



Recent Developments in Trust, Estate, and Conservatorship Law

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Agenda

- “Recent” Developments
- Trust Cases
- Estate Cases
- Conservatorship Cases
- Statutory Updates
- Questions


Meiri v. Shamtoubi (2022) 81 Cal.App.5th 606

- Trust contest based on lack of capacity, undue influence, and fraud
- Beneficiary's trust contest was filed after the 120-day deadline (PC § 16061.7)
- Trustee responds w/ petition for instructions re: enforcement of no-contest clause
- Probate court grants trustee's petition
 - The trust contest was a direct contest
 - Lacked probable cause
- Holding on appeal? **AFFIRMED**
- Beneficiary deemed predeceased for filing direct trust contest after the 120-day deadline
- The late filing demonstrated lack of probable cause



Autonomous Region of N.A. v. N.A. World Services (2022) 77 Cal.App.5th 950

- Regional Narcotics Anonymous (NA) group alleging that it had a special interest in revocable charitable trust controlling the intellectual property of NA filed petition alleging trustee breached the trust and violated its fiduciary duties
- Trial court dismissed on standing grounds
- Holding on appeal? **AFFIRMED**
- “Autonomous” group was not a “settlor” as defined per trust
- The common law doctrine of special interest standing to enforce charitable trusts does not extend to revocable trusts
- “Autonomous” group did not have special interest in revocable charitable trust, as required for standing to sue trustee



Bruno v. Hopkins (2022) 79 Cal.App.5th 801

- Trust contest based on forgery, and request for trustee removal
- Competing handwriting experts opined on allegedly forged trust instrument
- Probate court determines it was not a forgery and awarded attorney's fees against contestant for bad faith removal request (\$829,000 in attorney's fees and \$96,000 in costs)
- Probate Code § 15642(d) permits personal money judgment
- Holding on appeal? **AFFIRMED**
- A beneficiary who petitions to remove trustee in bad faith may be liable for attorney's fees and costs, which can exceed their beneficial interest in the trust

Haggerty v. Thornton (2021) 68 Cal.App.5th 1003

- Settlor's 2015 trust reserved the "right by an acknowledged instrument in writing to revoke or amend"
- The final 2018 amendment, which revoked the gift for Haggerty, was a handwritten amendment with instructions to Jeane's EP attorney to place it with her original trust document, but it was not notarized
- Haggerty argued the exclusive method of amendment under the trust required notary acknowledgement
- The probate court found the 2018 amendment valid
- Holding on appeal? **AFFIRMED**
- Because the trust did not make the described method of revocation and amendment the exclusive method, statutory methods of amendment were available to the settlor
- The 2018 amendment was valid because Settlor complied with the statutory method of amendment by signing and delivering a writing to herself as trustee

Balistreri v. Balistreri (2022) 75 Cal.App.5th 511

- Petition to construe and confirm trust amendment
- Petitioner was widow who, together with her now-deceased husband, amended their trust
- Trust contained language requiring amendments be notarized
- Trust amendment was not notarized
- Probate court ruled the amendment was invalid for lack of notarization
- Holding on appeal? **AFFIRMED**
- Trust described a method of amendment that was the exclusive means of amendment
- Trust amendment was invalid for failure to comply with that exclusive method

Balistreri v. Balistreri (2022) 75 Cal.App.5th 511

- Fourth District v. First District



- Probate Code § 15402: “*Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation.*”

Diaz v. Zuniga (2023) 2023 WL 3558205

- Trust could only be amended if notice delivered to trustee via certified mail
- Settlor attempted to amend, but did not send document to himself as trustee via certified mail
- Probate court ruled amendment was invalid
- Holding on appeal? **AFFIRMED**
- Adopted *Balistreri* view

Breslin v. Breslin (2021) 62 Cal.App.5th 801

- List of beneficiaries of trust was missing
- Trustee gave notice to a series of likely beneficiaries, and petitioned for instructions as to identity of beneficiaries
- Some appeared, and the court ordered mediation
- Trustee gave notice to all beneficiaries, many of whom did not attend mediation
- Case settled, and trustee petitioned for approval of settlement
- Trial court approved settlement over objections of some beneficiaries who didn't appear or participate in mediation
- Holding on appeal? **AFFIRMED**

Breslin v. Breslin (2021) 62 Cal.App.5th 801

- Where potential trust beneficiaries abstain from participating in court proceedings to determine the beneficiaries of a trust, and are given notice of a mediation at which their rights may be affected but fail to participate, they waive their right to object to the settlement
- This case is notable because some courts and practitioners are construing it as conferring on the court the power to order mediation in any trust dispute
- The Court stated that “the court has the power to order parties into mediation,” citing as authority only Probate Code section 17206
- The language of section 17206 is indeed broad and apparently all-encompassing (“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”), but *Breslin* is the first case to conclude that the section confers the power to order mediation

Breslin v. Breslin (2021) 62 Cal.App.5th 801

- Arguably, *Breslin* should not be read as conferring an absolute right to order mediation in any trust dispute, as some courts seem to believe, and its holding should be limited to the unusual situation where parties have received notices of trial court proceedings and nevertheless decline to participate in mediations arising therefrom
- In fact, *Breslin* itself said as much: “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”
- TEXCOM’s potential legislative overrule?

Royals v. Lu (2022) 81 Cal.App.5th 328

- Competing elder abuse petitions filed by decedent's wife and daughter
- Daughter alleged compensatory damages of at least \$1,095,000
- Daughter also alleged punitive damages, statutory penalties, attorney's fees, and costs
- Daughter filed for a right-to-attach order (RTAO) in the amount of \$3,440,000
- Probate court granted the RTAO based on allegations in daughter's verified petition
- Holding on appeal? **REVERSED**
- Financial elder abuse claimant may not obtain a pretrial writ of attachment for prospective punitive damages or statutory penalties, including double and treble damages

Estate of Jones (2022) 82 Cal.App.5th 948

- Petitioner was a widow who was not a beneficiary of her husband's trust
- Daughter and wife entered into a settlement agreement providing that the trust would pay the wife \$3 million out of the escrow from the sale of specific real property
- Property fell out of escrow and the daughter refused to pay
- Probate court denied petition to enforce the settlement agreement since the sale of the property was an implied condition precedent
- Holding on appeal? **REVERSED AND REMANDED**
- Settlement agreement / stipulated judgment were enforceable even though the condition precedent had not yet occurred

Parker v. Schwarcz (2022) 84 Cal.App.5th 418

- Former temporary conservatee filed a petition under Probate Code section 850 seeking documents and communications regarding the former conservator's administration of the temporary conservatorship
- Probate Code section 850 does not apply to documents and communications
- The purpose of Section 850 is to allow the ability to recover assets that should be part of the conservatorship estate, by effectuating a conveyance or transfer of title to real or personal property
- Holding on appeal? **AFFIRMED**
- Documents and communications do not carry the same indicia as real or personal property because people do not hold title to them, they have no monetary value, and here they were not previously owned by the conservatee

Pool-O'Connor v. Guadarrama (2023) 2023 WL 3071019

- Absent express authority under a power of attorney, an attorney-in-fact may not create a survivorship interest in the principal's funds by depositing them into a joint account, of which the attorney-in-fact is a joint owner
- Holding on appeal? **AFFIRMED**
- Guadarrama breached his fiduciary duties as attorney-in-fact by:
 - (1) creating a survivorship interest in funds deposited to the joint account where the POA did not expressly grant him such power
 - (2) claiming an ownership interest in the joint account funds because to do so amounted to an attempted change in the designation of beneficiaries who would have otherwise shared in the entitlement to the funds under principal's will and trust
- Guadarrama was properly surcharged for amounts he withdrew from the joint account in excess of \$14,000 (the federal annual exclusion amount)

Silk v. Bond (2023) 65 F.4th 445

- Probate exception did not apply to strip federal court of jurisdiction over an *in personam* breach of contract action brought after disallowance of a creditor's claim even though valuing the estate would be necessary to compute an award of damages
- Holding on appeal? **REVERSED**
- The probate exception is narrow, giving state courts exclusive power to:
 - (1) probate or annul a will;
 - (2) administer a decedent's estate; and
 - (3) assume *in rem* jurisdiction over property in probate
- Silk's suit did not seek to probate or annul a will
- Valuing estate to calculate contract damages did not amount to administering estate
- Appellate court found the suit involved standard *in personam* jurisdiction for breach of contract against a contracting party, who was now deceased

Zahnleuter v. Mueller (2023) 88 Cal.App.5th 1294

- Successor trustee surcharged for attorney's fees paid from trust assets in defense of trust contest as to trust amendment
- Holding on appeal? **AFFIRMED**
- By defending the third amendment, trustee improperly pursued the interests of the beneficiaries under the third amendment over the interests of the beneficiaries under the earlier amendments
- Fact that trustee himself did not have a beneficial interest in the third amendment was irrelevant
- Key issue was that the trustee did not participate as a neutral party to defend the existence of the trust and its assets
- Trusts may include language permitting trustee to defend validity of an amendment, but this trust lacked such authorization and explicitly precluded the trustee from defending any amendment

Gordon v. Ervin Cohen Jessup LLP (2023) 88 Cal.App.5th 543

- Where EP attorney drafted trust amendment to disinherit specified grandchildren, client's other family members could not sue that attorney for legal malpractice for subsequently drafting LLC operating agreements that permitted the disinherited grandchildren to receive interests in the LLCs through lifetime gifts
- Holding on appeal? **AFFIRMED**
- Under the eight-factor test set forth in *Lucas v. Hamm* (1961) 56 Cal.2d 583 and its progeny, EP attorney did not owe a duty to the non-clients to draft the LLC operating agreements in a way that disinherited the three grandchildren
- Client's intent to prevent the three grandchildren from receiving any shares of the LLC was not "clear, certain, or undisputed"
- Client's undisputed intent as to testamentary gifts was insufficient to show she necessarily had the same intent as to lifetime gifts

AB 1663 – The Probate Conservatorship Reform and Supported Decision-Making Act

- Assembly Bill 1663 was introduced during the 2021-2022 legislative session by Assemblymember Brian Maienschein, was passed by unanimous vote, and was signed into law by Governor Newsom on September 30, 2022
- It was chaptered the same day and became effective on January 1, 2023
- Revisions to various conservatorship laws in numerous Code sections, including:
 - Health & Safety Code §§ 416.17 and 416.19
 - Probate Code §§ 1456, 1800, 1803, 1812, 1821, 1835, 1835.5, 1836, 1850, 1860.5, 1861.5, 1863, and 2113
 - Welfare & Institutions Code §§ 21000 - 21008

AB 1663 – The Probate Conservatorship Reform and Supported Decision-Making Act

- Embraces a national trend of affording greater autonomy to adults with disabilities, who are persons for whom limited conservators are frequently created, while also reflecting a recent scrutiny of California conservatorship law generally
- Intended to promote less restrictive alternatives to conservatorship for adults with a disability, persons who are generally served by the various Regional Centers, and those most likely to use a limited conservatorship
- The new law also contemplates a process of supported decision-making for persons for whom a limited conservatorship has been established

AB 1663 – The Probate Conservatorship Reform and Supported Decision-Making Act

- Among AB 1663's provisions include changes to sections of the Probate Code that will give statutory preference to the proposed conservatee's choice of conservator, and which prohibit Regional Centers from serving as conservators
- As does AB 2960, which applies to conservatorships generally, AB 1663 requires petitioners to apprise the court of any alternatives to conservatorship explored by the petitioner, if any, including details as to the length and duration of attempted alternatives, and the reasons why those alternatives do not meet the conservatee's needs
- Those alternatives include, but are not limited to (i) supported decision-making agreements, (ii) powers of attorney, (iii) AHCDs, and (iv) designations of a health care surrogate

AB 1745 – Notification by Trustee

- Under PC 16061.7, a trustee is required to serve a statutory notification within 60 days of the following events:
 - (1) when a revocable trust or a portion of a trust becomes irrevocable because of the death of a settlor
 - (2) whenever there is a change of trustee of an irrevocable trust
 - (3) whenever a power of appointment retained by a settlor over an otherwise irrevocable trust lapses upon death
- AB 1745 clarifies that the 120-day deadline for trust contests, after the trustee notification required under Probate Code section 16061.7, applies only when the notice is required by reason of the death of a settlor

SB 1024 - Replacement of an Incapacitated or Deceased Professional Fiduciary

- Effective January 1, 2024
- Authorizes the appointment of a professional fiduciary practice administrator to act as a temporary professional fiduciary when a professional fiduciary either becomes incapacitated or dies and a vacancy exists
- The procedure is similar to the practice-administrator procedure used for deceased or incapacitated attorneys
- Petition for appointment is required with notice to all persons interested in the impacted matters

SB 1279 – Guardian Ad Litem

- Amends PC 1003 and CCP 372, both of which relate to the appointment of a guardian ad litem of an incapacitated person
- Amends CCP 372 to clarify that a guardian ad litem may be appointed even when the person for whom the guardian ad litem is needed already has a conservator or guardian, if the court deems it expedient, and provided that:
 - (i) notice is given to the conservator or guardian,
 - (ii) the application discloses the existence of the conservator or guardian,
 - (iii) the application gives reasons why the conservator or guardian is inadequate to represent the interests of the estate, and
 - (iv) the conservator or guardian has five days to oppose the application

SB 1279 – Guardian Ad Litem

- More comprehensively describes the persons for whom a guardian ad litem may be appointed as (i) a person who lacks capacity to understand the nature or consequences of the action or proceeding, (ii) a person who lacks capacity to assist the person's attorney in the preparation of the case, and (iii) a person for whom a conservator may be appointed under Probate Code section 1801
- Statute previously just said "incapacitated person"
- Also requires applicant to disclose relevant potential conflicts of interest, and requires GAL to disclose any conflict of interest that arises after their appointment



QUESTIONS?



Ciarán O'Sullivan

- Ciarán O'Sullivan has litigated the entire range of trusts, estates, and property disputes since he began his career in 1998 in the Bay Area office of the firm now known as Reed Smith. He has been a solo practitioner since 2010. He is a frequent presenter on many topics of interest to Trusts and Estates practitioners, and has published articles on litigation, trial, and appellate procedure in the Trusts and Estates context. He is a former chair of the Bar Association of San Francisco's Trusts and Estates Litigation section. In 2017 he was appointed by the State Bar Trustees to serve a six-year term on the executive committee of the Trusts and Estates section (now CLA Trusts and Estates section, aka TEXCOM). He has served as the chair of TEXCOM's Litigation, Incapacity, and Membership and Marketing sub-committees, and is a former author and editor of the section's New Case Alerts.
- He received his undergraduate degree in Economics from University College Dublin, Ireland, and his law degree from U.C. Hastings College of the Law.
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Matt Owens

- Matt is a partner in the trust and estate litigation team at the international law firm, Withersworldwide. Matt focuses his practice on trust, estate, and inheritance disputes. He has prosecuted and defended a wide range of matters in probate court, including trust contests, elder abuse actions, accountings, contested conservatorships and claims involving breach of fiduciary duty. His clients include high net worth individuals and families, corporate trustees, and private professional fiduciaries.
- Matt is a certified specialist in estate planning, trust, and probate law by the State Bar of California Board of Legal Specialization. He frequently speaks and writes on trust and estate litigation topics, is a member of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (TEXCOM), and served as Chair of the Executive Committee of the San Diego County Bar Association's Estate Planning, Trust, and Probate Law Section. He was recognized as a Best Lawyers "Ones to Watch" each year since 2021, has been a Super Lawyers Rising Star each year since 2013, and has been on Legal Week's Private Client "Ones to Watch" list each year since 2017.
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THANK YOU!

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