

Breslin and the All Too Common Circumstance of the Non-Participating Beneficiary

Breslin v. Breslin (2021) 62 Cal.App.5th 801 and Smith v. Szeyllar (2019) 31 Cal.App.5th 450



Presented by:
Hon. Glen M. Reiser (Ret.)
Mark A. Lester, Esq.



1



Don Sr. and Gladys Szeyllar

Dave
Donna
Dee
★ **JoAnn**
Don Jr.



2

Don and Gladys' estate plan

Three subtrusts:


- **Bypass trust**
- **QTIP trust**
- **Survivor's trust (which survivor can amend)**
- **All subtrust income to surviving spouse**
- **Limited rights in survivor to lifetime principal from the bypass and QTIP trusts**
- **ALL FIVE CHILDREN ARE EQUAL BENEFICIARIES OF ALL THREE SUBTRUSTS**




3

LIFE HAPPENS

- ☐ Don Sr. (dad) dies with \$14 million in CP combined trust assets
- ☐ JoAnn moves in with mom
- ☐ Gladys (mom) amends the Survivors Trust to disinherit Donna and give Dee's share to JoAnn
- ☐ Gladys (mom) dies



JoAnn and her husband, the successor co-trustees, allegedly spend over \$2 million of trust funds on personal items, gambling and gifts



Don Jr., JoAnn's brother, demands financial information and trust accountings

HELLO I AM... SUING YOU

- ❖ After a verified accounting is delivered with a "plug" number, Don Jr. files a verified petition in the Probate Court seeking the removal and surcharge of JoAnn and her husband for breach of trust
- ❖ Don Jr.'s petition includes a prayer for his attorney fees from all three subtrusts, alleging that the removal would benefit all beneficiaries

➤ **Pendente lite, sibling/subtrust beneficiaries Dave, Donna and Dee, sit on the sidelines and do not litigate**

➤ **Donna is under conservatorship due to mental illness**



➤ **JoAnn and her husband agree to revise their accounting and distribute \$200,000 to each beneficiary**

➤ **Don Jr. objects to JoAnn's amended account and files a civil elder abuse action**



Donna dies and trial begins

After the third day of trial, **Don Jr. reaches a settlement with JoAnn and her husband**



Under the settlement, **Don Jr. only receives a "confidential" sum from JoAnn's various subtrust shares...**
[Remember that JoAnn received Dee's entire share of the Survivor's Trust and a portion of Donna's share]

Also under the settlement:



- **The court to appoint a CCP §638 referee to prepare a final accounting and an IRS Form 706**
- **Subtrusts to pay Don Jr. \$721,258.28 in attorney fees and expert fees, of which 49.90% comes from the QTIP Trust and 10.71% from the Bypass Trust**

Also under the settlement:

The Subtrusts to further pay all future attorney fees incurred by both Don Jr. and JoAnn and her husband to complete the accountings and close the Subtrusts



Rather than proceed by Petition to Approve Settlement, with notice to Dave, Dee and Donna’s personal representative, the Court simply signs an **Order After Trial** encompassing the settlement terms and findings



10

The Court expressly finds in approving Don Jr. and JoAnn’s settlement that Don Jr.’s petition and litigation “benefited all of the beneficiaries of the [family] trust... by acting as a catalyst to the improved preparation of the accountings.”



=



11

Donna’s estate makes an appearance and moves for a new trial and to vacate the judgment. Donna’s estate argues:



- 1. Don Jr.’s \$721,258.28 attorney fee award is not supported by the pleadings;
- 2. Don Jr.’s \$721,258.28 attorney fee award is not supported by the evidence;
- 3. Don Jr.’s \$721,258.28 attorney fee award is disproportionate to any benefit to the beneficiaries; and
- 4. Don Jr.’s \$721,258.28 attorney fee award violates Donna’s right to due process of law .

12

The trial court finds:

- 1. **New trial motions are not permitted under the Probate Code AND**
- 2. **Donna forfeited her objections when she did not earlier object to any of Don Jr.'s litigation activities**



13

Due process of law : How can private settlement terms signed off by the court be findings ?

“Donna chose not to participate in the trial and cannot now second-guess the resolution of Don [Jr.]’s objections. The litigating parties resolved disputed facts, and the court was bound by that resolution.”



14

Due process of law : What about a petition to approve settlement, with notice, which is the way it’s always been done ?

“Due process did not require the parties to use other procedures, such as a motion to enforce a settlement or a petition for approval of a settlement or a new accounting... [S]uch procedures were unnecessary because the dispute was before the court on properly noticed petitions and objections.”



15

Excess of jurisdiction: the substantial benefit doctrine never pleaded

“No published decision applies the substantial benefit doctrine in the probate context, ‘but it plainly would apply, for example,... to an action to remove a trustee who has breached the trust or to petition to compel an accounting’ [quoting the Matthew Bender Practice Guide.]”



16

Excess of jurisdiction: the substantial benefit doctrine never pleaded

“The theory was pleaded”:

Don Jr.’s initiating removal/surcharge petition and his objections to the accounting approval petition of JoAnn and her husband both requested “reasonable attorneys’ fees and costs incurred to remove the trustee be charged as an expense of the trust and reimbursed to [Don Jr.]”

Donna’s theory that JoAnn was never removed as trustee held countered by the trial court’s explanation that “there is no reason to appoint new trustees for purposes of emotional victory.”

17

Substantial evidence: What substantial benefit to Dave, Donna and Dee?

“[T]his litigation maintained the health of the sub-trusts; raised the standards of fiduciary relations, accountings and tax filings; and prevented abuse. ‘It is not significant that the benefits found were achieved by settlement of plaintiffs’ action rather than by final judgment’.”



18

Substantial evidence: no evidence at all supporting the \$721,258.28 paid to Don, Jr.

“There is no need for billing records to support the amount of the award,

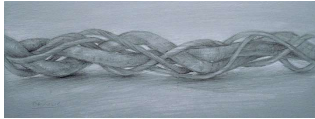


because the only parties who contested the award agreed to the amount. Had Donna responded to or objected to Don [Jr.]’s verified petitions, she would have been entitled to an evidentiary hearing on the question of the reasonable value of services rendered. But she did not.”

19

Substantial evidence: No apportionment of all to fees providing “substantial benefit”

“Donna ...contends that the court should apportion the fee award because most of Don [Jr.]’s fees were incurred prosecuting his elder abuse petition, not for the benefit of the sub-trusts. Apportionment, however, was not necessary because the pleadings were completely intertwined and relied on the same factual allegations.”



20

(Uncle) Don Kirchner

Nephews and Nieces



21

Donald's Trust



**Residue (\$3,000,000-\$4,000,000)
per "Schedule A" attached**



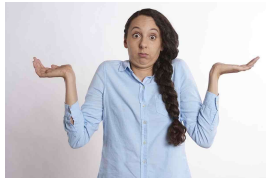
X 30-40

22

No "Schedule A" attached



**Trustee is nephew and \$10,000
beneficiary David Breslin**



23

Trustee finds, in a pocket of the estate planning binder, a worksheet labeled "Estate Charities"



**The worksheet has the names of 24 Roman Catholic
charities with numerous cross-outs and interlineations,
but the numbers next each charity all total 100**

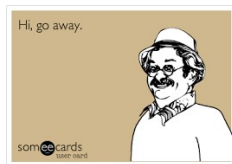
24

Trustee Breslin petitions the Court for instructions (\$17200), giving notice to Breslin next of kin and the 24 charities



25

The trial judge orders the case to mediation



And the lawyers have just read Szeyller

26

1	Stanford A. Vaccaro, Inc. # 10000	2	Stanford A. Vaccaro, Inc. # 10000
3	Stanford A. Vaccaro, Inc. # 10000	4	Stanford A. Vaccaro, Inc. # 10000
5	Stanford A. Vaccaro, Inc. # 10000	6	Stanford A. Vaccaro, Inc. # 10000
7	Stanford A. Vaccaro, Inc. # 10000	8	Stanford A. Vaccaro, Inc. # 10000
9	Stanford A. Vaccaro, Inc. # 10000	10	Stanford A. Vaccaro, Inc. # 10000
11	Stanford A. Vaccaro, Inc. # 10000	12	Stanford A. Vaccaro, Inc. # 10000
13	Stanford A. Vaccaro, Inc. # 10000	14	Stanford A. Vaccaro, Inc. # 10000
15	Stanford A. Vaccaro, Inc. # 10000	16	Stanford A. Vaccaro, Inc. # 10000
17	Stanford A. Vaccaro, Inc. # 10000	18	Stanford A. Vaccaro, Inc. # 10000
19	Stanford A. Vaccaro, Inc. # 10000	20	Stanford A. Vaccaro, Inc. # 10000
21	Stanford A. Vaccaro, Inc. # 10000	22	Stanford A. Vaccaro, Inc. # 10000
23	Stanford A. Vaccaro, Inc. # 10000	24	Stanford A. Vaccaro, Inc. # 10000
25	Stanford A. Vaccaro, Inc. # 10000	26	Stanford A. Vaccaro, Inc. # 10000
27	Stanford A. Vaccaro, Inc. # 10000	28	Stanford A. Vaccaro, Inc. # 10000
29	Stanford A. Vaccaro, Inc. # 10000	30	Stanford A. Vaccaro, Inc. # 10000
31	Stanford A. Vaccaro, Inc. # 10000	32	Stanford A. Vaccaro, Inc. # 10000
33	Stanford A. Vaccaro, Inc. # 10000	34	Stanford A. Vaccaro, Inc. # 10000
35	Stanford A. Vaccaro, Inc. # 10000	36	Stanford A. Vaccaro, Inc. # 10000
37	Stanford A. Vaccaro, Inc. # 10000	38	Stanford A. Vaccaro, Inc. # 10000
39	Stanford A. Vaccaro, Inc. # 10000	40	Stanford A. Vaccaro, Inc. # 10000
41	Stanford A. Vaccaro, Inc. # 10000	42	Stanford A. Vaccaro, Inc. # 10000
43	Stanford A. Vaccaro, Inc. # 10000	44	Stanford A. Vaccaro, Inc. # 10000
45	Stanford A. Vaccaro, Inc. # 10000	46	Stanford A. Vaccaro, Inc. # 10000
47	Stanford A. Vaccaro, Inc. # 10000	48	Stanford A. Vaccaro, Inc. # 10000
49	Stanford A. Vaccaro, Inc. # 10000	50	Stanford A. Vaccaro, Inc. # 10000
51	Stanford A. Vaccaro, Inc. # 10000	52	Stanford A. Vaccaro, Inc. # 10000
53	Stanford A. Vaccaro, Inc. # 10000	54	Stanford A. Vaccaro, Inc. # 10000
55	Stanford A. Vaccaro, Inc. # 10000	56	Stanford A. Vaccaro, Inc. # 10000
57	Stanford A. Vaccaro, Inc. # 10000	58	Stanford A. Vaccaro, Inc. # 10000
59	Stanford A. Vaccaro, Inc. # 10000	60	Stanford A. Vaccaro, Inc. # 10000
61	Stanford A. Vaccaro, Inc. # 10000	62	Stanford A. Vaccaro, Inc. # 10000
63	Stanford A. Vaccaro, Inc. # 10000	64	Stanford A. Vaccaro, Inc. # 10000
65	Stanford A. Vaccaro, Inc. # 10000	66	Stanford A. Vaccaro, Inc. # 10000
67	Stanford A. Vaccaro, Inc. # 10000	68	Stanford A. Vaccaro, Inc. # 10000
69	Stanford A. Vaccaro, Inc. # 10000	70	Stanford A. Vaccaro, Inc. # 10000
71	Stanford A. Vaccaro, Inc. # 10000	72	Stanford A. Vaccaro, Inc. # 10000
73	Stanford A. Vaccaro, Inc. # 10000	74	Stanford A. Vaccaro, Inc. # 10000
75	Stanford A. Vaccaro, Inc. # 10000	76	Stanford A. Vaccaro, Inc. # 10000
77	Stanford A. Vaccaro, Inc. # 10000	78	Stanford A. Vaccaro, Inc. # 10000
79	Stanford A. Vaccaro, Inc. # 10000	80	Stanford A. Vaccaro, Inc. # 10000
81	Stanford A. Vaccaro, Inc. # 10000	82	Stanford A. Vaccaro, Inc. # 10000
83	Stanford A. Vaccaro, Inc. # 10000	84	Stanford A. Vaccaro, Inc. # 10000
85	Stanford A. Vaccaro, Inc. # 10000	86	Stanford A. Vaccaro, Inc. # 10000
87	Stanford A. Vaccaro, Inc. # 10000	88	Stanford A. Vaccaro, Inc. # 10000
89	Stanford A. Vaccaro, Inc. # 10000	90	Stanford A. Vaccaro, Inc. # 10000
91	Stanford A. Vaccaro, Inc. # 10000	92	Stanford A. Vaccaro, Inc. # 10000
93	Stanford A. Vaccaro, Inc. # 10000	94	Stanford A. Vaccaro, Inc. # 10000
95	Stanford A. Vaccaro, Inc. # 10000	96	Stanford A. Vaccaro, Inc. # 10000
97	Stanford A. Vaccaro, Inc. # 10000	98	Stanford A. Vaccaro, Inc. # 10000
99	Stanford A. Vaccaro, Inc. # 10000	100	Stanford A. Vaccaro, Inc. # 10000

“Non-participating persons or parties to receive notice of the date, time and place of the mediation may be bound by the terms of any agreement reached at mediation without further action by the court or further hearing. *Smith v. Szeyller* 31 Cal.App.5th 540. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.”

28

Only five of the Catholic charities show up to the mediation.

Those five charities and Don’s next of kin divide up the entirety of the estate residue, to the exclusion of the 19 no-shows.



29

Trustee David petitions the Court to approve the settlement



Two of the 19 “No-Show” charities object, saying: It’s not fair**

****13 “No-Show” Charities appeared on the appeal**

The trial court approves the settlement

30

The Court of Appeal, in the opinion after rehearing, affirms the trial court 2-1:

“[T]he probate court has the power to establish the procedure. (§ 17206.) It made participation in mediation a prerequisite to an evidentiary hearing. By failing to participate in the mediation, the [19 No-Shows] waived their right to an evidentiary hearing. It follows that the [19 No-Shows] were not entitled to a determination of factual issues, such as [Don’s]’s intent....”

31

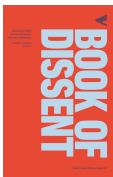
“The [19 No-Shows] apparently believe that after the trustee and participating parties have gone through mediation and reached a settlement, they should have been notified before the settlement was signed. ... But that would defeat the purpose of the court-ordered mediation.

NOTHING IS MORE EXPENSIVE THAN A MISSED OPPORTUNITY.



Justice Tangeman’s Dissent:

“A charitable gift must be carried into effect if it ‘can possibly be made good.’ (*Estate of Tarrant* (1951) 38 Cal.2d 42, 46.) The majority’s newfound requirement that a party participate in mediation before it can inherit ignores this command.”



Are charitable gifts (or potential charitable gifts) entitled to greater protection under the dissent?

33

The California Supreme Court Denies Review AND Depublication



Why?



Post Script to *Breslin* & Substantial Benefit:

What happens to the five charitable beneficiaries who appeared at mediation and were destined to receive \$1,416,257.00 but failed to appear at the court of appeal to defend the judgment?

“Substantial Benefit” theory of *Smith v. Szeyller* supports award of \$90,000 and \$20,600.14 of Trustee’s attorneys’ fees against charities’ shares pro-rata



Do You Have to Throw Non-Participating Family Members Under the Bus?



§17206 is a Trust Statute. What about Probate and Conservatorship Disputes?



37

Representing the Non-Litigating Beneficiary: How Do You Preserve Rights?



38

JAMS | GReiser@jamsadr.com | Mark@venturaestatelegal.com

39
