PROGRAM MATERIALS
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So You Lost in Probate Court. Should you Appeal?

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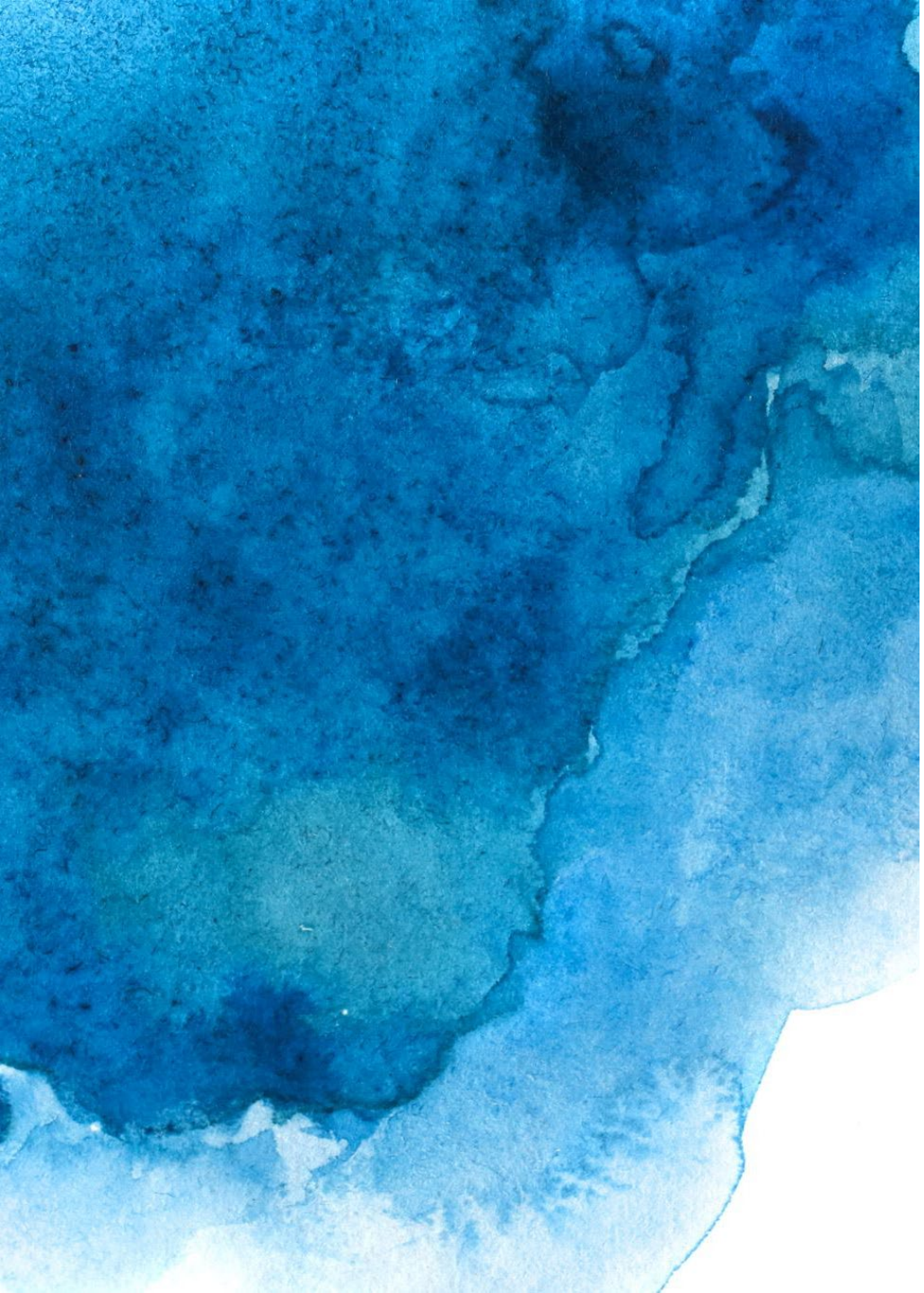

SO YOU LOST IN PROBATE COURT. SHOULD YOU APPEAL?

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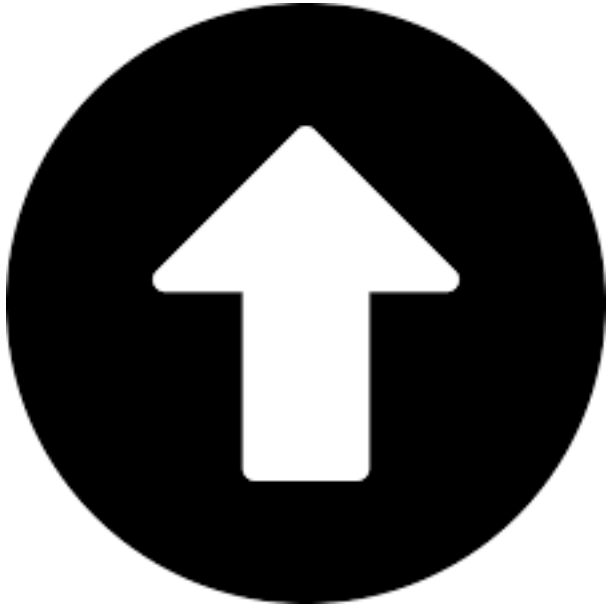
GENERAL CONSIDERATIONS

- Appealability (*See Conservatorship of Manuel,* Cal. Ct. Appeal Case No. B297334)
- Nature of probate proceedings
- Factual v. legal issues



APPEALABILITY

- Generally, only final judgments are appealable, with some statutory exceptions
- Excluding writs and other discretionary/interlocutory appeals

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APPEALABILITY IN CALIFORNIA

- **California Code of Civil Procedure § 904.1**
  - Final judgments
  - Motions to quash service of summons
  - Injunctions
  - Appointments of receiver
  - Certain sanctions
  - Anti-SLAPP rulings
  - New trial motions
- **California Probate Code § 1303**
  - Granting or revoking letters to personal representative
  - Admitting or refusing to admit a will to probate
  - Homestead exemption
  - Determining heirship and distribution
  - Directing distribution

THE NATURE OF PROBATE PROCEEDINGS

- In most jurisdictions, probate courts sit in equity.
- No trial by jury.
- Judges have broad discretion.
  - *California Probate Code § 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, including appointment of a temporary trustee to administer the trust in whole or in part."

"LOST ISSUES" IN PROBATE APPEALS

- Juror misconduct
- Jury instructions
- Jury selection
- Verdict form defects

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JUDGE'S FACTUAL FINDINGS

- The probate judge's factual findings are assumed correct.
- Appellate courts will assume the judge's legal conclusion is supported by adequate facts, unless proven otherwise.
- Abuse of discretion/substantial evidence standards.
- Even when there are blended equitable and legal issues, the equitable issues are tried first and those factual findings bind the later legal trial.

SO WHY APPEAL AT ALL?

If the standards are impossible to overcome, is a probate appeal worth it?

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ISSUES OF LAW

- Statutory interpretation
- Interpretation of a testamentary instrument
- Standing
- Application or non-application of law to facts

STATUTORY INTERPRETATION & INTERPRETATION OF DOCUMENTS

- Interpretation of statutes and language of testamentary documents are both purely legal questions.
- Review is *de novo* — no deference to lower court's determination.
- A fresh start.

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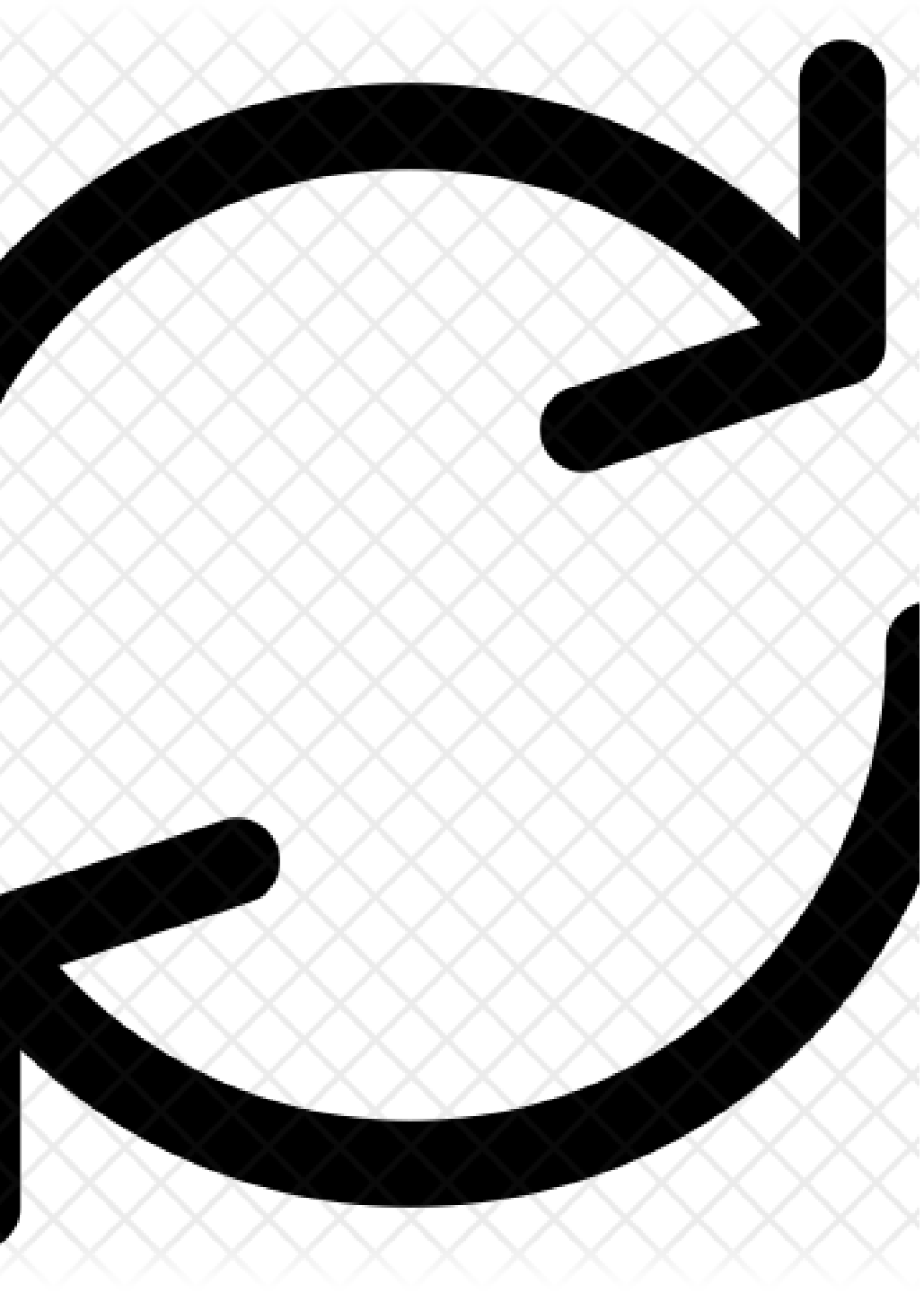

DUNLAP V. MAYER
CAL. CT. OF APPEAL – D077561

- Citing section 17206, the probate court dismissed a petition based on objections, where facts were in dispute.
- Court of Appeal reversed.
- 17206 does not empower probate judge to dismiss petition without advance notice to petitioner or evidentiary hearing. *See* Cal. Prob. Code § 1042.

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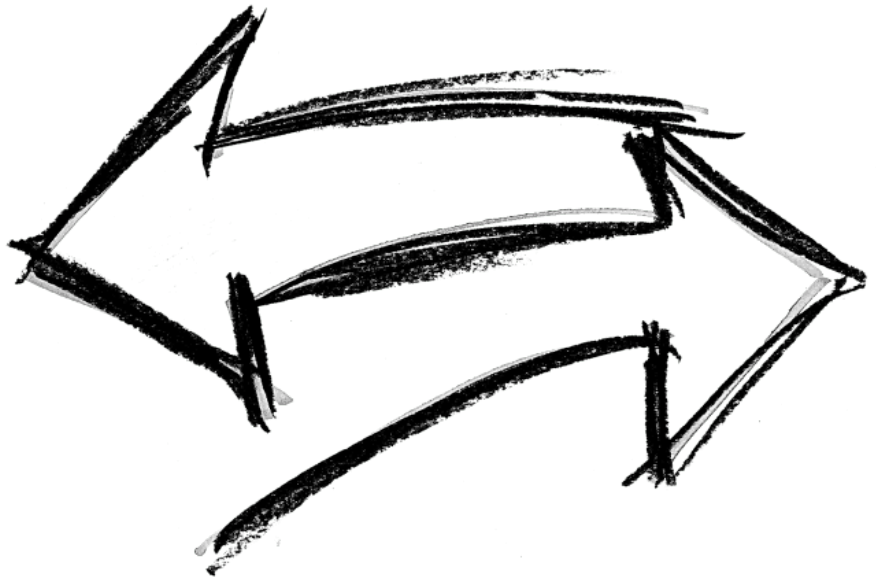
ROUSSOS V. ROUSSOS
CAL. CT. OF APPEAL – 60 CAL. APP. 5TH 962

- Two brothers, co-trustees, could not agree on how to manage the trusts or the businesses that the trusts owned.
- Five years earlier, parties signed stipulation requiring that all disputes, forever into the future, would be heard by the same arbitrator.
- Trial court confirmed arbitration award, over one brother's objection that arbitrator refused to recuse himself despite timely service disqualification.
- Court of Appeal reversed trial court's order confirming arbitration award.
- Under Code of Civil Procedure § 1281.91, any party can disqualify an arbitrator after the arbitrator makes disclosures.
- The "parties to an arbitration agreement cannot contract away their statutory right to disqualify an arbitrator" under § 1281.81.
- Public policy of ensuring neutral arbitrators and fair adjudication of disputes.

STANDING

- Standing is a prerequisite to suit.
- Subject matter jurisdiction depends on the parties having standing.
- Standing can be raised at any time, even for the first time on appeal.
  - *Drake v. Pinkham*, 217 Cal. App. 4th 400, 407 (2013)
  - *U.S. v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997)



BAREFOOT V. JENNINGS
CAL. SUPREME COURT – 8 CAL. 5TH 822

- Court of Appeal determined that petitioner lacked standing to pursue probate petition because later amendments to trust disinherited petitioner.
- California Supreme Court reversed.
- When a plaintiff claims to be a rightful beneficiary of a trust if challenged amendments are deemed invalid, she has standing to petition the probate court.
- Probate Code was intended to broaden the jurisdiction of the probate court.

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SUBSTANTIAL EVIDENCE VERSUS NO EVIDENCE

- An appeal is worth pursuing if the trial court made findings *completely unsupported by the record*, not just if there were disputed facts
- An appeal is worth pursuing if the trial court's order made only implied findings of fact which are unsupported by the record
- There cannot be substantial evidence where there is no evidence at all.

SCOTT V. MATSUI, ET AL.
CAL. CT. OF APPEAL – D072161 (UNPUB.)

- Plaintiffs purchased residential real estate from trustees of a trust.
- Plaintiffs claimed trustees did not disclose easement over property.
- Purchase & sale agreement contained arbitration clause.
- Trial court denied sellers' motion to compel arbitration.
- Court of Appeal reversed.
- The plaintiff-buyers had not submitted any evidence that they suffered prejudice by any alleged delay in seeking arbitration.
- Trial court's order did not mention prejudice, so finding was at best implied.

MULBERG V. AMSTER
CAL. CT. OF APPEAL – A158954 (UNPUB.)

- Probate attorney sued former client for unpaid fees.
- Trial court rejected the claims, asserting that other funds paid to lawyer constituted payment for outstanding legal invoices.
- Court of Appeal reversed. Money paid to the estate left outstanding legal bills unsatisfied.

APPLICATION OF LAW TO FACT

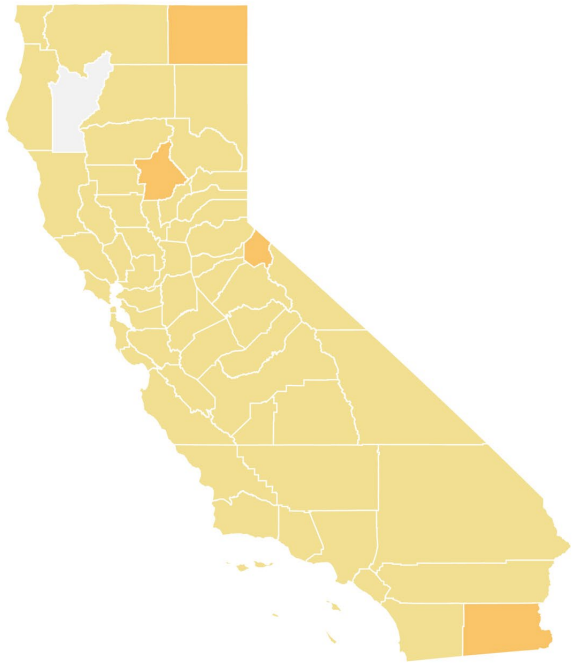
- Where the relevant facts are undisputed, but the trial court misapplied those facts to the law, an appeal may be appropriate

BUSKIRK V. BUSKIRK
CAL. CT. OF APPEAL – 53 CAL. APP. 5TH 523 (2020)

- Son claimed that sisters kidnapped mother, took her to Idaho, sold California-based trust property, and changed her estate documents.
- Daughters claim that son was volatile and abusive to mother, and they were her saviors.
- Daughters and mother moved to quash summons for lack of personal jurisdiction.
- Trial court granted motion.
- Court of Appeal reversed.

BUSKIRK V. BUSKIRK
CAL. CT. OF APPEAL – 53 CAL. APP. 5TH 523 (2020)

- Court of Appeal took no position on what it called a "blazing family dispute."
- Instead, it looked at the undisputed facts:
  - Daughters had come to California to take mother to Idaho, kidnapping or not
  - Trust was created in California and governed by California law
  - At-issue transactions concerned real property in California
  - Mother had recently filed other lawsuits in California
- Contrasted SCOTUS Case – *Hanson v. Denckla*, 357 U.S. 235 (1958)



COLLATERAL ATTACK VERSUS APPEAL

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LUND V. COWAN
NINTH CIR. CASE NO. 20-55764

- Heir to Walt Disney set to inherit fortune worth over $200 million.
- Superior Court judge rejected settlement that would have resulted in heir receiving his inheritance, stating "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no."
- No factual basis for this statement. Heir's capacity had been previously litigated in Arizona.

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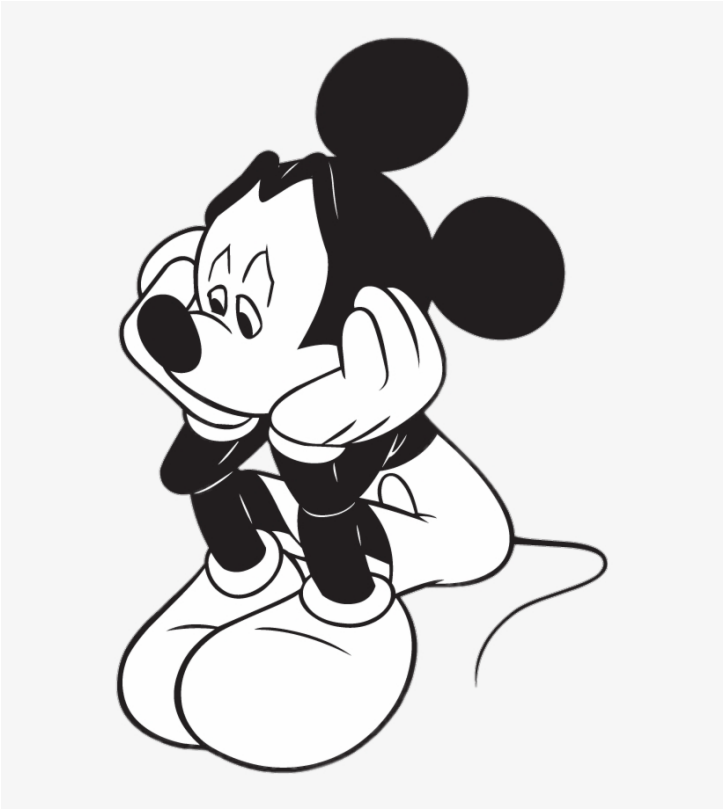
LUND V. COWAN
NINTH CIR. CASE NO. 20-55764



- Heir sued Superior Court and Judge Cowan in Federal District Court, alleging violations of Due Process and other claims.
- Ninth Circuit affirmed dismissal. Judicial Immunity rendered Judge Cowan exempt from suit for his comments made during judicial proceedings.
- Ninth Circuit called the statements "troubling."
- Court of Appeals called probate court "The Unhappiest Place on Earth."
- Lesson: proper course is an appeal.

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Filed 6/22/21 Conservatorship and Estate of Manuel CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Conservatorship of the Person and Estate of SUSAN MANUEL. GREGORY (MANUEL) MANVELIAN, Petitioner and Respondent, JEFFREY SIEGEL, as Conservator, Respondent, v. YANA MARIE MANVEL, Objector and Appellant.	B297334 (Los Angeles County Super. Ct. No. BP141252)

APPEALS from orders of the Superior Court of Los Angeles County. David J. Cowan, Judge. Affirmed.

Yana Manvel, in pro. per.; Schorr Law, Zachary D. Schorr, and Valerie H. Li for Objector and Appellant.

Klapach & Klapach and Joseph S. Klapach; Adam L. Streltzer for Petitioner and Respondent Gregory Manvelian.

Law Offices of Stewart J. Levin and Stewart J. Levin; Zarmi Law and David Zarmi for Respondent Jeffrey Siegel, as Conservator.

INTRODUCTION

Gregory Manvelian filed a petition for a conservatorship of his mother, Susan Manuel, which the probate court granted. Yana Manvel, Susan's daughter, appealed, and we affirmed. (See *Conservatorship of Manuel* (Feb. 14, 2017, B266834) [nonpub. opn.].)

Jeffrey Siegel, the court-appointed conservator, subsequently filed a petition on behalf of Susan against Yana to recover real property and other assets Yana arranged for Susan to transfer to her. On the third day of the trial on the conservator's petition, Siegel, Yana, and Gregory reached a settlement that resolved all claims in the conservatorship proceeding. Among other terms, the settlement required Yana to return certain property. Each of the three parties orally agreed to the terms of the settlement on the record and in open court. Siegel and Yana (but not Gregory) also submitted a stipulation and proposed order that resolved Siegel's petition against Yana by requiring Yana to return the property. The probate court signed and entered the order.

Four months later Gregory filed a motion to enforce the oral settlement agreement. Yana opposed the motion, arguing she agreed to the settlement because of extrinsic fraud and under duress. Yana also filed a motion to set aside the written stipulation and order resolving Siegel's petition against her. The probate court granted Gregory's motion to enforce the settlement and denied Yana's motion to vacate the written stipulation and order. Yana appeals from both orders. We conclude that we have jurisdiction to hear both appeals and that the probate court did not err in making either ruling. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Probate Court Appoints a Conservator of Susan's Person and Estate*

As discussed in our prior opinion, Susan had two children, Yana and Gregory. At one time Susan owned substantial assets, but over time she transferred some of them (or rights to them) to Yana. In 2007 Susan's revocable trust was amended to name Yana as the sole beneficiary. Also in 2007 Susan transferred to Yana three parcels of real property, one of which was in Orange County and included an income-producing commercial mall (the Orange County property). In 2008 Susan transferred to Yana two condominium units in the Ocean Towers buildings in Santa Monica. And in 2013 Yana became the sole primary beneficiary of Susan's $1.4 million individual retirement account (IRA), which previously had designated Yana as a 50 percent beneficiary and Gregory as a 50 percent beneficiary. Meanwhile, although in 2012 the trust was amended to name Gregory as a 50 percent beneficiary, in March 2013 the trust was amended to

again name Yana as the sole beneficiary of the trust. (*Conservatorship of Manuel*, *supra*, B266834.)

Gregory filed a petition in 2013 to appoint a conservatorship of Susan's person and estate. In 2015 the probate court conducted a seven-day trial at which Susan, Yana, Gregory, Dr. Susan Bernatz, the court appointed expert, and several percipient witnesses testified. The court granted Gregory's petition and issued letters of conservatorship. In February 2017 this court affirmed the probate court's orders. (*Conservatorship of Manuel*, *supra*, B266834.)

B. *The Conservator Files a Petition To Recover Assets from Yana, Which the Parties Settle During Trial*

In February 2017 Siegel filed a petition on behalf of Susan under Probate Code section 850 to compel Yana to transfer certain property back to Susan.[1] In particular, Siegel sought to recover the three parcels of real property and the two condominium units Susan had transferred to Yana in 2007 and 2008, as well as $720,000 Yana allegedly caused Susan to withdraw from her IRA and give to Yana. Siegel also asserted several causes of action, including for financial elder abuse, and claims for punitive damages and attorneys' fees. Siegel filed a separate petition for a substituted judgment modifying and reforming Susan's trust to provide that, upon Susan's death, Yana and Gregory would receive equal distributions from the trust estate.

The probate court held a three-day trial on the section 850 petition. The following witnesses testified: Yana; Richard Skolnick, an attorney who prepared Susan's amended trust and

[1] Undesignated statutory references are to the Probate Code.

the deeds transferring the parcels of real property and condominium units from Susan to Yana; Vineendra Jain, a certified property manager and real estate broker who testified that the Orange County property generated over $1 million between 2012 and 2018; Dr. Bernatz, who testified that by 2012 Susan suffered from significant cognitive impairment and did not understand the nature and consequences of her transfers to Yana; and Dr. Robert Kahn-Rose, a geriatric psychiatrist who, in contrast to Dr. Bernatz, testified Susan had testamentary and contractual decisionmaking capacity as late as 2013, only minimal susceptibility to undue influence prior to 2008, and only mild to moderate susceptibility from 2012 to 2013.

On August 6, 2018, the third day of trial, Yana, Gregory, Siegel, and Susan (through her attorney) informed the court they had reached a settlement. Counsel for the parties recited the terms of the settlement on the record and in open court. The parties agreed that Siegel, as Susan's conservator, would obtain title to one of the condominium units in the Ocean Towers building and to the Orange County property and that Yana would retain title to the remaining properties. The parties agreed that Susan's estate would pay $190,000 for Gregory's attorneys' fees and costs and that Yana and Gregory would receive equal shares of the remainder of the trust estate upon Susan's death. The parties also agreed to release all claims against each other, including the conservator's claims to recover the money allegedly obtained by Yana from Susan's IRA.[2] After counsel stated the

[2] The settlement did not affect the conservator's right to seek expenses relating to management of the estate properties or Yana's right to seek reimbursement for expenses she incurred maintaining the Orange County property.

terms, the probate court asked Yana, Gregory, and Siegel, individually whether each of them understood the terms, had enough time to discuss the terms with their attorneys, and agreed to the terms. They all answered they did.

After Yana, Gregory, Siegel, and counsel for Susan stated their agreement to the settlement, Yana and Siegel (but not Gregory) submitted a signed written stipulation regarding the section 850 petition that contained only those settlement terms relevant to them—namely, that Siegel would release all claims against Yana and that Siegel, as Susan's conservator, would receive title to one of the condominium units and the Orange County property. The probate court signed and entered the written stipulation and order that day.

C. *Gregory Seeks To Enforce the Oral Settlement Agreement, Yana Seeks To Vacate the Written One*

In December 2018 Gregory filed a motion under Code of Civil Procedure section 664.6 for an order to enter judgment enforcing the terms of the settlement the parties had orally agreed to in court on August 6, 2018. Yana opposed the motion, arguing that her attorneys had "work[ed] with opposing counsel to unduly pressure her to settle" and that she agreed to the settlement under duress. Yana claimed that at the trial her attorneys were unwilling to present evidence favorable to her case and that they told her the judge "hated her," thought she "was on the road to perjury," "would jail her," and would "fine her treble damages" if she did not settle. Yana also filed a motion to set aside the stipulation and order signed by the parties (other

than Gregory) and the probate court that resolved Siegel's section 850 petition.

In April 2019 the probate court denied Yana's motion to set aside the written stipulation and order and granted Gregory's motion for an order to enter judgment enforcing the March 6, 2018 oral settlement. The court found Yana presented insufficient evidence her attorneys were unprepared for trial, were "selling [her] out," or were in "cahoots" with the attorneys for Gregory or Siegel. Yana filed a timely notice of appeal from both the order granting Gregory's motion for entry of judgment and the order denying Yana's motion to set aside the stipulation and order.

DISCUSSION

A. *The Orders Are Appealable*

1. *The Order Granting Gregory's Motion To Enforce the Stipulated Settlement Is Appealable*

We agree with the parties the order granting Gregory's motion to enforce the oral settlement agreement is appealable. "In all proceedings governed by" the Probate Code, "an appeal may be taken" from an order "[d]irecting or allowing payment of a . . . cost" or "authorizing, allowing, or directing payment of compensation or expenses of an attorney." (§ 1300, subds. (d) & (e).) The order granting Gregory's motion is both: It authorizes and approves payment from Susan's estate to Jackson Chen, Susan's attorney, of "$26,025.00, plus an additional $330.00 in reimbursement of costs," and it authorizes and approves payment from the estate to Gregory's attorneys of $190,000. In addition,

"[w]ith respect to a trust, the grant or denial" of "[a]ny final order" under section 17200 is appealable. (§ 1304, subd. (a).) The order granting Gregory's motion is a final order under section 17200 because it grants Siegel's petition for a substituted judgment modifying and reforming Susan's trust and it orders that Gregory and Yana will be equal beneficiaries of the trust estate upon Susan's death.

2. *The Order Denying Yana's Motion To Set Aside the Stipulated Order Is Also Appealable, but It's a Little Messy*

The appealability of the probate court's order denying Yana's motion to set aside the stipulation and order resolving Siegel's section 850 petition is a closer question. Under section 1300, subdivision (k), "an appeal may be taken from" an order "[a]djudicating the merits of a claim made under" section 850. Siegel and Gregory contend that under subdivision (k), Yana could have appealed from the court's August 6, 2018 stipulation and order, but she cannot appeal from the court's April 2019 order denying her motion to set aside the prior order. According to Siegel and Gregory, who have moved to dismiss Yana's appeal, because the Probate Code does not include a provision that allows an appeal from an order denying a motion to vacate a prior order, the order denying Yana's motion to vacate is not appealable.

There is authority supporting Siegel and Gregory's position. "The right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5; accord, *Levinson Arshonsky & Kurtz LLP v. Kim* (2019) 35 Cal.App.5th 896, 903; *In re Marriage of Garcia* (2017) 13 Cal.App.5th 1334, 1342.) "Unless an order is expressly made

appealable by a statute," we have "no jurisdiction to consider it." (*Levinson Arshonsky & Kurtz LLP*, at p. 903; see *Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1083.)

The Code of Civil Procedure has a "'catch-all'" provision (*City and County of San Francisco v. Shers* (1995) 38 Cal.App.4th 1831, 1835) that allows a party to appeal from a postjudgment order, so long as "the issues raised by the appeal from the order [are] different from those arising from an appeal from the judgment" and the postjudgment order "'either affect[s] the judgment or relate[s] to it by enforcing it or staying its execution." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652; see Code Civ. Proc., § 904.1, subd. (a)(2).) But "[i]t is well established that '[a]ppeals which may be taken from orders in probate proceedings are set forth in . . . the Probate Code, and its provisions are exclusive.'" (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125-1126; see *Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575; *Estate of Downing* (1980) 106 Cal.App.3d 159, 163.) Therefore, Code of Civil Procedure section 904.1, subdivision (a)(2), does not apply to probate proceedings. And as Siegel and Gregory point out, the Probate Code does not contain a provision similar to Code of Civil Procedure section 904.1, subdivision (a)(2), that authorizes an appeal from postjudgment orders in probate proceedings. Therefore, an order denying a motion to vacate a judgment or prior order in a probate proceeding is generally not appealable. (See *Conservatorship of Harvey* (1970) 3 Cal.3d 646, 652; *Estate of Duke* (1953) 41 Cal.2d 509, 515-516; *Estate of Martin* (1999) 72 Cal.App.4th 1438, 1442; cf. *Estate of Stoddart*, at pp. 1123, 1126 [order denying an alleged heir's motion for reconsideration

of an order denying her petition to obtain portion of trust and estate proceeds was not appealable].)

Nevertheless, in *Estate of Baker* (1915) 170 Cal. 578 (*Baker*) the California Supreme Court recognized an exception to this general rule, holding that an "appeal is permitted from an order refusing to vacate a judgment or decree when, for reasons involving no fault of the appealing party, he has never been given an opportunity to appeal directly from the judgment or decree." (*Id.* at p. 582.) In *Baker* a sister contested her deceased brother's will, but died while her action was pending. (*Id.* at p. 581.) After the trial court dismissed the action and entered judgment, the administrator of the sister's estate moved to vacate the judgment and substitute himself as a party, which the trial court denied. (*Ibid.*) The Supreme Court held that, because the administrator was not a party to the action and therefore could not have appealed from the order of dismissal, he could appeal from the postjudgment order denying his motion to vacate the judgment. (*Id.* at p. 584; see *Estate of Cahoon* (1980) 101 Cal.App.3d 434, 438 ["'The general rule allowing appeals from orders granting or denying . . . motions to vacate . . . does not apply in probate,'" but "'an exception is recognized where the motion to vacate is the only way in which an aggrieved party can protect his rights; denial of the motion in such a case is appealable.'"].)

On the other hand, the Supreme Court has declined to extend *Baker* to allow a party to appeal from an order denying a motion to vacate an order under Code of Civil Procedure section 473. In *Estate of Allen* (1917) 175 Cal. 356 (*Allen*) the widow of the decedent failed to timely secure a bill of exceptions and moved for relief under section 473 of the Code of Civil Procedure on the ground of excusable neglect. The trial court denied the

motion. (*Allen,* at pp. 356-357.) The Supreme Court held the order denying the motion under Code of Civil Procedure section 473 was not appealable, even though the basis of the widow's motion was excusable neglect, because the Probate Code did not contain any provision permitting such an appeal. (*Allen,* at p. 357.)

Similarly, in *Estate of O'Dea* (1940) 15 Cal.2d 637 (*O'Dea*) two claimants filed a motion for relief under Code of Civil Procedure section 473 (although it is not clear on what ground they moved) after the probate court dismissed them from a proceeding to determine the heirs of a decedent, and the trial court denied the motion for relief. (*O'Dea,* at p. 638.) Again holding that the order denying the motion for relief was not appealable, the California Supreme Court stated "the peculiar and unusual situation arising out of the facts in [*Baker*] does not lay down any general exception to the rule that appeals in probate matters must be limited to those orders and judgments specified" and that the "facts in the instant case have no similarity to those in" *Baker*. (*O'Dea,* at p. 639.)

This case falls between *Allen* and *O'Dea*, on the one hand, and *Baker*, on the other. Like the appellants in *Allen* and *O'Dea*, and unlike the appellant in *Baker*, Yana was a party to the proceeding when the court entered the stipulation and order. And unlike the appellant in *Baker*, Yana received notice of the order she later sought to set aside. (Cf. *Kalenian v. Insen*, *supra*, 225 Cal.App.4th at p. 575 [children of a trustor could appeal the trial court's order denying their motion to vacate an order dismissing their petition where they did not receive notice of the trial court's dismissal order and therefore "could not avail themselves of the right to appeal"].)

But like the appellant in *Baker*, and "for reasons involving no fault" on her part, Yana "has never been given an opportunity to appeal directly from" the stipulation and order on the grounds she argues the court should set aside the stipulated order. (*Baker*, *supra*, 170 Cal. at p. 582.) Contrary to Siegel and Gregory's argument, Yana could not have appealed (or at least meaningfully appealed) from the stipulation and order on the ground of extrinsic fraud or duress. She claims she was under duress—i.e., that she was compelled to act against her will (see *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1523)—when she agreed to, and the probate court signed, the stipulation and order. And even if, after the probate court entered the order, Yana overcame the effects of the claimed duress, she could not have challenged the order on either extrinsic fraud or duress because the facts she needed to support her challenge were not in the record. The only way for Yana to present her arguments based on extrinsic fraud and duress was to file the post-order motion she filed to set aside the stipulated order and present her evidence.

In the end, this case is closer to *Baker* than *Allen* and *O'Dea*. Like the appellant in *Baker*, Yana asked the court to use its equitable authority to set aside an order that deprived her of a fair adversary proceeding. Yana claims she stipulated to the order under duress and without knowing "her trial attorneys . . . worked with opposing counsel and sold out her interest to the opposing parties to pressure her into [the] settlement . . . ." And as was true for the appellant in *Baker*, Yana, through no fault on her part, could not have meaningfully appealed from the stipulated order. She could not have argued the evidence of the alleged extrinsic fraud and duress warranted vacating the order

until she filed a motion to set aside the order. Therefore, under *Baker*, which the Supreme Court has never overruled and thus is still binding, the order denying Yana's motion to vacate the stipulated order is appealable.

B. *The Probate Court Did Not Err in Refusing To Set Aside the Stipulated Order*

1. *Applicable Law and Standard of Review*

A "'party may obtain relief from an erroneous judgment,'" including a stipulated judgment, "'by establishing that it was entered through extrinsic fraud or mistake.'" (*Warga v. Cooper* (1996) 44 Cal.App.4th 371, 376; see *In re Marriage of Grissom* (1994) 30 Cal.App.4th 40, 46.) A party may also move to vacate a stipulated judgment on the ground that the stipulation was entered as a result of duress. (See *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 83 ["Duress has . . . been recognized as a ground justifying relief from a final judgment."]; see also *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205 [because the plaintiffs "pleaded duress against" the defendants, "any consent judgment or judgment of dismissal that may have been entered pursuant to a settlement agreement would not act as a bar to the present action"].) "'[T]he party seeking equitable relief on the grounds of extrinsic fraud'" or duress "'must show three elements: (1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the [order] once discovered.'" (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1025; see *Warga*, at p. 376.)

A motion to set aside a stipulated order for extrinsic fraud or duress "is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion, the

order will not be disturbed on appeal." (*In re Marriage of Grissom*, *supra*, 30 Cal.App.4th at p. 46; accord, *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118; see *Richardson v. Franc* (2015) 233 Cal.App.4th 744, 751 ["After the trial court has exercised its equitable powers, the appellate court reviews the judgment under the abuse of discretion standard."].) We review "the [probate] court's findings of fact pertaining to the existence of extrinsic fraud [or duress] . . . for substantial evidence." (*Kramer v. Traditional Escrow* (2020) 56 Cal.App.5th 13, 28.) But the "burden is on the complaining party to establish abuse of discretion, and the showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion." (*Marriage of Eben-King & King*, at p. 118; see *Richardson*, at p. 751 ["Under [the abuse of discretion] standard, we resolve all evidentiary conflicts in favor of the judgment and determine whether the trial court's decision falls within the permissible range of options set by the legal criteria." (Internal quotation marks omitted.)].)

2. *Extrinsic Fraud*

"[E]xtrinsic fraud" occurs where "a party has been denied by his opponent or otherwise an opportunity to be heard or to fully present a claim or defense" and "usually arises when a party is denied a fair adversary hearing because he has been deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." (*F.E.V. v. City of Anaheim* (2017) 15 Cal.App.5th 462, 472, internal quotation marks omitted; see *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471; *Luxury Asset Lending, LLC v. Philadelphia Television Network, Inc.* (2020) 56 Cal.App.5th 894, 910-911.) And a party may show extrinsic fraud where ""the

attorney regularly employed"'" by the moving party "'"corruptly sells out his client's interest to the other side . . . ."'" (*Warga v. Cooper*, *supra*, 44 Cal.App.4th at pp. 376-377.)

Yana asserts her attorneys must have sold out her interests because, according to her, (1) her attorneys performed poorly and were unprepared at trial; (2) her attorneys forced her to settle by telling her the judge hated her, thought she was lying, and was going to fine her and send her to jail; and (3) the settlement terms were one-sided. The probate court, however, did not abuse its discretion in ruling Yana failed to show extrinsic fraud. Most significantly, the probate court did not find credible Yana's description of her attorneys' purported efforts to coerce her to settle, finding it "exaggerated." "[S]o long as it has 'reasonable' grounds to do so," a factfinder "may reject even uncontradicted testimony by a witness it does not find credible." (*Moran v. Foster Wheeler Energy Corp.* (2016) 246 Cal.App.4th 500, 518; see *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.) "'Consequently, the testimony of a witness which has been rejected by the trier of fact cannot be credited on appeal unless, in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved.'" (*In re Marriage of Grimes & Mou* (2020) 45 Cal.App.5th 406, 422; accord, *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 196; see *Estate of Sapp* (2019) 36 Cal.App.5th 86, 106 ["the probate court, as the trier of fact, was entitled to determine how much credence and weight the testimony deserved" and was "'the sole judge of the credibility of witnesses'"].)

The probate court had numerous rational and reasonable grounds to disbelieve Yana's description of her attorneys'

allegedly coercive statements. For example, Yana was not a disinterested witness; she was the party seeking to avoid the settlement terms, and she relied largely on her uncorroborated declaration. (See *Jennifer K. v. Shane K.* (2020) 47 Cal.App.5th 558, 579 [""[i]n passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact is entitled to consider their interest in the result of the case, [and] their motives""]; *South Bay Transportation Co. v. Gordon Sand Co.* (1988) 206 Cal.App.3d 650, 657 [while "[u]ncontradicted testimony should not be arbitrarily rejected by the fact finder, . . . it may be self-impeaching and warrant disbelief for a number of reasons, such as . . . obvious bias"].) In addition, the court stated it had participated in settlement discussions with Yana's attorneys and never observed any conduct suggesting they were either "selling" Yana out or "forcing" her to settle. (See *A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1287 [trial court was "entitled to rely" on its observations of a party's conduct during trial when making findings]; *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 762 [trial court's "observations are evidence which may be used alone or with other evidence to support its findings"].) The court's credibility findings were also supported by the declaration of Adam Streltzer, Gregory's attorney, who stated that Yana "was an active participant" in settlement discussions and "successfully asserted key negotiating points in her favor"—namely, the provision allowing her to retain the right to seek reimbursement from Susan for money Yana paid to maintain the Orange County property. And the probate court observed that Yana had replaced multiple, "well-qualified" lawyers.

Moreover, there were a number of rational and reasonable explanations for the conduct of Yana's attorneys other than

corruption and duplicity. For example, her attorneys may have reasonably believed that Yana did not have a strong defense, that the trial was not going well for her, and that it was not in her interest to proceed and risk greater liability. (See *In re Marriage of Eben-King & King*, *supra*, 80 Cal.App.4th at p. 118 [a showing of extrinsic fraud on appeal "is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion"].) Yana complains her attorneys did not call several witnesses that would have been "key to corroborating [Yana's] testimony at trial" and did not submit documents and video recordings that "supported [her] claims . . . ." But Yana does not provide any further detail in her opening brief about how these purported witnesses or exhibits would have advanced her defense to the petition, nor does she explain why her attorneys' tactical decision not to call certain witnesses or submit evidence showed they had sold out her interests to Siegel and Gregory.

Finally, as the probate court correctly determined, the settlement terms were not one-sided. In his section 850 petition, Siegel sought to recover both condominium units and all three parcels of property Susan had transferred to Yana; the $720,000 Susan withdrew from her IRA that Yana allegedly received; damages equal to twice the value of the transferred property pursuant to section 859;[3] punitive damages; and attorneys' fees.

[3] Section 859 provides that, "[i]f a court finds that a person has in bad faith wrongfully taken, . . . property belonging to a conservatee," or "an elder," or has taken "the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered . . . ."

Under the settlement, Yana lost only a fraction of what Siegel sought; she only had to return one of the two condominium units and one of the three parcels of property. She did not have to give back any of the money she received from Yana's IRA and she escaped liability for any further damages. Not a bad settlement for Yana, especially considering the probate court, in its order appointing a conservator, had already found Yana unduly influenced Susan—a finding we held in the prior appeal was supported by substantial evidence. (See *Conservatorship of Manuel*, *supra*, B266834.)[4]

3. *Duress*

"'"'"[D]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion [citation] . . . .'" [Citation.] It is shown where a party "intentionally used threats or pressure to induce action or nonaction to the other party's detriment."'" (*In re Marriage of Balcof*, *supra*, 141 Cal.App.4th at p. 1523; see *Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 276 ["Duress generally exists whenever one is induced by the unlawful act of another to

[4] Yana complains the settlement was unfair because it provided that Gregory would receive $190,000 in attorneys' fees from the trust, even though he was not a party to the section 850 petition. But Gregory agreed to release all claims he had in the conservatorship proceedings (and any other potential claims against Yana) as a condition of the settlement. Again, not a bad deal for Yana.

make a contract or perform some other act under circumstances that deprive him of the exercise of free will."].)

Yana contends her attorneys exercised duress by making the statements to pressure her to settle; she does not contend Siegel or Gregory exercised any duress. Even assuming a party can set aside a settlement agreement as a result of duress exercised by the party's attorney,[5] as discussed the probate court did not abuse its discretion in finding Yana's description of her attorneys' statements was not credible. Moreover, even if the probate court had credited some of Yana's testimony, it would have been reasonable for the court to infer the statements by Yana's attorneys were not sufficiently coercive to cause duress (with the possible exception of the alleged statement that the judge would send Yana to jail if she did not agree to a settlement—an allegation that seems particularly farfetched). As discussed, the party exercising the alleged duress generally must perform an unlawful or wrongful act. (*Tarpy v. County of San Diego*, *supra*, 110 Cal.App.4th at p. 276; see *Hester v. Public Storage* (2020) 49 Cal.App.5th 668, 679 ["[e]conomic duress requires an unlawful or 'wrongful act,'" such as the "'the assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment'"].) There is nothing unlawful or wrongful about an attorney giving his or her honest, negative

[5] Generally, if a party enters a settlement agreement under duress, the party may only rescind the contract if the duress was "'exercised by or with the connivance of the party as to whom he rescinds.'" (*Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1174; see Civ. Code, § 1689, subd. (b)(1); *Leeper v. Beltrami*, *supra*, 53 Cal.2d at p. 206 [duress "renders a transaction voidable by a party induced thereby to enter into it if the other party thereto . . . has reason to know" of the duress].)

impressions of a case to the client, including that a court may award all or most of the damages sought against the client (including treble damages, which Siegel sought in his petition), that the court does not appear to believe the client's testimony is truthful, or even that the judge does not appear to like the client.

C. *The Probate Court Did Not Err in Granting Gregory's Motion To Enforce the Settlement*

In ruling on a motion to enter judgment pursuant to a settlement agreement "'the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement.'" (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360; see *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1454; *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533.) Generally, "[t]he standard of review on appeal is whether substantial evidence exists to support the trial court's ruling." (*Terry*, at p. 1454; see *Machado v. Myers* (2019) 39 Cal.App.5th 779, 790; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162; *Kohn*, at p. 1533.)

Yana does not dispute that the terms described in the order granting Gregory's motion to enforce the settlement accurately reflect the terms she orally agreed to in court. Yana's only argument is that she agreed to those terms under duress and as a result of extrinsic fraud, the same grounds on which she moved to set aside the stipulated order. As discussed, the probate court did not err in declining to find that Yana entered the agreement under duress or as a result of extrinsic fraud, and therefore granting the motion to enforce the settlement.

DISPOSITION

The orders are affirmed. Siegel and Gregory are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.

Filed 4/23/21

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN T. DUNLAP, as Executor, etc., Plaintiff and Appellant, v. MARIA E. MAYER, as Trustee, etc., Defendant and Respondent.	D077561 (Super. Ct. No. 37-2018-00033083-PR-TR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey S. Bostwick, Judge. Reversed.

Withers Bergman; Mary F. Gillick and Matthew R. Owens; Kimura London & White and William O. London, for Plaintiff and Appellant.

Henderson, Caverly, Pum & Trytten; Kristen E. Caverly and Lisa B. Roper, for Defendant and Respondent.

Plaintiff John T. Dunlap is the executor of the New York estate (Estate) of Josephine A. Mayer,[1] who passed away in 2016. Josephine was the lifetime beneficiary of a testamentary trust (Marital Trust) established by

1 We refer to members of the Mayer family by their first names, for clarity. No disrespect is intended.

Josephine's husband, Erwin Mayer. The Estate petitioned the trustee of the Marital Trust, defendant Maria E. Mayer, for an accounting. Maria objected to the petition, alleging that she was never a trustee of the Marital Trust and that she never had possession or control of the assets of the trust. The court dismissed the petition at a case management conference, without an evidentiary hearing to resolve the contested facts. The court abused its discretion in doing so. We reverse the order of the court and remand for further proceedings.

BACKGROUND

Facts

Josephine and Erwin Mayer were married and had two children, Maria and Claudia. Erwin was a resident of San Diego County when he passed away in 1995 and his estate was probated here. Erwin created a trust in his will for the benefit of Josephine. In litigation over Erwin's estate, family members and business entities entered into a settlement agreement that modified the terms of the Marital Trust. The settlement agreement, including the terms of the Marital Trust, was approved by the San Diego probate court. Pursuant to the settlement agreement, Josephine was the sole income beneficiary of the Marital Trust during her lifetime, and Maria was the sole principal beneficiary upon Josephine's death. The court appointed Maria as the sole trustee of the Marital Trust, pursuant to the terms of the settlement agreement. Claudia disclaimed any interest in the Marital Trust.

The Marital Trust was to be funded with Erwin's 99 percent interest in Peterson & Ross Limited Partnership (P&R) and his stock in Fillmore Mercantile, Inc. (FMI). Maria's husband at that time, Ray F. Garman, III, was the president of FMI. P&R was a subsidiary of, affiliate of, or related to FMI. Maria and Garman subsequently divorced. Josephine, as executor of

Erwin's estate, and Maria, as trustee of the Marital Trust, were responsible for funding the Marital Trust with the identified assets.

Procedural Background

The Estate filed this petition for an accounting of the Marital Trust for the period from Erwin's death until Josephine's death, January 21, 1995, through September 30, 2016. Maria filed a verified objection to the petition. The objection stated that Maria did not know if the Marital Trust was ever funded; she never acted as a trustee of the Marital Trust; to the best of her knowledge she never possessed the assets as a trustee of the Marital Trust; and upon investigation, information and belief, the entities that were to fund the Marital Trust had been defunct for more than 15 years. Maria further stated that she could not provide an accounting of the Marital Trust because she never served as a trustee. In her objection she claimed that she was not involved with, did not administer, and held no assets of the Marital Trust, other than being nominally named as a trustee in the settlement agreement.

The court held an initial case management conference in October 2019, and set another case management conference in January 2020, to give the Estate time to conduct discovery into the Marital Trust assets. The Estate sent discovery requests to Maria, but the responses were not received before the January conference. The Estate filed a progress report in advance of the hearing attaching documents showing that in 1996 the court approved a creditor claim for more than one million dollars to be transferred to FMI, and Maria signed a partnership agreement for P&R, as trustee of the Marital Trust, agreeing that the trust would provide a capital contribution of more than three million dollars to P&R.

At the case management conference on January 13, 2020, the court dismissed the petition without prejudice pursuant to Probate Code[2] sections 17202 and 17206.[3] The Estate timely appealed.

DISCUSSION

The court dismissed the petition at a case management conference without advance notice that the conference could result in a dismissal. The court based its order on Maria's objection. There was no evidentiary hearing and consequently no evidence was accepted into the record.

I

STANDARD OF REVIEW

Sections 17202 and 17206 both provide the court with discretion to make orders regarding trusts. (*Gregge v. Hugill* (2016) 1 Cal.App.5th 561, 567.) The court must exercise its discretion within the " ' "limitations of legal principles governing the subject of its action." ' " (*Id.* at p. 568.) A court abuses its discretion if " 'it exceeded the bounds of reason or contravened the uncontradicted evidence [citation], failed to follow proper procedure in reaching its decision [citation], or applied the wrong legal standard to the determination.' " (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1482 (*Becerra*).)

2 Further statutory references are to the Probate Code unless otherwise noted.

3 Section 17202 states: "The 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."

Section 17206 states: "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, including appointment of a temporary trustee to administer the trust in whole or in part."

Because the court dismissed the petition based solely on the pleadings, without an evidentiary hearing, we must accept the allegations of the petition as true. (*Chacon v. Union Pacific Railroad* (2018) 56 Cal.App.5th 565, 572.)

II

THE ESTATE HAD STANDING TO REQUEST AN ACCOUNTING

Maria contends that the Estate had no standing to petition for an accounting pursuant to section 17200 because the Estate was not a present beneficiary of the trust. She relies on section 24, subdivision (c), which states that a beneficiary is "a person who has any present or future interest, vested or contingent." The complete definition of a trust beneficiary under section 24, however, states: " 'Beneficiary' means a person to whom a donative transfer of property is made *or that person's successor in interest*; and [¶] . . . [¶] (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent." (Italics added.)

In interpreting section 24, our Supreme Court has recently reminded us that "the Probate Code ' "was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." ' [Citations.] . . . [A]n expansive reading of the standing afforded to trust challenges under section 17200 'not only makes sense as a matter of judicial economy, but it also recognizes the probate court's inherent power to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust.' [Citation.]" (*Barefoot v. Jennings* (2020) 8 Cal.5th 822, 827–828.) Construing the words of section 24 with these precepts in mind, and with general tenets of statutory interpretation (see *People v. Salcido* (2008) 166 Cal.App.4th 1303, 1310–1311), persons with a present or future interest in a trust include those

persons' successors in interest. The Estate, as successor in interest to Josephine's interest in the trust, can pursue an accounting for the time when Josephine was the beneficiary of the trust, i.e. during her lifetime.

The general rules of survivability apply to proceedings under the Probate Code.[4] (Code Civ. Proc., § 377.30[5]; *Elliott v. Superior Court* (1968) 265 Cal.App.2d 825, 831 (*Elliott*).) The court in *Elliott* held that a beneficiary's cause of action against the trustee survives the death of the beneficiary. (*Id.* at p. 831.) The court relied on former section 573, which was repealed in 1992 and "restated without substantive change in Code of Civil Procedure sections 377.20(a) (survival of actions), [and] 377.30 (commencement of action decedent could have brought) . . . ." (Former § 573, repealed by Stats. 1992, ch. 178 (S.B. 1496) § 31, Law Revision Commission Comm.) The court said that the Legislature created "a comprehensive rule of survivability, and . . . there are no longer any nonsurvivable causes of action." (*Elliott*, at p. 831.) Maria distinguishes *Elliott* because it involved the survivability of a cause of action when the beneficiary died while the action was pending. The *Elliott* court's legal interpretation of former section 573 applies to both of its two successors in the Code of Civil Procedure, sections 377.20 and 377.30, regarding survivability and commencement of actions respectively.

[4] Probate Code section 1000 states: "Except to the extent that [the Probate 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."

[5] Code of Civil Procedure section 377.30 provides as relevant: "A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, . . . and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest."

In sum, Josephine's right to request an accounting of the Marital Trust during her lifetime, when she was a beneficiary, continued after her death. The Estate, as the successor in interest to Josephine, was authorized to initiate this petition for an accounting from the trustee. (Code Civ. Proc., § 377.30; *Elliott*, *supra*, 265 Cal.App.2d at p. 831.)

III

DISMISSAL OF PETITION AT CASE MANAGEMENT CONFERENCE

The probate court erred in dismissing the petition at a case management conference, without an evidentiary hearing or completion of discovery and without giving the Estate notice that the conference could result in dismissal of the petition.

When matters within the purview of the Probate Code are contested, "[t]he court shall hear and determine any matter at issue and any response or objection presented, consider evidence presented, and make appropriate orders." (§ 1046.) There was no hearing here, and no evidence was presented. The court relied on Maria's objection to the petition, which stated that Maria did not know if the Marital Trust was ever funded, she never took title to or controlled any of the assets of the Marital Trust, and two businesses that were to fund the trust were defunct. The latter two statements were "to the best of her knowledge" and "upon information and belief," respectively. The Estate contested these statements and produced documents showing that in 1996 money was transferred to the two entities that were the assets of the Marital Trust.

The court could not rely on Maria's objections, even though verified, as a basis for its ruling because the facts were contested. "[W]hen challenged in a lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing." (*Evangelho* (1998) 67 Cal.App.4th

615, 620.) "[S]ection 1022 authorizes the use of declarations only in an 'uncontested proceeding.' " (*Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309.) "When a petition is contested, as it was here, . . . absent a stipulation among the parties to the contrary, each allegation in a verified petition and each fact set forth in a supporting affidavit must be established by competent evidence. [Citations.]" (*Estate of Lensch* (2009) 177 Cal.App.4th 667, 676.) The Estate contested Maria's declarations about the trust. There was no competent evidence establishing the allegations stated by Maria in her objection to the petition.

Maria contends that under section 17206, the court has the discretion to "make any orders and take any action necessary or proper to dispose of the matters presented by the petition . . . ." (§ 17206; see *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.) "The probate court has general power and duty to supervise the administration of trusts." (*Schwartz*, at p. 427.) This power, however, comprises only the " 'inherent power to decide all *incidental* issues necessary to carry out [the court's] express powers to supervise the administration of the trust.' " (*Ibid*., emphasis added.) In *Schwartz*, the court suspended the trustee and appointed an interim trustee pending a hearing. The court took these actions sua sponte, as part of its duties to supervise administration of the trust, and to inquire into the prudence of the trustee's actions. (*Ibid*.) In another case, a probate court's sua sponte request for an accounting under section 17206 was affirmed as part of the probate court's duty to supervise the administration of the trust. (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.)

Dismissal of a petition altogether is not an incidental issue; it is the complete resolution of the petition. 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 Probate Code requires that "[a] hearing under this code shall be on notice unless the statute that provides for the hearing dispenses with notice." (§ 1042.) Neither section 17206 nor section 17202 dispense with notice for a hearing on a motion to dismiss. There was no notice of dismissal before the conference. Notice of the hearing stated only that it was set for a "[p]rogress report on pending discovery." There was no notice to the Estate that dismissal of the petition would be considered, much less granted. (See *Lee v. An* (2008) 168 Cal.App.4th 558, 565 [court erred in imposing sanctions that resulted in a default judgment at case management conference when party had no notice that sanctions leading to dismissal could be imposed if party failed to appear].)

We note that reviewing courts are "increasingly wary" of using procedural shortcuts because they "circumvent procedural protections provided by the statutory motions or by trial on the merits; they risk blindsiding the nonmoving party; and, in some cases, they could infringe a litigant's right to a jury trial." (*Amtower v. Photon Dynamics, Inc*. (2008) 158 Cal.App.4th 1582, 1594 [discussing in limine motions used to dispose of causes of action].) "The purpose of the pretrial is to expedite the proceedings and to facilitate the correct determination of the issues. The pretrial proceeding should not become a trap for the unwary." (*Mays v. Disneyland, Inc*. (1963) 213 Cal.App.2d 297, 300.)

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 Josephine's lifetime. (§ 1046.) The court abused its discretion because it failed to follow the proper procedure in reaching its decision. (*Becerra*, *supra*, 175 Cal.App.4th at p. 1482; *Gregge*, *supra*, 1

Cal.App.5th at p. 571 [court abused its discretion in accepting dismissal that deprived petitioner of trial].)

DISPOSITION

We reverse the order of the probate court and remand for further proceedings in accordance with this opinion. Costs to be awarded to appellant.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.

Filed 2/16/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HARRY ROUSSOS et al., Plaintiffs and Respondents, v. THEODOSIOS ROUSSOS, Defendant and Appellant.	B293358 (Los Angeles County Super. Ct. No. BS170767)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Reversed and remanded with directions.

Nossaman, Jennifer L. Meeker and Maya G. Hamouie for Defendant and Appellant.

RMO, Scott E. Rahn, Sean D. Muntz and David G. Greco for Theocharis Roussos as Amicus Curiae on behalf of Defendant and Appellant.

Kesselman Brantly Stockinger, S.V. Stuart Johnson and Ryan Davis for Plaintiffs and Respondents.

Theodosios (Ted) Roussos appeals from a judgment confirming an arbitration award removing the managing director

of two corporations, owned by Ted and his brother Harry Roussos as cotrustees of two trusts, and appointing the director proposed by Harry.[1] Ted contends the arbitration award must be vacated because of the arbitrator's refusal to recuse himself after Ted timely served his disqualification notice. Harry contends Ted waived his right to object to the arbitrator because five years earlier the parties had agreed the specified arbitrator would have binding authority to arbitrate all issues. However, the arbitrator was still a "proposed neutral arbitrator" for the present arbitration under Code of Civil Procedure sections 1281.9 and 1281.91,[2] and under section 1281.91, subdivision (b)(1), the arbitrator was required to disqualify himself upon Ted's timely service of a notice of disqualification. We conclude the parties cannot contract away California's statutory protections for parties to an arbitration, including mandatory disqualification of a proposed arbitrator upon a timely demand. We reverse and remand.[3]

[1] Because the Roussos family members share the same last name, we refer to them by their first names to avoid confusion.

[2] Further statutory references are to the Code of Civil Procedure.

[3] Ted also contends on appeal the arbitration agreement, entered in 2012, did not cover the parties' 2016 disputes; the signatures on the arbitration agreement were not properly authenticated; and Harry and his wife Christine Roussos failed to join indispensable parties. Because we reverse based on the required disqualification of the arbitrator, we do not address the other issues.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Trusts and Business Entities*

Harry and Ted are brothers and cotrustees of the S.M.B. Investor Associates Irrevocable Trust (SMB Trust) and the O.F. Management Irrevocable Trust (OF Trust). As cotrustees of the two trusts, Harry and Ted had management roles and financial interests in multiple interrelated companies (the Roussos entities). As cotrustees of the SMB Trust, Harry and Ted held ownership interests in Dazum Limited (Dazum), Velnor Overseas Ltd. (Velnor), S.M.B. Management, Inc. (SMB Management), and S.M.B. Investor Associates, L.P. (SMB LP). As cotrustees of the OF Trust, they held ownership interests in Fenbe, Ltd. (Fenbe), Kelroad International, Inc. (Kelroad), Liro, Inc. (Liro), and O.F. Enterprises Ltd., L.P. (OF LP). In 2017 OF LP owned two apartment buildings on Abbot Kinney Boulevard and Paloma Avenue in Venice and a third apartment building in Colton. Liro owned a vacant lot on Abbot Kinney Boulevard and an apartment building on Ocean Front Walk in Venice.

B. *Harry and Christine's Demand for Arbitration and Motion To Compel Arbitration*

On August 31, 2017 Harry and his wife Christine Roussos demanded arbitration pursuant to a December 2012 arbitration agreement signed by Christine, Harry (individually and on behalf of OF LP and SMB LP), Ted (individually and on behalf of OF LP and SMB LP), and two individuals signing on behalf of Liro, Kelroad, Fenbe, Dazum, Velnor, and SMB Management. The arbitration agreement provided the parties "stipulate and agree not to contest that Judge John P. Shook will arbitrate all issues

with binding authority" over them. In their arbitration demand, Harry and Christine requested the appointment of a single director for Velnor, Dazum, Kelroad and Fenbe; a stay of any distribution of cash or sale of assets held by Liro, OF LP, and SMB Management; and an order requiring Sarah Daly, the director of Liro and SMB Management, to keep Harry, Ted, and other Roussos entities informed as to the business operations of Liro, SMB Management, SMB LP, and OF LP. According to the demand, the arbitrator (Judge Shook) had previously appointed Daly to serve as the director of SMB Management and Liro, but he did not appoint a director for Velnor, Dazum, Kelroad, or Fenbe. The demand also alleged Daly was acting inappropriately with respect to her role as director of SMB Management and Liro. Harry and Christine's demand for arbitration followed a prior arbitration in which the arbitrator ordered partition by sale of six properties held by OF LP, SMB LP, and Liro (the first arbitration).[4]

On September 8, 2017 Harry and Christine filed a petition to compel arbitration naming Ted, SMB LP, OF LP, SMB Management, and Liro as respondents after they objected to the arbitrator's jurisdiction to resolve the dispute.[5] On October 6 Harry and Christine filed a motion to compel arbitration, which the trial court granted on March 5, 2018. The trial court ordered the parties to "arbitrate the controversies between them,

[4] The first arbitration is the subject of Ted's appeal in *Roussos v. Roussos* (Feb. 2, 2021, B293356) (nonpub. opn.).

[5] Harry and Christine later dismissed SMB LP and OF LP from the petition.

including the entire Petition scope, in accordance with their agreement to arbitrate."

C. *The Arbitrator's Disclosure and Ted's Notice of Disqualification*

On March 13, 2018 Judge Shook served on the parties a disclosure report that disclosed two matters in which he had served as an arbitrator: (1) a March 2016 matter involving Ted, Harry, Christine, and the Roussos entities; and (2) the first arbitration involving Harry, Christine, and Ted resulting in a September 2016 arbitration award. The cover letter to counsel stated, "[D]isclosures are being made for the prior sixty months pursuant to Code of Civil Procedure Sections 1281.6 and 1281.9." The disclosure also provided, "To further comply with CCP section 1281.85 as adopted by the Judicial Council of California and effective as of July 1, 2002 *ARC* [(Alternative Resolution Centers)] makes the following disclosure: If selected as a neutral arbitrator the Arbitrator selected in the instant matter will entertain and accept offers of permitted employment or new professional relationships from parties, attorneys, or law firms involved in a case while this case is pending. *ARC* will entertain offers of permitted employment or new professional relationships—for example, as a neutral arbitrator or mediator—from parties or attorneys involved in this case while this case is pending." The letter concluded, "[I]t is the position of *ARC* that the foregoing constitutes a complete and thorough disclosure. Proceeding to hearing in this matter shall be deemed acknowledgment of said disclosures and your acceptance of the arbitrator."

On March 22, 2018 Ted served a notice of disqualification of Judge Shook as the arbitrator based on the disclosure report pursuant to section 1281.91, subdivision (b). Ted asserted the arbitrator's prior rulings and awards, as well as his relationships with Ted's prior attorney and Harry and Christine's attorney, could affect the arbitrator's neutrality. The arbitrator denied Ted's disqualification request.

D. *The Arbitration Award*

As part of the 2018 arbitration, Harry and Christine moved to remove and replace Daly as the director of SMB Management and Liro. The arbitrator had appointed Daly on June 6, 2016 to serve as director of SMB Management and Liro upon Ted's nomination, but at the time of the 2018 arbitration both Harry and Ted sought her removal and replacement. After a hearing, on March 30, 2018 the arbitrator revoked his prior appointment of Daly and removed her from her position as director of SMB Management and Liro. The arbitrator set an evidentiary hearing to consider Harry's and Ted's nominations of individuals to serve as the director of the Roussos entities.

After a hearing, on May 18, 2018 the arbitrator in his final amended award appointed David Kaplan, Harry's choice of director, as the acting director for all of the Roussos entities.

E. *The Trial Court's Confirmation of the Arbitration Award*

On June 6, 2018 Harry and Christine filed a petition and motion to confirm the amended arbitration award. On June 18 Ted filed an answer to the petition, requesting the trial court vacate the award. Ted also filed an opposition to the motion to confirm the amended arbitration award. Ted contended the

award must be vacated because the arbitrator failed to disqualify himself upon timely receipt of Ted's notice of disqualification. Ted also argued Harry and Christine had not authenticated the arbitration agreement because Harry's declaration did not aver he saw an authorized agent of the Roussos entities sign the arbitration agreement; the arbitration agreement only covered the issues in dispute in 2012, not the present dispute; the arbitrator exceeded his powers by issuing an award that went beyond the arbitration demand (removal of Daly); and the award was void because the two trusts were not joined as indispensable parties.

On August 1, 2018 the trial court granted Harry and Christine's motion to confirm the amended arbitration award. On August 31 the court entered judgment confirming the amended arbitration award and ordering Ted to pay Harry and Christine $51,289.85 in attorneys' fees incurred to confirm the award. Ted timely appealed.

DISCUSSION

A. *The Disclosure and Disqualification Requirements of the Arbitration Act and Ethics Standards for Neutral Arbitrators*

"The California Arbitration Act (§ 1280 et seq.) 'represents a comprehensive statutory scheme regulating private arbitration in this state.'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380; accord, *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) "In 2001 the Legislature 'significantly revised the disclosure requirements and procedures for disqualifying arbitrators pursuant to private or contractual arbitration' and directed the

Judicial Council to adopt ethical standards for neutral arbitrators. [Citations.] 'The 2001 legislation arose out of a perceived lack of rigorous ethical standards in the private arbitration industry. Cosponsored by the Governor and the Judicial Council, the bill sought to provide "basic measures of consumer protection with respect to private arbitration, such as minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements."'" (*Honeycutt v. JP Morgan Chase Bank, N.A.* (2018) 25 Cal.App.5th 909, 921, fn. omitted (*Honeycutt*); accord, *Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, 1162, 1165 (*Azteca*).)

"The statutory scheme, in seeking to ensure that a neutral arbitrator serves as an impartial decision maker, requires the arbitrator to disclose to the parties any grounds for disqualification. Within 10 days of receiving notice of his or her nomination to serve as a neutral arbitrator, the proposed arbitrator is required, generally, to 'disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.' (§ 1281.9, subd. (a).)"[6] (*Haworth v. Superior Court,*

[6] Section 1281.9, subdivision (a), provides in pertinent part, "In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including all of the following: [¶] (1) The existence of any ground specified in Section 170.1 for disqualification of a judge. . . . [¶] (2) Any matters required to be disclosed by the

supra, 50 Cal.4th at p. 381, fn. omitted; accord, *Gray v. Chiu* (2013) 212 Cal.App.4th 1355, 1361.)

Section 1281.91, subdivision (b), provides, "(1) If the proposed neutral arbitrator complies with Section 1281.9, the proposed neutral arbitrator shall be disqualified on the basis of the disclosure statement after any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after service of the disclosure statement. [¶] (2) A party shall have the right to disqualify one court-appointed arbitrator without cause in any single arbitration, and may petition the court to disqualify a subsequent appointee only upon a showing of cause." As the Court of Appeal explained in *Azteca, supra*, 121 Cal.App.4th at page 1163, the disqualification provision "confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. [Citation.] There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. [Citation.] As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute." (Fn. omitted; accord, *Luce, Forward, Hamilton & Scripps, LLP v.*

ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter. . . . [¶] . . . [¶] (4) The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any."

Koch (2008) 162 Cal.App.4th 720, 729 (*Luce*).) "[A party's] demand for disqualification of a proposed neutral arbitrator therefore ha[s] the same practical effect as a timely peremptory challenge to a superior court judge under section 170.6—disqualification is automatic, the disqualified judge loses jurisdiction over the case and any subsequent orders or judgments made by him or her are void." (*Azteca*, at pp. 1169-1170.) However, "disqualification based on a disclosure is an absolute right only when the disclosure is legally required." (*Luce*, at p. 735.)

Neutral arbitrators (proposed or serving) are also required to comply with the ethics standards for neutral arbitrators adopted by the Judicial Council. (§ 1281.85, subdivision (a); see Cal. Ethics Standards for Neutral Arbitrators in Contractual Arbitration (Ethics Standards).) Further, section 1281.85, subdivision (c), provides that "[t]he ethics requirements and standards of this chapter are nonnegotiable and shall not be waived." The Judicial Council adopted the ethics standards in 2002, explaining the purpose of the standards: "For arbitration to be effective there must be broad public confidence in the integrity and fairness of the process. Arbitrators are responsible to the parties, the other participants, and the public for conducting themselves in accordance with these standards so as to merit that confidence." (Ethics Standards, std. 1(b).) Standard 2(a)(1)(A) and (B) clarifies that the standards apply to arbitrators selected by the parties or appointed by the court.

Ethics Standards, standard 7(d) requires a "proposed arbitrator or arbitrator" to "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial." Standard 7(d)

includes as examples of required disclosures a family, "significant personal," or attorney-client relationship with a party or lawyer in the arbitration; a financial or other interest in the outcome of the arbitration; prior service as an arbitrator for a party or lawyer; and knowledge of "disputed evidentiary facts concerning the proceeding." (Std. 7(d)(2)-(4), (7), (11)-(13).) Standard 7(e) requires the arbitrator to disclose other matters relating to professional discipline and the arbitrator's inability to conduct and complete the arbitration in a timely manner.

Although the mandatory disqualification provisions of section 1281.91, subdivision (b)(1), apply only to a "proposed neutral arbitrator," any neutral arbitrator (proposed or serving) "shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding" if any ground for disqualification in section 170.1 exists. (§ 1281.91, subd. (d).) Section 170.1, in turn, provides specific grounds for disqualification for a judge (and thus an arbitrator), including personal knowledge of disputed evidentiary facts concerning the proceeding, specified relationships with parties or lawyers in the proceeding, or a financial interest in the subject matter of the proceeding. (§ 170.1, subd. (a)(1)(A), (3)(A), (4)-(5).) Further, section 170.1, subdivision (a)(6)(A), provides for disqualification if "(i) The judge believes his or her recusal would further the interests of justice. [¶] (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial. [¶] [Or,] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." The trial court must vacate an arbitration award if the arbitrator "was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify

himself or herself as required by that provision." (§ 1286.2, subd. (a)(6)(B).) "'On its face, the statute leaves no room for discretion. If a statutory ground for vacating the award exists, the trial court must vacate the award.'" (*Honeycutt, supra*, 25 Cal.App.5th at pp. 924-925; accord, *Luce, supra*, 162 Cal.App.4th at p. 730.)

B. *Standard of Review*

"'"On appeal from an order confirming an arbitration award, we review the trial court's order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court's ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues."'" (*ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 900; accord, *Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 386; see *Haworth v. Superior Court, supra*, 50 Cal.4th at p. 383 [reviewing de novo whether trial court properly vacated arbitration award based on arbitrator's failure to disclose certain circumstances].) We also review de novo "legal issue[s] involving statutory construction and the ascertainment of legislative intent." (*Azteca, supra*, 121 Cal.App.4th at p. 1164.)

C. *The Award Must Be Vacated Based on the Arbitrator's Failure To Disqualify Himself Upon Ted's Timely Demand*

As discussed, on March 13, 2018 Judge Shook disclosed two arbitrations in March and September 2016 involving the parties and their lawyers in which Judge Shook was the neutral arbitrator, pursuant to section 1281.9, subdivision (a). Ted timely served his notice of disqualification based on the disclosures on March 22, 2018—nine days after service of the

disclosure report. Harry and Christine contend in their supplemental briefing[7] that Judge Shook was not required to make disclosures under section 1281.9, subdivision (a), and Ted did not have a right to disqualify Judge Shook under section 1281.91, subdivision (b)(1), because both provisions apply only to a "proposed neutral arbitrator." Harry and Christine assert Judge Shook was the appointed arbitrator, not a "proposed" arbitrator because the parties had agreed in their 2012 arbitration agreement that Judge Shook would arbitrate "all issues" arising among the parties. Ted responds that even though the parties agreed in 2012 that Judge Shook would serve as the arbitrator and he had presided over the first arbitration, he still was "proposed" for purposes of this arbitration because he could have declined the engagement or become unavailable, or matters could have arisen since the initial agreement that would have affected his impartiality.

We agree with Ted that Judge Shook was a "proposed neutral arbitrator" subject to the disclosure and disqualification requirements of sections 1281.9 and 1281.91. As the cover letter to his disclosure report made clear, the disclosures were made to the parties to confirm their acceptance of Judge Shook as the arbitrator. The letter provided, for example, that Judge Shook would entertain and accept offers of employment with the parties and attorneys while the arbitration was pending "[i]f selected as a neutral arbitrator." Similarly, the letter concluded that if the parties proceeded to the scheduled hearing, that would "be

[7] On January 8, 2021 we requested the parties provide supplemental briefing on whether Judge Shook was a "proposed neutral arbitrator" pursuant to section 1281.91, subdivision (b)(1). The parties filed supplemental briefs on January 18.

deemed acknowledgment of . . . your acceptance of the arbitrator."

As the proposed neutral arbitrator, Judge Shook was legally required to make the disclosures set forth in his disclosure report, and Ted had an absolute right to disqualify him without cause. (*Luce, supra*, 162 Cal.App.4th at p. 735; *Azteca, supra*, 121 Cal.App.4th at p. 1163; see § 1281.91, subd. (b)(1).) But despite Ted's notice of disqualification, the arbitrator refused to disqualify himself. The trial court was therefore required to vacate the award under section 1286.2, subdivision (a)(6)(B), because the arbitrator "was subject to disqualification upon grounds specified in Section 1281.91, but failed upon receipt of timely demand to disqualify himself or herself as required by that provision."

Harry and Christine contend the trial court properly confirmed the arbitration award because Ted stipulated in the arbitration agreement for Judge Shook to serve as the arbitrator and "not to contest that Judge John P. Shook will arbitrate all issues with binding authority," so Ted could not withdraw his consent simply because the arbitrator ruled against him. But the parties to an arbitration agreement cannot contract away their statutory right to disqualify an arbitrator pursuant to section 1281.91. (*Azteca, supra*, 131 Cal.App.4th at p. 1160.)

The Court of Appeal's opinion in *Azteca* is instructive. There, the parties agreed to private arbitration pursuant to construction industry dispute resolution procedures that provided, upon receiving an objection to an arbitrator, the American Arbitration Association (AAA) would make a conclusive determination whether to disqualify the arbitrator. (*Azteca, supra*, 121 Cal.App.4th at p. 1160.) Plaintiff Azteca

Construction, Inc., demanded disqualification of the proposed arbitrator pursuant to section 1281.91, but the AAA decided there was no good cause for the disqualification and affirmed the appointment of the arbitrator. The trial court denied Azteca's motion to vacate the arbitration award, finding Azteca had waived its right to disqualify the arbitrator by agreeing to the AAA rules. (*Azteca*, at p. 1162.) The Court of Appeal reversed, explaining, "While the parties may be free to contract among themselves for alternative methods of dispute resolution, such contracts would be valueless without the state's blessing. Because it imbues private arbitration with legal vitality by sanctioning judicial enforcement of awards, the state retains ultimate control over the 'structural aspect[s] of the arbitration' process. [Citation.] The critical subject of arbitrator neutrality is a structural aspect of the arbitration and falls within the Legislature's supreme authority. [¶] Finally, the neutrality of the arbitrator is of such crucial importance that the Legislature cannot have intended that its regulation be delegable to the unfettered discretion of a private business." (*Id*. at pp. 1167-1168.) "Only by adherence to the Act's prophylactic remedies can the parties have confidence that neutrality has not taken a back seat to expediency." (*Id*. at p. 1168.)

We agree with the reasoning in *Azteca*. Although federal and state law favor enforcement of valid arbitration agreements (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97), the California Supreme Court has emphasized that certain "'minimum levels of integrity' [must] be achieved if the [arbitration] arrangement in question is to pass judicial muster" (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 825; accord, *Armendariz*, at p. 103; see *Honeycutt, supra*,

25 Cal.App.5th at p. 931 ["The public deserves and needs to know that the system of private justice that has taken over large portions of California law produces fair and just results from neutral decision makers."]). As discussed, section 1281.9 is designed to ensure the neutrality of the arbitrator by enabling a party to disqualify the arbitrator for failure to make a required disclosure or based on the disclosures. It is true, as argued by Harry and Christine, that Ted agreed Judge Shook would serve as the arbitrator, and nothing in the disclosure revealed information not previously known to Ted (that is, that Judge Shook was the arbitrator in the two previous matters). But section 1281.91 makes clear the arbitrator "shall" be disqualified upon the timely service of a notice of disqualification based on the disclosure statement, without requiring a showing of good cause.

Under Harry and Christine's reading of section 1281.91, once the parties agreed not to contest Judge Shook serving as the arbitrator, the parties would be limited in their ability to object to Judge Shook based on any changed circumstances since the parties had stipulated to the arbitration agreement in December 2012. For example, Judge Shook could have accepted repeat referrals from the attorneys for one side of the dispute with the opposing party having limited recourse despite the possible impact of the referrals on his neutrality.[8] This would be contrary

[8] Ted could still have challenged Judge Shook based on any ground for disqualification under section 170.1 (applicable to proposed and serving arbitrators). The acceptance of repeat referrals could fall within section 170.1, subdivision (a)(6)(A)(iii) ("[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial"), but this provision would not provide the certainty of disqualification afforded by the

to the intent of the Legislature in enacting section 1281.9 and 1281.91 "to inform and protect participants in arbitration, and to promote public confidence in the arbitration process." (Ethics Standards, std. 1(a); see *Azteca, supra*, 121 Cal.App.4th at p. 1167.)

Harry and Christine's reliance on *Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 190-191 (*Fininen*) and *Dornbirer v. Kaiser Foundation Health Plan, Inc.* (2008) 166 Cal.App.4th 831, 846 (*Dornbirer*) to argue the trial court has discretion whether to vacate an arbitration award under section 1286.2, subdivision (a)(6), is misplaced. In *Fininen*, the arbitrator disclosed he had previously mediated a construction collection dispute involving appellant Mark Barlow, but the arbitrator failed to provide any specifics of the prior mediation. (*Fininen*, at p. 188.) Following the disclosures, Barlow and the opposing party waived any potential conflicts. (*Ibid*.) The Court of Appeal affirmed the trial court's denial of Barlow's motion to vacate the arbitration award because Barlow was a party to the nondisclosed case on which he had access to his own file, consented to proceed with the arbitration based on the incomplete information, and waited until after the arbitrator ruled against him to object to the arbitrator. (*Id*. at p. 190.) On these facts the court concluded it would be "absurd to construe section 1286.2, subdivision (a)(6) to require that the arbitration award be vacated based on an incomplete or untimely disclosure." (*Id*. at pp. 190-191.)

mandatory disqualification provision of section 1281.91, subdivision (b)(1). We are not suggesting Judge Shook took any actions that created an actual conflict or affected his impartiality, only that Ted had a right to disqualify him based on the disclosure statement.

Similarly, in *Dornbirer*, an arbitrator disclosed numerous prior arbitrations involving defendant Kaiser Permanente or its counsel, but the arbitrator's disclosure did not contain complete information on the details of the arbitrations, including the dates, the names of the attorneys, and the specifics of the award. (*Dornbirer, supra*, 166 Cal.App.4th at pp. 840-841.) The Court of Appeal concluded the incomplete disclosures under section 1281.9 did not support vacatur because the plaintiff was on notice prior to the arbitration of the missing information but consented to the arbitration and failed to raise an objection until after the arbitrator ruled in favor of Kaiser. (*Dornbirer*, at p. 846.) The Court of Appeal explained the plaintiff's remedy for the arbitrator's "failure to meet the statutory disclosure requirements was to disqualify him on that basis *before* the arbitration commenced, not after the arbitration was over." (*Ibid.*)

Unlike the appellants in *Fininen* and *Dornbirer*, Ted served a timely disqualification notice before commencement of the arbitration. Further, both cases concerned the materiality of incomplete disclosures under section 1281.91, subdivision (a), for purposes of disqualification, not the absolute right to disqualification under section 1281.91, subdivision (b)(1) and (2), under which a party has a right to disqualify an arbitrator without cause one time in a single arbitration. Ted properly exercised his right to disqualify the arbitrator.

DISPOSITION

The judgment is reversed and remanded with directions for the trial court to vacate its order granting the petition to confirm

the arbitration award, and to enter a new order vacating the award. Ted Roussos is to recover his costs on appeal.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

IN THE SUPREME COURT OF CALIFORNIA

JOAN MAURI BAREFOOT,
Plaintiff and Appellant,
v.
JANA SUSAN JENNINGS et al.,
Defendants and Respondents.

S251574

Fifth Appellate District
F076395

Tuolumne County Superior Court
PR11414

January 23, 2020

Justice Chin authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Liu, Cuéllar, Kruger, and Groban concurred.

BAREFOOT v. JENNINGS
S251574

Opinion of the Court by Chin, J.

If amendments to a revocable trust made shortly before the settlor dies disinherit a beneficiary, does that individual, as one who is not named in the trust's final iteration, have standing to challenge the validity of the disinheriting amendments in probate court on grounds such as incompetence, undue influence, or fraud?

The Court of Appeal interpreted Probate Code section 17200, subdivision (a),[1] which provides that "a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust," as permitting *only* a currently named beneficiary to make such a petition. It further concluded that because the plaintiff was no longer a named beneficiary, she lacked standing to challenge the validity of the amendment that eliminated her interest under section 17200.

We disagree with the Court of Appeal, and hold today that the Probate Code grants standing in probate court to individuals who claim that trust amendments eliminating their beneficiary status arose from incompetence, undue influence, or fraud.[2]

[1] All further statutory references are to the Probate Code unless otherwise indicated.

[2] We do not decide here whether an heir who was never a trust beneficiary has standing under the Probate Code to challenge that trust.

I. FACTUAL AND PROCEDURAL HISTORY

Because no party petitioned the Court of Appeal for a rehearing, we take this factual and procedural discussion largely from that court's opinion. (*Barefoot v. Jennings* (2018) 27 Cal.App.5th 1, 3-4 (*Barefoot*); see Cal. Rules of Court, rule 8.500(c)(2).)

The underlying petition in probate court alleges the following: Joan Lee Maynord and her now deceased husband established the Maynord Family Trust (Trust) in 1986. After her husband's death in 1993, Maynord served as the sole trustor. Plaintiff Joan Mauri Barefoot (plaintiff), one of Maynord's daughters, was a beneficiary and successor trustee under the Trust. Two of Joan Lee Maynord's other daughters, Jana Susan Jennings and Shana Wren (collectively defendants), were also beneficiaries. (Maynord's three other children, one deceased, are not involved in this litigation.)

"In or around August 2013 and continuing through 2016, Maynord executed a series of eight amendments to and restatements of the Trust, referred to as the 17th through the 24th amendments. The 24th amendment was the final amendment prior to Maynord's death. In these amendments and restatements, [plaintiff's] share of the Trust, as set out in the 16th amendment, was eliminated and [plaintiff] was both expressly disinherited and removed as a successor trustee. At the same time Wren was provided with a large share of the Trust and named successor trustee." (*Barefoot, supra,* 27 Cal.App.5th at p. 4.)

After Maynord's death on August 20, 2016, plaintiff filed a petition in probate court alleging the amendments disinheriting her were invalid on three grounds: (1) Maynord was incompetent to make the amendments; (2) the amendments

were the product of defendants' undue influence; and (3) the amendments were the product of defendants' fraud. Regarding standing, the petition alleged that plaintiff was "a person interested in both the devolution of [Maynord's] estate and the proper administration of the Trust because [plaintiff] is [Maynord's] daughter and both the trustee and a beneficiary of the Trust before the purported amendments. She will benefit by a judicial determination that the purported amendments are invalid, thereby causing the Trust property to be distributed according to the terms of the Trust that existed before the invalid purported amendments. Therefore, [plaintiff] has standing to bring this petition."

Defendants moved to dismiss the petition under sections 17200 and 17202 (authorizing dismissal of a petition if reasonably necessary to protect the Trust), arguing that plaintiff lacked standing because she was neither a beneficiary nor a trustee under the Trust. Plaintiff responded that she had standing because she was a beneficiary before the amendments — which, she argued, were invalid — were executed. The trial court ultimately agreed with defendants and dismissed the petition. Plaintiff appealed.

The Court of Appeal affirmed judgment in defendant's favor. We granted plaintiff's petition for review to resolve the narrow standing question.

II. DISCUSSION

Underlying this action is the revocable trust that Maynord and her deceased husband created in 1986. "A revocable trust is a trust that the person who creates it, generally called the settlor, can revoke during the person's lifetime." (*Estate of Giraldin* (2012) 55 Cal.4th 1058, 1062, fn. omitted.) The primary duty of a court in construing a trust is to give effect to

the settlor's intentions. (*Brock v. Hall* (1949) 33 Cal.2d 885 (*Brock*).)

Our review concerns whether plaintiff has standing to assert the invalidity of the Trust amendments that left her without an interest in her mother's trust estate. In concluding that plaintiff does not have standing to challenge the amendments to the Trust, the Court of Appeal suggested that plaintiff relied exclusively on section 17200, subdivision (a), which provides: "Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust." Section 15800 generally provides that so long as the trust remains revocable (that is, as long as the settlor is alive) and the settlor is competent, the settlor, "and not the beneficiary, has the rights afforded beneficiaries under this division." (*Id*., subd. (a); see *Estate of Giraldin*, *supra*, 55 Cal.4th at p. 1066.) Here, the settlor (Maynord) has died, so section 15800 is no longer relevant.

The Court of Appeal interpreted section 17200's reference to "a trustee or beneficiary" in subdivision (a) to mean that even wrongly disinherited beneficiaries are prohibited from making the petition. As we will explain, the Court of Appeal's approach runs counter to both the Probate Code and cases interpreting it.

Initially, we note that when a demurrer or pretrial motion to dismiss challenges a complaint on standing grounds, the court may not simply assume the allegations supporting standing lack merit and dismiss the complaint. Instead, the court must first determine standing by treating the properly pled allegations as true. If, having taken the allegations as true, the court finds no standing, it should sustain the demurrer or dismiss the petition. If it finds standing by contrast, the court should allow the

litigation to continue. (*Warth v. Seldin* (1975) 422 U.S. 490, 501 [standing in federal courts]; *Estate of Plaut* (1945) 27 Cal.2d 424, 426, 429-430 [will contest].)

The applicable Probate Code provisions support plaintiff's standing to challenge the merits of the Trust amendments on the grounds of incompetence, undue influence, or fraud. Section 17200, subdivision (a), authorizes a beneficiary to petition the court concerning the trust's affairs "or to determine [its] existence." Section 17200, subdivision (b)(3) contemplates the court's determination of "the validity of a trust provision." Plainly, the term "trust provision" incorporates any amendments to a trust. Section 24, subdivision (c) defines a "beneficiary" for trust purposes, as "a person who has any present or future interest, vested or contingent." Assuming plaintiff's allegations are true, she has a present or future interest, making her a beneficiary permitted to petition the probate court under section 17200.

Years ago, this court observed that as a general matter, the Probate Code " 'was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust.' " (*Estate of Bissinger* (1964) 60 Cal.2d 756, 765 (*Bissinger*), quoting *Estate of Marre* (1941) 18 Cal.2d 184, 187.) The wisdom of those decisions has not lessened over time. More recently, the Court of Appeal in *Estate of Heggstad* (1993) 16 Cal.App.4th 943 explained that an expansive reading of the standing afforded to trust challenges under section 17200 "not only makes sense as a matter of judicial economy, but it also recognizes the probate court's inherent power to decide all incidental issues necessary to carry out its express powers to supervise the administration

of the trust." (*Estate of Heggstad*, at p. 951.) Other Courts of Appeal that have addressed the same question are in agreement. (*Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407-409 [individual petitioned under § 17200 claiming two amendments to a trust that disinherited her were invalid on the ground the settlor was incompetent]; *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1341 ["it is clear from viewing section 17200 as a whole that a probate court has jurisdiction over both inter vivos and testamentary trusts to entertain petitions for instructions regarding the validity (and thus, invalidity) of trust agreements or amendments"].)

Reading the Probate Code section consistent with the statutory scheme as a whole, and examining the statutory language to give it commonsense meaning, we conclude that claims that trust provisions or amendments are the product of incompetence, undue influence, or fraud, as is alleged here, should be decided by the probate court, if the invalidity of those provisions or amendments would render the challenger a beneficiary of the trust. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [courts should not examine statutory language in isolation].) So when a plaintiff claims to be a rightful beneficiary of a trust if challenged amendments are deemed invalid, she has standing to petition the probate court under section 17200.

Defendants argue that interpreting section 17200 to permit purported beneficiaries to challenge a trust or its amendments would "invite chaos" because it would permit individuals with no present interest in the trust to "meddle" with its administration. We think defendants overstate the matter. Our holding does not allow individuals with no interest in a trust to bring a claim against the trust. Instead, we permit

those whose well-pleaded allegations show that they have an interest in a trust — because the amendments purporting to disinherit them are invalid — to petition the probate court.

Additionally, section 17206 provides the probate court with wide latitude to "make any orders and take any other action necessary or proper to dispose of the matters presented by the petition." This section supports a finding of standing here. We have held that although the probate court has no general equity jurisdiction, it does have the power to apply equitable and legal principles in order to assist its function as a probate court. (*Bissinger, supra,* 60 Cal.2d at pp. 764-765.) Indeed, the probate court is given broad jurisdiction " 'over practically all controversies that might arise between the trustees and those claiming to be beneficiaries of the trust.' " (*Id.* at p. 765, quoting *Estate of Marre, supra,* 18 Cal.2d at p. 187.) Using such discretion, the court can preserve trust assets and the rights of all purported beneficiaries while it adjudicates the standing issue. As one court explained, interpreting section 17200 as we do here "not only makes sense as a matter of judicial economy, but it also recognizes the probate court's inherent power to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust." (*Estate of Heggstad*, *supra*, 16 Cal.App.4th at p. 951.)[3]

[3] We also note that defendants' restrictive interpretation of the Probate Code does not promote the public interest in preventing the administration of trust property that is procured through fraud or undue influence. This interest is expressed most clearly in section 21380, which provides that certain donative transfers (e.g., transfers to the drafter of the trust or to the settlor's caregiver) are presumptively the product of fraud or undue influence. Courts have held that "no contest" provisions

Defendants also contend that section 850 allows "any interested person" to file a petition to take certain actions challenging title and property transfer issues, and provides the *exclusive* means to challenge trust provisions. That section concerns "the transfer of property of the trust." (See § 17200.1.) We need not examine in detail what section 850 does and does not do because plaintiff is asserting her standing as a beneficiary to challenge the validity of several amendments to the Trust only, and not contesting any transfer or sale of property into or out of the Trust. We therefore leave the statute's interpretation to a future case.

To hold other than we do today would be to insulate those persons who improperly manipulate a trust settlor to benefit themselves against a probate petition. Today's narrow holding in fact provides an orderly and expeditious mechanism for limited challenges like plaintiff's to be litigated early in the probate process, in probate court, and to ensure that the settlor's intent is honored. (See *Brock, supra,* 33 Cal.2d a p. 885.)

in trusts cannot be used to avoid this section because that would undermine the Legislature's intent to deter persons from procuring trust benefits through fraud or undue influence. (*Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 256.) Similarly, where a person fraudulently induces a settlor to amend a trust so that it transfers all of the settlor's estate to that person and disinherits all prior beneficiaries, it would undermine the public interest if a court were to rule that those valid beneficiaries had no standing to contest the fraudulently procured amendment.

III. CONCLUSION

We reverse the judgment of the Court of Appeal and remand the matter to that court for further proceedings consistent with this opinion.

CHIN, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Barefoot v. Jennings

Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 27 Cal.App.5th 1
Rehearing Granted

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Judge: Kate P. Segerstrom

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Filed 3/20/18 Scott v. Matsui CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JASON M. SCOTT et al., Plaintiffs and Respondents, v. DARRYL SHOJI MATSUI, Individually and as Trustees, etc., et al., Defendants, Cross-complainants and Appellants; GEORGIA MURPHY et al., Cross-defendants and Respondents.	D072161 (Super. Ct. No. 37-2016-00024163-CU-OR-NC)

APPEAL from an order of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Nicholas & Tomasevic, Craig M. Nicholas and David G. Greco for Defendants, Cross-complainants and Appellants.

Galuppo & Blake, Louis A. Galuppo, Steven W. Blake, Andrew E. Hall, and Daniel T. Watts for Plaintiffs and Respondents.

Keeney, Waite & Stevens, Todd F. Stevens and Mary M. Best for Georgia Murphy and Coldwell Banker Residential Brokerage Company, Cross-defendants and Respondents.

Plaintiffs Jason M. Scott and Patricia J. Scott (Buyers) bought a home (Property) from defendants Darryl Shoji Matsui and Pollie Alisa Gautsch (Sellers) in July 2014. After Buyers began the process of remodeling in April 2015, they allege that they first learned of an easement on the Property that created an encroachment onto the city's right-of-way. In a complaint filed in July 2016, Buyers asserted various causes of action against Sellers based on Sellers' alleged failure to disclose the easement.

Pursuant to an arbitration provision in the contract for the purchase and sale of the Property, Sellers demanded arbitration and filed a motion to compel arbitration in March 2017. The superior court denied Sellers' motion, ruling that, by their actions during the October 2015 through March 2017 time period—i.e., from the date the parties first attempted to resolve their dispute through the filing of Sellers' motion—Sellers had waived their right to arbitrate the dispute.

Sellers appeal from the May 2017 order denying their motion (Order). Because the record contains no evidence of the requisite prejudice to Buyers from Sellers' delay in demanding arbitration, we will reverse the Order and remand with directions to grant Sellers' motion.

I.

FACTUAL AND PROCEDURAL BACKGROUND[1]

We recite the facts in a light most favorable to the trial court's order denying arbitration. (*Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 833.)

Buyers purchased the Property from Sellers in July 2014, pursuant to a written agreement (Contract), which consists of five forms from the California Association of Realtors, Inc.: California Residential Purchase Agreement and Joint Escrow Instructions and Counter Offer Nos. 1-4, copies of which are attached as exhibit Nos. 1-5 to the complaint.[2] Buyers alleged that, as they began the remodeling process in April 2015,

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1 Since the record contains no evidence for some of the underlying facts, we—like Sellers and the trial court—will rely on certain allegations in Buyers' unverified complaint. However, an unverified complaint contains only allegations, not evidence. (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1271, fn. 1.) Thus, we will rely on such allegations only for general background, not for any fact that affects the parties' arbitration agreement or the parties' actions that contributed to the resolution of the waiver issue on appeal.

2 We reject Buyers' argument that because Sellers did not authenticate the Contract containing the arbitration provision, the record lacks evidence of the agreement to arbitrate. In support of their motion, Sellers relied on the copy of the Contract *attached to Buyers' complaint*, and at the hearing on the motion Buyers' counsel acknowledged that Buyers had judicially admitted the terms of the Contract. Notably, despite their evidentiary objection, Buyers do not contend either that exhibit Nos. 1-5 to their complaint do not comprise the Contract between the parties or that paragraph 26.B. of the Contract is not the arbitration agreement applicable to the parties to the Contract.

Buyers also argue on appeal, as they did in the trial court, that the agreement to arbitrate is not enforceable because one of the two Buyers did not provide initials next to the provision as required by the terms of the Contract. We reject this argument based on Counter Offer No. 1, in which (1) Sellers proposed that Buyers initial paragraph 26 of the offer that provides for arbitration of disputes, and (2) both Buyers accepted that proposal, which thereby became a term of the Contract. Moreover, all parties signed the Contract, and Code of Civil Procedure section 1298's requirement that parties to an arbitration

they learned for the first time that "an easement runs through structure(s) on the Property, thereby creating an encroachment onto the [city's] right-of-way." By June of 2015, Buyers allege that they received notice from the city that required them "to significantly and substantially alter or tear down portions of existing structures on the Property that encroach over the Property line."

In September 2015, Buyers wrote Sellers asking to discuss issues related to Sellers' failure to disclose an easement.[3] Approximately a week later, Sellers responded, indicating that they wanted to mediate the dispute pursuant to the mediation provision found at paragraph 26.A. of the Contract.[4] The parties exchanged further correspondence in January 2016 in which Buyers outlined their issues in more detail, and both sides indicated their willingness to mediate. The parties met, but did not resolve their dispute.

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provision in a contract to convey real property "indicate their assent" by initialing the provision is preempted by the Federal Arbitration Act (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 764; *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 583)—which, as we explain in the Discussion at part II., *post*, applies to the arbitration provision here.

[3] Actually, counsel for the respective sides wrote and received the letter. Going forward, we will not distinguish between the parties and their attorneys, except where context requires otherwise.

[4] Paragraph 26 of the Contract is entitled, "Dispute Resolution," and subparagraphs 26.A., 26.B., and 26.C. are entitled, respectively, "Mediation," "Arbitration of Disputes," and "Additional Mediation and Arbitration Terms." (Some capitalization omitted.) The parties are familiar with the Contract; rather than quoting paragraph 26 in the margin, we will set forth particular terms or provisions, as necessary in the text, *post*.

In July 2016, Buyers filed the underlying action against Sellers, both individually and as trustees of a living trust. In each of the six causes of action in the complaint, Buyers seek damages from Sellers based on Sellers' alleged failure to disclose an easement on the Property.

In September 2016, the parties participated in a second mediation. Although unsuccessful, they continued talking afterward.

In December 2016, Sellers responded to the complaint. They filed an answer, generally denying the allegations of the complaint and affirmatively asserting 36 defenses. Sellers also filed a cross-complaint for indemnity against Buyers' real estate agent and the agent's broker (Realtors).

The court presided over three case management conferences between December 2016 and March 2017, ultimately setting an October 2017 trial date.[5] By late March 2017, Buyers had propounded written discovery on Sellers, Sellers had provided written responses, Buyers had noticed the depositions of Sellers, and Sellers had deposited the statutory advance jury fee.

In late March, the parties again engaged in a formal mediation. Again they did not settle their dispute; and before the end of the day, Sellers delivered a letter to Buyers and Realtors demanding arbitration under the terms of the Contract. This was the first time Sellers ever mentioned arbitration to Buyers.

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[5] In their case management conference statement in preparation for the March 2017 hearing, Sellers checked the box indicating that they were willing to participate in mediation, but they did not check the box indicating that they were willing to participate in private arbitration.

Within days, Sellers followed up their demand with a motion in the trial court for an order to compel arbitration and to stay the court proceedings. Buyers opposed the motion, in part arguing that Sellers, by their delay in demanding arbitration and their participation in the litigation, had waived any right they may have had to arbitrate the dispute. Realtors opposed the motion, in part arguing that, because they are not parties to the Contract, they cannot be required to arbitrate. Sellers filed a written reply to both oppositions.

Following oral argument, the trial court took the matter under submission, ultimately issuing a minute order denying Sellers' motion to compel arbitration and stay the court proceedings (previously identified as the Order). In relevant part, the court ruled that, because "[Sellers'] actions are inconsistent with the right to arbitrate and the litigation machinery has been substantially invoked," Sellers had waived their right under the Contract to arbitrate their disputes in the pending litigation. Sellers timely appealed from the Order.[6]

II.

DISCUSSION

The sole issue on appeal is whether the trial court erred in finding that Sellers had waived their right to arbitrate their dispute with Buyers concerning disclosures related to an easement on the Property. The agreement to arbitrate is found at paragraph 26.B. of the Contract and provides in part:

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[6] Sellers have abandoned their appeal from that portion of the Order denying arbitration with cross-defendant Realtors.

> "ARBITRATION OF DISPUTES: [¶] Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement . . . , which is not settled through mediation, shall be decided by neutral, binding arbitration. . . . The parties shall have the right to discovery in accordance with Code of Civil Procedure § 1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part 3 of the Code of Civil Procedure. . . . *Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act[(FAA; 9 U.S.C. § 1 et seq.)]* . . . ." (Italics added; bolding omitted.)

As we will explain, a party that opposes arbitration under the FAA on the basis that its adversary waived the right to arbitrate by its litigation conduct and delay in demanding arbitration must demonstrate a showing of prejudice by the adversary's actions. As we will further explain, because Buyers presented no evidence of prejudice, the trial court erred in finding that Sellers waived their right to arbitrate their dispute with Buyers.

A. *Law*

"[T]he courts of this state have held that the failure to make a timely demand for arbitration results in a 'waiver' of the right to compel arbitration." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 314 (*Platt Pacific*).) Although cases and statutes speak in terms of a "waiver" of the right to arbitrate, the term is used " 'as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (*St. Agnes*).) In contrast with traditional waiver, "[t]his does not require a voluntary relinquishment of a known right . . . . In this context, waiver is more like a forfeiture arising from the nonperformance of a required act." (*Burton v. Cruise* (2010) 190

Cal.App.4th 939, 944; see *Platt Pacific*, at p. 315 [" 'waiver' " is used "as a shorthand statement for the conclusion that a contractual right to arbitration has been lost"].)

Because of the strong policy favoring arbitration, "under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 98, fn. omitted; see also 9 U.S.C. § 2; Code Civ. Proc., § 1281.[7])

Thus, the FAA, "requires close judicial scrutiny of waiver claims"; "waivers are not lightly to be inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes, supra,* 31 Cal.4th at p. 1195; accord, *Richards v. Ernst & Young, LLP* (9th Cir. 2013) 744 F.3d 1072, 1074 (*Richards*) [" 'Waiver of a contractual right to arbitration is not favored,' and, therefore, 'any party arguing waiver of arbitration bears a heavy burden of proof.' "].) Indeed, " 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' "—especially where the issue involves " 'an allegation of waiver, delay, or a like defense to arbitrability.' " (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376,

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7 "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

"A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.)

384, quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.)

Where no deadline for demanding arbitration is specified in the agreement, a reasonable time is allowed, and the determination of what constitutes a reasonable time depends on " 'the situation of the parties, the nature of the transaction, and the facts of the particular case.' " (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043 [under state law].) Participating in litigation of an arbitrable claim does not itself waive a party's right to seek arbitration later. (*St. Agnes, supra*, 31 Cal.4th at p. 1203.) Although "[b]oth state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration," the California Supreme Court has instructed for almost 40 years that " '[t]he presence or absence of prejudice from the litigation of the dispute is *the determinative issue under federal law*.' " (*Id.* at pp. 1195, 1204, quoting *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 188 (*Doers*), italics added;[8] accord, *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 237 (*Thorup*) [to establish an effective waiver under the FAA, "[*t*]*he party opposing arbitration must demonstrate actual prejudice*" (italics added)].)

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8 In support of this statement, the *St. Agnes* court cited, for example, *Creative Solutions Group, Inc. v. Pentzer Corp.* (1st Cir. 2001) 252 F.3d 28, 32; *American Recovery Corp. v. Computerized Thermal Imaging, Inc.* (4th Cir. 1996) 96 F.3d 88, 95-96; *Walker v. J.C. Bradford & Co.* (5th Cir. 1991) 938 F.2d 575, 577; *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 694; *Rush v. Oppenheimer & Co.* (2d Cir. 1985) 779 F.2d 885, 887; *Tenneco Resins, Inc. v. Davy International, AG* (5th Cir. 1985) 770 F.2d 416, 420-422. (*St. Agnes, supra,* 31 Cal.4th at p. 1203, fn. 6.)

A majority of federal appellate courts agrees that, under the FAA, a party seeking to prove waiver of a right to arbitration must demonstrate, in addition to acts inconsistent with the right to arbitrate, "*prejudice to the party opposing arbitration resulting from such inconsistent acts*." (*Richards, supra,* 744 F.3d at p. 1074, italics added; accord, *Martin v. Yasuda* (9th Cir. 2016) 829 F.3d 1118, 1124 [same test]; *Krinsk v. SunTrust Banks, Inc.* (11th Cir. 2011) 654 F.3d 1194, 1200 [same test]; *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.* (8th Cir. 2009) 589 F.3d 917, 920 [same test], 922, fn. 6 [focus is "on the prejudice to [the opposing party]," not on forum shopping]; *Iraq Middle Market Development Foundation v. Harmoosh* (4th Cir. 2017) 848 F.3d 235, 241 [to establish waiver based on pending litigation, party opposing arbitration must show that proceeding with the arbitration would " 'prejudice' the [opposing] party"]; *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation* (10th Cir. 2015) 790 F.3d 1112, 1116 [six-factor test that includes "whether the delay affected, misled, or prejudiced the opposing party"]; *In re Pharmacy Benefit Managers Antitrust Litigation* (3d Cir. 2012) 700 F.3d 109, 117 [" '[p]rejudice is the touchstone for determining whether the right to arbitrate has been waived by litigation conduct"]; *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.* (5th Cir. 2009) 575 F.3d 476, 480 [finding of waiver requires party opposing arbitration to have suffered " 'detriment or prejudice' "]; *O.J. Distributing, Inc. v. Hornell Brewing Co., Inc.* (6th Cir. 2003) 340 F.3d 345, 356 ["actual prejudice" required]; *Doctor's Associates, Inc. v.*

Distajo (2d Cir. 1997) 107 F.3d 126, 131 [pending litigation must " 'result[] in prejudice to the opposing party' "].)[9]

B. *Analysis*

1. *Standard of Review*

The parties disagree on the standard of review we are to apply.

For purposes of appellate review of an order granting or denying a motion to compel arbitration, where the party opposing arbitration contends the moving party waived the right to arbitrate, the determination of waiver is "[g]enerally" a question of fact, and accordingly "the trial court's finding, if supported by sufficient evidence, is binding on the appellate court." (*St. Agnes, supra,* 31 Cal.4th at p. 1196, citing *Platt,*

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9 We acknowledge the minority view of the Seventh and D.C. Circuits, which do not require a showing of prejudice. (*Kawasaki Heavy Industries, Ltd. v. Bombardier Recreational Products, Inc.* (7th Cir. 2011) 660 F.3d 988, 994 ["we do not require a showing of prejudice to find waiver"]; *Khan v. Parsons Global Services, Ltd.* (D.C. Cir. 2008) 521 F.3d 421, 425 ["finding of prejudice is not necessary"].) However, in ruling that, under federal law, prejudice is "the determinative issue," our Supreme Court expressly noted this minority view and declined to apply it. (*St. Agnes, supra,* 31 Cal.4th at p. 1203, fn. 6.) Accordingly, we too decline to apply the minority view. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [Supreme Court decisions are "binding upon and must be followed by all the state courts of California"].)

We also acknowledge Buyers' reliance on *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783, 793, in which the court stated: "While lack of prejudice is a factor to weigh when the claimant has been diligent, given Gonzalez's protracted and unexplained delay in filing a formal demand for arbitration with the AAA, it is unnecessary to address whether Allstate established it was prejudiced by the delay." We do not find that statement persuasive, however, since the appellate court applied it in the context of determining whether an insured had waived arbitration of his uninsured motorist claim against his insurer *under state insurance law.* (*Id.* at pp. 792-793; see Ins. Code, former § 11580.2, subd. (i)(3); Stats. 1985, ch. 792, § 3 [uninsured motorist arbitration claim must be "formally instituted" within one year from the date of the accident].) In contrast, the present dispute involves a contractual dispute in which we are to analyze a potential waiver of arbitration *under federal arbitration law*—i.e., the FAA.

supra, 6 Cal.4th at p. 319.) Referring to the record here, Buyers contend that the trial court considered evidence and made factual findings related to Sellers' delay in demanding arbitration—ultimately finding that Sellers waived their right to arbitrate the dispute because "[their] actions [we]re inconsistent with the right to arbitrate and the litigation machinery ha[d] been substantially invoked." Based on the above-quoted standard under *St. Agnes* and *Platt Pacific*, therefore, Buyers argue that we must review the Order for substantial evidence.

Relying on the same two authorities, Sellers assert that we must review the waiver issue de novo: " 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' " (*St. Agnes, supra,* 31 Cal.4th at p. 1196, quoting *Pacific Platt, supra,* 6 Cal.4th at p. 319.) Sellers, too, refer to the same record, suggesting that none of the facts, or inferences from facts, is in dispute, because the evidence on which the trial court relied involved specific litigation-related events that occurred on uncontroverted dates.

We need not decide which standard of review to apply, because as we explain at part II.B.2., *post*, the record lacks evidence that Buyers were prejudiced by the timing of Sellers' arbitration demand. Thus, the result is the same on this record whether we review

the Order de novo or for substantial evidence to support an implied finding of prejudice.[10]

2. *Prejudice to Buyers*

In support of their opposition to Sellers' motion, the *only* evidence Buyers submitted was the declaration of Buyers' attorney, in which counsel testified *only* to undisputed chronological events.[11] In their points and authorities, Buyers relied on this evidence to establish, as the trial court found, that Sellers first demanded arbitration in March 2017—nine months after Buyers filed the underlying lawsuit and 18 months after Buyers first complained to Sellers about the Property.

In response to Sellers' argument below that, under the FAA, the court was required to compel arbitration unless Buyers established the requisite prejudice, Buyers argued that they were prejudiced by Sellers' delay in demanding arbitration on the following grounds: (1) During the three attempts to mediate or informally resolve the matter,

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10 The finding of prejudice to Buyers is, at best, inferred, because the trial court did not mention prejudice. The Order merely recites the (uncontroverted) dispute-related events and dates—including Sellers' failure to demand arbitration in March 2017, "nine months after participation in the litigation and 18 months after the parties [first] attempted to settle their disputes"—and denies Sellers' motion on the basis that "[Sellers'] actions are inconsistent with the right to arbitrate and the litigation machinery has been substantially invoked."

Thus, regardless whether we consider the issue de novo or review the trial court's implied finding, we must first review the record to determine whether it contains substantial evidence (or inferences from substantial evidence) to support a finding of prejudice to Buyers. (See *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 443 [order denying motion to compel arbitration].)

11 We have included all of these events in the Factual and Procedural Background at part I., *ante*.

Buyers discussed the merits of their case; (2) the dispute concerned the sale of real property, escrow had closed almost three years earlier, and there was a chance that documents could have been lost; (3) the parties had a trial date in six months, and "it is unlikely that an arbitration would resolve this dispute before [then]"; (4) Buyers already had "expended a great deal of time and resources mediating and litigating this case"; (5) the delay had deprived Buyers of the benefits of arbitration; and (6) prior to Sellers' first notice that they intended to arbitrate, Buyers had undertaken considerable efforts to resolve the dispute during the nine months of formal litigation and the nine months of informal attempts to resolve the dispute prior to litigation. However, "unsworn averments in a memorandum of law prepared by counsel do not constitute evidence." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454 [effect of pending FAA arbitration on court order awarding provisional relief]; accord, *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, fn. 11 (*Zeth S.*) ["the unsworn statements of counsel are not evidence"].)

Without *evidence* of anything other than the events and dates over the 18 months that preceded Sellers' motion, Buyers did not meet their burden of establishing prejudice. Stated differently, in response to the first five of the above-described suggestions of prejudice, the record contains *no evidence* of: (1) discussions of the merits of Buyers' case; (2) what documents, if any, were needed or unavailable; (3) when an arbitration hearing might commence; (4) the resources Buyers had expended; and (5) what benefits of arbitration Buyers had been denied. With regard to an argument of prejudice based on (6) Buyers' considerable efforts to resolve the dispute, as a matter of law such efforts are

insufficient to establish the requisite prejudice: " ' "[W]aiver does not occur by mere participation in litigation" ' if there has been no judicial litigation of the merits of arbitrable issues . . . . [¶] Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses." (*St. Agnes, supra,* 31 Cal.4th at p. 1203.)

At the hearing on Sellers' motion, Buyers repeated some of these examples of alleged prejudice—in particular, the considerable money Buyers had already spent, the fees and costs anticipated in arbitration, the length of time before an arbitrator could hear the dispute, the unusable discovery undertaken in the litigation, and disclosure of Buyers' litigation strategy. However, the oral argument of counsel is no more evidence than the written argument.[12] (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433; *Zeth S., supra,* 31 Cal.4th at p. 414.)

On appeal, Buyers have narrowed their presentation. Buyers argue first that they "suffered prejudice because they lost the primary benefit of arbitration: Speedy resolution of a lawsuit at low cost." (Bolding omitted.) We acknowledge that "[p]rejudice typically is found only where the petitioning party's conduct has . . . substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*St. Agnes, supra,* 31 Cal.4th at p. 1204.) Again, however,

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12 At the close of the hearing, the trial court asked Buyers' counsel, "What about the fact that you have no evidence [of prejudice]?" The court denied counsel's responsive request to present live testimony.

the record contains no evidence of what Buyers contend were the primary benefits of their agreement to arbitrate—namely, the speed or low cost associated with arbitration that Buyers allegedly lost as a result of Sellers' delay in demanding arbitration.

In any event, generic claims of speed or low cost are not the type of benefit or efficiency the *St. Agnes* court had in mind when analyzing potential prejudice. Instead, the examples given by the court include: "where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration"; "where a party unduly delayed and waited until the eve of trial to seek arbitration"; "or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence." (*St. Agnes, supra,* 31 Cal.4th at p. 1204 [citing cases].) Even if we were to consider that the record contains evidence to support Buyers' appellate arguments, Buyers still fail to establish the requisite prejudice under the above-quoted examples: Sellers, the petitioning parties, did not initiate any discovery or otherwise gain information about Buyers' case that could not have been gained in arbitration;[13] Sellers did not first demand arbitration on the eve of trial; and Buyers do not suggest what, if any, evidence may have been lost.

Buyers' alternative argument on appeal is that the party opposing a delayed demand for arbitration necessarily suffers prejudice without the need for an additional showing "when he is 'misled' or encounters 'significant delay' in the resolution of the

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13 To the extent Buyers contend that they disclosed information about their case during the mediation process, they would have been required to mediate even in the event of an arbitration under paragraph 26 of the Contract.

case"—relying on *Thorup, supra,* 180 Cal.App.3d at p. 237. We do not read *Thorup* as excusing an evidentiary showing of prejudice; nor could we, given the court's express statement of the law under the FAA and its application in that appeal:

> "[*For*] *an effective waiver*, [*t*]*he party opposing arbitration must demonstrate actual prejudice.* [Citations.[14]]. Here, no such prejudice has been shown." (*Thorup*, at p. 237, italics added.)

Indeed, *Thorup*'s ruling that the party opposing arbitration failed to establish the requisite showing of prejudice immediately *precedes* the court's statement—on which Buyers rely—that the party opposing arbitration was not "misled" and the delay was not "significant."[15] (*Ibid.*) There is no suggestion in *Thorup*, or in the 30 years of jurisprudence since *Thorup,* that evidence of whether a party was misled or whether the delay was significant is a substitute for evidence of prejudice.

Finally, in the last few pages of their appellate brief, Buyers argue that Sellers "are estopped from demanding arbitration because they repudiated the arbitration contract,

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14 Among the citations provided at 180 Cal.App.3d at p. 237, *Thorup* relied on: *Doers, supra,* 23 Cal.3d at p. 188, which instructs (and is binding on us), "the mere filing of a lawsuit does not waive contractual arbitration rights. The presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law."; *Lounge-A-Round v. GCM Mills, Inc.* (1980) 109 Cal.App.3d 190, 200, which, under the " 'modern rule,' " describes the " 'essential test' " to be " 'whether the pursuit of a remedy other than arbitration has worked substantial prejudice to the other party.' "; and *Shinto Shipping Co. v. Fibrex & Shipping Co., Inc.* (9th Cir. 1978) 572 F.2d 1328, 1330, which requires that the court "be convinced not only that the [party demanding arbitration] acted inconsistently with that arbitration right, but that the [party opposing arbitration] was prejudiced by this action before [the court] can find a waiver."

15 According to *Thorup*, a sufficient showing of "significant delay" requires a showing of "the loss of relevant evidence" (*Thorup, supra,* 180 Cal.App.3d at p. 237)—a showing that may *also* be used to establish prejudice.

demanded a jury, filed a cross-claim, consented to trial, consented to depositions, and told the court that they did not want to arbitrate." However, Buyers forfeited appellate consideration of this argument, because they failed to mention estoppel in the trial court. " 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' " (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12, quoting *Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) In any event, in both the trial court and on appeal Buyers referenced each of those events, arguing that together they supported the trial court's finding of waiver. As we have concluded *ante*, without evidence of prejudice those events will not support a finding of waiver, and Buyers do not suggest how or why those events support an estoppel under the FAA when they will not support a waiver.

In conclusion, where an arbitration agreement is subject to the FAA, for the party opposing arbitration to establish that the party seeking arbitration waived the right to arbitrate as a result of a delay in demanding arbitration, the superior court must first find, *based on substantial evidence*, that the opposing party was prejudiced by the delay. Here, however, the party opposing arbitration, Buyers, did not present any evidence of prejudice. Accordingly, regardless whether we review the Order de novo or for substantial evidence, because the record contains *no evidence* that Buyers were prejudiced by Sellers' delay in demanding arbitration, the trial court erred in denying Sellers' motion to compel Buyers to arbitrate their dispute.

DISPOSITION

The Order is reversed as to Buyers, and the superior court is directed to enter an order granting Sellers' motion to compel arbitration and to stay the proceedings. The Order is affirmed as to Realtors. Sellers are entitled to their costs on appeal from Buyers, and Realtors are entitled to their costs on appeal from Sellers. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.

Filed 7/14/21 Mulberg v. Amster CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FRANK MULBERG, Plaintiff and Appellant, v. PATRICIA DAVIS DANEMAN AMSTER, Defendant and Respondent.	A158954 (Marin County Super. Ct. No. CIV 1703628)

Plaintiff Frank Mulberg, a licensed attorney appearing in propria persona, appeals from a posttrial judgment the trial court entered in favor of defendant Patricia Amster after it rejected all six causes of action Mulberg alleged in his complaint.[1] The court rejected three of the causes based on its finding that Amster paid Mulberg $62,820 for attorney fees she owed him in her individual capacity. We agree with Mulberg that substantial evidence does not support this finding, and we therefore reverse the court's rulings on those three causes and remand for further proceedings. We otherwise affirm.

[1] For purposes of simplicity we refer to the six claims as causes of action although, as we explain further below, some are more accurately described as "common counts."

I.
BACKGROUND

The parties have spent years litigating various disputes. This one arose after Amster hired Mulberg from 2008 to 2012 to help her with matters related to an anticipated inheritance. During this time, Amster paid Mulberg for some, but not all, of the attorney fees incurred.

When her mother died in 2011, Amster inherited property titled in a trust and, with the apparent authority to do so, she appointed Mulberg as trustee. It is uncontested that, as the trial court found, Mulberg used trust funds to pay himself the attorney fees that Amster incurred in her individual capacity. Specifically, Mulberg used trust assets to pay himself $35,000 in October 2011 and $27,819.75 in January 2012. The total amount was $62,819.75, which we, as do the parties, round to $62,820. After Mulberg made these payments to himself, he sent Amster a statement in April 2012 notifying her that her individual attorney fees had been paid in full.

In 2013, the parties' relationship deteriorated, and in 2014 probate proceedings were initiated, with Amster petitioning to remove Mulberg as trustee, and Mulberg cross-petitioning to challenge Amster's right to remove him and to seek approval of the estate's accounts. A probate trial was held in 2015, and one of the main issues was whether Mulberg had paid himself excessive trustee fees, which the evidence showed amounted to over $500,000. In its ruling, the probate court removed Mulberg as trustee, approved a trustee fee for him of $227,897.59, representing "1% of the total trust corpus per annum," and ordered him to return—in what the parties refer to as a "surcharge"—more than $200,000 to the estate.[2]

[2] The exact amount Mulberg was ordered to return is immaterial for purposes of this appeal. The trial court found that the amount was $226,222.16, while Mulberg insists that it was $267,222.16.

Mulberg appealed, and we affirmed the probate court's decision. (*Amster v. Mulberg* (Nov. 18, 2016, A146374) [nonpub. opn.].) Mulberg thereafter reimbursed the estate the amount ordered, with interest.[3] He then sent Amster a new bill for the $62,820, plus interest. After Amster refused to pay, Mulberg filed this suit. In his complaint, he asserted six causes of action: promissory fraud, breach of contract, account stated, open book account, quantum meruit, and unjust enrichment. Amster answered with a general denial, and she also asserted 33 affirmative defenses.

After a bench trial, the trial court ruled against Mulberg on all his causes of action, and it therefore did not consider Amster's affirmative defenses. The court then entered judgment in Amster's favor.

II.
DISCUSSION

A. The Standards of Review

We review factual determinations made after a trial for substantial evidence. In doing so, "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631.) The testimony of a single witness may constitute substantial evidence in support of the judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of

[3] Mulberg satisfied the probate judgment in March 2017. Thus, he "had full compensation for his services (and use of the [$62,820]) for more than five years" before the money was returned to the estate.

law specifying the inference to be drawn. We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment." (*Howard,* at p. 631.) To the extent the trial court's determinations rest on purely legal issues, our review is de novo. (*Snow v. Woodford* (2005) 128 Cal.App.4th 383, 393.)

B. The Trial Court Properly Rejected Mulberg's Cause of Action for Promissory Fraud.

In its ruling, the trial court rejected Mulberg's claim of promissory fraud, finding "no proof of [Amster's] fraudulent intent." Mulberg argues that this ruling was erroneous because he proved all the claim's elements. We perceive no error.

The elements of fraud " 'are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) " 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Ibid.*)

The trial court found that Amster intended to fulfill her obligation to pay her individual attorney fees to Mulberg. This finding is supported by substantial evidence, which includes the undisputed evidence that Amster had been making payments on the fees she owed and that trust assets were used to pay off that amount before the probate court ordered the money returned to the estate as part of the surcharge. Although the extent of Amster's acquiescence in Mulberg's use of the trust funds to pay the individual fees obligation is contested, Mulberg stated that Amster approved

the trust payment, and no evidence was presented that Amster disapproved of it at the time it was made. Collectively, this evidence constitutes more than sufficient evidence to support the court's finding that Amster intended to pay the debt. Therefore, the court properly rejected Mulberg's promissory fraud cause of action.

C. No Substantial Evidence Supports the Trial Court's Finding that Amster Paid Mulberg for the Individual Attorney Fees She Incurred.

We come to a different conclusion, however, regarding the causes of actions that the trial court rejected on the basis of its finding that Amster paid Mulberg for the individual attorney fees she incurred. We agree with Mulberg that there was "no substantial evidence to support the [trial] court's conclusion that Amster made any unconditional payment of $62,820 to [him] to satisfy her existing outstanding balance." Because there was no substantial evidence to support the finding, the court incorrectly relied on it to reject Mulberg's claims based on breach of contract, account stated, and open book account.

1. Breach of contract

We first consider the trial court's ruling on the cause of action for breach of contract. "The elements of a cause of action for breach of contract are well known. A plaintiff must establish: the existence of a contract, plaintiff's performance (or excuse for nonperformance), defendant's breach, and resulting damages." (*Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690 (*Lujan*).) Whether a party breached a contract is a question of fact, which we ordinarily review for substantial evidence. (*Kotler v. PacifiCare of California* (2005) 126 Cal.App.4th 950, 956.) But when the operative facts are not in dispute, our review is de novo. (See, e.g., *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) Here,

most of the operative facts are undisputed, suggesting the less deferential de novo standard applies, but we conclude that the court's finding that Amster paid the $62,820 (and therefore did not breach the contract) cannot be sustained under either standard.

The trial court held that although the parties had a contract requiring "Amster . . . to pay Mulberg for his services," the contract was not breached. This holding was based on the court's finding that "Mulberg's own evidence proved that as of April 2012 he had been paid in full," since as trustee he used trust assets to pay himself for the fees Amster incurred in her individual capacity.

The trial court also found, however, that, while "the evidence presented was less than precise, it appears that part of the surcharge [ordered to be returned to the estate by the probate court] included fees Mulberg had paid himself out of [the] trust for his prior legal services to Amster." Amster affirmatively acknowledges in her appellate briefing that the probate court "applied the surcharge to these funds." The court did not consider it to be consequential that Mulberg was required to return the $62,820 to the estate as part of the surcharge. It reasoned that "Mulberg offer[ed] no legal authority for the proposition that [Amster's attorney fee] debt was somehow 'resurrected' (his words) as a result of the probate action," and it held that an "order of the [probate] court (affirmed on appeal) cannot be imputed to Amster as an act in breach of contract."

To the contrary, the fact that Mulberg was required to return the $62,820 to the estate *is* consequential. True enough, both parties agree that Amster's individual fees obligation had been paid by the estate before the probate court ordered Mulberg to return the money. The trial court believed that Mulberg's payments to himself with estate funds meant that "Amster . . .

in fact did . . . pay Mulberg for his work." But the uncontested evidence is that it was the estate, not Amster, that paid the fees, and Mulberg was ordered to return this money to the estate as part of the surcharge. In turn, this left Amster's individual fees obligation unsatisfied. Her contractual obligation to pay fees incurred in her individual capacity was not extinguished simply because estate assets were improperly used in a failed attempt to pay off the obligation. While we agree with the court that the debt was not "somehow 'resurrected' . . . as a result of the probate action," we think it is accurate to say that Amster's debt remained unsatisfied, even if the parties might have intended for the debt to be paid with estate assets.

Amster argues that Mulberg is collaterally estopped from denying that the bill was satisfied, but she is mistaken.[4] She contends that Mulberg is precluded from now litigating an "issue that was 'actually litigated' " in the probate proceeding. But collateral estoppel does not apply, because the issue here is different, and it was not actually litigated in the probate proceeding. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [elements required for application of collateral estoppel].)

The issue in the probate proceeding was whether Mulberg paid himself excessive trustee fees. The probate court found that he had, and we affirmed the court's order requiring him to reimburse the estate the amount of the surcharge, which included the payments for Amster's individual attorney

[4] At one point in her appellate brief, Amster asserts that Mulberg's claim is barred because of "judicial estoppel," but the argument she advances and the law she cites reveal she means to contend that the claim is barred by collateral estoppel because the probate court determined that Mulberg used trust assets to pay her individual attorney fees obligation. (See *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 835 [discussing difference between judicial and collateral estoppel].)

fees. (*Amster v. Mulberg*, *supra*, A146374.) In doing so, we concluded that sufficient evidence supported the probate court's finding that the amount was part of the excessive payment made "in connection with [Mulberg's] services as trustee." (*Ibid.*) We rejected Mulberg's theory that he should not have to return the $62,820 to the estate because it was "previously owed attorney fees earned prior to his trusteeship."[5] (*Ibid.*) Here, however, the parties agree that the surcharge included the amount Mulberg used to pay Amster's individual attorney fees, and no contrary determination was made in the probate proceeding.

The fact that Mulberg unsuccessfully tried as trustee to use trust assets to pay off Amster's individual attorney fees obligation does not support the conclusion that the debt was satisfied and extinguished. Because no substantial evidence supported the trial court's finding that Amster satisfied her contractual obligation to pay the fees she incurred in her individual capacity, we must reverse the court's ruling that there was no breach of contract. (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.) We make no determinations regarding the strength of Amster's affirmative defenses, and we leave it for the trial court on remand to consider those defenses in the first instance.

2. Account stated and open book account

Mulberg asserted claims for account stated and open book account as well. The trial court also rejected both of these claims based on its finding that Mulberg had been paid the $62,820 from the estate assets.

Each of these claims is technically a common count, which " 'is not a specific cause of action . . . , [but] rather . . . a simplified form of pleading

[5] We are at a loss to understand why Mulberg argued that he did not have to return the $62,820 to the estate, in light of his unabashed admission that he, as the estate's trustee, used estate assets to pay a non-estate debt.

normally used to aver the existence of various forms of monetary indebtedness.' " (*Lujan*, *supra*, 23 Cal.App.5th at p. 690.) A common count "is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." (4 Witkin Cal. Proc. (5th ed. 2020) Pleading, § 554.)

" 'A "book account" is "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith . . . ." ' [Citation.] The creditor must keep these records in the regular course of its business and 'in a reasonably permanent form,' such as a book or card file. (Code Civ. Proc., § 337a.) 'A book account is "open" where a balance remains due on the account.' " (*Lujan*, *supra*, 23 Cal.App.5th at pp. 690–691.) " 'An account stated is "an agreement based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing." ' [Citation.] 'When an account stated is " 'assented to, either expressly or impliedly, it becomes a new contract.' " . . . Accordingly, an action on an account stated is not based on the parties' original transactions, but on the new contract under which the parties have agreed to the balance due.' " (*Id.* at p. 691.)

Mulberg maintained that he sent invoices to Amster, and they established an account stated or an open book account. The trial court found that the "main evidentiary problem with accepting Mulberg's invoices . . . is that they demonstrated he had been paid in full." But as we have determined, no substantial evidence supports the finding that Amster

satisfied her contractual obligation to pay Mulberg for the $62,820 in attorney fees she incurred in her individual capacity. We therefore reverse the court's rulings as to these common counts. (See *Bowers v. Bernards, supra,* 150 Cal.App.3d at pp. 873–874.)

D. The Trial Court Properly Rejected Mulberg's Equitable Claims for Quantum Meruit and Unjust Enrichment.

We lastly consider, and affirm, the trial court's rulings on Mulberg's equitable claims for quantum meruit and unjust enrichment.

These doctrines are interconnected. To state a claim for quantum meruit, a plaintiff must allege performance of certain services for the defendant, the reasonable value of those services, that the services were rendered at the special instance and request of the defendant, and that the services are unpaid. (*Haggerty v. Warner* (1953) 115 Cal.App.2d 468, 475.) Quantum meruit " 'refers to the well-established principle that "the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered." [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that "the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made." ' " (*Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 642.) "However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.)

" 'The right to restitution or quasi-contractual recovery is based upon *unjust enrichment.* Where a person obtains a *benefit* that [the person] may not *justly retain*, the person is unjustly enriched. The quasi-contract, or

contract "implied in law," is an *obligation* . . . created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to [that party's] former position by return of the thing or its equivalent in money.' " (*Unilab Corp. v. Angeles-IPA*, *supra*, 244 Cal.App.4th at p. 639.)

In rejecting Mulberg's equitable causes, the trial court observed that equitable relief is generally not available when an obligation, such as Amster's debt for her individual attorney fees, is founded in contract. But the court held that even if there had been no contract, "the evidence was insufficient to support a finding of unjust enrichment." The court pointed out that in imposing the surcharge the probate court had found that "Mulberg's liability to the trust came about in large measure because of his inadequate record-keeping, his breach of fiduciary duties, and his failure to abide by the rules applicable to trustees. The factual circumstances do not show that Amster was unjustly enriched here or that Mulberg was unfairly aggrieved." Stated otherwise, the court found that even if there had been no contract Mulberg would not be entitled to equitable relief as a result of his own conduct and malfeasance.

We review a trial court's exercise of its equity powers for an abuse of discretion. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771.) "Under that standard, we resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision ' "falls within the permissible range of options set by the legal criteria." ' " (*Ibid.*) Applying the abuse of discretion standard here, we cannot say that the court's rationale in denying equitable relief to Mulberg fell outside such a range of options. Accordingly, we affirm its ruling rejecting his equitable claims.

III.
DISPOSITION

The trial court's rulings on the claims for promissory fraud, quantum meruit, and unjust enrichment are affirmed. The rulings on the claims for breach of contract, account stated, and open book account are reversed. The judgment is vacated, and the matter is remanded for further proceedings on the latter three claims, including a consideration of Amster's affirmative defenses. The parties shall bear their own costs on appeal.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Banke, J.

Mulberg v. Amster A158954

Filed 8/14/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WALTER VAN BUSKIRK III, Plaintiff and Appellant, v. ELLEN J. VAN BUSKIRK, Individually and as Trustee, etc., et al., Defendants and Respondents.	B295648 (Los Angeles County Super. Ct. No. 18STPB07724)

APPEAL from an order of the Superior Court of Los Angeles County, Paul T. Suzuki, Judge. Reversed and remanded.

RMO, Scott E. Rahn, Sean D. Muntz, Matthew F. Baker and David G. Greco for Plaintiff and Appellant.

Jeffer Mangels Butler & Mitchell, Mark Riera and Talya Goldfinger for Defendant and Respondent Ellen J. Van Buskirk.

Law Offices of Savin & Bursk, Bonnie Marie Bursk and Lindsay Lupe Savin for Defendants and Respondents Susan Howard and Patricia Schlener.

Gunderson Law Firm, Mark H. Gunderson and Catherine A. Reichenberg for Defendant and Respondent Charles Bluth.

For want of personal jurisdiction, the trial court dismissed this family dispute over a trust. This was error, for the trust has ample connections to California, as do all family members who live elsewhere and who protest jurisdiction in California. We reverse and remand this matter.

I

The central figure in this family dispute is respondent Ellen Van Buskirk, who now is 92. For simplicity and clarity, we refer to her as the mother.

The mother was married to Walter Van Buskirk, Jr., who died in 2005. The mother was a lifelong California resident; the couple had lived together in Santa Monica. Earlier in 2005, they created a revocable living trust called "The VAN BUSKIRK TRUST dated August 24, 2005" (Trust). They executed the Trust in Los Angeles County and chose California law as the governing law. After Walter Van Buskirk, Jr., died, the mother became the sole trustor.

The mother also is the trustee of the Trust. Before 2017, the Trust appointed the following people as successor trustees, should the mother be unwilling or unable to act as trustee:

- *Appellant Walter Van Buskirk III*, is the mother's son, and we refer to him by this relationship. This son lives in Santa Monica, California.
- *Respondents Susan Howard and Patricia Schlener* are Mother's twin daughters and the son's twin sisters. We

refer to Howard and Schlener collectively as the daughters. The daughters live in Idaho.

- *Respondent Charles Bluth* is the mother's brother and uncle to the daughters and the son. Bluth lives in Nevada.

The mother is the current beneficiary of the Trust. Before 2017, the Trust named the daughters, the son, and Elizabeth Rakestraw (the mother's granddaughter) as successor beneficiaries.

The Trust was administered in California from 2005 to 2016. After the mother's husband died in 2005, Bluth began to help the mother—his sister—run the Trust. Bluth's precise level of involvement is disputed, as we will describe.

September 30, 2016 was a watershed for the family and its Trust. What happened that day depends on who tells the story.

The son's version goes like this. He is the only child to have worked in the family real estate business. He spent time caring for his parents "more than any other child" in the family. He lived with and cared for his mother in their family home in Santa Monica until a medical condition hospitalized her at St. John's Hospital in Santa Monica, which later released her to a local rehabilitation facility. But on September 30, 2016, the son's twin sisters—the daughters—conspired to kidnap Mother from that facility. One daughter and the other daughter's child came at night to remove their mother from the facility, against medical advice, and to take her to Idaho, where the daughters live. The other daughter and Bluth assisted them. The mother remains in Idaho, isolated and under the undue influence of the daughters. When the son tried to visit his mother there, the daughters "and others acting in concert with them" have blocked his visits with "threats of violence." The mother's actions since 2016 ostensibly

have cut the son out of the Trust and thus out of his inheritance. The Trust sold some of its California properties at fire sale prices. The son suspects these actions stem from his sisters' manipulation and control of their mother. That is the son's view of events.

The daughters and the mother paint a different picture. They say the son is a ne'er-do-well who neither went to college nor gained marketable skills but just lived off the family's wealth. The mother fears her son's anger management problem. When she fell and got hurt, her son abused her by locking her away without proper food or care, hoping to hasten her demise and his inheritance. To escape him, the mother left the California rehabilitation facility of her own free will. Although advanced in years, the mother continues to make independent personal and financial decisions, including the decisions to relocate permanently to Idaho and to disinherit her son. All her property transactions have been prudent and proper. The son's allegations are simply "wild." That is the mother's and the daughters' account.

We cannot and need not resolve this family dispute. Our task is to analyze the issue of personal jurisdiction in the face of this ongoing factual conflict. We base our analysis only on undisputed record facts.

The mother and the daughters claim the mother made crucial changes to the Trust in 2016 and 2017. The mother produced evidence she amended the Trust in these years to remove her son and Rakestraw as beneficiaries and her son and Bluth as successor trustees. In 2017, the mother registered the Trust in Idaho. California law still governs the Trust, as the mother and her daughters conceded at oral argument.

The Trust's assets have changed since 2016. The Trust formerly held interests in many real properties in California. Then the Trust transferred most of these properties so that now most of its assets—more than 40 real properties and all bank accounts—are in Idaho.

Since moving to Idaho, the mother has filed four lawsuits in California. She brought an unlawful detainer action against her son to evict him from the former family home in Santa Monica. She filed a 2017 partition action concerning land in Malibu. She sued in 2018 to dissolve a partnership and to sell a Coachella date farm the partnership owned. The Trust has interests in both the Malibu and the Coachella properties. The son's lawyers also assert the mother filed a spousal property petition in California. The mother filed all these actions in state court in Los Angeles County.

The son opposed his mother's recent real estate transactions. He filed this lawsuit, arguing the transactions violated the Trust's interests and his interests as well. He claimed the daughters and Bluth participated in these transactions. The son sought an accounting and the removal of the mother, the daughters, and Bluth as trustees.

On occasion, we refer to the mother, the daughters, and Bluth collectively as Respondents.

The mother and daughters moved to quash the son's petition for lack of personal jurisdiction. They also sought dismissal for lack of standing and for "mandatory" venue in Idaho. Bluth joined the motions. No party brought a forum non conveniens motion.

The son opposed the motions, relying on allegations in his verified petition and on pleadings from other cases pending in California involving some or all the parties.

The trial court ruled the son failed to establish Respondents' minimum contacts with California. The court also assumed the case could move forward in Idaho and declined to accept jurisdiction.

The son appealed, arguing the trial court's personal jurisdiction ruling was wrong. The mother and daughters filed responsive briefs that blend concepts of venue, standing, and jurisdiction. Bluth joined this briefing. No party appealed any determination regarding standing or venue. The trial court's ruling on personal jurisdiction is the only matter before us.

II

The mother incorrectly argues the trial court's order is a non-appealable denial of an accounting. In fact, the order granted the motions to quash and dismissed the case without prejudice. That order is appealable. (See Code Civ. Proc., § 904.1, subd. (a)(3); see also Prob. Code, § 1000, subd. (a) [rules for civil actions generally apply in probate matters].) We treat this matter as the son's appeal and not as an extraordinary writ.

III

We review personal jurisdiction law.

When a defendant moves to quash service for lack of personal jurisdiction, the plaintiff must establish by a preponderance of the evidence the facts justifying the exercise of jurisdiction. The burden then shifts to the defendant to demonstrate exercising jurisdiction would be unreasonable. (*Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd.* (2019) 31 Cal.App.5th 543, 553.)

We draw all reasonable inferences in support of the trial court's order. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.) When the evidence conflicts, we defer to the trial court's factual findings when substantial evidence supports them. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (*Vons*), abrogated on other grounds by *Bristol-Myers Squibb v. Superior Court* (2017) ___ U.S. ___, ___ [137 S.Ct. 1773, 1781] (*Bristol-Myers*).) When evidence does not conflict, we independently review both the record and the trial court's application of law to facts. (*Vons*, at p. 449.)

Among other findings, the trial court specifically found most of the Trust properties currently are in Idaho, the son is no longer a Trust beneficiary, and the mother has moved to Idaho. We accept those factual findings and do not question them.

As matters of state law, personal jurisdiction rules are the same for civil and trust proceedings. (See Prob. Code, § 17004 ["The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure."].) California courts may exercise jurisdiction to determine matters concerning trust property located in California—particularly land—even if the trust is administered elsewhere. (Cal. Law Revision Com. com., 54A pt. 1 West's Ann. Prob. Code (2011 ed.) foll. § 17004, p. 306.)

Also as a matter of state law, California courts may exercise jurisdiction on any basis consistent with the state or federal Constitutions. (Code Civ. Proc., § 410.10.)

Because state law in this field stretches to the limits set by federal law, state law here incorporates federal law. California state courts cannot extend the reach of their personal jurisdiction beyond federal limits. (E.g., *Bristol-Myers*, *supra*, 137 S.Ct. at

p. 1779.) We focus on the defendants' relationship to the forum state when assessing personal jurisdiction. (*Ibid.*) Jurisdiction is proper if a defendant has minimum contacts with the state such that the lawsuit does not offend traditional notions of fair play and substantial justice. (*Daimler AG v. Bauman* (2014) 571 U.S. 117, 126.)

Personal jurisdiction can be all-purpose (also called "general") or case-linked (also called "specific"). (*Bristol-Myers*, *supra*, 137 S.Ct. at pp. 1779–1780.) The parties limit their focus to case-linked jurisdiction. We do too. With case-linked jurisdiction, the court may adjudicate only those disputes relating to defendants' contacts with the forum. (*Id.* at p. 1780.)

A three-part test governs case-linked jurisdiction. With our emphasis, case-linked jurisdiction is proper when:

(1) defendants have *purposefully availed* themselves of forum benefits;

(2) the controversy *relates* to the defendants' contacts with the forum; and

(3) the exercise of jurisdiction comports with *fair play* and substantial justice. (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.)

IV

The trial court had case-linked personal jurisdiction over the mother, the daughters, and Bluth. All four have been deeply involved with this Trust, which is a stronghold of this family's wealth. The Trust originated and was administered in California. It is governed by California law. It holds interests in California real estate. The mother, daughters, and Bluth claim the mother has moved the Trust to Idaho and has cut all ties to

California, but the propriety and effectiveness of that effort is the focus of this California lawsuit.

A

The first prong of the three-part test is "purposeful availment": have defendants purposefully availed themselves of forum benefits? We consider whether the defendants' conduct connects them to the forum in a meaningful way. (*Walden v. Fiore* (2014) 571 U.S. 277, 290.) Defendants purposefully avail themselves of a forum's benefits if they intentionally direct their activities at a forum such that, by virtue of the benefit the defendants receive, they should reasonably expect to be subject to jurisdiction there. (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475–476 (*Burger King*).) By focusing on the defendants' reasonable expectations, this requirement ensures defendants will not be haled into a jurisdiction solely because of fortuitous or attenuated contacts or because of the unilateral activity of another party. (*Id.* at p. 475.)

The mother, the daughters, and Bluth intentionally connected with California for their own benefit. Their choices overwhelmingly satisfy the purposeful availment prong.

The mother's acceptance of the trusteeship and trust benefits connected her to California. The mother is the central living figure in this Trust. As a lifelong Californian, she helped establish the Trust here in 2005. She and her husband chose California law to govern it. Her Trust held and continues to hold interests in California real estate. (See *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1179 [one who claims an interest in property located in California generally expects to benefit from the state's protection of this interest].)

Since leaving California, the mother has filed four lawsuits in California state courts. Some of these lawsuits involve Trust property.

Since leaving California, the mother has engaged in transactions aimed at extinguishing the Trust's interests in this California real estate. The fact is undisputed that these transactional efforts occurred, as is the mother's ostensible role in them. That is what counts: the mother (or someone in her name) has been transacting about land in California.

We note the sharp disagreements about the transparency, wisdom, and effectiveness of these California land deals. The mother says she truly and fully was the one in charge, notwithstanding her age, and her deals were proper, effective, and wise. On the other hand, her son says his sisters are Rasputins who have taken over and engaged in illegal follies. The trial court took no view on this blazing family dispute. Neither do we. It does not affect our jurisdictional analysis.

In sum, the mother has been a longtime California resident, a California property owner, a California trust creator and participant, and a California plaintiff. The mother purposefully availed herself of this state's benefits, beyond question.

The daughters also have ample California connections. They are successor beneficiaries and successor trustees of the Trust, which originated in California, which is governed by California law, and which has owned and still owns California real estate. The daughters participated in Trust transactions, according to the son's verified petition. The daughters do not deny some level of involvement: their declarations give details about some of the transactions and maintain the transactions

were "done correctly." There is no dispute the daughters or their agents physically came to the California rehabilitation facility to get their mother and to move her to Idaho, which triggered the Trust changes at issue. The daughters have purposely availed themselves of California's benefits.

Again we note the family dispute that does not affect our analysis. The son says his sisters and their agents kidnapped their mother. The daughters and (ostensibly) the mother say the mother's exit was a voluntary escape and indeed a rescue that saved the mother from a scary and abusive son. The trial court made no finding about *why* the mother left California for Idaho. Neither do we. For our jurisdictional analysis, the key point is California was the travel destination for the daughters and their agents. They chose to come to the state to accomplish results important to them—results that related to the dispute over control over the family Trust.

The same holds true for Bluth. Whatever the exact extent and duration of his involvement, Bluth had some role in managing the California Trust, as we will discuss. Bluth also participated in the Trust's real estate transactions, according to the son's verified petition. Bluth assisted in moving his sister from California to Idaho, which was the event that changed everything about the Trust's operation. Bluth's involvement with the Trust shows he purposively availed himself of California's benefits. Bluth wanted his say in family affairs, including the Trust. These family affairs have been, and continue to be, linked to California.

This case differs from a trust dispute decided in the landmark case of *Hanson v. Denckla* (1958) 357 U.S. 235. There, a Pennsylvania resident created a trust in Delaware and named

Wilmington Trust Co., of Wilmington, Delaware as the trustee. (*Id.* at p. 238.) The settlor moved to Florida, where she exercised her power of appointment and eventually died. (*Id.* at p. 239.) Individuals who stood to benefit from the settlor's will but not the trust contested the validity of the trust and sued the trustee and others in Florida, where they lived. (*Id.* at pp. 240–242, 247, fn. 16.) The Supreme Court found the Delaware trustee lacked minimum contacts with Florida to support personal jurisdiction. (*Id.* at p. 251.) Wilmington Trust Co. had no office in Florida. It did not solicit or do business in Florida. The trust assets were not in Florida. They had never been administered there. (*Ibid.*) The settlor had moved to Florida and then exercised her power of appointment. And Wilmington Trust Co. had remitted trust income to her there. But these acts were not enough to establish personal jurisdiction over Wilmington Trust Co. (*Id.* at pp. 252, 254.) "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." (*Id.* at p. 253.) For purposes of personal jurisdiction, the acts of the defendant trustee mattered, and these were insufficient to support jurisdiction. (*Id.* at p. 254.)

Unlike the trust in *Hanson*, the trust here was embedded in California from the beginning. It continues to own California property and to be governed by California law. And the mother, the daughters, and Bluth have all connected themselves to California, as we have explained. In each way they departed from the parochial insularity of the Wilmington Trust Co.

Respondents incorrectly tell us the son supplied no evidence to support case-linked jurisdiction. They say his verified

petition and allegations made on information and belief were insufficient to defeat a motion to quash.

These arguments are contrary to precedent. The mother cites *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, but this case refutes Mother's argument. (*Id.* at p. 217 ["Generally, a properly verified complaint—or in this case a properly verified petition—may be treated as a declaration or affidavit."].)

The son verified his petition, thus converting it into the functional equivalent of a declaration like the ones the mother and her daughters have filed for themselves.

The mother also cites *Strauch v. Eyring* (1994) 30 Cal.App.4th 181, but that holding is consistent with *ViaView*, for the pleadings in *Strauch* were *not* verified. The holding in *Strauch* does not favor the mother.

Strauch does contain a dictum the mother quotes, but as support for its dictum the *Strauch* court cited an outdated treatise. The relevant portion from the current treatise defeats the mother's argument: "Jurisdictional facts must be proved by admissible evidence. This generally requires declarations by competent witnesses. *A properly verified complaint may be treated as a declaration for this purpose*." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) ¶ 3:387, italics added.)

The mother made only one specific objection in the trial court, which was to paragraph 20 of the son's verified petition. (Cf. Evid. Code, § 353, subd. (a); Assem. Com. on Judiciary, com. on Assem. Bill No. 333 (1965 Reg. Sess.) reprinted at 29B pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 353, pp. 598-599 [objections must specify the grounds for objection; general objections are insufficient].) Paragraph 20

asserted Bluth and the daughters had managed the Trust since the mother moved to Idaho, and Bluth resigned as a trustee in 2017, leaving the daughters in sole control. The mother objected to the son's statement Bluth was acting as trustee and the daughters were acting as cotrustees. This objection extended to Bluth's 2017 resignation.

The mother's objection in the trial court was insufficient. She did not object to paragraphs 16 through 19 of the son's petition. Nor did she object to exhibits B and C to the petition, which these paragraphs authenticated. This verified testimony established Bluth played a major role in managing the Trust for the better part of a decade. Nor did the mother object to paragraphs 4, 22, and 23 of the petition, which asserted the daughters both were Trust beneficiaries and had acted as its trustees.

The trial court made no findings on these issues. The material in the son's verified petition to which there were no proper objections is in the record. The son's ample evidentiary showing countered the motion to quash.

At oral argument, the mother's counsel argued we are limited to the facts the parties and the trial court cite and we are unable to consider undisputed evidence in the record. This view is contrary to the law. (See *Vons*, *supra*, 14 Cal.4th at p. 449.)

The mother also argues the trial court lacked jurisdiction over her because she moved to Idaho before she began selling the California property. She thus argues any allegedly wrongful acts took place out of state. Similarly, the daughters say they have lived in Idaho the whole time and have had no contacts with California.

These arguments fail. A defendant need not physically enter California at all to be subject to personal jurisdiction here. (*Halyard Health, Inc. v. Kimberly-Clark Corp.* (2019) 43 Cal.App.5th 1062, 1075.) Nor can the mother undo her lifelong California contacts by moving to a new state. No matter where they now live, Respondents' activities have involved a trust that was created and managed in California, that is governed by California law, and that owned—and still owns—California real property. Respondents have purposefully availed themselves of the California forum.

B

Next we tackle the second prong about "*relatedness*": whether the son's claims *relate* to Respondents' contacts with California. We look for a substantial connection between Respondents' forum activities and the son's claims. (*Vons*, *supra*, 14 Cal.4th at pp. 452, 456.)

We need not look far.

The son's claims relate to Respondents' contacts. Respondents are connected to California through the Trust, which is the topic of the son's suit. His lawsuit asserts his mother, her daughters, and Bluth harmed him and the Trust by engaging in below-market California land deals. The son also argues the date farm transaction showed the mother created an impermissible conflict of interest. The son claims these transactions rendered Respondents unfit to serve as trustees. His lawsuit seeks appointment of a professional fiduciary as trustee and an accounting. The son alleges he asked for an accounting but Respondents have refused to supply one.

The son's showing satisfies prong two of the test.

C

We finally take up prong three: is exercising jurisdiction here fair?

In assessing fairness, we consider the burden on the defendants, California's interests in hearing this dispute, the plaintiff's interest in obtaining convenient and effective relief, judicial economy, and the states' shared interest in furthering fundamental substantive social policies. (*Burger King*, *supra*, 471 U.S. at p. 477; *Vons, supra*, 14 Cal.4th at p. 448.) To defeat jurisdiction, the defendant must present a compelling case that exercising jurisdiction would be unreasonable. (*Burger King*, *supra*, at p. 477; *Vons*, *supra*, at p. 476.)

Respondents have not met this burden.

Respondents argue as follows. The mother is aged. Litigation with her son has taken a toll on her health, she has certain health issues about which we lack details, and it is difficult for her to travel. Mother has lived in Idaho since 2016 and intends to remain there indefinitely. She has cut most ties with California. Now, most of the Trust property is in Idaho, and the Trust is registered there. Witnesses concerning the mother's health and competence are in Idaho. The daughters and Bluth live out-of-state. Daughter Howard has been undergoing cancer treatment in Idaho.

Respondents also surmise there are apt to be few documents in California (apart from documents the son took) and few witnesses in California other than the son himself. They assert information about recent Trust purchases is in Idaho. Without explaining why, they also imply it would be unfair and absurd to have a California professional trustee managing Idaho assets.

The son asks us to consider his perspective. He is a California resident. California trustors established the Trust in California to be governed by California law. The events at the heart of this dispute—the sale and attempted sale of Trust property in California—were consummated in California. Witnesses and documents regarding these events are in California. Litigating in California is not burdensome, as the mother has demonstrated with her numerous lawsuits in Los Angeles. The mother cannot be too infirm to defend a lawsuit here because she swears she still makes her business and financial decisions independently. She has been a serial California plaintiff.

It is fair to exercise jurisdiction here. As a resident of California, the son has a valid interest in obtaining relief in California for harm he claims from the sale of property in California. When it suited the mother's purposes, she repeatedly has chosen to litigate in California from Idaho. Undisputedly, the daughters or their agents came to California to move the mother to Idaho. There is an unresolved issue about why they did this: was it a rescue or a kidnapping? We take no view on that unresolved issue. Neither did the trial court. But the daughters' undisputed decision physically to come to California, either personally or via agent, is significant. It is fair they return to California to defend the actions following in the wake of the mother's move. Bluth has been a successor trustee from the start of this Trust and has managed its affairs for his sister, who lived in California for 89 years. Bluth's connection with California is deep and wide.

Respondents emphasize the mother's age and the one daughter's cancer. We have no doubt the trial court will be

sensitive to the health concerns of all involved and will make suitable arrangements. When advisable, trial judges regularly make accommodations of all sorts. At this moment, lawyers, parties, and courts are discovering the many ways technology can reduce or eliminate the burdens of travel. Moreover, at oral argument, the son's counsel committed on the record, going forward, to enter reasonable and loving stipulations to minimize the burdens of this litigation on his aged mother and his suffering sister. This prospective and enforceable flexibility and compassion softens the burdens of age and illness in this context.

California is a fair place to resolve this family dispute about their Trust.

V

Respondents make arguments concerning Probate Code sections 17002 and 17005 that are unavailing. These state statutes do not pertain to the threshold constitutional issue of minimum contacts. They are venue statutes.

Venue is separate from personal jurisdiction. This appeal concerns only personal jurisdiction. Accordingly, Probate Code sections 17002 and 17005 are inapplicable.

DISPOSITION

We reverse the trial court's order and remand for further proceedings. We award costs to Walter Van Buskirk III, and grant the request for judicial notice.

WILEY, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

78 S.Ct. 1228
Supreme Court of the United States

Elizabeth Donner HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, et al., Appellants,
v.
Katherine N. R. DENCKLA, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Browning Stewart. Dora Stewart LEWIS, Mary Washington Stewart Borie and Paula Browning Denckla, Petitioners,
v.
Elizabeth Donner HANSON, as Executrix and Trustee Under the Last Will of Dora Browning Donner, Deceased, et al.

Nos. 107 and 117.
|
Argued March 10, 11, 1958.
|
Decided June 23, 1958.
|
Rehearing Denied Oct. 13, 1958.

See 79 S.Ct. 10.

Synopsis

In a controversy concerning right to part of corpus of trust established in Delaware by settlor who later became domiciled in Florida, the Florida Supreme Court, 100 So.2d 378, concluded that trust was invalid and that property passed under residuary clause of settlor's will, and an appeal was taken. The Delaware Supreme Court, 128 A.2d 819, concluded that the Florida decree was not binding for purposes of full faith and credit and upheld a Delaware chancellor's ruling that trust was valid. The Delaware case came on for review on certiorari, and the United States Supreme Court, finding itself without jurisdiction of appeal from Florida decree, treated papers whereon the appeal had been taken as a petition for certiorari, and granted certiorari in that case as well. Thereafter the United States Supreme Court, Mr. Chief Justice Warren, resolved the controversy by holding that the Florida court had had no personal jurisdiction over the trustee and no jurisdiction over the trust and that therefore it had been, under its own law, without jurisdiction to determine validity of trust.

Delaware judgment affirmed; Florida judgment reversed and cause remanded with directions.

Mr. Justice Douglas, Mr. Justice Black, Mr. Justice Burton, and Mr. Justice Brennan, dissented.

Attorneys and Law Firms

****1231** ***237** Mr. William H. Foulk, Wilmington, Del., for appellants Hanson et al.

Mr. Arthur G. Logan, Wilmington, Del., for petitioners Lewis et al.

Mr. Sol A. Rosenblatt, New York City, for appellees Denckla et al.

Mr. Edwin D. Steel, Jr., Wilmington, Del., for respondents Hanson et al.

Opinion

***238** Mr. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This controversy concerns the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. One group of claimants, 'legatees,' urge that this property passed under the residuary clause of the settlor's will, which was admitted to probate in Florida. The Florida courts have sustained this position. Fla., 100 So.2d 378. Other claimants, 'appointees' and 'beneficiaries,' contend that the property passed pursuant to the settlor's exercise of the inter vivos power of appointment created in the deed of trust. The Delaware courts adopted this position and refused to accord full faith and credit to the Florida determination because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. —- Del. —-, 128 A.2d 819. We postponed the question of jurisdiction in the Florida appeal, No. 107, 354 U.S. 919, 77 S.Ct. 1377, 1 L.Ed.2d 1434, and granted certiorari to the Delaware Supreme Court, No. 117, 354 U.S. 920, 77 S.Ct. 1380, 1 L.Ed.2d 1435.

The trust whose validity is contested here was created in 1935. Dora Browning Donner, then a domiciliary of Pennsylvania, executed a trust instrument in Delaware naming the Wilmington Trust Co., of Wilmington, Delaware, as trustee. The corpus was composed of securities. Mrs. Donner reserved the income for life, and stated that the remainder should be paid to such persons or upon such trusts as she should appoint by inter vivos or testamentary instrument. The trust agreement provided that Mrs. Donner could change the trustee, and that she could amend, alter or revoke the agreement at any time. A measure of control over trust administration was assured by the provision that only with the consent of a trust 'advisor' appointed by the settlor could the trustee (1) sell trust assets, (2) make investments, and (3) participate in any plan, proceeding, reorganization or merger ***239** involving securities ****1232** held in the trust. A few days after the trust was established Mrs. Donner exercised her power of appointment. That appointment was replaced by another in 1939. Thereafter she left Pennsylvania, and in 1944 became domiciled in Florida, where she remained until her death in 1952. Mrs. Donner's will was executed Dec. 3, 1949. On that same day she executed the inter vivos power of appointment whose terms are at issue here.[1] After making modest appointments in favor of a hospital and certain family retainers (the 'appointees'),[2] she appointed the sum of $200,000 to each of two trusts previously established with another Delaware trustee, the Delaware Trust Co. The balance of the trust corpus, over $1,000,000 at the date of her death, was appointed to her executrix. that amount passed under the residuary clause of her will and is not at issue here.

The two trusts with the Delaware Trust Co. were created in 1948 by Mrs. Donner's daughter, Elizabeth Donner Hanson, for the benefit of Elizabeth's children, Donner Hanson and Joseph Donner Winsor. In identical terms they provide that the income not required for the beneficiary's support should be accumulated to age 25, when the beneficiary should be paid 1/4 of the corpus and receive the income from the balance for life. Upon the death of the beneficiary the remainder was to go to such of the beneficiary's issue or Elizabeth Donner Hanson's issue as the beneficiary should appoint by inter vivos or testamentary instrument; in default of appointment to the beneficiary's issue alive at the time of his death, and if none to the issue of Elizabeth Donner Hanson.

Mrs. Donner died Nov. 20, 1952. Her will, which was admitted to probate in Florida, named Elizabeth Donner ***240** Hanson as executrix. She was instructed to pay all debts and taxes, including any which might be payable by reason of the property appointed under the power of appointment in the trust agreement with the Wilmington Trust Co. After disposing of personal and household effects, Mrs. Donner's will directed that the balance of her property (the $1,000,000 appointed from the Delaware trust) be paid in equal parts to two trusts for the benefit of her daughters Katherine N. R. Denckla and Dorothy B. R. Stewart.

This controversy grows out of the residuary clause that created the lastmentioned trusts. It begins:
'All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be at the time of my death, including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows * * *.'

Residuary legatees Denckla and Stewart, already the recipients of over $500,000 each, urge that the power of appointment over the $400,000 appointed to sister Elizabeth's children was not 'effectively exercised' and that the property should accordingly pass to them. Fourteen months after Mrs. Donner's death these parties petitioned a Florida chancery court for a declaratory judgment 'concerning what property passes under the residuary clause' of the will. Personal service was had upon the following defendants: (1) executrix Elizabeth Donner Hanson, (2) beneficiaries Donner Hanson and Joseph Donner Winsor, and (3) potential beneficiary William Donner Roosevelt, also one of Elizabeth's children. Curtin Winsor, Jr., another of Elizabeth's children and ***241** also a potential beneficiary of the Delaware trusts, was ****1233** not named as a party and was not served. About a dozen other defendants were nonresidents and could not be personally served. These included the Wilmington Trust Co. ('trustee'), the Delaware Trust Co. (to whom the $400,000 had been paid shortly after Mrs. Donner's death), certain individuals who were potential successors in interest to complainants Denckla and Stewart, and most of the named appointees in Mrs. Donner's 1949 appointment. A copy of the pleadings and a 'Notice to Appear and Defend' were sent to each of these defendants by ordinary mail, and notice was published locally as required by the Florida statutes dealing with constructive service.[3] With the exception of two individuals whose interests coincided with complainants Denckla and Stewart, none of the nonresident defendants made any appearance.

The appearing defendants (Elizabeth Donner Hanson and her children) moved to dismiss the suit because the exercise of jurisdiction over indispensable parties, the Delaware trustees, would offend Section 1 of the ***242** Fourteenth Amendment. The Chancellor ruled that he lacked jurisdiction over these nonresident defendants because no personal service was had and because the trust corpus was outside the territorial jurisdiction of the court. The cause was dismissed as to them. As far as parties before the court were concerned, however, he ruled that the power of appointment was testamentary and void under the applicable Florida law. In a decree dated Jan. 14, 1955, he ruled that the $400,000 passed under the residuary clause of the will.

After the Florida litigation began, but before entry of the decree, the executrix instituted a declaratory judgment action in Delaware to determine who was entitled to participate in the trust assets held in that State. Except for the addition of beneficiary Winsor and several appointees, the parties were substantially the same as in the Florida litigation. Nonresident defendants were notified by registered mail. All of the trust companies, beneficiaries, and legatees except Katherine N. R. Denckla, appeared and participated in the litigation. After the Florida court enjoined executrix Hanson from further participation, her children pursued their own interests. When the Florida decree was entered the legatees unsuccessfully urged it as res judicata of the Delaware dispute. In a decree dated Jan. 13, 1956, the Delaware Chancellor ruled that the trust and power of appointment were valid under the applicable Delaware law, and that the trust corpus had properly been paid to the Delaware Trust Co. and the other appointees. Hanson v. Wilmington Trust Co., 119 A.2d 901.

Alleging that she would be bound by the Delaware decree, the executrix moved the Florida Supreme Court to remand with instructions to dismiss the Florida suit then pending on appeal. No full faith and credit question was raised. ****1234** The motion was denied. The Florida Supreme Court affirmed its Chancellor's conclusion that Florida law applied to determine the validity of the trust ***243** and power of appointment. Under that law the trust was invalid because the settlor had reserved too much power over the trustee and trust corpus, and the power of appointment was not independently effective to pass the property because it was a testamentary act not accompanied by the requisite formalities. The Chancellor's conclusion that there was no jurisdiction over the trust companies and other absent defendants was reversed. The court ruled that jurisdiction to construe the will carried with it 'substantive' jurisdiction 'over the persons of the absent defendants' even though the trust assets were not 'physically in this state.' Whether this meant jurisdiction over the person of the defendants or jurisdiction over the trust assets is open to doubt. In a motion for rehearing the beneficiaries and appointees urged for the first time that Florida should have given full faith and credit to the decision of the Delaware Chancellor. The motion was denied without opinion, Nov. 28, 1956.

The full faith and credit question was first raised in the Delaware litigation by an unsuccessful motion for new trial filed with the Chancellor Jan. 20, 1956. After the Florida Supreme Court decision the matter was renewed by a motion to remand filed with the Delaware Supreme Court. In a decision of Jan. 14, 1957, that court denied the motion and affirmed its Chancellor in all respects. The Florida decree was held not binding for purposes of full faith and credit because the Florida court had no personal jurisdiction over the trust companies and no jurisdiction over the trust res.

The issues for our decision are, first, whether Florida erred in holding that it had jurisdiction over the nonresident defendants, and second, whether Delaware erred in refusing full faith and credit to the Florida decree. We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor ***244** since the question was not seasonably presented to the Florida court. Radio Station WOW v. Johnson, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092.

No. 107, The Florida Appeal. The question of our jurisdiction was postponed until the hearing of the merits. The appeal is predicated upon the contention that as applied to the facts of this case the Florida statute providing for constructive service is contrary to the Federal Constitution. 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2). But in the state court appellants (the 'beneficiaries') did not object that the statute was invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution.[4] Accordingly, we are without jurisdiction of the appeal and it must be dismissed. Wilson v. Cook, 327 U.S. 474, 482, 66 S.Ct. 663, 667, 90 L.Ed. 793; Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857. Treating the papers whereon appeal was taken as a petition for certiorari, 28 U.S.C. s 2103, 28 U.S.C.A. s 2103, certiorari is granted.

Relying upon the principle that a person cannot invoke the jurisdiction of this Court to vindicate the right of a ****1235** third party,[5] appellees urge that appellants lack standing to complain of a defect in jurisdiction over the nonresident ***245** trust companies, who have made no appearance in this action. Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust.[6] In the absence of such a party a Florida court may not proceed to adjudicate the controversy.[7] Since state law required the acquisition of jurisdiction over the nonresident trust company[8] before the court was empowered to proceed with the action, any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired. Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, 78 S.Ct. 1063.

Appellants charge that this judgment is offensive to the Due Process Clause of the Fourteenth Amendment because the Florida court was without jurisdiction. There is no suggestion that the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings,[9] or denied them an opportunity to be heard in defense of their interests.[10] The alleged defect is the absence of those ***246** 'AFFILIATING CIRCUMSTANCES'[11] WITHOut which the courts of a state mAY NOt enter a judgment imposing obligations on persons (jurisdiction in personam) or affecting interests in property (jurisdiction in rem or quasi in rem).[12] While the in rem and in personam classifications do not exhaust all the situations that give rise to jurisdiction,[13] they are adequate to describe the ****1236** affiliating circumstances suggested here, and accordingly serve as a useful means of approach to this case.

In rem jurisdiction. Founded on physical power, McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States.[14] The basis of the jurisdicton is the presence of the subject property within the territorial jurisdiction of the forum State. Rose v. Himely, 4 Cranch 241, 277, 2 L.Ed. 608; Overby v. Gordon, 177 U.S. 214, 221—222, 20 S.Ct. 603, 606, 44 L.Ed. 741. Tangible property poses no problem for the application of this rule, but the situs of ***247** intangibles is often a matter of controversy.[15] In considering restrictions on the power to tax, this Court has concluded that 'jurisdiction' over intangible property is not limited to a single State. State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358; Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339. Whether the type of 'jurisdiction' with which this opinion deals may be exercised by more than one State we need not decide. The parties seem to assume that the trust assets that form the subject matter of this action[16]

were located in Delaware and not in Florida. We can see nothing in the record contrary to that assumption, or sufficient to establish a situs in Florida.[17]

The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient ***248** to confer the requisite jurisdiction.[18] ****1237** But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called 'in rem' jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which ***249** neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner[19] is a fiction of limited utility. Green v. Van Buskirk, 7 Wall. 139, 150, 19 L.Ed. 109. The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled has an in rem effect on personalty outside the forum State that could render it conclusive on the interests f nonresidents over whom there was no personal jurisdiction. Riley v. New York Trust Co., 315 U.S. 343, 353, 62 S.Ct. 608, 614, 86 L.Ed. 885; Baker v. Baker, Eccles & Co., 242 U.S. 394, 401, 37 S.Ct. 152, 154, 61 L.Ed. 386; Overby v. Gordon, 177 U.S. 214, 20 S.Ct. 603, 44 L.Ed. 741.[20] The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction in rem. Having concluded that Florida had no in rem jurisdiction, we proceed to consider whether a judgment purporting to rest on that basis is invalid in Florida and must therefore be reversed.

Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity,[21] but the matter ***250** remained a question of state law over which this Court exercised no authority.[22] With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired in personam jurisdiction was ****1238** void within the State as well as without. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. Nearly a century has passed without this Court being called upon to apply that principle to an in rem judgment dealing with property outside the forum State. The invalidity of such a judgment within the forum State seems to have been assumed—and with good reason. Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.[23] Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained. Sadler v. Industrial Trust Co., 327 Mass. 10, 97 N.E.2d 169.

In personam jurisdiction. Appellees' stronger argument is for in personam jurisdiction over the Delaware trustee. They urge that the circumstances of this case amount to sufficient affiliation with the State of Florida to empower its courts to exercise personal jurisdiction over this nonresident defendant. Principal reliance is placed upon McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223. In McGee the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological ***251** progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. State of Washington, 326 U.S. 310. 319, 66 S.Ct. 154, 159, 90 L.Ed. 95.

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail. Cf. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; Travelers Health Ass'n v. Com. of Virginia ex rel. State Corporation Comm., 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154.

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from **1239 McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, and the cases there cited. In McGee, the nonresident defendant solicited a reinsurance agreement with a resident of California. *252 The offer was accepted in that State, and the insurance premiums were mailed from there until the insured's death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit 'was based on a contract which had substantial connection with that State.' In contrast, this action involves the validity of an agreement that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in McGee.[24] But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. Cf. International Shoe Co. v. State of Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95. This case is also different from McGee in that there the State had enacted special legislation (Unauthorized Insurers Process Act, West's Ann.Cal.Insurance Code, s 1610 et seq.) to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation. Cf. *253 Travelers Health Ass'n v. Com. of Virginia ex rel. State Corporation Comm., 339 U.S. 643, 647—649, 70 S.Ct. 927, 929—930, 94 L.Ed. 1154; Doherty & Co. v. Goodman, 294 U.S. 623, 627, 55 S.Ct. 553, 554, 79 L.Ed. 1097; Henry L. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091.

The execution in Florida of the powers of appointment under which the beneficiaries and appointees claim does not give Florida a substantial connection with the contract on which this suit is based. It is the validity of the trust agreement, not the appointment, that is at issue here.[25] For the purpose of applying its rule that the validity of a trust is determined by the law of the State of its creation, Florida ruled that the appointment amounted to a 'republication' of the original trust instrument in Florida. For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant. The unilateral activity of those who claim some relationship with a nonresident defendant **1240 cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. State of Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95. *254 The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.

It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a nonsequitur. With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so. As we understand its law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust.[26] It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[27]

Because it sustained jurisdiction over the nonresident trustees, the Florida Supreme Court found it unnecessary to determine whether Florida law made those defendants indispensable parties in the circumstances of this case. Our conclusion that Florida was without jurisdiction over the Delaware trustee, or over the trust corpus held in that State, requires that we make that determination in the first instance. As we have noted earlier, the Florida Supreme Court has repeatedly held that a trustee is an ***255** indispensable party without whom a Florida court has no power to adjudicate controversies affecting the validity of a trust.[28] For that reason the Florida judgment must be reversed not only as to the nonresident trustees but also as to appellants, over whom the Florida court admittedly had jurisdiction.

No. 117, The Delaware Certiorari. The same reasons that compel reversal of the Florida judgment require affirmance of the Delaware one. Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment. 28 U.S.C. s 1738, 28 U.S.C.A. s 1738. Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over nonresident defendants. D'Arcy v. Ketchum, 11 How. 165, 13 L.Ed. 648; Hall v. Lanning, 91 U.S. 160, 23 L.Ed. 271. See Baker v. Baker, Eccles & Co., 242 U.S. 394, 37 S.Ct. 152, 61 L.Ed. 386; Riley v. New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885. Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit—even against parties ****1241** over whom Florida's jurisdiction was unquestioned.

It is suggested that this disposition is improper—that the Delaware case should be held while the Florida cause is remanded to give that court an opportunity to determine whether the trustee is an indispensable party in the circumstances of this case. But this is not a case like Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789, where it is appropriate to remand for the state court to clarify an ambiguity in its opinion that may reveal an adequate state ground that would deprive us of power to affect the result of the controversy. Nor is this a circumstance where the state ***256** court has never ruled on the question of state law that we are deciding. Although the question was left open in this case, there is ample Florida authority from which we may determine the appropriate answer.

The rule of primacy to the first final judgment is a necessary incident to the requirement of full faith and credit. Our only function is to determine whether judgments are consistent with the Federal Constitution. In determining the correctness of Delaware's judgment we look to what Delaware was entitled to conclude from the Florida authorities at the time the Delaware court's judgment was entered. To withhold affirmance of a correct Delaware judgment until Florida has had time to rule on another question would be participating in the litigation instead of adjudicating its outcome.

The judgment of the Delaware Supreme Court is affirmed, and the judgment of the Florida Supreme Court is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Judgment of Delaware Supreme Court affirmed; judgment of Florida Supreme Court reversed and cause remanded with directions.

Mr. Justice BLACK, whom Mr. Justice BURTON and Mr. Justice BRENNAN join, dissenting.

I believe the courts of Florida had power to adjudicate the effectiveness of the appointment made in Florida by Mrs. Donner with respect to all those who were notified of the proceedings and given an opportunity to be heard without violating the Due Process Clause of the Fourteenth Amendment.[1] If this is correct, it follows that ***257** the Delaware courts erred in refusing to give the prior Florida judgment full faith and credit. U.S.Const., Art. IV, s 1; 28 U.S.C. s 1738, 28 U.S.C.A. s 1738.

Mrs. Donner was domiciled in Florida from 1944 until her death in 1952. The controversial appointment was made there in 1949. It provided that certain persons were to receive a share of the property held by the Delaware ‘trustee’ under the so-called

trust agreement upon her death. Until she died Mrs. Donner received the entire income from this property, and at all times possessed absolute power to revoke or alter the appointment and to dispose of the property as she pleased. As a practical matter she also retained control over the management of the property, the 'trustee' in Delaware being little more than a custodian.[2] A number of the beneficiaries **1242 of the appointment, including those who were to receive more than 95% of the assets involved, were residents of Florida at the time the appointment was made as well as when the present suit was filed. The appointed property consisted of intangibles which had no real situs in any particular State although Mrs. Donner paid taxes on the property in Florida.

The same day the 1949 appointment was made Mrs. Donner executed a will, which after her death was duly probated in a Florida court. The will contained a residuary clause providing for the distribution of all of *258 her property not previously bequeathed, including 'any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me * * *.' Thus if the 1949 appointment was ineffective the property involved came back into Mrs. Donner's estate to be distributed under the residuary clause of her will. As might be anticipated the present litigation arose when legatees brought an action in the Florida courts seeking a determination whether the appointment was valid. The beneficiaries of the appointment, some of whom live outside Florida, and the Delaware trustee were defendants. They had timely notice of the suit and an adequate opportunity to obtain counsel and appear.

In light of the foregoing circumstances it seems quite clear to me that there is nothing in the Due Process Clause which denies Florida the right to determine whether Mrs. Donner's appointment was valid as against its statute of wills. This disposition, which was designed to take effect after her death, had very close and substantial connections with that State. Not only was the appointment made in Florida by a domiciliary of Florida, but the primary beneficiaries also lived in that State. In my view it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction might properly apply Florida law, if it chose, to determine whether the appointment was effectual. Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74; Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 84 L.Ed. 1074. True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations. It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have *259 power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 343, 85 L.Ed. 278; International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95. So far as the nonresident defendants here are concerned I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all.[3] Certainly there is nothing fundamentally unfair in subjecting the corporate trustee **1243 to the jurisdiction of the Florida courts. It chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question.

Florida's interest in the validity of Mrs. Donner's appointment is made more emphatic by the fact that her will is being administered in that State. It has traditionally been the rule that the State where a person is domiciled at the time of his death is the proper place to determine the validity of his will, to construe its provisions and to marshal and distribute his personal property. Here Florida was seriously concerned with winding up Mrs. Donner's estate and with finally determining what property was to be distributed under her will. In fact this suit was brought for that very purpose.

The Court's decision that Florida did not have jurisdiction over the trustee (and inferentially the nonresident beneficiaries) stems from principles stated the better part *260 of a century ago in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. That landmark case was decided in 1878, at a time when business affairs were predominantly local in nature and travel between States was difficult, costly and sometimes even dangerous. There the Court laid down the broad principle that a State could not subject nonresidents to the jurisdiction of its courts unless they were served with process within its boundaries or voluntarily appeared, except to the extent they had property in the State. But as the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on

state jurisdiction announced in that case. In the course of this evolution the old jurisdictional landmarks have been left far behind so that in many instances States may now properly exercise jurisdiction over nonresidents not amenable to service within their borders.[4] Yet further relaxation seems certain. Of course we have not reached the point where state boundaries are without significance, and I do not mean to suggest such a view here. There is no need to do so. For we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.

Perhaps the decision most nearly in point is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. In that case the Court held that a State could enter a personal judgment in favor of a trustee against nonresident beneficiaries of a trust even though they were not served with process in that State. So far as appeared, their only connection with the State was the fact that the trust was ***261** being administered there.[5] In upholding the State's jurisdiction the Court emphasized its great interest in trusts administered within its boundaries and governed by its laws. Id., 339 U.S. at page 313, 70 S.Ct. at page 656. Also implicit in the result was a desire to avoid the necessity for multiple litigation with its accompanying waste and possibility of inconsistent results. ****1244** It seems to me that the same kind of considerations are present here supporting Florida's jurisdiction over the nonresident defendants.

Even if it be assumed that the Court is right in its jurisdictional holding, I think its disposition of the two cases is unjustified. It reverses the judgment of the Florida Supreme Court on the ground that the trustee may be, but need not be, an indispensable party to the Florida litigation under Florida law. At the same time it affirms the subsequent Delaware judgment. Although in form the Florida case is remanded for further proceedings not inconsistent with the Court's opinion, the effect is that the Florida courts will be ogliged to give full faith and credit to the Delaware judgment. This means the Florida courts will never have an opportunity to determine whether the trustee is an indispensable party. The Florida judgment is thus completely wiped out even as to those parties who make their homes in that State, and even though the Court acknowledges there is nothing in the Constitution which precludes Florida from entering a binding judgment for or against them. It may be argued that the Delaware judgment is the first to become final and therefore is entitled to prevail. But it only comes first because the Court makes it so. In my judgment the proper thing to do would be to hold the Delaware case until the Florida courts had an opportunity to ***262** decide whether the trustee is an indispensable party. Under the circumstances of this case I think it is quite probable that they would say he is not. See Trueman Fertilizer Co. v. Allison, Fla., 81 So.2d 734. I can see no reason why this Court should deprive Florida plaintiffs of their judgment against Florida defendants on the basis of speculation about Florida law which might well turn out to be unwarranted.

Mr. Justice DOUGLAS, dissenting.

The testatrix died domiciled in Florida. Her will, made after she had acquired a domicile in Florida, was probated there. Prior to the time she established a domicile in Florida she executed a trust instrument in Delaware. By its terms she was to receive the income during her life. On her death the principal and undistributed income were to go as provided in any power of appointment or, failing that, in her last will and testament.

After she had become domiciled in Florida she executed a power of appointment; and she also provided in her will that if the power of appointment had not been effectively exercised, the property under the trust, consisting of intangibles, should pass to certain designated trusts.

The Florida court held that the power of appointment was testamentary in character and not being a valid testamentary disposition for lack of the requisite witnesses, failed as a will under Florida law. Therefore the property passed under the will. Fla., 100 So.2d 378.

Distribution of the assets of the estate could not be made without determining the validity of the power of appointment. The power of appointment, being integrated with the will, was as much subject to construction and interpretation by the Florida court as the will itself. Of course one not a party or privy to the Florida proceedings is not bound by it and can separately litigate ***263** the right to assets in other States. See Riley v. New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885; Baker v. Baker, Eccles & Co., 242 U.S. 394, 37 S.Ct. 152, 61 L.Ed. 386. But we have no such situation here. The trustee of the trust was in privity with the deceased. She was the settlor; and under the trust, the trustee was to do her bidding. That is to say, the

trustee, though managing the res during the life of the settlor, was on her death **1245 to transfer the property to such persons as the settlor designated by her power of appointment or by her last will and testament, or, failing that, to designated classes of persons. So far as the present controversy is concerned the trustee was purely and simply a stakeholder or an agent holding assets of the settlor to dispose of as she designated. It had a community of interest with the deceased. I see no reason therefore why Florida could not say that the deceased and her executrix may stand in judgment for the trustee so far as the disposition of the property under the power of appointment and the will is concerned. The question in cases of this kind is whether the procedure is fair and just, considering the interests of the parties. Cf. Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22; Mullane v. Central Hanover Trust Co., 339 U.S. 306, 312—317, 70 S.Ct. 652, 656—658, 94 L.Ed. 865. Florida has such a plain and compelling relation to these out-of-state intangibles (cf. Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339), and the nexus between the settlor and trustee is so close, as to give Florida the right to make the controlling determination even without personal service over the trustee and those who claim under it. We must remember this is not a suit to impose liability on the Delaware trustee or on any other absent person. It is merely a suit to determine interests in those intangibles. Cf. Mullane v. Central Hanover Trust Co., supra, 339 U.S. at page 313, 70 S.Ct. at page 656. Under closely analogous facts the California Supreme Court held in Atkinson v. Superior Court, 49 Cal.2d 338, 316 P.2d 960, that California had *264 jurisdiction over an absent trustee. I would hold the same here. The decedent was domiciled in Florida; most of the legatees are there; and the absent trustee through whom the others claim was an agency so close to the decedent as to be held to be privy with her—in other words so identified in interest with her as to represent the same legal right.

All Citations

357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283

Footnotes

1 The appointment was partially revoked July 7, 1950 in a respect not material to the instant controversy.

2 The hospital received $10,000. Six servants qualified for appointments totalling $7,000.

3 Fla.Stat., 1957, c. 48, s 48.01:
'Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in s 48.02 in any suit or proceeding:
'(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.
'(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder.'
s 48.02: 'Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including: (1) Any known or unknown natural person * * * (2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown * * *.'

4 The record discloses no mention of the state statute until the petition for rehearing in the Florida Supreme Court. In the trial court, appellant's motion to dismiss raised the federal question in this manner: 'The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.' No. 107, R. 41.

5 See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U.S. 71, 88, 48 S.Ct. 291, 294, 72 L.Ed. 473; Smith v. State of Indiana, 191 U.S. 138, 148, 24 S.Ct. 51, 52, 48 L.Ed. 125; Tyler v. Judges of the Court of Registration, 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252; Robertson and Kirkham, Jurisdiction of the Supreme Court (Wolfson and Kurland ed.), s 298.

6 Trueman Fertilizer Co. v. Allison, Fla., 81 So.2d 734, 738; Winn v. Strickland, 34 Fla. 610, 633, 16 So. 606, 613; Wilson v. Russ, 17 Fla. 691, 697; McArthur v. Scott, 113 U.S. 340, 396, 5 S.Ct. 652, 670, 28 L.Ed. 1015; Sadler v. Industrial Trust Co., 327 Mass. 10, 97 N.E.2d 169.

7 Martinez v. Balbin, Fla., 76 So.2d 488, 490; Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 512—513, 39 So. 392, 396.

8 Hereafter the terms 'trust,' 'trust company' and 'trustee' have reference to the trust established in 1935 with the Wilmington Trust Co., the validity of which is at issue here. It is unnecessary to determine whether the Delaware Trust Co., to which the $400,000 remainder interest was appointed and was paid after Mrs. Donner's death, is also an indispensable party to this proceeding.

9 Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 179; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608.

10 Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520.

11 Sunderland, The Problem of Jurisdiction, Selected Essays on Constitutional Law, 1270, 1272.

12 A judgment in personam imposes a personal liability or obligation on one person in favor of another. A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5—9. For convenience of terminology this opinion will use 'in rem' in lieu of 'in rem and quasi in rem.'

13 E.g., Mallane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312, 70 S.Ct. 652, 656, 94 L.Ed. 865; Williams v. State of North Carolina, 317 U.S. 287, 297, 63 S.Ct. 207, 212, 87 L.Ed. 279. Fraser, Jurisdiction by Necessity, 100 U. of Pa.L.Rev. 305.

14 Baker v. Baker, Eccles & Co., 242 U.S. 394, 400, 37 S.Ct. 152, 154, 61 L.Ed. 386; Riley v. New York Trust Co., 315 U.S. 343, 349, 62 S.Ct. 608, 612, 86 L.Ed. 885; Overby v. Gordon, 177 U.S. 214, 221—222, 20 S.Ct. 603, 606, 44 L.Ed. 741; Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Rose v. Himely, 4 Cranch 241, 277, 2 L.Ed. 608.

15 See Andrews, Situs of Intangibles in Suits against Non-Resident Claimants, 49 Yale L.J. 241.

16 This case does not concern the situs of a beneficial interest in trust property. These appellees were contesting the validity of the trust. Their concern was with the legal interest of the trustee or, if the trust was invalid, the settlor. Therefore, the relevant factor here is the situs of the stocks, bonds, and notes that make up the corpus of the trust. Properly speaking such assets are intangibles that have no 'physical' location. But their embodiment in documents treated for most purposes as the assets themselves makes them partake of the nature of tangibles. Cf. Wheeler v. Sohmer, 233 U.S. 434, 439, 34 S.Ct. 607, 58 L.Ed. 1030.

17 The documents evidencing ownership of the trust property were held in Delaware, cf. Bank of Jasper v. First Nat. Bank, 258 U.S. 112, 119, 42 S.Ct. 202, 204, 66 L.Ed. 490, by a Delaware trustee who was the obligee of the credit instruments and the record owner of the stock. The location of the obligors and the domicile of the corporations do not appear. The trust instrument was executed in Delaware by a settlor then domiciled in Pennsylvania. Without expressing any opinion on the significance of these or other factors unnamed, we note that none relates to Florida.

18 The Florida Supreme Court's opinion states: 'We held (in Henderson v. Usher, 118 Fla. 688, 160 So. 9) that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the Henderson case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants.' Fla., 100 So.2d at page 385.

The foregoing leaves unclear whether the court was invoking in personam jurisdiction over the trustee, or in rem jurisdiction over the trust assets. Henderson v. Usher, supra, which was an action by testamentary trustees for a construction of the will establishing a trust whose assets were held in New York, found it unnecessary to decide the basis of the jurisdiction exercised. In response to the jurisdictional objections of a specially appearing nonresident defendant, the Florida Supreme Court ruled: 'Since the interpretation of the will is the primary question with which we are confronted we are impelled to hold that the res is at least constructively in this state and that the Florida courts are empowered to advise the trustees how to proceed under it and what rights those affected have in it. For the immediate purpose of this suit the will is the res and when that is voluntarily brought into the courts of Florida to be construed the trust created by it is to all intents and purposes brought with it.' 118 Fla. at page 692, 160 So. at page 10.

19 We assume arguendo for the purpose of this discussion that the trust was invalid so that Mrs. Donner was the 'owner' of the subject property.

20 Though analogous, these cases are not squarely in point. They concerned the efficacy of such judgments in the courts of another sovereign, while the issue here is the validity of such an exercise of jurisdiction within the forum State.

21 See Pennoyer v. Neff, 95 U.S. 714, 720—728, 732, 24 L.Ed. 565; Story, Commentaries on the Conflict of Laws (6th ed. 1865), ss 539, 550—551; Cooley, Constitutional Limitations (1st ed. 1868), 404—405; Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. of Chi.L.Rev. 775, 792—793.

22 See Baker v. Baker, Eccles & Co., 242 U.S. 394, 403, 37 S.Ct. 152, 155, 61 L.Ed. 386.

23 This holding was forecast in Pennoyer v. Neff, supra. When considering the effect of the Fourteenth Amendment, this Court declared that in actions against nonresidents substituted service was permissible only where 'property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose * * *.' (Emphasis supplied.) 95 U.S. at page 733.

24 By a letter dated Feb. 5, 1946, Mrs. Donner changed the compensation to be paid the trust advisor. April 2, 1947, she revoked the trust as to $75,000, returning that amount to the trustee December 22, 1947. To these acts may be added the execution of the two powers of appointment mentioned earlier.

25 The Florida Supreme Court's opinion makes repeated references to the 'invalidity' of the trust, and uses other language of like import. See 100 So.2d at pages 381, 382, 383, 384, 385. Its ruling that the 1949 and 1950 'appointments' were ineffective to pass title to the property (because lacking the requisite testamentary formalities) proceeded from this initial ruling that the trust agreement was 'invalid,' 100 So.2d at page 383, or 'illusory,' 100 So.2d at page 384, and therefore created no power of appointment. There was no suggestion that the appointment was ineffective as an exercise of whatever power was created by the trust agreement.

26 See note 6, supra.

27 This conclusion make unnecessary any consideration of appellants' contention that the contacts the trust agreement had with Florida were so slight that it was a denial of due process of law to determine its validity by Florida law. See Home Insurance Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926.

28 See notes 6 and 7, supra.

1 In my judgment it is a mistake to decide this case on the assumption that the Florida courts invalidated the trust established in 1935 by Mrs. Donner while she was living in Pennsylvania. It seems quite clear to me that those courts had no such purpose. As I understand it, all they held was that an appointment made in Florida providing for the disposition of part of the trust property after Mrs. Donner's death was (1) testamentary since she retained complete control over the appointed property until she died, and (2) ineffective because not executed in accordance with the Florida statute of wills.

2 Among other things Mrs. Donner reserved the right to appoint 'advisers' serving at her sufferance who controlled all purchases, sales and investments by the 'trustee.' Evidence before the Delaware courts indicated that these advisers, not the Delaware 'trustee,' actually made all decisions with respect to transactions affecting the 'trust' property and that the 'trustee' mechanically acted as they directed.

3 The suggestion is made that Delaware was a more suitable forum, but the plain fact is that none of the beneficiaries or legatees has ever resided in that State.

4 See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; Travelers Health Ass'n v. Com. of Virginia ex rel. State Corporation Comm., 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154; International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278; Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097; Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091.

5 There was no basis for in rem jurisdiction since the litigation concerned the personal liability of the trustee and did not involve the trust property.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRADFORD D. LUND, *Plaintiff-Appellant*, v. DAVID J. COWAN, The Honorable, Los Angeles County Superior Court; LOS ANGELES COUNTY SUPERIOR COURT, for the State of California, *Defendants-Appellees.*	No. 20-55764 D.C. No. 2:20-CV-01894-SVW-JC OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted May 14, 2021
Pasadena, California

Filed July 15, 2021

Before: Ryan D. Nelson and Kenneth K. Lee, Circuit Judges, and Sidney H. Stein*, District Judge.

Opinion by Judge Lee

* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal of a complaint alleging that Los Angeles Superior Court Judge David Cowan violated plaintiff's due process rights under 42 U.S.C. § 1983 by appointing a guardian without notice or a hearing; and violated the Americans with Disabilities Act by commenting (apparently with questionable factual basis) that plaintiff had Down syndrome.

Plaintiff Bradford Lund is the grandson of Walt Disney. He has been embroiled in a long-running dispute with family members and trustees and has yet to claim a fortune estimated to be worth $200 million. In 2019, during settlement hearing, Judge Cowan remarked: "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no." Judge Cowan rejected the proposed settlement and appointed a guardian ad litem over Lund without holding a hearing.

The panel affirmed the district court's dismissal on the basis that most of Lund's claims were now moot because Judge Cowan removed the guardian ad litem and relinquished this case to another judge. And while Judge Cowan's statement may have been inaccurate and inappropriate, any claim challenging it was barred by judicial immunity, which shields judges from liability for

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

conduct or speech arising from their judicial duties. The panel further held that because judicial immunity barred the Americans with Disabilities Act claim against Judge Cowan, Lund's claim against the Superior Court also failed. Finally, the panel held that the district court did not abuse its discretion when it denied Lund's motion for leave to file a second amended complaint because all of Lund's proposed amendments would have been futile.

COUNSEL

Sandra Slaton (argued), Horne Slaton PLLC, Scottsdale, Arizona; Joseph Busch III, Adkisson Pitet LLP, Newport Beach, California; for Plaintiff-Appellant.

Matthew L. Green (argued), Best Best & Krieger LLP, San Diego, California, for Defendants-Appellees.

OPINION

LEE, Circuit Judge:

For over a decade, Bradford Lund — the grandson of Walt Disney — has languished in perhaps the Unhappiest Place on Earth: probate court. Embroiled in a long-running dispute with family members and trustees, Lund has yet to claim a fortune estimated to be worth $200 million. In 2019, it appeared that Lund would finally receive his rightful inheritance when he reached a proposed settlement. But Judge David Cowan of the Los Angeles Superior Court rejected it, suggesting (apparently with questionable factual basis) that Lund has Down syndrome. Judge Cowan then

appointed a guardian ad litem over Lund without holding a hearing.

Understandably frustrated at this latest turn of events, Lund sued Judge Cowan and the Superior Court, arguing that the appointment of the guardian without notice or hearing violated his due process rights under 42 U.S.C. § 1983. Lund also argued that Judge Cowan's comment violated the Americans with Disabilities Act (ADA). The district court dismissed the complaint, and Lund now appeals both the dismissal and the denial of leave to amend.

We affirm because most of Lund's claims are now moot after Judge Cowan removed the guardian ad litem and relinquished this case to another judge. And while Judge Cowan's statement may have been inaccurate and inappropriate, any claim challenging it is barred by judicial immunity, which shields judges from liability for conduct or speech arising from their judicial duties.

BACKGROUND[1]

Since 2009, Bradford Lund, an heir to the Disney fortune, has been mired in a protracted and pitched battle in probate court. As a beneficiary of several trusts, Lund should have received his inheritance distributions on his 35th, 40th, and 45th birthdays. Despite being over 50 years old today, Lund has yet to receive a distribution because the trust agreements included a caveat that allowed trustees to withhold the money if Lund lacked the maturity or financial acumen to manage the funds.

[1] This factual background is based on the first amended complaint. At the dismissal stage, we accept all factual allegations as true and construed in the light most favorable to Lund.

Lund claims that certain trustees, along with some "estranged" family members, have stymied his efforts to receive the distributions by casting him as mentally incompetent. According to Lund, though, he has largely prevailed in rebutting these incompetency allegations. For example, a ten-day bench trial in Arizona state court ended in a judicial determination that Lund was "not incapacitated." Similarly, a California state court determined that Lund had the capacity to choose new trustees for one of his trusts.

That all changed when Lund ended up in front of Judge David Cowan in Los Angeles County Superior Court. Judge Cowan issued a sua sponte order to show cause whether the court should appoint a guardian ad litem over Lund. Shortly afterward, Lund and the trustees engaged in mediation that led to a proposed global settlement agreement.

The parties appeared before Judge Cowan to seek approval of the proposed settlement agreement. During the hearing, Judge Cowan remarked: "Do I want to give 200 million dollars, effectively, to someone who may suffer, on some level, from Down syndrome? The answer is no." Lund's counsel immediately informed Judge Cowan that Lund did not have Down syndrome and asked Judge Cowan to retract his statement. Judge Cowan refused. Ultimately, Judge Cowan rejected the settlement.

Judge Cowan then appointed a guardian ad litem over Lund without holding a hearing. The next month, Lund filed a statement of objection to Judge Cowan, seeking to disqualify him for judicial bias because of the Down syndrome comment. In response, Judge Cowan filed an order striking Lund's statement of disqualification under California Code of Civil Procedure § 170.4(b), which allows

judges to strike statements that offer "no legal grounds for disqualification."

Lund sued both Judge Cowan and the Superior Court in federal court. Lund at first alleged a variety of constitutional due process claims under 42 U.S.C. § 1983, mostly related to the appointment of the guardian ad litem without notice or hearing. Later, Lund amended his complaint to add a claim under the Americans with Disabilities Act based on Judge Cowan's in-court statement about Down syndrome. Lund sought declaratory relief for the Section 1983 violations and money damages for the ADA violations. The defendants moved to dismiss the complaint, and the district court granted the motion, dismissing the case with prejudice. This appeal followed.

In November 2020 — after Lund filed his opening brief on appeal but before the defendants had filed an answering brief — Judge Cowan issued three orders. The first order discharged the guardian ad litem. The second order granted Lund's motion to reassign the case to a new judge in the probate division. Finally, the third was an order to show cause whether to disqualify Lund's lawyer for conflicts of interest. Judge Cowan commented that if Lund's lawyer were disqualified, then the new judge might want to consider reappointing the guardian ad litem to help deal with the aftermath of the disqualification.

STANDARD OF REVIEW

We review de novo the district court's order granting a motion to dismiss for failure to state a claim. *Los Angeles Lakers, Inc. v. Fed. Ins. Co*., 869 F.3d 795, 800 (9th Cir. 2017). In doing so, we accept all factual allegations as true and construe them in the light most favorable to Lund. *Mazurek v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025,

1031 (9th Cir. 2008). We review for abuse of discretion the district court's denial of leave to amend the complaint. *AmerisourceBergen Corp. v. Dialysist W., Inc*., 465 F.3d 946, 949 (9th Cir. 2006).

ANALYSIS

I. Lund's Section 1983 Claims Are Moot or Barred by Sovereign Immunity.

The complaint alleges five Section 1983 counts seeking declaratory relief against Judge Cowan. Counts 1 through 4 relate to the appointment of the guardian ad litem without notice or hearing, while Count 5 objects to the order striking Lund's statement of disqualification. We affirm the district court's dismissal of the Section 1983 claims.

A. Counts 1 Through 4 Are Moot.

Counts 1 through 4 — all of which challenge the guardian ad litem appointment — are moot because Judge Cowan issued an order discharging the guardian.

"A party must maintain a live controversy through all stages of the litigation process." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797 (9th Cir. 1999) (cleaned up). "If an action or a claim loses its character as a live controversy, then the action or claim becomes moot." *Id.* at 797–98 (cleaned up). For a defendant's voluntary conduct to moot a case, the standard is more "stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) (cleaned up). Simply put, speculative suppositions, far-fetched fears, or remote possibilities of recurrence cannot overcome

mootness. *See Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997); *Dufresne v. Veneman*, 114 F.3d 952, 955 (9th Cir. 1997).

Lund no longer faces any harm from the appointment of the guardian ad litem because Judge Cowan has lifted the order appointing her. And any possibility of future harm sounds only in speculation, especially because Judge Cowan has transferred this case to another judge (and, indeed, he no longer serves in probate court). Lund, however, protests that a possibility still exists that the new judge may reimpose a guardian ad litem. Under Lund's reading of Judge Cowan's orders, he "has specifically instructed the next judge to reappoint the GAL if the OSC were to be granted" and has effectively "directed" the reappointment of the guardian ad litem.

But Lund overstates the court's orders. Judge Cowan only wrote that *if* the new judge disqualifies Lund's counsel for conflict of interest, he or she "*may* wish to consider re-appointing the GAL (Ms. Lodise) to investigate whether the attorney's fees received by Ms. Slaton were in Brad's best interests." But even then, the ultimate decision to reappoint the guardian ad litem remains within the sole discretion of the new judge. Given all that, the possibility that the new judge would first disqualify Lund's counsel and then appoint a guardian ad litem without notice or hearing rests in the realm of speculation. In our view, the reappointment of the guardian ad litem "could happen only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable." *Mayfield*, 109 F.3d at 1425.

It may have been more prudent for Judge Cowan to simply transfer the case without including this extra commentary. But nothing in any of the orders suggests that Judge Cowan affirmatively ordered the reappointment of the

guardian in any binding way. Unfounded fears cannot save the claims from the mootness challenge, so we affirm the dismissal of Counts 1 through 4 as moot.

B. Sovereign Immunity Bars Count 5.

That just leaves one remaining claim under Section 1983: Count 5 challenging Judge Cowan's order striking Lund's statement of disqualification against him. Lund seeks a declaratory judgment holding that California Code of Civil Procedure § 170.4(b) — the statute giving Judge Cowan the authority to strike a statement of disqualification "if on its face it discloses no legal grounds for disqualification" — is unconstitutional.

Sovereign immunity bars this claim because it impermissibly seeks retrospective relief against Judge Cowan. "The Eleventh Amendment bars individuals from bringing lawsuits against a state for money damages or other retrospective relief." *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016) (cleaned up). State officials sued in their official capacities are generally entitled to Eleventh Amendment immunity. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). The Eleventh Amendment thus applies to Judge Cowan, who serves as a state court judge and is being sued in his official capacity. *See Simmons v. Sacramento Cty. Superior Ct.*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment.").

The Eleventh Amendment does not permit retrospective declaratory relief. *Arizona Students' Ass'n*, 824 F.3d. at 865. To get around this bar, Lund characterizes his declaratory relief as prospective. Admittedly, the line between

retrospective relief and prospective relief can blur. *See Edelman v. Jordan*, 415 U.S. 651, 667 (1974). But in general, "relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant," while "relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (cleaned up).

We agree with Judge Cowan that Count 5 seeks purely retrospective relief and thus cannot survive sovereign immunity. Count 5 amounts to an as-applied challenge of California Code of Civil Procedure § 170.4(b), and Lund does not allege any continuing violation or harm stemming from Judge Cowan's past conduct. *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) (observing that "an as-applied challenge invites narrower, retrospective relief, such as damages"). Not only does this claim involve past conduct and past harm, but Judge Cowan has since reassigned the case to a new judge and, indeed, he no longer serves in the probate division. So Judge Cowan cannot handle Lund's probate matter again at any point in the future, and an opinion declaring that Judge Cowan acted unconstitutionally would be advisory. *See McQuillion v. Schwarzenegger,* 369 F.3d 1091, 1095 (9th Cir. 2004). Thus, we hold that Count 5 is barred by the Eleventh Amendment.

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Because we hold that the Section 1983 claims are either moot or barred by sovereign immunity, there is no need to address the other issues raised by Lund, including whether

Section 1983 bars prospective declaratory relief,[2] as well as whether Lund must exhaust state appellate remedies before he can seek declaratory relief.

II. Judicial Immunity Bars Lund's ADA Claim.

Relying on Title II of the ADA, Lund seeks money damages against both Judge Cowan and the Superior Court based on Judge Cowan's in-court comment that he would not give money to someone who "may suffer, on some level, from Down syndrome." The district court dismissed the ADA claims, citing judicial immunity. We affirm.

A. Claim Against Judge Cowan

"It is well settled that judges are generally immune from suit for money damages." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). The question here is whether judicial immunity shields Judge Cowan for his questionable in-court comment.

Judicial immunity only applies to judicial acts, and not to "the administrative, legislative, or executive functions that

[2] Section 1983 states that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. This language was added to the statute in 1996 as part of the Federal Courts Improvement Act. Other circuits have held that prospective declaratory relief is still available under this statutory amendment because the text only explicitly bars injunctive relief. *See Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019) ("Currently, most courts hold that the amendment to § 1983 does not bar declaratory relief against judges."). Our court has not yet explicitly answered whether the statutory amendment bars declaratory relief, so Lund urges us to hold that it does not. But we leave that question for another day.

judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988). To determine whether an act is judicial, we consider these factors: whether "(1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity." *Duvall*, 260 F.3d at 1133 (cleaned up).

Lund points out that this case differs from *Duvall* because the statement here was not specifically made in the context of ruling on a motion. *See* 260 F.3d at 1133 ("Ruling on a motion is a normal judicial function, as is exercising control over the courtroom while court is in session."). Rather, Judge Cowan uttered it during a settlement hearing. But Lund does not identify any caselaw suggesting that judicial statements are protected only when they are embedded in an official judicial ruling, rather than made during a court hearing more generally.[3] We reject a cramped and illogical reading of a judicial act that would include only instances when a judge expressly decides a formal motion or

[3] None of the cases cited by Lund apply. For instance, Lund relies on *Jordan v. City of Union City, Ga.*, 94 F. Supp. 3d 1328 (N.D. Ga. 2015) and *Donaldson v. Trae-Fuels, LLC*, 399 F. Supp. 3d 555 (W.D. Va. 2019), for the proposition that statements or comments by decision-makers can support ADA liability. But those cases involve employers, not judges acting in their judicial capacity. Nor does *Grant v. Comm'r, Soc. Sec. Admin.*, 111 F. Supp. 2d 556, 559 (M.D. Pa. 2000), bear on this case. That case involved comments by an administrative law judge in the context of a Social Security appeal, but the plaintiffs did not seek money damages against the judge. And the same goes for the judicial recusal cases cited by Lund. Again, the dispute here is not whether judicial statements can be biased (they can), but whether judicial immunity bars claims for money damages based on judicial statements made from the bench during a hearing.

request. Indeed, the Supreme Court has remarked that even when a proceeding is "informal and ex parte," that does not necessarily deprive "an act otherwise within a judge's lawful jurisdiction . . . of its judicial character." *Forrester*, 484 U.S. at 227.

This broad conception of what constitutes a judicial act makes sense, given the history and purposes of the judicial immunity doctrine. For one, judicial immunity ensures that challenges to judicial rulings are funneled through more efficient channels for review like the appellate process. "Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Id.* at 225.

Judicial immunity also serves the goal of judicial independence. As the Supreme Court has noted, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Subjecting judges to liability for the grievances of litigants "would destroy that independence without which no judiciary can be either respectable or useful." *Id*. In some cases, this commitment to judicial independence might result in unfairness to individual litigants. *See Stump v. Sparkman*, 435 U.S. 349, 363 (1978). But it is precisely in those types of unfair or controversial situations that judicial immunity may be more necessary to preserve judicial independence. *Id*. at 364.

With that background in mind, Judge Cowan's in-court statement easily falls within the purview of a judicial act. Judge Cowan did not comment on Lund's perceived

disability out of the blue in the courtroom or (thankfully) on Twitter. Rather, Judge Cowan made the statement from the bench during an official settlement approval hearing in a probate case. The comment directly related to Judge Cowan's efforts to decide whether to approve a proposed settlement agreement that would have given Lund access to a large sum of monetary distributions. It was thus not unreasonable for Judge Cowan to comment on Lund's capacity to manage money; indeed, Lund's competency was central to the litigation.

To be clear, we find Judge Cowan's comment troubling. That someone has Down syndrome does not necessarily preclude the ability to manage one's own financial affairs. In any event, the record suggests that Lund does not have Down syndrome. But judicial immunity shields even incorrect or inappropriate statements if they were made during the performance of a judge's official duties. Indeed, a judicial act does not stop being a judicial act even if the judge acted with "malice or corruption of motive." *Forrester*, 484 U.S. at 227. Rather, the relevant inquiry focuses on "the particular act's relation to a general function normally performed by a judge," not necessarily the judicial act itself. *Mireles v. Waco*, 502 U.S. 9, 13 (1991). "If only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge." *Id.* at 12 (cleaned up).

Congressional representatives enjoy immunity for comments made on the congressional floor. *See Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 520 (3d Cir. 1985). Lawyers have immunity for comments made during litigation. *See Robinson v. Volkswagenwerk AG*, 940 F.2d

1369, 1372 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). We see no reason to treat differently a judge making a comment from the bench during a judicial proceeding. Thus, we hold that judicial immunity applies when a judge makes a statement from the bench during an in-court proceeding in a case before the judge. We affirm the district court's dismissal of the ADA claim against Judge Cowan.

B. Claim Against Superior Court

Lund also seeks to hold the Superior Court liable based on the same in-court statement by Judge Cowan. Because judicial immunity bars the ADA claim against Judge Cowan, that claim against the Superior Court must also fail.

Under *Duvall*, Title II of the ADA allows respondeat superior liability. *Duvall*, 260 F.3d at 1141. But as a general matter, there can be no respondeat superior liability where there is no underlying wrong by the employee, which includes situations in which the employee is immune to suit. Because judicial immunity bars any finding of individual liability against Judge Cowan, the Superior Court similarly cannot be held liable for Judge Cowan's conduct. Thus, we affirm the district court's dismissal of the ADA claim against the Superior Court based on judicial immunity.

III. The District Court Did Not Err in Denying Leave to Amend.

Finally, we hold that the district court did not abuse its discretion when it denied Lund's motion for leave to file a second amended complaint. "Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008) (cleaned up). Here, all of Lund's proposed amendments were futile.

First, Lund tries to save his lawsuit by re-asserting the ADA claim against the Superior Court only, not Judge Cowan, to try to plead around judicial immunity. But in the end, the factual basis for the ADA claim remains the same, so any liability against the Superior Court would still stem from the conduct of Judge Cowan, who enjoys judicial immunity. Simply removing Judge Cowan as a defendant does not change the respondeat superior analysis. Lund also proposes adding disability discrimination claims under Section 504 of the Rehabilitation Act, based on the same in-court statement by Judge Cowan as the ADA claim. But if the Rehabilitation Act claims seek money damages, though, they are barred by judicial immunity. *See Duvall*, 260 F.3d at 1133. Finally, Lund tries to plead around judicial immunity by adding requests for injunctive relief and declaratory relief under both the ADA and Rehabilitation Act. But like with the Section 1983 claims, Lund seeks retrospective, not prospective, relief.

We thus affirm the district court's order denying leave to file a second amended complaint.

CONCLUSION

The district court's orders granting Cowan's motion to dismiss and denying Lund's motion for leave to file a second amended complaint are **AFFIRMED**.[4]

[4] The motion for judicial notice (Dkt. No. 19) is **GRANTED**.