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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GISELLE BETSER, as Trustee, etc., Petitioner and Respondent, v. MEL RAAB, as Trustee, etc. Objector and Appellant.	B291853 (Los Angeles County Super. Ct. No. BP162861)

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Dismissed.

Law Office of Lawrence M. Lebowsky, Lawrence M. Lebowsky and Margaret A. Sedy for Appellant.

Holland & Knight, Vivian L. Thoreen, Jonathan H. Park and Roger B. Coven for Respondent.

This case arises from a contentious battle between siblings Giselle Betser and Mel Raab, over the distribution of property from a family trust. Betser and Raab entered into a settlement agreement but then disagreed over enforcement of that agreement. The trial court found the settlement agreement was unenforceable, because it was lacking several material terms. The court thus denied the parties' competing motions to enforce the agreement. Raab appealed. We conclude there is no appealable order in this case.[1] We therefore dismiss the appeal.

BACKGROUND

I. The Raab Family Trust

Bernard and Eva Raab created the Raab Family Trust on October 20, 1977. They executed Amendment 7 and Restatement of Raab Family Trust on September 8, 2010 (Trust). Eva Raab died on June 17, 2012. Bernard Raab died on September 22, 2014.

Raab and Betser are siblings and Bernard and Eva Raab's only children. Raab and Betser are equal beneficiaries of the

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[1] The order from which the appeal was taken was a June 1, 2018 order (1) denying Betser's petition for reformation of the settlement agreement with prejudice; (2) denying Betser's and Raab's motions to enforce the settlement agreement with prejudice; (3) suspending Betser and Raab as cotrustees and appointing a neutral successor interim trustee; (4) denying without prejudice Betser's and Raab's petitions for instructions to the trustees as moot; and (5) continuing the hearing on Betser's accounting. On appeal, Raab challenges the denial of his motion to enforce the settlement agreement and the denial of his petition for instructions as moot.

Trust. The Trust provided that upon the death of the trustors, Raab and Betser were to serve as successor co-trustees.

The Trust further provided that Bernard and Eva Raab's residence on Maple Drive in Beverly Hills, and its contents, would be distributed to Betser. The remainder of the trust property would be divided equally between Betser and Raab; their shares of the trust property would be placed in Child Trusts established for them. The trust property included a 70 percent interest in Pace Center, LLC; real property on Lincoln Boulevard; cash and securities.

II. The Competing Petitions for Instructions to the Trustees

A. *Betser's Petition*

On May 14, 2015, Betser filed a petition "as a beneficiary" of the Trust for order instructing trustees (Prob. Code, § 17200). In it, she sought to resolve a disagreement between her and Raab regarding distribution of the trust property. Betser requested immediate distribution to her of the Trust's 50 percent interest in the Maple Drive residence (Bernard Raab previously distributed the other 50 percent interest to Betser); prompt distribution of the balance of the trust estate to Betser and Raab; maintenance of a tax reserve to cover potential tax liability and other expenses; and clarification of special trustee provisions.

In particular, Betser alleged that she and Raab were unable to jointly own and manage the trust properties. For this reason, she requested that the court divide the properties in such a way that the two did not hold any property in common. She requested that the court do this by means of "a 'silent auction' bidding process" to receive the Pace Center interest, with the

losing party to receive the remaining trust property and an equalizing payment.

B. *Raab's Objections and Petition*

Raab filed objections to Betser's petition on August 7, 2015. He claimed there was no provision in the Trust for immediate transfer of the Maple Drive residence. Raab further claimed the "contents" of the residence did not include the contents of a safe in the residence; the contents of the safe should be divided equally between him and Betser.

Raab also challenged the use of a " 'silent auction' [bidding] process" to receive the Pace Center interest, the Trust's central asset, worth approximately $25 million. In addition, Raab claimed a tax reserve was no longer necessary, as the estate tax had already been paid. He claimed the reserve should be limited to an amount necessary for administration of the trust. Raab additionally objected to Betser's request for clarification of the special trustee provisions.

On September 8, 2015, Raab filed his own petition "as co-trustee" of the Trust for trustee instructions pursuant to Probate Code section 17200, subdivision (b)(6) and (8). He characterized Betser's petition as a trust contest and requested that the court authorize him alone to make the distributions required by the Trust.

Raab sought to have the Trust execute a grant deed transferring the Trust's 50 percent interest in the Beverly Hills residence—and its contents—to Betser. The remaining trust property, including the Pace Center interest and the Lincoln Boulevard property, would be divided equally between Raab and Betser.

C. *The Trial Court's Partial Ruling on Betser's Petition*

On November 4, 2015, the trial court issued a partial ruling on Betser's petition, making a preliminary distribution of the Trust's interest in the Maple Drive residence to Betser. The court noted that Raab acknowledged he would not be injured by this distribution of the interest in the residence, and the Trust did not require concurrent distribution of all property.

D. *Betser's Objections to Raab's Petition*

Betser filed objections to Raab's petition on January 20, 2016. She noted that she and Raab had been engaged in settlement negotiations which "may potentially come to resolve this dispute in the near future." However, she objected to Raab's request that he be authorized to act alone to distribute trust property. She also claimed that her proposal for distribution of trust property was consistent with the terms of the Trust.

III. The Settlement Agreement

Trial on the two competing petitions began on December 12, 2016. On December 14, Betser and Raab entered into a memorandum settlement agreement. The key provisions of the settlement agreement were as follows:

The Pace Center interest would be distributed to Betser's Child Trust; Raab would resign as a manager of Pace Center. The Lincoln Boulevard property, cash and securities would be distributed to Raab's Child Trust. Betser would make an equalizing payment of $1.1 million to Raab.

Betser and Raab "agree[d] to take tax reporting positions consistent with [the settlement a]greement, namely that the Co-Trustees are making non-pro rata allocations in the exercise of

their discretion. To the extent that a [p]arty takes a tax reporting position that is inconsistent with [the a]greement, the [p]arty taking the inconsistent position shall indemnify the other [p]arty from all damages resulting therefrom."

The settlement agreement contained a waiver of unknown claims. It also contained an agreement to execute additional documents as necessary.

Betser and Raab agreed to dismiss their petitions and to waive any right of appeal. They agreed: "This agreement shall be enforceable under [Code of Civil Procedure section] 664.6. This agreement shall be superseded and replaced in its entirety by a later long form settlement agreement. If any party brings a motion or petition under [Code of Civil Procedure section] 664.6, the prevailing party shall be entitled to reasonable attorney's fees and costs."

IV. The Motions To Enforce the Settlement Agreement And Related Documents

On April 4, 2017, Betser and Raab each filed a motion to enforce the settlement agreement.

In her motion, Betser claimed that Raab failed to abide by the terms of the memorandum settlement agreement by refusing to cooperate with Betser in completing a long form settlement agreement. In addition, Betser claimed she discovered the existence of a bond account after the settlement agreement; she claimed this should be divided equally between her and Raab, not distributed to Raab's Child Trust under the settlement agreement. Finally, Betser requested the appointment of an

elisor[2] to execute the documents necessary to enforce the agreement.

Raab similarly claimed that Betser failed to abide by the terms of the settlement agreement. He argued that Betser made a "unilateral mistake" as to the amount of cash in the trust, and she was not entitled to half of the additional cash. Raab also claimed Betser made revisions to the proposed long form settlement agreement which were inconsistent with the memorandum settlement agreement.

On April 28, 2017, Betser and Raab filed opposition to one another's motions. Betser claimed Raab's "motion seeks enforcement of only select provisions of the settlement, and in certain instances, provisions that the parties did not even agree to." Raab asserted Betser's "refusal to honor the terms of the settlement agreement, and her refusal to execute a long-form agreement in accordance with the written settlement, is the sole cause for the delays of which she now purports to complain." Raab accused Betser of having "buyer's remorse." Betser and Raab then filed replies to the opposition to their motions.

On May 15, 2017, the court advised the parties to continue settlement negotiations. While the proceedings on the motions to enforce the settlement agreement continued, on August 1, 2017, Betser filed a petition for reformation of the memorandum

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[2] "[A]n elisor is a person appointed by the court to perform functions like the execution of a deed or document. [Citation.] A court typically appoints an elisor to sign documents on behalf of a recalcitrant party in order to effectuate its judgments or orders, where the party refuses to execute such documents. [Citation.]" (*Blueberry Properties, LLC v. Chow* (2014) 230 Cal.App.4th 1017, 1020.)

settlement agreement. The petition focused on the bond account and additional cash Betser had discovered following the settlement agreement. Raab filed a response and objections, again accusing Betser of attempting to rewrite the settlement agreement.

V. The Trial Court's Ruling

Trial of the matter began in November 2017 and continued at various hearings through mid-February 2018. The court issued its tentative statement of decision on April 6, 2018. Betser and Raab filed objections to the court's tentative statement of decision.

The court filed its order on the motions to enforce the settlement agreement and on Betser's petition for reformation of the memorandum settlement agreement on June 1, 2018. The court denied all three motions with prejudice.

The trial court found the fact Betser and Raab sought different orders with respect to the memorandum settlement agreement "suggest[ed] that they have not agreed what the relevant terms are." The court rejected Raab's argument "that non-essential terms may be left for future agreement." (See *Mabee v. Nurseryland Garden Centers, Inc.* (1978) 84 Cal.App.3d 968, 972.)

The court explained that the negotiations subsequent to the memorandum settlement agreement and Betser's motion to enforce the settlement agreement showed that the parties intended for Betser to borrow $1.1 million for the equalization payment to Raab. This was a material term that was not in the settlement agreement; enforcing the settlement agreement would mean enforcing an agreement lacking a material term.

Additionally, the memorandum settlement agreement did not contain provisions regarding valuation and tax treatment of the trust properties, necessary for execution of a long form settlement agreement.

The court added: "More generally, the [memorandum settlement agreement] was expressly dependent on a condition subsequent; namely, an executed long form agreement . . . , the terms for which the parties could not agree upon. The [memorandum settlement agreement] is not an independent stand-alone contract without execution of a long form agreement. As a result, the [memorandum settlement agreement] is unenforceable where this executory term was not performed and it has been shown at trial will not be performed."

The court noted that Code of Civil Procedure section 664.6 (section 664.6) requires that a settlement agreement be signed by the parties and incorporate all necessary material terms. (See *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) "Though it is true that '[w]hen parties intend that an agreement be binding, the fact that a more formal agreement must be prepared and executed does not alter the validity of the agreement.' (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48-49.) [I]t is also true that 'California law is clear that there is no contract until there has been a meeting of the minds on *all* material points.' (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357-[3]58.) Further, for an agreement to be enforceable, the terms must be sufficiently certain to make the precise act to be done clearly ascertainable. [(See Civ. Code, § 3390, subd. (e); *Weddington Productions, Inc.*, *supra*, at p. 810.)]"

The court found it "evident that the long form [settlement] agreement would have had material terms that were not previously agreed upon." Thus, it was "not just a formality, but was to include essential terms needed for resolution of the underlying issues. In particular, the long form [settlement] agreement was to include the parties' consistent positions for tax purposes. Without any provision for what those positions should be (i.e., as to value), the [c]ourt has nothing to go by to enforce the [memorandum settlement agreement]. Indeed, Betser's motion required the [c]ourt to appoint an elisor to execute all necessary documents to effectuate the settlement—thereby implicitly showing that the [memorandum settlement agreement] was incomplete." The court added that the provision for enforcement under section 664.6 did not mean the memorandum settlement agreement was enforceable. It only meant the parties "agree[d] that this is the summary mechanism by which it *might be* enforced—consistent with applicable law."

The court rejected Raab's argument that Betser should be estopped from contending that there was no meeting of the minds based on her assertion that there was an enforceable settlement agreement. The court noted it was not bound to enforce the settlement agreement merely because the parties believed it was enforceable.

The court also suspended Betser and Raab as co-trustees of the Trust and appointed a trust company as successor interim trustee. The court ordered the successor interim trustee to familiarize itself with the Trust provisions and trust property "and submit a business plan for prompt distribution of all Trust assets . . . for approval by the [c]ourt." The court denied the two

original petitions for instructions without prejudice, finding they were "now made moot by subsequent events."

Notice of entry of order was served on June 6, 2018. The trust company's attorneys prepared an amended order, which was filed on June 28, 2018. On August 6, 2018, Raab filed a notice of appeal from the June 1, 2018 "[j]udgment after court trial."

DISCUSSION

I. Appealability

Preliminarily, we must address the question of appealability. Betser contends the appeal must be dismissed, because the challenged orders—the orders denying the motions to enforce the settlement agreement and the orders denying as moot the petitions for instructions—are not appealable. In response, Raab asserts the order denying his motion to enforce the settlement agreement is reviewable as an intermediate order on appeal from the order denying the petitions for instructions and Betser's petition for reformation of the memorandum settlement agreement.

A. *General Provisions Regarding Appealability*

Code of Civil Procedure section 904.1, subdivision (a)(10), provides that an appeal may be taken from an order made appealable by the Probate Code. (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1126.) The provisions of the Probate Code are exclusive. (*Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575; see Prob. Code, § 1300.) " 'There is no right to appeal from any orders in probate except those specified in the Probate Code.'

[Citation.] 'Appeals in general probate . . . matters are limited.' [Citation.] '[I]f there was a free appeal in every probate matter, estates could be unreasonably delayed.' [Citation.]" (*Estate of Stoddart*, *supra*, at p. 1126.)[3]

Probate Code "section 1304 lists appealable orders in trust proceedings. [Citation.]" (*Kalenian v. Insen*, *supra*, 225 Cal.App.4th at p. 576.) These include final orders under Probate Code sections 17200 et seq., 19020 et seq., and 20200 et seq. (Prob. Code, § 1304, subds. (a), (b) & (c).)

B. *The Order Denying Betser's Petition To Reform the Settlement Agreement Is Not Appealable*

Raab contends the order denying Betser's petition to reform the settlement agreement constitutes "an order 'instructing or directing a fiduciary,' " which is appealable under Probate Code section 1300, subdivision (c), and "an order denying a petition under Probate Code section 17200" (section 17200), which is appealable under Probate Code section 1304, subdivision (a).

Probate Code section 1300, subdivision (c), provides that "an appeal may be taken from the making of, or the refusal to make," an order "[a]uthorizing, instructing, or directing a fiduciary, or approving or confirming the acts of a fiduciary." We fail to see—and Raab fails to explain—how an order reforming a settlement agreement constitutes an order instructing or directing a fiduciary. We therefore reject Raab's contention that

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[3] Even outside the context of probate, an order denying a motion to enforce a settlement agreement under section 664.6 is a nonappealable interlocutory order. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1293-1294; see *Sayta v. Chu* (2017) 17 Cal.App.5th 960, 964, fn. 6.)

the order is appealable under this section. (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956.)

Section 17200 permits a trustee or beneficiary to petition the court "concerning the internal affairs of the trust or to determine the existence of the trust." (*Id.*, subd. (a).) Section 17200, subdivision (b) contains a list of "[p]roceedings concerning the internal affairs of a trust," none of which involves a settlement agreement in litigation between two trustors or beneficiaries. Rather, they involve issues as to the trust itself or the actions of the trustees, such as construction of the trust or determining the validity of a trust provision (*id.*, subd. (b)(1) & (3)); instructing, granting powers to, or appointing or removing a trustee (*id.*, subd. (b)(6), (8) & (10)); or approving or directing the modification or termination of a trust (*id.*, subd. (b)(13)). Again, Raab has failed to show that the order denying Betser's petition for reformation of the settlement agreement is an appealable order.

C. *The Order Denying Raab's Petition for Instructions*

Raab filed his petition for instructions pursuant to section 17200, subdivision (b)(6) and (8). As stated above, "an order denying a petition under . . . section 17200" is appealable under Probate Code section 1304, subdivision (a). The question here is whether it is appealable when denied without prejudice on the ground the petition was "now made moot by subsequent events."

Probate Code section 1304, subdivision (a), makes appealable "[a]ny final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9 . . . ." Raab argues that the trial court's order denying his petition was a final order because it "represented a *final* determination of the petition for

instructions on justiciability grounds" and "terminated all further proceedings on Raab's petition."

Raab cites a number of cases for the proposition that "[w]here, as here, a court denies a petition on justiciability grounds, the aggrieved party is entitled to challenge the probate court's ruling on appeal." Raab paints the rules on appealability with too broad a brush.

In *Gregge v. Hugill* (2016) 1 Cal.App.5th 561, one of the cases Raab cites, the appellant, one of the deceased trustor's grandchildren, filed a petition under section 17200 to determine the validity of a trust amendment based on lack of testamentary capacity and undue influence. (*Id*. at p. 565.) The amendment had the effect of reducing each grandchild's share of the trust. (*Id*. at p. 564.) In order to avoid litigation, another grandchild "signed a declaration disclaiming his interest in the grandchildren's trust conditioned on the entry of a final order dismissing the petition." (*Id*. at p. 567.) This had the effect of increasing the appellant's share of the trust to the pre-amendment level. The probate court then dismissed the petition under Probate Code section 17202 on the ground it was unnecessary to protect the interests of the appellant. (*Id*. at p. 567.)

On appeal, the court recognized that the "disclaimer eliminated any potential financial impact on [the appellant's] share of the" affected trust. (*Gregge v. Hugill*, *supra*, 1 Cal.App.5th at p. 569.) It then stated that "to determine whether the trial court's dismissal was appropriate, we turn to whether [the] disclaimer was properly accepted by the trial court." (*Ibid*.) It concluded that the trial court's acceptance of the disclaimer and dismissal of the petition violated public policy and was an

abuse of discretion. (*Ibid*.) The dismissal deprived the appellant, "a vested beneficiary with a pecuniary interest in the proceeding, . . . of the right to challenge the . . . amendment on undue influence and lack of capacity grounds. [Citation.]" (*Id*. at p. 571.) The court did not specifically address the question of appealability.

In *Kalenian v. Insen*, *supra*, 225 Cal.App.4th 569, the trial court's order dismissing the appellants' section 17200 petition without prejudice "had the net effect of dismissing their probate action with prejudice. This is because the statute of limitations would have expired" by the time the appellants received notice of the dismissal order. (*Id*. at p. 575.) The appellants appealed from an order denying their motion to vacate the dismissal order. (*Id*. at p. 576.) Under the unique circumstances of the case, the appellate court concluded the order denying the motion to vacate was appealable as an order made after an appealable judgment. (See *id*. at pp. 576-579.)

By contrast, in *Aviles v. Swearingen* (2017) 16 Cal.App.5th 485, the appellant contended that the trial court abused its discretion in removing her as trustee. The court held: "This was a pendente lite order and 'without prejudice.' It is not appealable. [Probate Code s]ection 1304, subdivision (a) makes appealable any '*final order*' under section 17200 including an order removing a trustee (italics added; see § 17200, subd. (b)(10))." (*Id*. at p. 492.)

We conclude the facts here are closer to *Aviles* than to *Gregge* and *Kalenian*. The trial court's dismissal of Raab's petition as moot, while it was a final resolution of the petition, was not a final order for purposes of the ongoing trust proceedings. Raab retained the ability to file a new section 17200

petition should circumstances change. He was not permanently deprived of any rights by the order. The order "was a pendente lite order and 'without prejudice,' " and thus nonappealable. (*Aviles v. Swearingen*, *supra*, 16 Cal.App.5th at p. 492.)

Raab also relies on *White v. Lieberman* (2002) 103 Cal.App.4th 210 for the proposition that "[a]n order declaring [a] motion to be moot is the equivalent of a denial and is appealable." (*Id*. at p. 220.) *White*, however, involved an anti-SLAPP motion. The court explained that "an order granting or denying an anti-SLAPP motion is expressly made appealable by [Code of Civil Procedure] section 425.16, subdivision (j)." (*Ibid*.) In this context, the order declaring the anti-SLAPP motion to be moot was the equivalent of a denial and was thus an appealable order. (*Ibid*.) Here, the dismissal of Raab's petition as moot was not equivalent to a final appealable order.

At oral argument, Raab argued that "every petition filed in probate is a separate action" or proceeding, and every order resolving a petition is a final, appealable order; nothing further remains to be done with respect to that "proceeding." Therefore, according to Raab, the order denying his petition for instructions was a final appealable order; the order denying his motion to enforce the settlement agreement was an interim order, reviewable on appeal from that final appealable order (see *Estate of Dayan* (2016) 5 Cal.App.5th 29, 38-39).

Raab cites no case authority in support of his argument that each petition filed initiates a separate proceeding which terminates with a final, appealable order. He relies on the provisions of the Probate Code and Code of Civil Procedure. His reliance is misplaced.

Raab argues that Probate Code section 1000 defines "proceedings" as those set forth in the Code of Civil Procedure. Under the Code of Civil Procedure, there is "one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs." (Code Civ. Proc., § 307.) "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints." (*Id.*, § 422.10.) "The petitioner or other party affirming is the plaintiff and the party objecting or responding is the defendant." (Prob. Code, § 1044.) From these code sections, Raab concludes that each petition filed in a probate action is a complaint and, therefore, each order deciding a petition is a final judgment on a complaint, which is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1).

What Probate Code section 1000, subdivision (a), actually states is that, "*[e]xcept to the extent that this 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. . . ." (Italics added.) As discussed above, the Probate Code provides applicable rules as to what orders in trust proceedings are appealable. Raab's attempt to equate a petition for instructions with a civil action, and an order denying the petition with a final judgment in a civil action, is contrary to the applicable statutory law. We reject his argument.

II. Treatment as a Writ Petition

Raab contends that even if there is no appealable order, we should treat his appeal as a writ petition in order to review the merits of the court's order denying his motion to enforce the settlement agreement. Raab acknowledges that he filed a

petition for writ of mandate/prohibition at the same time he filed his notice of appeal. In it, he sought review of the denial of his motion to enforce the settlement. He argued, as he does on appeal, that writ review was necessary to avoid needless future litigation. We summarily denied that petition. (*Raab v. Superior Court* (Sep. 6, 2018, B291805).) We decline to revisit that decision.[4]

DISPOSITION

The appeal is dismissed.
NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J. WEINGART, J.*

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[4] Moreover, Raab makes this request for the first time in his reply brief. Ordinarily, we do not consider points raised for the first time in reply briefs unless good cause is shown for the failure to raise them in the opening brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 355.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.