

ROADBLOCKS ON THE ROAD TO PROBATE TRIALS

Written by Matthew Owens, Esq.* and Golnaz Yazdchi, Esq.**

I. INTRODUCTION

Without a solid grasp of pre-trial procedure in probate court governing the way in which trials are set and under what circumstances, the probate court can feel like the wild west with traps for the unwary. While it is true the probate court has wide discretion concerning the manner in which it manages and sets cases for trial, there is an established body of case law that provides direction and some level of certainty on when and how probate trials will be conducted. Some recent cases have placed additional roadblocks on the road to probate trials—for example, expanding the probate court's power to compel mediation and forfeit the rights of those who fail to participate—but that road is still navigable. The goal of this article is to explain the impact of those new cases, as well as pre-trial procedures generally in contested probate matters, so the reader will feel comfortable steering a contested probate matter to trial and overcoming any procedural hurdles along the way.

The authors hope that this article will be useful to estate planners who want to try cases, civil litigation attorneys who want to try probate cases, and experienced trust and estate litigators who want an update on recent case law impacting probate trials.

II. ENTITLEMENT TO TRIAL IN PROBATE COURT

A. The Court Will Set a Trial upon Demand in a Case with Disputed Facts

1. Right to a Trial in Probate Court

Although the probate court has its own method of handling case management in contested matters, the rules of evidence and civil procedure apply with full force and

effect all the way through trial, so long as those rules do not conflict with a more specific provision of the Probate Code.⁰¹ When matters within the purview of the Probate Code are contested, the probate court is typically required to hold a trial to adjudicate the dispute.

When at least one party demands a trial, the probate court is likely to set a trial date, after allowing time for discovery and pre-trial motions. The trial must be set in advance with proper notice to all parties.⁰² If it is a long-cause trial that will require multiple days, then, depending on the county, the trial might be assigned to a different department for trial, but that trial judge will still sit as a probate judge when adjudicating the case.

2. More than Just a Hearing

A trial in probate court is more than just a hearing on the regular probate calendar.⁰³ All of the standard civil rules surrounding pre-trial filings apply, including in limine motions, exhibit lists, witness lists, and trial briefs. Typically, live testimony will be offered in lieu of declarations, and exhibits must be formally offered and admitted into evidence.

The probate court is required to “hear and determine any matter at issue and any response or objection presented, *consider evidence presented*, and make appropriate orders.”⁰⁴ When an objection is asserted, the probate court generally may not decide a contested matter based on the pleadings.⁰⁵ The probate court may only consider declarations and verified pleadings as evidence in uncontested probate proceedings.⁰⁶ When a petition is contested and the facts are not stipulated, each allegation in a verified petition and each fact set forth in a supporting declaration must be established by competent evidence.⁰⁷ There are several key

cases that have analyzed the types of evidence the probate court may consider at trial.

In *Estate of Fraysher* (1956) 47 Cal.2d 131, a dispute over an estate accounting, the probate court considered declarations as evidence without requiring a trial with live witness testimony.⁸ It only did so, however, because the parties did not object and instead adopted that informal means of adjudicating the accounting at issue in the “relatively small” estate.⁹ In affirming the probate court’s ruling, the California Supreme Court held that, although declarations and verified pleadings normally may not be considered as evidence in contested probate matters, the parties waived their right to complain about the informal process on appeal since they adopted it and participated in it before the probate court.¹⁰

In *Estate of Duncan* (1969) 1 Cal.App.3d 212, the probate court decided a will contest without requiring that any evidence be formally introduced at the hearing.¹¹ The parties submitted verified pleadings and argument of counsel, but not live testimony or exhibits.¹² It was a contested hearing because there were competing petitions—one for letters of administration and one for probate of a holographic will.¹³ In reversing the probate court’s order denying the petition for letters of administration, the appellate court held that because it was a contested hearing the probate court was not permitted to decide the case based on verified pleadings and argument alone.¹⁴ The case was remanded so the probate court could hold a trial.¹⁵

In *Estate of Wallace* (1977) 74 Cal.App.3d 196, a dispute over a petition for family allowance from the decedent’s estate, the probate court barred one party from introducing a declaration as evidence.¹⁶ In affirming the probate court’s ruling on appeal, the appellate court noted that the rules of civil procedure generally apply in probate proceedings.¹⁷ The appellant who had attempted to use the declaration as evidence unsuccessfully argued that the declaration should have been considered because declarations may be considered as evidence at hearings on motions.¹⁸ The appellate court rejected that argument, however, because the contested probate dispute was not a motion and in probate court declarations can only be used in uncontested proceedings.¹⁹

In *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, a trust accounting dispute, the probate court decided the case without taking any live testimony from witnesses and without requiring that any exhibits be formally introduced into evidence.²⁰ In affirming the probate court’s ruling, the appellate court acknowledged that pleadings typically may not be considered as evidence in contested probate matters, but it found that the probate court’s ruling was

proper nonetheless because no one objected to the informal procedure used.²¹ The parties had submitted sworn statements in the form of verified pleadings and declarations, and they submitted the matter for decision to the probate court following argument of counsel.²² By adopting the probate court’s informal procedure, the parties waived their right to challenge that procedure on appeal.²³

In *Estate of Bennett* (2008) 163 Cal.App.4th 1303, a dispute over competing claims to entitlement to a decedent’s estate, the probate court granted a motion to set aside a settlement agreement based on declarations submitted without a trial.²⁴ The nonmoving party objected in the probate court, contending that a trial was necessary given the contested nature of the case.²⁵ The moving party’s position was that because it was a motion, as opposed to a petition, the rules of civil procedure permitting the use of declarations in connection with motions—Code of Civil Procedure section 2009—meant that declarations could be used without the need for a trial.²⁶ The appellate court reversed because, in this instance, there was a conflict between the Probate Code and the rules applicable to civil actions.²⁷ Probate Code section 1000 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.*”²⁸ In the context of this case, the Probate Code did “provide[] applicable rules.”²⁹ Specifically, the Probate Code provides a rule that limits the use of declarations to “uncontested proceeding[s].”³⁰ Since the case was a contested proceeding, and a trial demand had been timely made, declarations could not be considered as evidence, even though the matter presented for decision was presented by motion.³¹ In other words, the Probate Code’s express statute limiting the use of declarations to uncontested proceedings trumped the civil rule permitting litigants to use declarations in support of motions. Parties therefore cannot circumvent the Probate Code’s prohibition against the use of declarations in contested proceedings by framing the filing as a motion instead of a petition.

In *Estate of Lensch* (2009) 177 Cal.App.4th 667, another dispute over competing claims to entitlement to a decedent’s estate, the probate court denied a party’s request for a trial where the party made the request three times at the hearing in question.³² In reversing the ruling, the appellate court explained that the Probate Code anticipates that a party may submit a matter based on a verified petition alone, but as soon as it becomes contested the probate court is required to hold a trial on the contested issue.³³

In sum, absent waiver or stipulation, the probate court must hold a trial when the matter is contested. The trial will be

more than just a regular hearing because it will require live testimony and introduction of exhibits into evidence.

3. *Lawsuits with Both Equitable and Legal Claims*

There is no right to a jury trial for most matters brought under the Probate Code.³⁴ Most trials in probate court therefore are bench trials tried before a judge. Some common exceptions are contested conservatorship petitions and elder abuse claims, both of which can be tried before a jury upon proper demand. With respect to mixed cases—those with both equitable and legal claims—there are some procedural complications that counsel will need to be aware of and navigate.

A common example of a mixed case containing both equitable and legal claims is a trust contest petition brought on undue influence grounds that also contains an elder abuse claim. These are common occurrences because undue influence is a form of committing financial elder abuse.³⁵ The strategy of pleading a trust dispute as an elder abuse claim was bolstered by a case that held that damage to an elder's estate plan qualified as deprivation of a property right, constituting elder abuse.³⁶ Now, for better or worse, many trust contest petitions are also pled as elder abuse cases. This practice is particularly enticing to litigants since elder abuse claims carry with them enhanced remedies such as double damages, treble damages, attorney's fees, and disinheritance.³⁷ Further, a successful petitioner on an elder abuse claim can now recover attorney's fees and costs even *without* a bad faith finding,³⁸ making it even more desirable to transform a garden variety trust contest case into an elder abuse claim.

With respect to elder abuse claims where a jury trial has been demanded, the probate department in some counties may sever the elder abuse component of the case from any equitable component of the case and transfer the elder abuse component to the civil department.³⁹ The probate court in most counties is not well equipped to empanel a jury and would often prefer to have the jury trial aspect of the case transferred to the civil department where jury trials are commonly held. Alternatively, the probate court may bifurcate the elder abuse claim and try it last, after first holding a bench trial on the equitable claims that can be tried before a judge. In many cases, if the petitioner loses the bench trial component of the case, the elder abuse claim that would otherwise need to be tried to a jury is rendered moot by a defense ruling. The parties may, of course, waive their jury trial right and simply try the entire case before a judge, which is often done because it simplifies the process procedurally without conceding any of the enhanced remedies the petitioner may seek under the elder abuse claim.

B. *A Party Waives a Demand for Trial if Not Timely Asserted*

If the parties do not demand a trial and do not object to the use of pleadings in evidence, then the parties waive their right to an evidentiary hearing and may not question the process on appeal.⁴⁰ In that event, the probate court may simply rule on the petition without setting a trial and the parties will be deemed to have consented to submitting the case to the probate court based on the pleadings alone. Further, absent objection, the probate court may even consider unsworn memoranda submitted by the parties.⁴¹

It is critical, then, for a party to timely demand a trial if a trial is desired. Counsel must be ready to speak up at the hearing on the petition before the probate court rules on it. Once the probate court has ruled, it is too late to demand a trial.

C. *Consider Whether a Trial Is Really Necessary*

Just because you are entitled to a trial in the probate court does not mean you *need* one. For cost reasons, it may not be prudent to demand a trial. If the amount at issue is relatively low compared to the attorney's fees the parties will incur to try the case, the parties should not demand a trial. The parties may ask the probate court to permit counsel to present oral argument and then submit the matter for decision based on the pleadings, without the need for a trial. For example, if there is an objection to an accounting that is narrow in scope, the parties may simply ask the probate court to decide that one issue instead of taking up valuable court time to prove up the accounting, swear in witnesses, and formally introduce exhibits into evidence, all of which would be required at trial on the accounting.⁴²

The procedural traffic jam created by unnecessary trials (e.g., serial objections to annual accounting petitions coupled with a demand for trial on each one) bogs down the probate court's trial calendar with matters that should often more properly be resolved by simply submitting the matter for decision based on the pleadings and argument of counsel. Of course, parties have a due process right to trial in many cases. Counsel however should still advise their clients to balance that due process right against the cost of trial, as well as the need for judicial efficiency and economy.

Counsel may also consider whether a case is appropriate for judicial reference, either by agreement of the parties (voluntary) or upon order of the probate court over objection (involuntary). In a voluntary judicial reference, the parties have the flexibility to either refer all issues to the referee, which is a general reference, or to merely refer a specified issue to the referee, which is a special reference.⁴³

The referee in a voluntary judicial reference may issue a statement of decision that is binding.⁴⁴ By contrast, the referee in an involuntary judicial reference may only issue an advisory opinion that is not binding on the court, although in practice the advisory opinion is often adopted as the order of the court.⁴⁵ Included within the category of cases for which the court may make an involuntary judicial reference are matters that “require the examination of a long account.”⁴⁶ Counsel should therefore be prepared to address the issue of whether a judicial reference is appropriate when the probate case involves a disputed accounting. In certain cases, counsel may even wish to seek the appointment of a judicial referee instead of taking the case to trial.

III. ROADBLOCKS TO TRIAL IN PROBATE COURT

A. Early Dismissal Under Probate Code Section 17202

In trust proceedings, the probate court “may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.”⁴⁷ The court’s authority under Probate Code section 17202 is part of its broad equitable authority and can be an effective tool to resolve a case early under the right circumstances.⁴⁸

Similarly, in power-of-attorney proceedings, the probate court may dismiss the petition if it “is not reasonably necessary for the protection of the interests of the principal or the principal’s estate.”⁴⁹

The probate court’s authority under Probate Code section 17202 does not necessarily defeat the right to an evidentiary hearing in all cases where there is a contested factual dispute.⁵⁰ For example, in *Gregge v. Hugill* (2016) 1 Cal.App.5th 561 (“*Gregge*”), the trustor’s grandson filed a trust contest, alleging that the trustor (beneficiary’s grandfather) lacked capacity and was unduly influenced to execute the last amendment to his trust in 2008.⁵¹ Under the prior iteration of the trust executed in 2005, each of the trustor’s grandchildren were to receive \$75,000 from a grandchildren’s trust established for their benefit, and the trustee was vested with discretion to disburse funds from each grandchild’s share to pay for that grandchild’s higher education before age 26.⁵² Under the 2008 amendment, each grandchild’s fixed disbursement was reduced from \$75,000 to \$64,286 (a difference of \$10,714), because the trustor reinstated one of his grandchildren as a beneficiary, when that grandchild had been disinherited under the 2005 amendment.⁵³ The trustee, whom the contestant accused of unduly influencing the trustor into executing the final trust amendment at a time when the trustor lacked

capacity, argued that the contesting beneficiary lacked standing to contest the entire trust because he was not a beneficiary to the trust residue.⁵⁴ The trustee also argued that the reinstated beneficiary would agree to relinquish his interest in the trust to end the litigation, thereby restoring the contestant’s gift to what it would otherwise be under the 2005 amendment.⁵⁵ The reinstated grandchild beneficiary signed a declaration disclaiming his interest in the trust conditioned on the entry of a final order dismissing the petition.⁵⁶ The trial court viewed the disclaimer as a settlement of the estate resulting in the elimination of the contestant’s pecuniary interest in a challenge to the 2008 amendment, and dismissed the contest under Probate Code section 17202.⁵⁷ The appellate court reversed, finding that the trial court abused its discretion by dismissing the trust contest as not reasonably necessary for the protection of the contestant’s interest, because the contestant was entitled to a trial on his petition.⁵⁸ The appellate court noted that the dismissal of the trust contest and acceptance of the disclaimer “was contrary to public policies of effectuating a testator’s intent and dissuading elder abuse, and was premised on the erroneous view that the disclaimer effectuated a settlement of the lawsuit.”⁵⁹

A similar result followed in the recent *Dunlap v. Mayer* (2021) 63 Cal.App.5th 419 (“*Dunlap*”) case. There, the executor of an estate filed a petition for an accounting of a marital trust, of which the decedent was a lifetime beneficiary.⁶⁰ The alleged trustee of the marital trust stated that she did not know if the marital trust was ever funded, that she never acted as trustee, that she never possessed assets as a trustee of the marital trust, and that the entities that were to fund the marital trust had been defunct for more than 15 years.⁶¹ On that basis, the court dismissed the petition without prejudice pursuant to Probate Code sections 17202 and 17206.⁶² The appellate court reversed, holding that the probate court “does not have the power to dismiss an action sua sponte and without notice when, as here, there are disputed issues....The court was required to hold a hearing and consider competent evidence on the contested issue concerning an accounting of the assets of the Marital Trust during [decedent’s] lifetime.”⁶³

Conversely, in *Boys & Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049 (“*Boys & Girls Club*”), the appellate court affirmed the lower court’s dismissal of a petition to ascertain beneficiaries under Probate Code section 17202, where all beneficiaries consented to a modification of the trust in accordance with the requirements of Probate Code section 15403 and the successor trustee’s petition to ascertain beneficiaries was “not reasonably necessary for the protection” of the beneficiaries’ interests.⁶⁴ The difference between *Boys & Girls Club*, on the one hand, and *Gregge* and *Dunlap*, on the other hand, is that in *Gregge* and *Dunlap*, there was a contested issue of fact raised by a

beneficiary, whereas in *Boys & Girls Club* all the beneficiaries were in agreement and reached a settlement that excluded the trustees.

B. Early Dismissal Under Probate Code Section 17206

“The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition”⁶⁵ This statute gives the probate court discretion to enter a wide range of orders in trust matters. In *Schwartz v. Labow* (2008) 164 Cal. App.4th 417, the probate court suspended the trustee and appointed an interim trustee pending trial.⁶⁶ The court took these actions sua sponte, as part of its duty to supervise the trust administration, and to inquire into the prudence of the trustee’s actions.⁶⁷ In another case, *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, the probate court’s sua sponte order for an accounting under section 17206 was affirmed on appeal as consistent with the probate court’s duty to supervise the trust administration.⁶⁸ Without question, section 17206 serves as a powerful and useful tool that aids the probate court in efficiently and effectively supervising trust matters before it. But the probate court’s power under section 17206 does have limits.

In several cases, courts have interpreted section 17206 to only give the probate court the power to enter *incidental* orders.⁶⁹ As discussed further below, that limitation on the reach of section 17206 to *incidental* orders is arguably in tension with the more expansive view of section 17206 taken in *Breslin v. Breslin* (2021) 62 Cal.App.5th 801 (“*Breslin*”).⁷⁰

As explained above, in *Dunlap*, the Fourth District Court of Appeal took the approach of limiting section 17206’s reach to *incidental* orders.⁷¹ There, the probate court dismissed under section 17206 a petition to compel a trust accounting.⁷² In so doing, the probate court relied on the respondent’s verified objection as evidence in support of its ruling without holding a trial, even though the facts were contested.⁷³

The appellate court reversed the dismissal order and remanded for further proceeding so a trial could be held.⁷⁴ The petitioner had alleged the respondent took possession of trust assets worth several million dollars and then failed to account for them, and the respondent disputed those allegations.⁷⁵ Given the contested facts, the probate court could not rely on the respondent’s verified objection as the basis for its ruling.⁷⁶ Since no trial was held, there was no competent evidence establishing the allegations contained in the verified objection.⁷⁷

The respondent argued that section 17206 gave the probate court wide discretion to dismiss the case and that

the probate court also had the general power and duty to supervise the administration of trusts.⁷⁸ The appellate court disagreed, noting that the probate court’s powers comprise only the inherent power to decide all *incidental* issues necessary to carry out the probate court’s express powers to supervise the trust administration.⁷⁹ “Dismissal of a petition altogether is not an incidental issue; it is the complete resolution of the petition.”⁸⁰ The probate court therefore could not dismiss the petition under section 17206, and was required to hold a trial.⁸¹

The appellate court went on to explain that reviewing courts are “increasingly wary” of using procedural shortcuts because they circumvent procedural protections, risk blindsiding the nonmoving party, and, in some cases, could infringe a litigant’s trial rights.⁸² Notably, these comments conflict with *Breslin* discussed below, which creates its own procedural shortcut to cut off of a litigant’s right to trial in the event they fail to attend court-ordered mediation. *Breslin* also appears to have gone beyond a mere *incidental* order because it resulted in waiver of the trial rights of several parties.

C. Waiver of Rights Due to Failure to Participate in Certain Proceedings

1. Failure to Participate in Trial May Result in Waiver of Right to Object to Settlement Reached Among Litigants at Trial

In *Smith v. Szezyller* (2019) 31 Cal.App.5th 450 (“*Smith*”), following the death of the trust’s settlors, two of their five children became embroiled in litigation over the trust administration and distribution.⁸³ Although the five children were equal beneficiaries, three of the five decided not to participate in the proceeding, despite having received notice.⁸⁴ After five days of trial, the two litigating beneficiaries settled the case with court oversight and approval.⁸⁵ Without including their three other siblings, they simply stipulated to a settlement that included, among other things, an award of \$721,258.28 to one of the litigating beneficiaries for attorney’s fees, expert fees, and costs to be paid from the trust.⁸⁶ The two litigants had their settlement incorporated into an “Order After Trial” that set forth the terms of their agreement and findings, which the probate court entered as its order.⁸⁷ One of the non-participating beneficiaries attempted to object to the settlement based on lack of notice of the pleadings as to the attorney-fee request, lack of evidence to support the attorney-fee award (there was no attorney-fee declaration provided), disproportionate benefit among the beneficiaries, and violation of her due process rights.⁸⁸ The probate court overruled the objections on grounds that she waived her right to participate in the proceeding by failing to object to the petition or attend trial, and further that the attorney-fee

award was proper under the substantial benefit doctrine, an offshoot of the common fund doctrine.⁸⁹

In affirming the probate court's ruling, the appellate court held the non-participating beneficiary's due process rights were not violated by the stipulated settlement because the non-participating beneficiary forfeited her rights by not objecting earlier to any of the other parties' litigation activities.⁹⁰ The settling parties were not required to file a petition to approve the settlement, which would have given the non-participating beneficiaries a chance to object and present argument on the fairness of the settlement, because the matter was properly before the probate court in light of the fact the petitions and objections framed the dispute.⁹¹ The probate court could have decided a wide range of outcomes at trial based on the issues framed by the pleadings, so the fact that the order and findings were achieved by stipulation of the litigating parties as opposed to judicial decision was inconsequential.⁹² "The litigating parties resolved disputed facts, and the court was bound by that resolution."⁹³ As for the attorney-fee amount, no billing records were required to be provided because the litigating parties agreed to the amount.⁹⁴

Smith stands for the proposition that failure to participate in trial may result in the waiver of a party's right to object to any outcome achieved at trial, even if that outcome is achieved by stipulated settlement among the litigating parties. Counsel should therefore attend all proceedings before the probate court in contested matters or risk a waiver of the right to object in the event a settlement is reached either on the record or by stipulated order submitted to the probate court for entry.

2. Failure to Attend Mediation May Result in Forfeiture of Rights

Prior case law held that the probate court lacked the power to compel mediation in contested probate matters. In *Breslin v. Breslin* (2021) 62 Cal.App.5th 801 ("*Breslin*"), the appellate court took a detour and held that the probate court has the power to order parties into mediation.⁹⁵ In *Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536 ("*Jeld-Wen*"), the appellate court held that it would violate public policy to force parties to attend and pay for mediation, and that it would be contrary to the voluntary nature of private mediation.⁹⁶

With the recent decision in *Breslin*, it appears that a court's power to compel mediation—at least in probate—has been restored. The question remains, however, whether the probate court can force the parties to pay for mediation, or whether the power to compel mediation is limited to instances where the trust (or possibly the estate) pays for the mediation. There is also an open question as to whether *Breslin* only permits court-ordered mediation in situations

where interested persons receive notice of the hearing on the petition and fail to appear at the hearing at which mediation is ordered.⁹⁷

In *Breslin*, David Breslin was named as the successor trustee of decedent Don Kirchner's trust.⁹⁸ Kirchner established a living trust on July 20, 2017, and restated it on November 1, 2017.⁹⁹ Though Breslin located the restated trust, he could not find the original trust.¹⁰⁰ The restated trust made certain specific gifts and directed the residue of the trust estate to be distributed to persons and charities listed on Exhibit A.¹⁰¹ Breslin could not locate Exhibit A but found a document titled "Estate Charities (6/30/2017)" in Kirchner's estate planning binder, and based on this document Breslin filed a petition to confirm him as successor trustee and to determine the beneficiaries of the trust.¹⁰² Breslin served notice on each of the listed charities.¹⁰³ Only three of the twenty-four charities responded.¹⁰⁴ The court confirmed Breslin as the successor trustee and ordered mediation among interested parties, including Kirchner's intestate heirs and all listed charities.¹⁰⁵ The mediator's fees were to be paid from the trust.¹⁰⁶ Notice was given to all interested parties with a warning that any party may be bound by the terms of an agreement reached at mediation, and may lose rights as a trust beneficiary if the party does not participate in mediation.¹⁰⁷ Breslin, Kirchner's intestate heirs, and five of the listed charities participated in mediation and reached an agreement, that the court approved.¹⁰⁸ The court denied the objections of non-participating charities, known as the Pacific parties, to the settlement because they failed to file a response to the underlying petition or participate in mediation notwithstanding receiving notice of both.¹⁰⁹

The appellate court affirmed, holding that under Probate Code section 17206, the probate court has the power to order parties into mediation as part of its statutory authority to make any orders and take any other action necessary or proper to dispose of the matters presented by the petition.¹¹⁰ By failing to participate in mediation, the Pacific parties waived their right to an evidentiary hearing and forfeited their interest in the proceedings.¹¹¹ The appellate court held that the court has authority to direct the procedure of the proceedings, including ordering mediation.¹¹² Additionally, it held that the trustee did not breach his fiduciary duties by entering into the agreement even though it provided him with a gift because he provided notice of the mediation and an opportunity to participate to all interested persons, and the Pacific parties' made the decision to not participate of their own volition.¹¹³

The take-away from *Breslin*, is that where the court orders mediation, a party who receives notice of the mediation (now referred to as a "Breslin Notice") must attend or else risk forfeiting its right to object to a settlement and participate further in the proceedings. In *Breslin* the problem

for the Pacific parties was two-fold—not only did they fail to participate in mediation, but they also failed to participate and appear in the court proceedings prior to mediation. The court in *Breslin* noted:

Had the Pacific parties appeared at the initial probate hearing, for which they received notice, they would have had the opportunity to object to mediation. Instead, they waited until after the mediation, for which they also received notice, in addition to notices of continuances, to finally object to the result.¹¹⁴

It appears that there is at least some tension in the state of the law to the expansiveness of the probate court's powers under Probate Code section 17206. The Fourth District Court of Appeal took a more narrow view of the probate court's power in *Dunlap*, stating that section 17206 gives the court only the inherent power to decide all *incidental* issues necessary to supervise the trust administration, while *Breslin* took a more expansive view of the court's authority under section 17206 allowing the court to approve a settlement over the objection of an interested party where such party failed to participate in the proceedings or to appear in a court-ordered mediation.¹¹⁵

Although the *Breslin* decision is specific to the probate court's authority under Probate Code section 17206, it is possible that we will see the power to compel mediation expand into civil matters. Though as it stands, *Jeld-Wen* remains good law. In *Jeld-Wen*, the court held that compelling parties to mediate in complex civil cases and pay for mediation was not authorized by the powers set forth under Code of Civil Procedure section 128, subdivision (a) (3), and Code of Civil Procedure section 187, namely the court's inherent power to control the proceedings before it and to adopt suitable methods of process to the extent its orders do not conflict with any statute and are not inconsistent with law.¹¹⁶ This could change in the future in light of the *Breslin* decision.

Given that mediation is an effective and cost-efficient way to resolve a contested probate matter, the reinstatement of the court's power to compel mediation in trust matters as set forth in *Breslin* can certainly have a positive impact not only on the courts' already heavily impacted case load, but also for party litigants. However, the downside is that unrepresented and less sophisticated interested persons may suffer if they do not fully appreciate the potential ramifications of failing to participate in a mediation, i.e., a settlement may be reached that affects their beneficial interest and they could be precluded from objecting for failing to participate.

D. Requirement to Make an Offer of Proof

In *Conservatorship of Farrant* (2021) 67 Cal.App.5th 370 ("*Farrant*"), the probate court surcharged an attorney-in-fact at a hearing based on pleadings and declarations alone, without holding a trial.¹¹⁷ Consistent with the body of case law discussed above, the probate court was permitted to consider the pleadings and declarations, even though it was a contested probate proceeding, because no one objected.¹¹⁸ The appellate court affirmed on that basis.¹¹⁹

The new bump in the road from *Farrant*, though, is that the appellate court also affirmed on grounds that no trial was required in any event because counsel did not specify at the hearing the factual issues to be litigated or the relevant evidence, i.e. "testimony and exhibits," that would be presented at trial.¹²⁰ Instead, counsel only made vague representations about what would occur at trial.¹²¹ In support of its decision, the appellate court noted it had rejected the appellant's contention that he was entitled to a trial on the same basis in a prior appeal in the same conservatorship case.¹²² Specifically, in that prior appeal, no trial was required because appellant had failed to articulate before the probate court (i) the factual issues to be litigated, (ii) the reason a trial was necessary, (iii) the identity of the witnesses who would testify at trial, or (iv) an "offer of proof" as to the substance of the evidence that would be presented at trial.¹²³

This standard is akin to the standard that applies to motions for summary judgment, which may be granted when "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law."¹²⁴ A key difference, however, is that summary judgment motions may only be heard if notice of the hearing on the motion is given 75 days in advance.¹²⁵ Summary judgment motions also must be supported by a separate statement that sets forth all material facts the moving party contends are undisputed, with a corresponding citation to the evidence in support of that contention.¹²⁶ These rigid procedural requirements help ensure that, before the court potentially disposes of the case by motion practice without a trial, the nonmoving party has a full and fair opportunity to explain why the case should proceed to trial. Since *Farrant* now sets up a mini-summary-judgment procedure, but without the procedural protections that apply to actual summary judgment motions, there is a risk some probate petitions may be dismissed in expedited fashion without first giving litigants a chance to explain why trial is necessary.

In *Farrant* itself, the probate court was exceedingly generous and patient with the respondent who had misappropriated funds from his own elderly and incapacitated mother, granting multiple continuances and opportunities to be

heard before ultimately surcharging him. So, the authors have no compassion for that respondent. Nonetheless, it is conceivable that parties in more compelling cases could now face at routine hearings demands from probate courts for an offer of proof as to what evidence would be presented at trial if one were set, which witnesses would be called to testify, and the like. If the probate court is not satisfied that a viable offer of proof is given in response, *Farrant* could be invoked as grounds for denying the party a trial on the petition. That would be a dramatic ruling that could catch parties or counsel off guard if they are unfamiliar with *Farrant* or the concept of being required to make an offer of proof to justify the right to a trial.

The practical reality that comes through in *Farrant* is that probate courts are permitted to protect their impacted trial calendars from unnecessary trials. If litigants cannot demonstrate an actual need for a trial by making a viable offer of proof, then probate courts can simply rule on the petitions pending before them without a trial.

IV. TENSION BETWEEN APPELLATE DISTRICTS OVER SECTION 17206

As noted above, the Fourth District Court of Appeal held in *Dunlap* that section 17206 is only to be used for *incidental* orders. Before *Dunlap*, other cases had used the qualifier “incidental” when describing issues the probate court may decide under section 17206.¹²⁷ So what exactly is an incidental order? We know that, on the one hand, included within the scope of an incidental order is an interim order to suspend a trustee and an order that a trustee must provide an accounting.¹²⁸ We also know that, on the other hand, an incidental order does not include “[d]ismissal of a petition altogether.”¹²⁹ But that leaves a lot of room in between those two points on the section 17206 spectrum that must be sorted out on a case-by-case basis depending on the wide-ranging relief that may be sought under section 17206.

The Second District Court of Appeal in *Breslin* did not seem to believe section 17206 is relegated solely to *incidental* orders. Instead, it was comfortable with the probate court using section 17206 as a procedural tool to condition a litigant’s right to trial on participation in a particular pre-trial proceeding, which in that case was mediation. By using section 17206 in that way, the probate court was able to completely dispose of the pending trust petition without holding a trial, even though certain parties demanded a trial.

The Second District’s interpretation of section 17206 is in tension with the Fourth District’s view that section 17206 cannot be used to dispose of petitions altogether. This tension was highlighted when the Fourth District went out of its way in *Dunlap* to note that reviewing courts are

becoming “increasingly wary” of using procedural shortcuts to infringe a litigant’s trial rights.¹³⁰ It could be argued the probate court in *Breslin* did just that: it created a procedural shortcut that cut-off the trial rights of certain parties who were demanding a trial.

The probate court’s power under section 17206 has been interpreted to mean that, since the probate court has certain express powers under the Probate Code (e.g., the power to remove a trustee), then the probate court necessarily has the inherent equitable power to employ a less extreme remedy pending trial (e.g., suspending a trustee and appointing a temporary trustee pending trial).¹³¹ In that context, section 17206 empowers probate courts to enter a wide range of incidental orders pending trial so the probate court can ensure the trust is properly supervised and the parties’ rights are protected during that interim period. But *Breslin* appears to go well beyond the range of “incidental orders” or “less-extreme-remedy orders” by establishing a new procedural shortcut through which parties may inadvertently waive their right to trial altogether—arguably the most extreme remedy of all. This more aggressive interpretation of section 17206 is at odds with the *Dunlap* interpretation, which was that section 17206 was only for “incidental” orders and it could not be used to cut off a party’s right to trial. Indeed, waiver of trial rights is perceived by many to be far from “incidental.”

V. STRATEGIES FOR AVOIDING ROADBLOCKS

A. Make a Timely Trial Demand

The probate court may decide disputes pending before it based on the pleadings alone, unless one of the parties demands a trial. Counsel should be vigilant at hearings to ensure the probate court does not make a ruling on the petition before counsel make their trial demand. It is often proper to discuss the merits of the pleadings, at least on some level, at pre-trial hearings. But counsel must not fall into the potential trap of arguing the matter based on the pleadings and then submitting it for decision if counsel wish to set the case for trial. Once the court has made a ruling based on the pleadings, counsel will be deemed to have consented to submitting the matter for decision without a trial, and the probate court’s ruling will not be disturbed on appeal based on the procedure used. Counsel may also consider making a written demand for a trial in their pleadings to ensure they have created a record of that demand.

B. Be Prepared to Make an Offer of Proof

Just because you have a disputed fact, does not mean you necessarily get a trial. The probate court may rightfully

request that counsel make an offer of proof as to what the evidence would show at trial if one were held. Counsel in that scenario must be prepared to demonstrate that the trial is worth holding because the outcome could differ depending on the way the court weighs or credits the evidence counsel intends to offer at trial. If the probate court does not believe that a trial is necessary because it knows how it will rule even if the argument and evidence underpinning the offer of proof would not change the outcome, then it may decide the case without holding a trial.

This offer-of-proof demand is akin to a motion for summary judgment, but it is more dangerous for counsel because the topic could potentially be raised at any hearing before the probate court. If the probate court is contemplating potential dismissal based on inadequacy of counsel's offer of proof, then counsel should ask the probate court to set a further hearing on that issue, giving all parties advance notice of that specific hearing and the opportunity to argue the potential dismissal at that time.¹³² In the wake of *Farrant*, counsel should be prepared to request an offer-of-proof hearing at all pre-trial hearings and case management conferences, if the court is inclined to dismiss the petition for lack of evidence.

C. Attend All Mandatory Proceedings, Including Mediation if Ordered

Under *Breslin*, in trust proceedings the probate court may enter orders compelling parties to participate in pre-trial proceedings as a condition to preserving their right to a trial. Under the *Breslin* interpretation, section 17206 gives probate courts wide discretion to handle the petitions before them as they see fit, including forcing parties to participate in certain proceedings on pain of waiver of their trial right.

We know that such mandatory proceedings include court-ordered mediation because that is what occurred in the *Breslin* case. But the court-ordered proceeding could theoretically include a whole variety of events that the probate court could deem to be conditions that a party must satisfy to preserve the party's trial right. Examples could include mandatory settlement conferences hosted by the court, neutral evaluation by an expert, direct negotiation between the parties or counsel, or any other non-binding alternative dispute resolution technique. If the probate court orders any such proceeding, the parties must participate or risk waiver of their trial right.

Similarly, beneficiaries must attend trial or risk having the litigants settle around them at the time of trial. In that event, the non-participating beneficiaries may be barred

from objecting to the terms of any settlement reached by the litigants, as occurred in *Smith*.

VI. CONCLUSION

The cases discussed in this article have imposed additional roadblocks on the way to trial in probate court. From the requirement to make a timely trial demand, to the requirement to participate in mediation on pain of forfeiture of rights, to the requirement that an offer of proof be provided upon the probate court's request, these roadblocks can be significant challenges for those who are unfamiliar with them. The good news, though, is that practitioners who are familiar with these roadblocks can not only successfully navigate around them, but they can also use these roadblocks to their advantage in certain cases. The authors hope this article permits practitioners to do just that.

* Withers Bergman LLP, San Diego, CA

** Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA

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- 01 Prob. Code, section 1000, subd. (a).
- 02 Prob. Code, section 1042 ("[a] hearing under this code shall be on notice unless the statute that provides for the hearing dispenses with notice.").
- 03 For a discussion on the difference between a hearing and a trial in the context of a conservatorship petition brought under the Lanterman-Petris-Short Act, see *K.R. v. Super. Ct. of Napa County* (2022) 80 Cal.App.5th 133. This article does not address the substantial case law that governs trial rights in LPS conservatorship matters.
- 04 Prob. Code, section 1046 (emphasis added).
- 05 *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 620; *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676; *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1308-10.
- 06 Prob. Code, section 1022; *Estate of Bennett* (2008) 163 Cal. App.4th 1303, 1309.
- 07 *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676.
- 08 *Estate of Fraysher* (1956) 47 Cal.2d 131, 135.
- 09 *Id.* at p. 139.

- 10 *Id.* at p. 135.
- 11 *Estate of Duncan* (1969) 1 Cal.App.3d 212, 215.
- 12 *Id.* at p. 215.
- 13 *Ibid.*
- 14 *Ibid.*
- 15 *Id.* at p. 216.
- 16 *Estate of Wallace* (1977) 74 Cal.App.3d 196, 201.
- 17 *Id.* at p. 201.
- 18 *Ibid.*
- 19 *Ibid.*
- 20 *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 620.
- 21 *Id.* at p. 620.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1308.
- 25 *Id.* at p. 1308.
- 26 *Ibid.*
- 27 *Ibid.*
- 28 Prob. Code, section 1000 (emphasis added).
- 29 *Estate of Bennett, supra*, 163 Cal.App.4th at p. 1308.
- 30 *Estate of Bennett, supra*, 163 Cal.App.4th at p. 1309 (citing Prob. Code, section 1022).
- 31 *Ibid.*
- 32 *Estate of Lensch, supra*, 177 Cal.App.4th at pp. 676-77.
- 33 *Id.* at p. 677.
- 34 Prob. Code, section 825.
- 35 Welf. & Inst. Code, section 15610.30, subd. (a)(3) (financial elder abuse includes taking via undue influence); Welf. & Inst. Code, section 15610.70 (definition of undue influence).
- 36 *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841, 862.
- 37 Welf. & Inst. Code, section 15657.5, subd. (a) (attorney's fees and costs); Prob. Code, section 859 (double damages, attorney's fees, and costs); Civ. Code, section 3345, subd. (b) (treble damages); Prob. Code, section 259 (disinheritance).
- 38 *Keading v. Keading* (2021) 60 Cal.App.5th 1115, 1128.
- 39 Prob. Code, section 801.
- 40 *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 620.
- 41 *Ibid.* (citing *Greyhound Corp. v. Super. Ct.* (1961) 56 Cal.2d 355, 359).
- 42 But see *Estate of Fraysher* (1956) 47 Cal.2d 131, 134-35 (probate court was not reversed on appeal where it permitted the use of verified pleadings to substantiate small discrepancies in an estate accounting without requiring a trial, and where the parties failed to object to the informal procedure).
- 43 Code Civ. Proc., section 638.
- 44 Code Civ. Proc., section 638, subd. (a).
- 45 Code Civ. Proc., section 639.
- 46 Code Civ. Proc., section 639, subd. (a)(1).
- 47 Prob. Code, section 17202.
- 48 Prob. Code, section 17206.
- 49 Prob. Code, section 4543.
- 50 *Evangelho v. Presoto, supra*, 67 Cal.App.4th at p. 620.
- 51 *Gregge v. Hugill* (2016) 1 Cal.App.5th 561, 563.
- 52 *Id.* at p. 564.
- 53 *Ibid.*
- 54 *Id.* at p. 566.
- 55 *Ibid.*
- 56 *Id.* at p. 567.
- 57 *Ibid.*
- 58 *Id.* at p. 571.
- 59 *Id.* at p. 563.
- 60 *Dunlap v. Mayer* (2021) 63 Cal.App.5th 419, 422.
- 61 *Id.* at p. 423.
- 62 *Ibid.*
- 63 *Id.* at pp. 426-427.
- 64 *Boys & Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1060.
- 65 Prob. Code, section 17206.
- 66 *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.
- 67 *Id.* at p. 427.
- 68 *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.
- 69 *Dunlap v. Mayer* (2021) 63 Cal.App.5th 419, 426; *Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 427; *Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951.
- 70 *Breslin v. Breslin* (2021) 62 Cal.App.5th 801.
- 71 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 426.
- 72 *Id.* at p. 419.
- 73 *Id.* at p. 426.
- 74 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 426.
- 75 *Ibid.*
- 76 *Ibid.*
- 77 *Ibid.*
- 78 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 426.
- 79 *Ibid.* (citing *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427).
- 80 *Id.* at p. 426.
- 81 *Ibid.*
- 82 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 427 (quoting *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1594).
- 83 *Smith v. Szezyller* (2019) 31 Cal.App.5th 450, 453.

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

90 *Smith v. Szezyller, supra*, 31 Cal.App.5th at p. 457.

91 *Id.* at p. 458.

92 *Ibid.*

93 *Ibid.*

94 *Id.* at p. 462.

95 See *Jeld-Wen, Inc. v. Super. Ct.* (2007) 146 Cal.App.4th 536; *Breslin, supra*, 62 Cal.App.5th at p. 805.

96 *Jeld-Wen, Inc., supra*, 146 Cal.App.4th at p. 543.

97 *Breslin v. Breslin* (2021) 62 Cal.App.5th 801, 807 (“Had the Pacific parties appeared at the initial probate hearing, for which they received notice, they would have had the opportunity to object to mediation.”)

98 *Breslin, supra*, 62 Cal.App.5th at p. 803.

99 *Ibid.*

100 *Id.* at p. 804.

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 *Id.* at p. 805.

108 *Ibid.*

109 *Ibid.*

110 *Breslin, supra*, 62 Cal.App.5th at p. 806.

111 *Ibid.*

112 *Ibid.*

113 *Id.* at p. 807.

114 *Breslin, supra*, 62 Cal.App.5th at p. 807.

115 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at pp. 426-27; *Breslin, supra*, 62 Cal.App.5th at pp. 805-07.

116 *Jeld-Wen, Inc., supra*, 146 Cal.App.4th at p. 543.

117 *Conservatorship of Farrant* (2021) 67 Cal.App.5th 370, 377.

118 *Id.* at p. 377.

119 *Ibid.*

120 *Conservatorship of Farrant, supra*, 67 Cal.App.5th at p. 378.

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 Code Civ. Proc., section 437c, subd. (c).

125 Code Civ. Proc., section 437c, subd. (a)(2).

126 Code Civ. Proc., section 437c, subd. (b)(1).

127 *Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 427 (“probate court has the ‘inherent power to decide all incidental issues’”); *Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951 (same).

128 *Schwartz v. Labow, supra*, 164 Cal.App.4th at p. 427; *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.

129 *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 426.

130 *Dunlap v. Mayer, supra*, (2021) 63 Cal.App.5th at p. 427.

131 *People ex rel. Harris v. Shine* (2017) 16 Cal.App.5th 524, 539 (citing *Schwartz v. Labow, supra*, 164 Cal.App.4th at pp. 427-28).

132 See *Dunlap v. Mayer, supra*, 63 Cal.App.5th at p. 427 (“There was no notice to the Estate that dismissal of the petition would be considered [at the case management conference], much less granted.”).

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