The Potential Limits of *Breslin v Breslin*

By Ralph Hughes and Tim Riley

Mediators with West Coast Resolution Group

Summary

Recently, Tim Riley and Ralph Hughes presented a WCRG seminar that featured a discussion of *Breslin v Breslin* (2020) 62 Cal.App.5th 801. During discussions after the seminar, Tim and Ralph realized that *Breslin* may be more limited than it first appears. In this short article, they suggest that – especially since *Breslin* brushes closely against the Constitutional guarantee of due process – it makes sense for all concerned to tread cautiously as they move into the brave new world of *Breslin* mediations.

Breslin's Facts and its Holding

In *Breslin*, Decedent died leaving no spouse or children. His trust provided, in part, for distribution of the residuary estate to the "persons and charitable organizations listed on exhibit A." The original trust document was located, but without an attached exhibit A. However, the trustee discovered, in a notebook containing the trust instrument, a worksheet on which numerous charitable organizations and corresponding numbers had been listed, with some having been crossed out. The percentages designated to the remaining charities totaled 100.

The trustee petitioned the probate court to determine the proper distribution of the trust estate including the determination of beneficiaries or potential intestacy. The probate court ordered the matter to mediation, and notice was provided to all heirs and potential beneficiaries. The notice clearly informed parties that they risked forfeiture if they did not participate in the mediation. Some of the charities (the "Pacific Parties") failed to participate. The participating charities and the heirs of the Decedent (which included the trustee personally) reached a settlement that excluded the Pacific Parties.

The probate court approved the settlement over the objections of the Pacific Parties, who then appealed. The appellate court affirmed, holding that the probate court had the authority under Probate Code Section 17206[1] to order parties to mediation, and that a party receiving a sufficient notice of a court-ordered mediation and who then fails to participate is bound by the result.[2]

[1] California Probate Code Section 17206 provides the probate court with broad discretion to "make any orders and take any other action necessary or proper to dispose of the matters presented."

[2] The California Supreme Court has denied review and depublication of this decision. *(Cal LEXIS 4956.)*

A key fact underlying the court's rejection of the arguments made by the Pacific Parties was that the trust beneficiaries had never been identified.

The opinion begins with:

> The trustee of a decedent's trust petitioned the probate court ***to determine the trust beneficiaries. The potential trust beneficiaries*** received notice of the petition. The probate court ordered the matter to mediation. ***The same potential beneficiaries*** received notice of the mediation, but some did not participate. (62 Cal.App.5th 801, 803) (Emphasis added.)

When the court rejected the argument that the trustee had breached the trust by personally profiting by the settlement, it observed:

> Moreover, the Pacific parties' argument ***assumes the beneficiaries of the trust are known. The court did not determine the identity of the beneficiaries***.(62 Cal.App.5th 801, 808) (Emphasis added.)

When the court rejected the argument that the trustee had failed to keep the beneficiaries reasonably informed about the mediation and his intent to execute the settlement agreement, it observed:

> First, the probate court ***did not determine that the Pacific parties were beneficiaries of the trust.*** Second, assuming they were or could have been beneficiaries, the notice of mediation was all the information necessary for them to protect their interest. (62 Cal.App.5th 801, 808) (Emphasis added).

Remembering that a case's holding is limited to its facts, it is clear that the *Breslin* holding is limited to cases in which the beneficiaries are not known, and the only issue is division of the trust estate. The second sentence in the above quotation is *dicta* and is based on the court's apparent determination that, since the court never determined the beneficiaries, the trustee owed no duty to a beneficiary that could be breached. As mentioned below, a cautious trustee with known beneficiaries would be wise to notify them directly of a *Breslin* mediation.

Concerns Raised by Breslin's Facts and Holding

A trustee who knows the identities of the trust beneficiaries is in a different position than the trustee in *Breslin.*

A trustee in a mediation that involves issues other than the division of the trust estate is in a different position than the trustee in *Breslin.*

It is not certain that a trustee who entered into a mediation agreement that breached duties to known beneficiaries would find protection under the umbrella of *Breslin.*

An attorney representing a trustee who knows the identities of the trust beneficiaries should be sure that the trustee is giving all beneficiaries notice of the mediation and should be sure that the trustee is fulfilling the trustee's duties to the beneficiaries who don't participate in a mediation. It is possible that, today, a trustee with known beneficiaries who are entering into a *Breslin* mediation would be well advised to ask the court for instructions as to the trustee's duties and obligations in the trustee's particular situation.

Given the trustee's duty of impartiality and the trustee's duty to provide notice to known beneficiaries, it may be that a trustee with known beneficiaries would meet the trustee's duties of notice and impartiality by giving every beneficiary a complete *Breslin* notice (even if another party gives its own notice), and then not participating in the mediation. The trustee might be *required* not to participate in the mediation in order to remain impartial.

However, does nonparticipation in fact fulfill the trustee's fiduciary duty to every beneficiary? Moreover, at a practical level, a trustee's non-participation in a mediation runs real risks that the mediating parties might make tax or valuation mistakes that would be known to a participating trustee. Does a failure to participate fulfill the trustee's fiduciary duties to all beneficiaries in this situation?

When (as in *Breslin*) the trustee has a personal economic interest in the outcome of the distribution of the trust estate, it would be extremely problematic for the trustee to meet the trustee's duty of impartiality if the heirs contested and the identity of the trust beneficiaries is not at issue. The trustee in this situation is likely to be required to resign, and then participate only as an heir or beneficiary pursuing only their personal interests. (This might instead be the time to seek appointment of a temporary trustee.)

Finally, aren't the trustee's fees at issue in many mediations? Is the trustee's participation in mediation in order to protect the trustee's fee enough to create a violation of the trustee's duty of neutrality if a known non-participating beneficiary is left out?

Until we learn more, the bottom line seems to be that the holding of *Breslin* may be limited to its facts, and that both the statutory duties of a trustee, and Constitutional due process requirements, are not to be ignored.

PS: Since *Breslin* is based on Probate Code §17206, which appears in the Trust Law, it is not entirely obvious that *Breslin* applies in a non-trust context.