BRESLIN V. BRESLIN: DOES THE "SEAMLESS FABRIC" NEED TAILORING?

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I. SYNOPSIS

Declaring the contested trust proceeding under review "made from the seamless fabric of probate and mediation law," the Second District of the California Court of Appeal in *Breslin v. Breslin* recently ruled that prospective beneficiaries under a trust, the validity of which is in dispute, who are given notice of a court-ordered mediation and elect not to participate, are bound by the results of the mediation.[01]

This article will discuss the implications of the *Breslin* decision and the decision in *Smith v. Szeyller*,[02] on which the *Breslin* court relies, and ask whether the potentially drastic impact of these cases upon the potential claims of non-participants offends a non-participant's right to due process of law, and whether *Breslin* unnecessarily expands the power of the courts to compel alternative dispute resolution over attorney objection as California courts struggle to effectively manage ever-increasing caseloads.

Prior to *Breslin*, there had been a casual perception of mediation in California as simply a litigation assistance tool to measure and weigh case value in the context of assisted negotiation. The rule in California civil cases has traditionally been that mediation is a voluntary process with no consequence to those who fail or even refuse to participate, leaving the courts to toothless efforts to "try to cajole" interested parties into active participation.[03] As previously observed by one commentator:

> Mediation is a voluntary, informal, and confidential discussion in which a neutral facilitator assists two or more parties toward achieving a resolution of the conflict existing between them. As a conflict resolution tool, mediation serves a number of purposes, including providing parties the opportunity 'to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solution, and reach mutually satisfactory agreements, when desired.'[04]

After *Breslin* was published, and prior to its finality, a significant number of bar groups and the California Attorney General protested deviation from the "civil court" rule rejecting court-compelled mediation, asking the California Supreme Court either to review the decision or—at the very least—order the opinion depublished. The California Supreme Court refused to do either, suggesting at a minimum that shrinking judicial resources combined with increasing caseloads has propelled alternative dispute resolution into the new frontier of mandatory court-compelled participation.

In light of what is now an apparent divide between mandatory mediation in trust matters (*Breslin v. Breslin*)[05] and voluntary mediation in civil cases (*Jeld-Wen, Inc. v. Super. Ct.*)[06], the authors here raise the question as to whether or not court-compelled mediation and possible forfeiture of non-participants' rights under *Breslin* adversely and prejudicially violates the due process rights of trust beneficiaries and the concomitant ability of lawyers to manage their cases and clients without the courts forcing unwanted participation.

II. *BRESLIN V. BRESLIN*

A. The Facts

Don Kirchner ("Kirchner" or "Uncle Don") died in 2018, leaving an estate valued between $3 and $4 million. Uncle Don left no surviving wife or children, but was survived by nieces and nephews. Kirchner's restated and amended trust of July 27, 2017, and named his nephew David as trustee (the "Trustee" or "David"). The restated trust made three specific gifts of $10,000 each (including one to David) and directed that the residue of the trust be distributed to the persons and charitable organizations listed on an "exhibit

A" to the trust in the percentages set forth. Unfortunately, there was no "exhibit A" attached to the trust as located. However, in a pocket of the estate planning binder containing the restated trust, the Trustee found a document or worksheet titled "Estates Charities (6/30/2017)", which listed 24 charities with handwritten notations appearing to be percentages. (Although not further described in the court's opinion, the worksheet included the names of 24 charities with numerous cross-outs and interlineations, but the numbers next to each charity, when totaled, added up to 100 (%).)

B. Proceedings in the Probate Court

Faced with the foregoing facts, the Trustee, citing his duty of impartiality, filed a petition pursuant to Probate Code section 17200 asking the probate court to confirm his appointment as successor trustee and to instruct him as to whether there were any trust beneficiaries at all, given the absence of a formal "exhibit A." The probate court ordered mediation among the interested parties, including the intestate heirs and all of the listed charities. One of the listed charities sent notices of the mediation to *each* of the interested parties.

The notice of mediation was quite detailed and included language stating:

> Mediation may result in a settlement of the matter that is the subject of the above-reference cases and of any and all interested persons' and parties' interests therein. Settlement of the matter may result in an agreement for the distribution of assets of the above-referenced Trust.

Twice citing the Second District Court of Appeal's decision in *Smith v. Szeyller*,[07] the *Breslin* notice also stated that attorneys' fees could be awarded to one or more parties and that "[i]nterested persons or parties who do not have counsel may attend the mediation and participate."

The *Breslin* notice of mediation expressly warned:

> Non-participating persons or parties who 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.[08]

Although each of the intestate heirs and each of the 24 listed charities received notice, only five of the listed charities, together with the intestate heirs, participated in the mediation. Nineteen of the listed charities did not participate (although apparently only ten challenged the resulting settlement in the probate court).

At the mediation itself, the five charities and the intestate heirs who appeared at the mediation resolved their differences, with the settlement agreement awarding "specific amounts to various parties, including the appearing charities, and attorney fees with the residue to the intestate heirs." The "no-show" charities were excluded from any award under the settlement.

After the *Breslin* mediation, one of the five charities that participated filed a petition to approve the settlement. Ten of the non-participating charities (represented by one of the non-participants, the Pacific Legal Foundation, and therefore denominated the "Pacific parties") pursued objections to the petition to approve.

Before hearing on the petition for approval of the settlement in the trial court, the Trustee filed a supplemental declaration stating that he had discovered an original trust document with the previously referred to "exhibit A" attached, listing the same charities as found on the document first discovered by the Trustee. The probate court approved the mediated settlement over the objections of the Pacific parties. The Pacific parties appealed.

C. The Decision of the Court of Appeal

After publishing a unanimous decision affirming the trial court, and then rehearing its original decision after objection from numerous bar groups, the Court of Appeal affirmed the lower court in a 2-1 decision, citing Probate Code section 17206:[09]

> [T]he probate court has the power to establish the procedure. ([section]17206.). It made participation in mediation a prerequisite to an evidentiary hearing. By failing to participate in the mediation, the [19 charitable 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 Kirchner's intent, and cannot raise such issues for the first time on appeal.[10]

The Court of Appeal majority distinguished *Estate of Bennett*,[11] which had held that estate beneficiaries who petitioned to set aside a settlement agreement were entitled to an evidentiary hearing. The *Breslin* court dryly (albeit correctly) observed, "But *Bennett* did not involve a party's failure to respond to a mediation order."[12] The *Breslin* court held:

> The [19 charitable no-shows] may not ignore the probate court's order to participate in the proceedings and then challenge the result. The probate court's mediation order would be useless if a party could skip mediation and challenge the resulting settlement agreement.

D. The Dissent

In a dissenting opinion, one jurist was troubled by the fact that additional discovery emanating from the Trustee *after* the mediation strengthened the case of those who might otherwise object. That judge took the majority to task for, focusing upon the challengers' procedural shortcomings and not upon Uncle Don's substantive intent "above all else."[13]

The dissent also contended that the decision imposed a "forfeiture" of the interests of the non-participating parties and argued that the majority had elevated the probate court's authority to order mediation over concepts of fairness and due process.

Justice Tangeman observed:

> [This ruling] forces potential beneficiaries to participate in costly mediation (legal entities cannot appear except through counsel), something 'antithetical to the entire concept' [of mediation].[14]

The majority chastised the dissent for expressing concern for the due process rights of parties who ignored multiple notices to appear at the mediation, while showing "apparently no concern for the parties who responded to the notices and spent time and effort complying with the probate court's order for mediation."

After rehearing, the Pacific parties sought review of the decision before the California Supreme Court and depublication of the appellate decision. Both review and the request for depublication were denied.[15]

Before the authors discuss further the far-reaching implications of the *Breslin* decision, this analysis will consider the ruling of the Second District Court of Appeal in *Smith v. Szeyller*,[16] upon which reasoning the *Breslin* court places much of its weight.

III. *SMITH V. SZEYLLER*

A. The Facts

Don Smith Sr. ("Don Sr.") and Gladys Smith ("Gladys") created a family trust naming their five children, Dave, Donna, Dee, JoAnn, and Don Jr. as the beneficiaries following the death of the surviving spouse. Upon the death of the first spouse, the trust provided in relevant part for the creation of three subtrusts (a "bypass trust," a "QTIP trust" and a "survivor's trust," the latter being amendable by the surviving spouse). The five children were equal beneficiaries of the three subtrusts.

Don Sr. was the first spouse to pass away, and upon his death Gladys became the sole trustee. The couple's assets (worth approximately $14 million) were divided into the three subtrusts as contemplated by the trust instrument. JoAnn moved in with Gladys, who over time became estranged from the other children. Gladys amended her survivor's trust to disinherit Donna and to give Dee's share of that subtrust to JoAnn. JoAnn and her husband served as successor trustees and allegedly spent over $2 million in trust funds on personal items, gambling, and gifts.

After Gladys' death and the delivery of a verified account by the co-trustees to the beneficiaries, Don Jr. filed a petition in the probate court questioning the expenditures by the co-trustees, requesting the court to surcharge and remove the co-trustees (his sister and her husband), and for an award of attorneys' fees as an ancillary remedy to JoAnn's proposed removal. The co-trustees responded to Don Jr.'s petition, disputing substantially all of Don Jr.'s allegations. The other beneficiaries, Dave, Donna, and Dee did not appear in the proceedings. (Donna was under a conservatorship due to mental illness and died before trial of the case. She was represented by her conservator and, ultimately, her executor). The co-trustees, responding to Don Jr.'s complaints, filed an amended account to which Don Jr. further objected and filed a civil elder abuse action.

B. Trial and Settlement

The consolidated cases went to trial in the probate court. On the fifth day of trial, Don Jr. reached a settlement with his sister, JoAnn, and her co-trustee husband. Pursuant to the settlement, Don Jr. (only) received a "confidential" sum from JoAnn's subtrust shares (of course, JoAnn's shares under the amended trust included Dee's entire share of the survivor's trust and a portion of Donna's share). The settlement further contemplated the appointment by the probate court of a referee pursuant to Code of Civil Procedure section 638, and the preparation of a final accounting and of a revised federal estate tax return. The settlement provided that Don Jr. would receive over $700,000 in attorneys' and expert witness fees, of which almost 50% was to come from the QTIP trust and almost 11% from the bypass trust (neither of which were amendable by Gladys as the surviving spouse). The settlement further provided that all *future* fees incurred by both Don Jr. and JoAnn and her husband, as co-trustees, to complete the accountings and close and distribute the subtrusts were to be paid from each of the subtrusts proportionately.

Instead of requiring the filing of a petition to approve the settlement arrived at by the warring parties and the giving of notice to all the interested beneficiaries, the probate court entered an "Order after Trial" encompassing and approving all settlement terms and "findings." The trial court expressly found in approving Don Jr. and JoAnn's

settlement that Don Jr.'s petition and ensuing litigation "benefitted all of the beneficiaries of the [family] trust… by acting as a catalyst to the improved preparation of the accountings."[17]

C. Post-Trial Proceedings

Following the trial court's order, Donna's estate, through her personal representative, made its first appearance, moving for a new trial and to vacate the judgment. Donna's counsel argued:

1. Don Jr.'s attorney fee award was not supported either by the pleadings or by the evidence;
2. The fee award was disproportionate to any benefit to the beneficiaries; and
3. The fee award violated Donna's right to due process of law.

The trial court rejected Donna's arguments, finding that new trial motions are *not permitted* under the Probate Code in decedents' estate proceedings and that Donna forfeited her objections to the settlement mid-trial because she did not earlier object to any of the litigation activities undertaken by Don Jr. Donna (through her executor) appealed.

D. The Appellate Opinion

The Court of Appeal in *Smith* affirmed the trial court's decision. After observing that the Probate Code does not permit motions for new trial in probate proceedings,[18] the appellate court ruled that "Donna forfeited her objections to the fee award when she did not object to Don Jr.'s petitions and objections."[19]

The *Smith* court continued:

> 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* [by way of settlement], *and the court was bound by that resolution.*[20]

It is fundamental that a factual stipulation between parties only establishes facts as between the stipulating parties. Absent notice of prospective impact and subsequent finding of default with respect to notice of such a stipulation, would not imposition of those findings upon non-stipulating parties be in contravention of the non-participants' due process rights? The appellate court in *Smith* nevertheless found to the contrary, treating Donna's lack of previous participation as essentially a waiver of her right to intervene in the settlement allocation:

> 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.[21]

With respect to her conservator's decision to not participate in the first instance, Donna pointed out that there had been no notice to the remaining siblings that the bypass trust and the Q-Tip trust were at risk for purposes of paying hundreds of thousands of dollars of Don Jr.'s attorneys' fees so that Don Jr. could personally receive a "confidential" payment from JoAnn. The appellate court noted that Don Jr.'s initial pleading had requested payment of attorney fees from JoAnn as a potential remedy for her proposed removal as a fiduciary. Though JoAnn was never actually removed, through stipulation or otherwise, the appellate court in *Smith* held that the "substantial benefit" doctrine justified allocation of attorneys' fees across all subtrusts and beneficiaries.

The Court of Appeal in *Smith* determined that the litigation "substantially benefited" the non-participating litigants because the litigation had purportedly "maintained the health of the sub-trusts; raised the standards of fiduciary relations, accountings and tax filings; and prevented abuse." Specifically, and as it later relates to *Breslin*, the appellate court in *Smith* found that it was "'not significant that the benefits found were achieved by settlement of plaintiffs' action rather than by final judgment.'"[22]

The ruling in *Smith v. Szeyller*, if limited to its specific holding that the beneficiary who did not participate in the trial and settlement of the underlying litigation waived her right to contest an attorneys' fee award affecting that beneficiary's equitable share, may seem innocuous. However, it is on this inauspicious foundation that the appellate court in *Breslin* constructed its ruling that someone who does not participate (for whatever reason) in a duly noticed mediation ordered by the probate court possibly forfeits the right to object to a settlement arrived at in the mediation, even if the settlement confers benefits only as to participating beneficiaries who are otherwise identically situated to the forfeiting non-participating beneficiaries under the trust in litigation.

IV. *BRESLIN:* THE FALLOUT

Post-*Breslin* consequences, most of which are observational and anecdotal to the authors, appear mixed.[23] The reality is that the majority of trust litigation cases, because of their expense, complexity and uncertainty of outcome, resolve in mediation. That reality is inescapably alluring

to the California probate courts, which are overworked, underfunded, and under-resourced. If not resolved in mediation, trust litigation resolutions are almost exclusively judge-centric, requiring often lengthy court trials and comprehensive statements of decision, crafted by judges on nights and weekends when not attending to their daily calendars.

A large number of California judges, particularly those in urban and suburban areas, have leveraged the *Breslin* holding in order to help clear their COVID-delayed trial calendars of voluminous trust litigation inventories. *Breslin* orders are being utilized by courts not only through private mediation, typically at the trust's expense, but to weave in any non-participants by also issuing *Breslin* orders to achieve full case resolution at mandatory settlement conferences.

While *Breslin* itself authorized the participating litigants to completely ignore and thereby forfeit the prospective interests of the non-participating parties, more often *Breslin* settlements simply adjust the proportionate distributive shares of the non-participants to account for attorneys' fees and litigation risks as to which the non-participants did not share. While some California judges strictly apply the forfeiture rules authorized by *Breslin*, other probate courts, recognizing both their discretion and their equitable authority, prefer to consider settlement opposition through the critical lens of fairness voiced by the *Breslin* dissent.

Notably, there is no requirement in *Breslin* for a non-participating beneficiary or heir to retain counsel, and in fact most *Breslin* non-participants appearing at mediation today do so through self-representation. Likewise, there is no requirement for a non-participant who appears at mediation to agree to anything, as long as the non-participant appears in good faith. Lastly, there appears to be no requirement in practice for a non-participant to appear at mediation in person. In the experience of the authors, remote appearances on a designated software platform or by telephone have been deemed sufficient mediation participation. All of these allowances, to a large degree, undermine any contention that *Breslin* mediation participation requires money and lawyers to access.

While civil litigation and special proceedings in probate have their genesis in different courts and practice traditions, it appears to the authors that the *Breslin* decision to some degree attempts to fuse the harshness of a default judgment in a civil case with the latitude provided to probate judges in order to conform procedure to the needs of a particular case. In the situation of a civil default, the "go to" form of relief is typically Code of Civil Code Procedure section 473, in which the excusable neglect of the defaulting party or their counsel is presented to the court as grounds to relieve a party from adverse judgment "upon any terms that may be just." And while the non-participating beneficiaries in *Breslin* failed to claim excusable neglect, one can assume in many cases of non-participants such neglect will exist. The downside to such recourse is that "terms that may be just" to set aside a fully mediated settlement could include the many thousands of dollars collectively incurred by the settling parties and their counsel to mediate to settlement a case that should return to square one because of non-participant neglect.

Because probate courts are now fully leveraging the case management benefits of *Breslin* in contested trust matters, an obvious question becomes the prospective extension of Probate Code section 17206 court-compelled mediation to contested litigation in analogous probate and conservatorship estate litigation in the same court.

Probate Code section 1000, subdivision (a) authorizes a probate court to rely upon the California Code of Civil Procedure for applicable procedural rules where the Probate Code is silent. Examining inherent judicial powers provided to courts under Code of Civil Code Procedure section 128 and section 187, when viewed in tandem, such powers appear to a large degree to replicate the generic enabling language applicable to courts hearing trust cases under Probate Code section 17206. Once so extended, however, the rule of *Breslin* authorizing court-compelled ADR would arguably be applicable to all litigation, probate or civil, the only difference in a civil action being the lack of a probate estate or conservatorship estate from which to advance mediation expenses.

V. CONCLUSION

Breslin and its application raise a series of difficult questions that a trial court ought to consider when facing opposition from a mediation non-participant to settlement enforcement:

- Is the settlement "fair and honest" and "in the best interests of the estate"?[24]
- How can interested parties "rewrite" a will or trust without court oversight? The decision in *Breslin* effectively modifies the trust in question without ever definitively determining whether or not the trust was valid. Since Probate Code section 17200 proceedings involve only the "internal affairs" of a trust, how can unnamed heirs at law receive benefits from the trust assets when some of the named beneficiaries of the trust receive nothing?
- Should a party who does not participate in a mediation because they cannot afford to or do not know what their possible rights are, be precluded

from asking the court in equity to oversee the fairness of a voluntarily mediated settlement that purports to determine the rights of all parties, even those parties who have not participated in the mediation process?

Each of these thorny questions needs to be balanced against the very real need for litigating parties to resolve trust disputes timely and economically. In mediated settlements, trust agreements are very often rewritten to accommodate the compromises that are absolutely necessary to move trust administration and distribution timely forward. One can be certain that trust settlors do not labor for a lifetime to allow their trust assets to be withheld from distribution for years because courts lack the resources to try every case to judgment and appeal, all the while the family assets are whittled down in order to properly compensate litigation lawyers, accounting and medical experts.

Allowing our probate courts the power to better accomplish the purposes of a trust as envisioned by the settlor through compulsory ADR should certainly be encouraged. Whether *Breslin* is the appropriate means toward that end in light of fairness and due process concerns remains to be seen.

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01 *Breslin v. Breslin* (2022) 62 Cal.App.5th 801.

02 *Smith v. Szeyller* (2019) 31 Cal.App.5th 450.

03 *Jeld-Wen, Inc. v. Super. C.* (2007) 146 Cal.App.4th 536, 540-543.

04 Carter, *An Introduction to Mediation for Estate Planners* (ABA Section of Real Property, Trust & Estate Law, 2016) (citing ABA Section of Dispute Resolution, Model Standards of Conduct for Mediators (2005), *Mediation for Estate Planners: Managing Family Conflict*, p. 3, (Gary, S., ed.)).

05 *Breslin v. Breslin*, *supra*, 62 Cal.App.5th 801.

06 *Jeld-Wen, Inc. v. Super. C.*, *supra*, 146 Cal.App.4th 536.

07 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450.

08 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

09 Probate Code section 17206 is the same statutory authorization relied upon by the appellate court in *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, establishing the inherent right of a trial court in a trust proceeding to *sua sponte* suspend or remove a trustee (without regard to the requirements of the removal statute) "[t]o preserve the trust and to respond to perceived breaches of trust;" and by the appellate court in *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, authorizing one of this article's authors to *sua sponte* compel a full statutory accounting in the absence of any corresponding petition.

10 *Breslin v. Breslin*, *supra*, 62 Cal.App.5th at pp. 806-807, citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4.

11 *Estate of Bennett* (2008) 164 Cal.App.4th 1303, 1310.

12 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 807.

13 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 810.

14 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 810 (*dissenting opinion*), citing *Jeld-Wen, Inc. v. Superior Court*, *supra*, 146 Cal. App.4th at p. 543.

15 *Breslin v. Breslin* (Cal. Ct.App. No. B301382, 2021) 2021 Cal. App. Lexis 4956.

16 *Smith v. Szeyller*, supra, 31 Cal.App.5th 450.

17 *Smith v. Szeyller*, supra, 31 Cal.App.5th at p. 456, quoting the trial court.

18 Prob. Code, section 7220.

19 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 457.

20 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 591 (emphasis added), citing *Capital Nat. Bank v. Smith* (1944) 62 Cal.App.2d 328, 343 ("A stipulation of counsel at the trial of a case, agreeing that specified material facts upon essential issues may be considered as evidence, and that a judgment shall be rendered accordingly, is binding upon the respective parties thereto and upon the court.").

21 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at pp. 591-592.

22 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 594, quoting *Fletcher v. A.J. Industries, Inc.* (1968) 266 Cal.App.2d 313, 324 (shareholder derivative action).

23 The authors have found no published appellate opinion to date (August 2023) directly applying the rationale of the *Breslin* holding.

24 *Treharne v. Loftin* (1984) 153 Cal.App.3d 878, 886; see Prob. Code, sections 9831, 9832, 9833, 9834, 9835.