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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re PATRICE LIBAW TRUST  
DATED MAY 24, 1976.

B268682

(Los Angeles County  
Super. Ct. No. BP108727)

PATRICE LIBAW  
NIKOPOULOS,

Petitioner and Appellant,

v.

EVAN J. LIBAW et al.,

Objectors and  
Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff and Maria E. Stratton, Judges. Reversed and remanded with instructions.

HamptonHolley, George L. Hampton IV, Colin C. Holley and Kareen Sassounian for Petitioner and Appellant.

Parker Mills, David B. Parker, Mark A. Graf; Pine Pine Freeman Tillett, Norman Pine and Scott Tillett for Objectors and Respondents.

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Parties to a settlement agreement can enforce that agreement in at least two ways; with a breach of contract action, or, if the trial court has retained jurisdiction to enforce the settlement agreement, by a motion pursuant to Code of Civil Procedure section 664.6.<sup>1</sup> Here, Shawn and Evan Libaw attempted via section 664.6 to enforce their settlement agreement with their sister, Patrice Libaw Nikopoulos. Patrice appeals from the resulting probate court judgment entered in her brothers' favor.<sup>2</sup> Among other points of error, Patrice contends the probate court did not retain jurisdiction to enforce the settlement agreement after she voluntarily dismissed her case. Evan and Shawn cross-appeal, arguing the trial court abused its discretion when it awarded less attorney fees than they requested. Because we find the court lacked jurisdiction to enforce the settlement agreement, we reverse.

### **BACKGROUND**

Jack and Frances Libaw created a trust for their daughter, Patrice, in 1976; Evan and Shawn were co-trustees of Patrice's trust from its inception.<sup>3</sup> The family hired Munger, Tolles &

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

<sup>2</sup> We use first names for ease of reading and to avoid confusion, not out of disrespect.

<sup>3</sup> Frances passed away in 1988.

Olson (Munger) in 1995 to advise the family's various trusts and to advise Jack, Evan, and Shawn in their roles as trustees of those trusts.

In 2008, Patrice filed a probate petition seeking to have her brothers removed as co-trustees of her trust. The probate litigation eventually grew into three cases about transactions Munger had engineered involving several of the Libaw family's trusts.

The family settled the probate litigation contingent on probate court approval of a settlement agreement that said: "The Parties agree that the Los Angeles Superior Court shall retain jurisdiction under California Code of Civil Procedure § 664.6 to enforce this Agreement until all of its terms have been performed." According to its terms, Shawn and Evan petitioned the probate court to approve the settlement agreement and on March 29, 2012, the court did so. The probate litigation was dismissed on May 31.

On April 9, Evan, Shawn, and Jack filed a legal malpractice suit against Munger (L.A. Super. Ct. case No. BC482591). Patrice, as trustee of her trust, filed a separate malpractice action against Munger on April 30 (L.A. Super. Ct. case No. BC483450). In July 2012, Munger cross-complained in Patrice's case against Evan, Shawn, and Jack.<sup>4</sup>

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<sup>4</sup> In addition to the probate litigation (L.A. Super. Ct. case Nos. BP108727, BP124032, and BP129397) and the Munger malpractice litigation (case Nos. BC482591 and BC483450), the family's trust disputes have spawned three writ petitions and two appeals in this court (case Nos. B226024, B249706, B252669, B255235, and B271815), a petition for review in the Supreme

Arguing the family's probate litigation settlement required Patrice to indemnify them against Munger's cross-complaint, Shawn and Evan filed a section 664.6 motion in one of the three dismissed probate cases.<sup>5</sup> The probate court (Judge Beckloff) issued an order on January 31, 2014 ruling it had retained jurisdiction to enforce the settlement agreement, Patrice had a duty to defend her brothers against Munger's cross-complaint, and the siblings would have to litigate the amount Patrice owed her brothers later. Patrice attempted to appeal that order, but we dismissed the appeal because it was from an interlocutory order (case No. B255235).

After the Munger malpractice litigation all ended, the brothers filed a second motion to enforce the settlement agreement. The probate court (same department, but now Judge Stratton) granted the motion and entered judgment, but awarded less attorney fees than the brothers had requested.

Patrice timely appealed and her brothers timely cross-appealed.<sup>6</sup>

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Court (case No. S212470), and another probate petition (case No. BP163290).

<sup>5</sup> Jack passed away in March 2013, between the times Munger filed its cross-complaint and the brothers filed their section 664.6 motion.

<sup>6</sup> The notice of appeal identified four probate court orders related to the brothers' section 664.6 motion, but did not identify the later-entered judgment. Patrice requests we liberally construe her notice of appeal to include the judgment. We will do so. (Cal. Rules of Court, rules 8.100(a)(2), 8.104(d) & (e); see *Vibert v. Berger* (1966) 64 Cal.2d 65, 66-69.)

## DISCUSSION

Patrice contends the probate court did not retain subject matter jurisdiction under section 664.6 to enforce the settlement agreement. “[V]oluntary dismissal of an action or special proceeding terminates the court’s jurisdiction over the matter.” (*In re Conservatorship of Martha P.* (2004) 117 Cal.App.4th 857, 867.) “*If requested by the parties,*” however, “the court *may* retain jurisdiction over the parties to enforce [a] settlement until performance in full of the terms of the settlement.” (§ 664.6, *italics added.*)

A request for the court to retain jurisdiction under section 664.6 “must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court.” (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 440 (*Wackeen*)). “While a written or oral request for retention of jurisdiction may, but need not be, a part of the settlement agreement itself, that request must be express, not implied from other language, and it must be clear and unambiguous. A court should not have to resolve doubts or disputes as to whether an intention to retain jurisdiction is found in the provisions of a writing or an oral statement.” (*Id.* at p. 440.)

Where, as here, jurisdictional facts are undisputed, our review is de novo. (*Singletary v. Local 18 of the International Brotherhood of Electrical Workers* (2012) 212 Cal.App.4th 34, 41.)

We find in the record no express request to the probate court to retain jurisdiction under section 664.6. Evan and Shawn

characterize paragraph 27 of the settlement agreement as that request. The language in paragraph 27 is not a *request* for anything, but rather is the parties' *agreement* the court *will* retain jurisdiction. (See *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004, 1006, 1010-1011 (*Hagan*)). The *Hagan* court concluded the same based on similar settlement agreement language: "The settlement language purporting to vest the trial court with retained jurisdiction after the dismissal was a nullity: Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel." (*Id.* at pp. 1006, 1008.)

The brothers claim, however, both we and the Supreme Court have since settled the question otherwise. Evan and Shawn contend *In re Clergy Cases I* (2010) 188 Cal.App.4th 1224 and *deSaulles v. Community Hosp. of Monterey Peninsula* (2016) 62 Cal.4th 1140 both held language in a settlement agreement consenting to the trial court's retention of jurisdiction under section 664.6 satisfied the statute's requirements.

Those cases did not so hold. Whether the parties to the settlement agreement requested the court to retain jurisdiction or the trial court did so were issues neither of those cases decided. "[C]ases are not authority for propositions not considered." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.) Like *Wackeen*, those cases "do[] not stand for the proposition that parties may confer jurisdiction on trial courts by including language in a settlement agreement but not *asking the court* to retain jurisdiction." (See *Hagan, supra*, 115 Cal.App.4th at p. 1010.)

But this case adds a twist to *Wackeen* and *Hagan*. Here, unlike those cases, the trial court was asked to approve the settlement agreement generally. The brothers argue the petition

to approve the settlement agreement was a request that the trial court retain jurisdiction. We disagree. The petition to approve the settlement agreement does not comply with *Wackeen, supra*, 97 Cal.App.4th at page 440 in at least two ways. First, the petition was not filed by the *parties*, but rather by only Evan and Shawn.<sup>7</sup> (See *ibid.*) Second, the petition neither constitutes nor contains an “express, not implied from other language, . . . clear and unambiguous” request for the court to retain jurisdiction under section 664.6. (*Wackeen, supra*, 97 Cal.App.4th at p. 440.) We would run afoul of *Wackeen* were we to conclude the petition to approve the settlement agreement was “constructively requested” for the trial court to retain jurisdiction. (See *ibid.*) We will not.<sup>8</sup>

The record discloses no request that conforms to the requirements set forth in *Wackeen, supra*, 97 Cal.App.4th at page 433 for the probate court to retain jurisdiction. The probate court

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<sup>7</sup> The unopposed petition alleges the parties agreed to request approval of the settlement agreement and that they join in seeking that approval. The petition, however, was filed by the brothers’ attorneys, alleges all facts on behalf of only the brothers, and only Shawn Libaw verified it. The order approving the settlement agreement confirms the petition was brought by only Evan and Shawn, and not all three siblings.

<sup>8</sup> Evan and Shawn further contend Patrice is judicially estopped from challenging the trial court’s jurisdiction and that she forfeited any jurisdictional challenge. Subject matter jurisdiction “is not subject to forfeiture or waiver” and cannot be conferred by “estoppel, consent, . . . or agreement.” (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1347; *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 481.)

consequently lost subject matter jurisdiction in this case upon the filing of Patrice's requests for dismissal. Because we reverse on jurisdictional grounds, we do not consider any of the parties' remaining contentions and we dismiss the cross-appeal as moot. (Cf. *Venturi & Co. LLC v. Pacific Malibu Development Corp.* (2009) 172 Cal.App.4th 1417, 1424.)

#### **DISPOSITION**

The probate court's judgment is reversed and the cross-appeal is dismissed. The case is remanded with directions to deny Shawn and Evan's section 664.6 motion for lack of subject matter jurisdiction. Patrice is awarded costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.