Making Peace in Mediation – A Conversation with Daniel Spector

By Jeffrey S. Galvin on October 4, 2021
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Daniel Spector has litigated trust and estate cases in Northern California since the early 1990s. He is now focusing his practice on mediating trust and estate disputes across California, working with Judicate West. Dan is a colleague on the Executive Committee of the Trusts and Estates Section of the California Lawyers Association, and I thank him for sharing his thoughts here.

Why have you decided to build a mediation practice?
I feel great personal satisfaction helping people solve problems, and I have decades of experience advocating and mediating all sorts of challenges (on all sides) of virtually every issue in the trust, estate and financial elder abuse field. Ultimately, I want to finish my legal career focused on making peace, and with my experience as an advocate and counselor, I feel I can offer value to the mediation marketplace to those clients and counsel who need a mediator with a deep understanding of the issues, dynamics and risks inherent in trust, estate, and financial elder abuse cases.

How would you describe your approach as a mediator?
In a word, "thoughtful." In my mediations, generally, we explore history, feelings, and perspective in addition to the legal positions of the parties. By investing in this more complete assessment of "what has brought us here today," I can more effectively help the parties and their counsel find and describe a resolution that provides everyone involved with a more satisfying path to peaceful resolution.

What causes mediations to fail?
Of the hundreds of mediations in which I have been involved, only a handful have failed. Of those few that have failed, the reasons have usually been either that a party or their counsel has not soberly assessed the strengths and weaknesses of their own position, and/or the party or counsel is unwilling to meaningfully compromise to end the fight.

Any traps for the unwary in mediated settlement agreements?
Wow, this is a very technical and timely question.

First, given the evidentiary limitations of a Code of Civil Procedure section 664.6 hearing in view of the mediation privilege rules in the Evidence Code, when combined with the fact that most trust, estate and elder financial abuse cases involve complicated terms, having counsel and a mediator who have substantive expertise in trust, estate and elder financial abuse litigation is a must so that they may work collaboratively and expeditiously to craft a settlement agreement at the mediation. A "term sheet" in these cases is of very limited value since the court enforcing the document in a section 664.6 hearing will be effectively limited to the document itself

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ABOUT TRUST ON TRIAL

Welcome to our trust and estate litigation blog. Inheritance disputes are on the rise nationally as the baby boomers age and wealth passes from one generation to the next. This is high stress litigation, often pitting sibling against sibling or second spouse against step-children.

We cover hot button issues in California trust litigation and probate litigation, ranging from the flash points that we see in our cases to recent developments in the field. We discuss trust contests, will contests, and administration disputes. We explore issues of mental capacity, undue influence, fiduciary duty, and financial elder abuse. We follow how California courts grapple with dementia attributed to Alzheimer's disease, which is becoming more prevalent in our population. We comment on local court practices, including procedures in Department 129 (the probate unit) of Sacramento County Superior Court. We hope that our blog will be of interest to estate planning professionals and to family members immersed in trust and estate disputes. We invite you to follow our blog and to get to know us through our posts.

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(regardless of ambiguity) since the relevant extrinsic evidence is statutorily barred from admission.

Next and separately, the Legislature recently amended section 664.6, and with those amendments, settlement agreements relating to estate and trust issues require special handling to reserve those rights. Lastly, with the popularity of electronic signatures, practitioners need to be cognizant of providing for the law of the Uniform Electronic Transactions Act, which begins at Civil Code section 1633.1.

In *Breslin v. Breslin*, the Court of Appeal recently held that California probate judges can order parties to mediate – your thoughts on this case?
While I find the *Breslin* decision to advance a policy that I believe is good for California, I was surprised by the legal analysis giving effect to this policy. I have generally understood Probate Code section 17200 to be a relatively exhaustive list of the most common circumstances in which it makes sense to have a court exercise its authority into the affairs of a trust. However, no list can anticipate all possible factual circumstances, and I have generally believed that the Legislature enacted Probate Code section 17206 to address those additional circumstances where limited court intervention in the administration of a trust is consistent with the rights of settlors, trustees, beneficiaries, and other interested persons.

I did not expect this same relatively contextualized general authority to be used to allow a court to order people (including non-parties) to mediation and then effectively render meaningless any objection to the settlement because the person failed to attend the mediation. However, given the complex nature of trust, estate and elder financial abuse litigation, there is no perfect case on any side, and thus every case is very suited to be resolved, at some point, through mediation, and now under *Breslin*, trial courts have the authority to order that process to occur.

Can you share a mediation success story?
I recently mediated a case between a daughter and her half-brother. The decedent left virtually all of his $20 million dollar trust estate to his daughter. The half-brother was left a relatively small sum comprising less than two percent of the trust corpus.

Through mediation, we invested time into what each party *needed*. The sister wanted enough money to make her comfortable, but she was already relatively financially secure. She also wanted to be part of her half-brother's life and to be part of the lives of his children.

The half-brother had worked two jobs for nearly three decades; he was tired and had virtually no money saved retirement. The half-brother wanted to be able to retire and to be able to have some measure of financial security in order to enjoy the close family his wife and he had developed despite their difficult financial circumstances.

Through mediation, we developed a plan to divide the assets that gave the half-brother the resources he needed to retire, live comfortably, safely and with dignity; meanwhile the daughter also received sufficient funds for her to live comfortably, and we used the mediation to lay the groundwork for the two families to re-connect moving forward. Of course, had the parties not attended mediation and had continued to litigate, there would be no end to the fight, no understanding of each other's needs, no division of assets based on those needs, and certainly no reconciliation.

TAGS: CIVIL CODE SECTION 1633.1, CODE OF CIVIL PROCEDURE SECTION 664.6, DANIEL SPECTOR, JUDICATE WEST, NORTHERN CALIFORNIA TRUST LITIGATION MEDIATOR, PROBATE CODE SECTION 17200, PROBATE CODE SECTION 17206