estate should pass by intestacy.

In response to the petition for instructions, one of the charities filed a response asserting that the worksheet was intended to be exhibit A to the restated trust. Kirchner's nephews and nieces argued that there was no exhibit A, because their uncle was still contemplating which shares would go to whom. Faced with cogent arguments from both sides, the trial court ordered all parties to an early mediation to attempt to resolve their competing positions before spending down estate funds and potentially litigating for years.

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Five charities and various intestate beneficiaries agreed upon a mediator and selected a mutually convenient date. A little over two weeks before the scheduled mediation date, the participating charities sent out a notice of mediation to all charities that had been included on the worksheet as well as to potential intestate beneficiaries. The notice advised all prospective parties of the date, time and place of the mediation, and, citing Smith v. Szeyller expressly warned that the mediation could result in an agreement in which non-participants could lose their claims.

Only five of the 24 listed charities elected to show up at the mediation. The parties that did appear were able to reach an agreement allocating distribution of Kirchner's estate. With some minor adjustments, the five participating charities received the entirety of their stated numbers on the worksheet as a trust share percentage, with the balance of the estate distributed to Kirchner's intestate heirs. The 19 non-participating charities received nothing.

One of the participating charities petitioned the court to approve the settlement. A consortium of the non-attending charities made their first appearance and filed objections. The trial court found that the objecting charities had received adequate and timely notice of the mediation, and that their failure to participate in the court-ordered mediation constituted a waiver of their right to object to the petition to approve. The objecting charities appealed.

On appeal, the objecting charities argued that the probate court lacked the authority to order the parties to mediation, the non-participants were denied their right to an evidentiary hearing and the trustee breached the duty of impartiality by not adequately protecting their interests.

The appellate court affirmed the trial court's decision. The Breslin court held that a probate court ordering the parties to an estate dispute to mediation is consistent with the exercise of its broad powers under Probate Code Section 17206.

The appellate court in Breslin found that the objecting beneficiaries' failure to respect the trial court's pre-trial mediation order forfeited their right to an evidentiary hearing on the merits. Finally, the Breslin court found that the trustee had not violated the duty of impartiality. Implicit in the Breslin holding is the court's acquiescence to a fiduciary's use of a petition for instructions as a proper and impartial method for presenting competing interpretations of a trust instrument.

Though the objecting parties in Breslin are charities, a significant percentage of intra-family trust litigation matters in California includes unrepresented family members who do not wish to retain counsel or to self-represent in family disputes. It is also accurate that the vast majority of trust litigation matters in California resolve by way of settlement. Trust litigation matters, particularly undue influence and capacity challenges, as well as complex trust accounting disputes, are highly fact intensive and greatly deplete judicial, estate and personal resources when forced to trial.

Breslin suggests that a litigating family member challenging either an estate planning document or a trustee's actions no longer needs to "carry the sword" for all non-participating siblings and other similarly situated beneficiaries. Rather, that litigating family member can and should ask the court to direct the trust estate to mediation. Given proper notice, any non-participating bene-ficiaries can essentially be defaulted, with their gift reallocated or percentage diminished by failing to protect their own interests, effectively freeing the assets and dollars necessary for timely resolution.

The dissent takes the position, inter alia, that the settlement was not a proper reflection of the settler's estate plan, effectively resulting in a terminating sanction to all potential beneficiaries who failed to engage in "costly mediation."

Blood may be thicker than water, but it need not always come at the expense of bankrupting the estate and its litigants. Breslin provides a powerful tool to trust, probate and conservatorship litigation attorneys in creating hybrid resolution strategies adding a risk/reward component not previously available.

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**Judge Glen M. Reiser (Ret.)** *is an arbitrator, mediator and special master at JAMS. He has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator. Judge Reiser was the mediator in Breslin. He can be reached at greiser@ jamsadr.com.*

**Mark Lester** *is an estate planning attorney with Jones, Lester, Schuck, Becker & Dehesa, L.L.P. with over 25 years of experience in succession planning, probate, trust administration and trust and estate litigation. He is a certified estate planning, trust and probate law specialist by the State Bar of California Board of Legal Specialization. He can be reached at mark@venturaestatelegal.com.*

**Eric A. Hirschberg** *is an attorney with the law firm of Jones, Lester, Schuck, Becker & Dehesa, L.L.P. and focuses his practice in the areas of estate planning, probate, trust administration, trust and estate litigation, business and corporate transactions, and entity formation. He can be reached at eric@venturaestatelegal.com.*