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Probate mediations when there is a death of plaintiff or defendant

A LOOK AT HOW VARIOUS DEATH SCENARIOS CAN AFFECT RECOVERY

A quote attributed to the legendary attorney Clarence Darrow states: "I have never killed a man, but I have read some obituaries with great satisfaction."

No doubt some of our clients may feel this way if their opposing party dies suddenly. But regardless of how they feel, an attorney's job is to determine the impact of the death on their pending lawsuit, whether civil, family, or "other."

Welcome to probate-court jurisdiction

The Los Angeles County Superior Court is the largest unified superior court in the United States. Although accurate counts are not published, sources indicate that more than 100,000 probate cases are filed in California each year, with 30-35% of those handled in the marble halls of the Stanley Mosk Courthouse. Of course, when we say probate, it is not all wills and trusts.

Probate court obviously handles decedents' estates, but also guardianships, conservatorships, compromise petitions for minors' settlements, and petitions to establish the fact of birth or death. Even if a case stays with the same judge in civil court after the death of a party, you will probably have some interaction with the probate court to bring closure to the matter. Tweaking the old saying about Rome, after death, all roads lead to probate.

The cases do not automatically switch over, however, and failure to address the issue or to move quickly enough may result in loss of the recovery your client seeks. You, as the attorney, will need to find and follow the appropriate probate procedure based on the facts of your case.

Mediation orders in probate court

Probate judges have broad power to make orders on decedent's trusts under California Probate Code sections 17200, 17206 and 850. While the parties can always ask to be referred to an alternative dispute resolution (ADR) program at a Case Management Conference (CMC), or through stipulation, the court can compel the parties on its own under several statutory provisions.

Most attorneys see the writing on the wall after such an order, but some litigants are thinking emotionally, not rationally after a death and refuse to participate. This could be fatal to your client's claim if they do not participate in a court-proposed ADR program after receiving a proper *Breslin* notice. The *Breslin* notice comes from the case *Breslin v. Breslin*, (2021) 62 Cal.App.5th 801, that directly dealt with a noticed charitable beneficiary's intentional failure to participate in a court-ordered mediation after being properly notified of the mediation.

The facts: Mr. Breslin was successor trustee of a trust dated July 20, 2017. Initially, he was only able to locate an Amended & Restated (A & R) version of the original trust, which referred to the beneficiaries as being on "Exhibit A." There was no Exhibit A attached to the A & R trust, but there was, however, a separate document in that same binder entitled "Estate Charities." This latter document was dated less than 30 days before the trust was signed. The trustee filed a petition for confirmation as successor trustee and for a determination of the proper beneficiaries to the trust. In probate court, the matter and all parties were ordered to mediation.

Not all of the charities noticed for mediation responded, and one that did not attend – you guessed it – objected and appealed. The trial court's ruling binding the no-show charity to the mediated settlement agreement was affirmed, and they lost their rights!

Along with the date, time and place of mediation, to be a *Breslin* notice, the notice to proposed beneficiaries must include a *warning* that settlement may occur at mediation and attorney's fees could also be awarded to one or more parties under *Smith v. Szeyller* (2019) 31 Cal. App.5th 450. All interested persons must attend the ordered meditation or risk being bound by an agreement reached at mediation without their appearance and participation. (The actual wording can be found in the appeal; it is paraphrased here for brevity.)

Successful probate-mediation suggestions

Cases involving death of a party are well suited for mediation. A good mediator can help reframe the sterile legal issues into a way a broken family, emerging from the death of a loved one, can understand. To do this, the mediator recognizes the underlying issues which animate the dispute.

After a mediator is satisfied the proper parties are present, the mediator needs to listen to the story of the case and recognize certain patterns. There is always a *res* to fight over, but in probate, there is something more just under the surface. Being able to spot issues that repeat in these cases may be key to resolving the case.

The wicked stepmother

Mom and dad have children, then later divorce. It does not matter who filed for the divorce, or why, really. When dad marries a new wife, she often becomes the villain to his first wife's children. Over the years, I have met some of the nicest second wives who are battling adult stepchildren after the death of their father. Why? Because they are cast as the homewrecker and often, a gold digger. Beware of voices whispering into the children's ears "off stage," fanning the flames at mediation. Tease out whether there are strongly interested parties who are not present but are influencing the outcome of the case.

Sibling relationship problem

In a family with multiple children, there is sometimes jealousy and resentment. One child has been the hero, taking care of ailing parents, while the others (as the hero perceives it) "selfishly" led carefree lives. People do not admit this easily, but it can be fruitful for a mediator to ask if the birth order, religion, culture, or gender of the litigants has a part to play.

Sometimes, there is an understanding about this that the parties all know, and everyone has missed it. Why is this important? If you find an acknowledged "bully" has been named trustee, trust administration may be handled the same way household issues were handled when the parties were 16 and 12 years old. The younger siblings are discounted and may resort to passive-aggressive retaliation, nitpicking the accounting.

The bully sibling may use their power to delay or even deny assets to the sibling they want to torture. It sounds simple, but it is not always obvious. People come to mediation well dressed and on their best behavior; we do not wear signs about our private interactions.

Beware of expectations

Estate-planning clients and parents should be counseled to consider their children's expectations when deciding how to distribute assets. If they know what their adult child is thinking, it is much easier to disabuse them of mistaken notions while the parent is still alive. Many adult children have strong opinions about how their parents' estate should be distributed, even if they never voice them.

Sometimes a sibling is hurt and angry because they were not the one chosen to be the first trustee or executor. Once emotions are dealt with by the mediator, the channel of communication improves.

Surprise problem for the mediator

A big driver of trust litigation is the "Surprise!" problem. This is when parents do something unexpected in their estate plan, and it is sprung on the kids after their death. It can be disinheritance or any distribution that is not "equal to all my issue." The child(ren) left out will blame the golden child(ren), whom they perceive (rightly or wrongly) to have used undue influence to increase their gift.

Confidentiality in probate mediation is required

Probate mediation is covered by the Evidence Code sections 1115 through 1129, California Rules of Court sections 383.850-898, and Probate Code section 17206, which deals with confidentiality and its application to civil, trust and estate disputes.

It is essential for the mediator to meet with each attorney in a confidential pre-mediation conference to ensure they have discussed with their client how the death may have affected the valuation of the original case. These are sad cases, and sometimes expectations are unrealistic and not even legally possible.

A neutral mediator needs to focus on the litigant's future once they move beyond the case. The desire to blame someone is strong and can be a way to avoid the grieving process. The mediation can also erupt into a shouting match if the parties are physically in the same room. It may be best to forgo a joint session and immediately break out into caucus sessions.

Probate-mediation scenarios

Below are examples of how a case may intersect with probate court and end up in a probate court-ordered mediation due to a death of a party.

Scenario One – plaintiff dies

You practice personal injury and have filed a civil case for damages. In the middle of discovery, your plaintiff dies. Threshold questions for the attorney and potential mediator: *Is this still a personal-injury case, or is it now a wrongful-death case*? The answer can be found by whether the death flowed from the personal injury or whether it is sufficiently unrelated to be its own separate lawsuit. Sometimes the answer is "both" and the personal-injury case can be amended to include wrongful death. Once this issue is clarified, who has standing to continue the case(s) in civil court?

Code of Civil Procedure section 377.30 allows the decedent's personal representative to commence a *survival action* under these circumstances. So, while the case, which is still a personal-injury case, stays in civil court, you may need to have someone open a probate to be appointed as administrator. If there is no probate opened, the decedent's successor in interest, usually the person who inherits, can step in and file an affidavit under Code of Civil Procedure section 377.32 in the civil court. Any damages recovered are part of the decedent's estate.

Survival actions (continuing the personal-injury case) are distinct from *wrongful-death claims*; Code of Civil Procedure section 377.60 allows the deceased's surviving family members to bring their own action, but the damages belong to the family members, who are being compensated for their own loss.

Parsing the issues takes time, so be mindful of the statute of limitations, which continues to run in the background. If you pursue a survival action, do not delay! Code of Civil Procedure section 66.1 states you must file your lawsuit during the statute of limitations period applicable when the plaintiff was alive, or *within six months of the plaintiff's death, whichever is later.* Wrongful-death actions are generally two years from the date of the decedent's death.

Has the value of the case changed? The answer is almost always yes. Economic damages remain the same. A survival action can recover lost wages for the decedent up to the time of death, as well as usual hard costs such as medical bills and rehabilitation.

Loss of future earnings will vanish in a *survival* action, although they are a key component of damages for a *wrongful death* claim. It makes sense if you keep in mind who suffered the loss. The decedent's damages include things personal to them and belong to the estate. In a wrongful death action, the living members of the family usually allege they are now deprived of the decedent's ongoing financial support or even future inheritance; they are the ones who have been damaged.

Pain and suffering damages are personal to the decedent, and are not available in a survival action. See Code of Civil Procedure section 377.34, subd. (a), stating:

> In an action or proceeding by a decedent's personal representative or successor in interest on the

> decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, *and do not include damages for pain, suffering, or disfigurement.* (Emphasis added.)

Code of Civil Procedure section 377.34 has one exception – a limited window after the Covid 19 pandemic. If you filed the case between January 1, 2022, and January 1, 2026, section 377.34, subd. (b) allowed recovery for pain and suffering damages due to court closures.

Punitive damages are still available in a survival action as long as there are some economic damages, but not in a wrongful-death action. It is a high bar to meet, as the defendant's malicious or oppressive actions must be proved by clear and convincing evidence – tough without your star witness. Insurance will not cover punitive damages, which are always recoverable directly from the tortfeasor.

A savvy plaintiff's lawyer will explain the changes in value in the case and recalibrate client expectations after the death. If dealing solely with the insurance company for recovery, let your client know they will almost never pay more than policy limits in a survival action, unless you can show bad faith.

Scenario two – defendant dies

You represent two people who were seriously injured in a crosswalk by a negligent driver. The defendant dies before you can collect. You must now proceed against the defendant's estate. Sometimes an executor, administrator, or trustee steps into the defendant's shoes. If probate is opened, there is a four-month window during which creditors can file formal claims with the executor and the court, once the executor or administrator has their "letters."

Be sure to file a claim, or you will be shut out of recovery. If no one opens an estate and there are assets, a creditor can petition the court to be appointed administrator. There is a one-year statute of limitations from the date of decedent's death, however, so do not delay.

The same one-year statute of limitations (Code Civ. Proc., § 366.2) applies if the defendant's assets were held in trust. A successor trustee may try to avoid paying the coming damage claim by distributing all the assets quickly after the death, so get your petition to bring the trust under court supervision filed. If the creditor does not bring a trust creditor's claim against the decedent's trust estate *within one year of the death*, it lapses. (There is an exception for governmental bodies, which are allowed up to three years from the death). Some good news, if you are dealing with a defendant's insurance company: The duty to defend continues.

Scenario Three – illustrated case #1

Here is a family law case our firm handled:

A husband/petitioner, married since the 1980s, sued his wife for divorce. In their pleadings, ownership of real property transferred during the marriage to the wife's separate property trust was at issue. During the dissolution, the petitioner was arrested for elder abuse. While automatic temporary restraining orders were in effect, the respondent attempted to remove the petitioner as beneficiary of her pension. Before the divorce was final, the respondent/wife suddenly died. In California, a family law court loses jurisdiction after the death of a party, the court can no longer make orders. (Family Code § 310(a).)

In this case, the respondent's two adult sons from a previous marriage were the successor trustees of the respondent's trust, and the high conflict continued. Since the family law courthouse door was now closed, the petitioner filed a petition under Probate Code section 17200 to bring the respondent's "separate property" trust under probate court supervision. The trustees filed a countersuit for constructive trust and elder abuse causes of action in an attempt to disinherit our client entirely and deprive him of the decedent's pension.

After depositions were taken and reams of written discovery were traded, the petitioner faced an expensive, lengthy trial. Since the decedent was not available to testify, certified transcripts of family law proceedings and authenticated declarations filed with the respondent's motions had to be ordered. Deeds were pulled and chains of title scrutinized. Even with piles of evidence, however, the attorneys could not move the case to a settlement because neither side would give an inch.

This would have been a good time to try mediation, but the parties resisted. The trial judge ordered the parties to a mandatory settlement conference instead. California Rules of Court section 3.1380 governs that process, and it was somewhat helpful in shaping a framework for a future settlement, but no resolution. When emotions are high the compressed timeframe of an MSC – the judge who routinely handles these cases is extremely busy and cannot provide the time to let the parties run out of steam.

Scenario four – illustrated case #2 – High-conflict custody battles post-divorce.

Dad was the petitioner in the family law case. The paternal grandmother was very involved and allegedly joined in gate-keeping behavior. Mom/respondent was in family court seeking to enforce her visitation of two minors, when the dad/petitioner died.

Paternal grandmother filed a guardianship case in probate court, and this new case became the battleground for family law issues. In the case, there were emotional elements that would normally keep a case from settling: a death and estrangements within a family.

Money is important, but the issue here was the children's future. Comparatively, splitting up real property is easy. The judge in this case ordered minors' counsel appointed for the two children. Once everyone was represented, we went to voluntary Probate Mediation with Southern California Family Mediation, which often works with the Dependency Court.

Sometimes successful mediation takes more than one session, which this one did. We met with the mediator at least three times, allowing enough time for the children to meet with a therapist. It takes what it takes. As long as we provided progress reports, the probate judge in the guardianship case kicked the can down the street multiple times, giving the parties space to do this important work. Ultimately, the kids aged out before the matter became a win/lose situation.

Conclusion

Probate mediation is voluntary mediation. Even if court-ordered, the mediation is still considered voluntary as the court cannot force the parties to settle. Let's end with a quote on the Practice of Law by Abraham Lincoln:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Attorney Rebecca (Reba) J. Birmingham graduated from Pacific Coast University as valedictorian in 1997, and she holds an undergrad degree in Liberal Arts from CSULB Phi Kappa Phi. She has worked from 1998 to the present time at Long Beach Law, *Inc. In 2018, Reba received her Certificate in Mediation from Pacific Coast University and practices probate and estate planning. She was president of Women Lawyers of Long Beach (2002) and president of the Long Beach Bar (2020). She can be reached through LongBeachLaw.com, or by calling (562) 621-6300.*