Breslin – Trust Litigation in the 21st Century

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

Presented by:
Hon. Glen M. Reiser (Ret.)

MCBA

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

- ❑ **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**

4

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

5

- **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**

6

- ***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**

7

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]

8

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

9

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 .**

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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

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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.]"

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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."

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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.

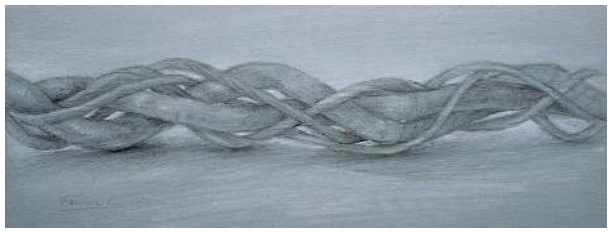
"There is no need for billing records to support the amount of the award,

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 (*Breslin*)

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"

CATHOLIC CHARITIES
SERVING NEIGHBORS IN NEED

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

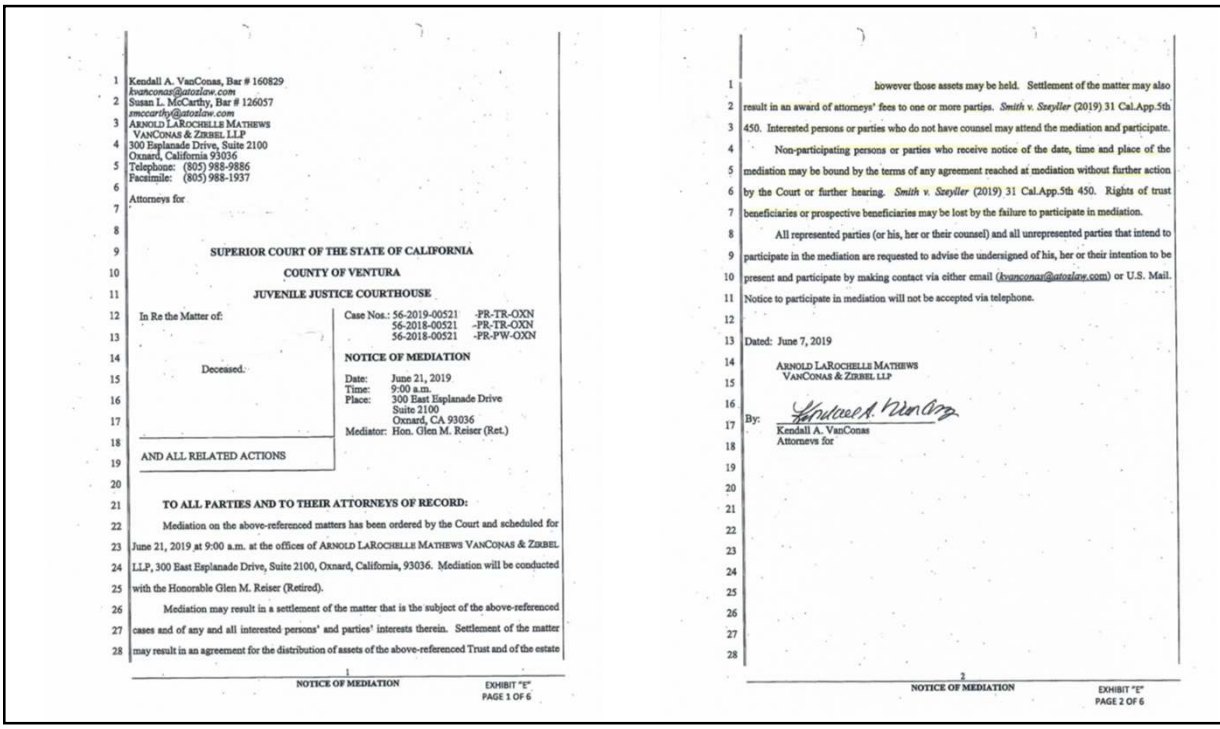
Trustee Breslin petitions the Court for instructions (§17200), giving notice to Breslin next of kin and the 24 charities

25

The trial judge orders the case to mediation

And the lawyers have just read *Szeyller*

26



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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA
JUVENILE JUSTICE COURTHOUSE

In Re the Matter of:

Deceased.

AND ALL RELATED ACTIONS

Case Nos.: 56-2019-00521 -PR-TR-OXN
56-2018-00521 -FR-TR-OXN
56-2018-00521 -PR-PW-OXN

NOTICE OF MEDIATION

Date: June 21, 2019
Time: 9:00 a.m.
Place: 300 East Esplanade Drive
Suite 2100
Oxnard, CA 93036
Mediator: Hon. Glen M. Reiser (Ret.)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Mediation on the above-referenced matters has been ordered by the Court and scheduled for June 21, 2019 at 9:00 a.m. at the offices of ARNOLD LAROCHELLE MATHEWS VANCONAS & ZIRBEL LLP, 300 East Esplanade Drive, Suite 2100, Oxnard, California, 93036. Mediation will be conducted with the Honorable Glen M. Reiser (Retired).

Mediation may result in a settlement of the matter that is the subject of the above-referenced 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 and of the estate

1
NOTICE OF MEDIATION
EXHIBIT "E"
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however those assets may be held. Settlement of the matter may also result in an award of attorneys' fees to one or more parties. *Smith v. Szeyller* (2019) 31 Cal.App.5th 450. Interested persons or parties who do not have counsel may attend the mediation and participate.

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. *Smith v. Szeyller* (2019) 31 Cal.App.5th 450. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

All represented parties (or his, her or their counsel) and all unrepresented parties that intend to participate in the mediation are requested to advise the undersigned of his, her or their intention to be present and participate by making contact via either email (kvanconas@atozlaw.com) or U.S. Mail. Notice to participate in mediation will not be accepted via telephone.

Dated: June 7, 2019

ARNOLD LAROCHELLE MATHEWS
VANCONAS & ZIRBEL LLP

By: _____
Kendall A. VanConas
Attorneys for

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NOTICE OF MEDIATION
EXHIBIT "E"
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"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

Several of the 19 No-Show charities object, saying:
It's not fair

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...."

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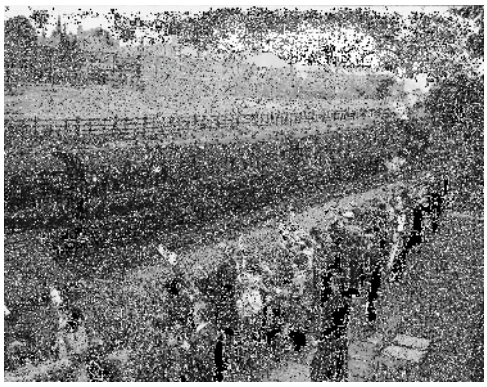
"The [19 No-Shows] apparently believe that after the trustee and participating parties have gone through mediation and reached a settlement, they should have been notified before the settlement was signed. ... But that would defeat the purpose of the court-ordered mediation.



The California Supreme Court Denies Review AND Depublication

Why?

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

34

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

35

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

36


danke
謝謝
ngiyabonga
teşekkür ederim
спасибо
thank you
gracias
dziękuje
obrigado
sukriya
go raibh maith agat
merci

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Hon. Glen M. Reiser (Ret.)

JAMS Mediator, Arbitrator, Referee/Special Master,
Judge Pro Tem

Case Manager

Stephanie Barraza
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Biography

Hon. Glen M. Reiser (Ret.) has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator. Judge Reiser spent more than 20 years on the Ventura County Superior Court, serving as both supervising probate judge and California Environmental Quality Act (CEQA) judge for more than a decade. Prior to his appointment to the bench, he litigated hundreds of civil cases to successful conclusion in trial and appellate courts throughout California.

Judge Reiser regularly teaches California judges trust, probate, and conservatorships through the Judicial Council of California's Center for Judicial Education and Research (CJER).

Judge Reiser is known for using his thoroughness, intellect, attention to detail and breadth of knowledge to develop creative solutions to disputes of all types.

ADR Experience and Qualifications

- More than a decade of exclusive assignment to trust and estate matters on the bench
- More than a decade serving as the only assigned CEQA judge in Ventura County, following years of land use experience as a private attorney
- Handled large-scale civil and appellate litigation, including environmental and real property, land use, water, complex banking and commercial litigation, real property secured transactions, mass toxic torts, trust litigation, insurance coverage and contract law as a litigator

Representative Matters

Estates/Probate/Trusts

- Successfully negotiated and supervised the industry-changing mediation in *Breslin v. Breslin* (2021) 62 Cal. App. 5th 801, in which the California appellate courts embrace mandatory mediation in trust disputes
- Successfully mediated scores of trust, probate and conservatorship estate disputes across virtually all issues including assertions of lack of capacity, undue influence, alleged elder abuse and breach of trust/accountings
- Managed through settlement the contested trust estate of a nationally prominent burn physician whose trust amendments had become increasingly less generous to his two children
- Actively settled the contested trust estate of a noted attorney who remarried several months before his death between the new spouse and his two young daughters
- Clarified the trial court's inherent power to order an accounting in trust disputes (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407)
- Rendered the initiating decision permitting "clawback" of trust assets where necessary to subsidize proper trust administration (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229)
- Compelled surcharge of a trustee who had placed his own financial interests ahead of the interests of a settlor with cognitive challenges (*Conservatorship of Moore* (2015) 240 Cal.App.4th 1101)
- Clarified the most recent legislation where a contested trust amendment incorporated the "no contest" clause of a prior instrument solely by reference (*Aviles v. Swearingen* (2017) 16 Cal.App.4th 1101)
- As an attorney, successfully enforced a "no contest" clause through the California Supreme Court, where settlor's fifth wife received a cornucopia of assets by electing not to litigate (*Burch v. George* (1994) 7 Cal. 4th 246)

Entertainment

- Arbitrated the emergency relief petition of a popular recording artist alleging violation of a non-disparagement contract
- Managed through distribution the probate estate of the lead guitarist of a well-known 1980s band including valuation of songwriting royalties
- Served as Emergency Arbitrator and General Arbitrator in the protection of revenue stream with respect to name, voice, image and likeness, music, copyright and trademark rights for an iconic R&B producer, composer and recording artist
- Actively settled the contested probate estate of an actor whose will bequeathed his one-half share of the community property to various charities; worked out the disposition that the Academy Award decedent had refused to claim during his lifetime in favor of the surviving spouse
- Established and managed for a number of years the contested conservatorship of a young actress dealing with serious personal challenges

Business & Commercial Law

- Arbitrated the emergency relief petition between two Silicon Valley AI start-ups over access to and use of alleged confidential information including Python source code
- Arbitrated the emergency relief petition of an android-based cellular "smartphone" manufacturer contesting violations of confidentiality provisions and nondisclosure requirements set forth in the Master Purchase Agreement with its primary manufacturer
- Arbitrated the emergency relief petition of a member of a financial services company, removed by the LLC board due to the administrative action of the Securities and Exchange Commission directed to the member's spouse
- Arbitrated the commission claims of a multi-media marketing professional in the performance of services performed on behalf of a digital marketing vendor
- Arbitrated the jewelry conversion claims of a bank customer whose safe deposit box had been drilled, bagged and shipped to New York
- Determined the non-arbitrability of claims between oncology physicians and their contracting association
- As a civil motion and trial judge, managed and adjudicated dozens of contract and transactional litigation matters at every level of complexity, including purchase and sale of business assets, construction disputes and debt collection

- Successfully litigated a months-long arbitration of non-conforming goods under a requirements contract for Air Force bomb castings
- Successfully litigated an action against a Korean manufacturer importing contaminated aloe vera intended for human consumption

Real Property

- Successfully mediated commercial landlord-tenant claims through the negotiation of a buy-sell agreement and imposition of mutually acceptable terms
- Handled numerous financing transactions including the following: securing loans, construction financing, guaranty and indemnity agreements, performance bonds and subordination agreements - handled these matters using negotiation, document preparation and litigation, including in appellate courts
- Shepherded land use planning including Subdivision Map Act/Subdivided Lands Act compliance, general plan and specific plan amendments, development agreements and CEQA planning through administrative planning levels, scoping, full environmental review, governing board hearings and numerous related litigation cases through and including the appellate courts
- Handled real property leasing transactions including long-term ground leases, multiple varieties of commercial and industrial leasing, agricultural leases and oil and gas leases/royalty contracts, including negotiation, drafting, performance, breach and associated litigation
- Directly assisted in the preparation of California Revenue and Taxation Code legislation exempting certain transaction types from ad valorem real property tax reassessment
- Represented the largest American title insurance company for the better part of two decades, plus its national 1031 exchange entity, including many coverage issues, title defense and elimination of covered defects of record through any variety of means, including all manner of real property litigation
- Represented various real property owners, contractors, subcontractors and materialmen on a number of mechanic's lien matters, principally on commercial and industrial projects

Environmental Law

- Adjudicated to final resolution the consolidated 2017 environmental cases brought by cities and residents against the City of Los Angeles involving on-site and off-site modernization plans at Los Angeles International Airport
- Rendered environmental decisions involving coastal and residential and industrial development, including climate change and sea level rise

- Managed and adjudicated a lengthy inverse condemnation case where homeowners' yards cascaded down a bluff due to flood control improvements
- Served as general counsel on multiple diverse matters for a member agency of the Metropolitan Water District, including groundwater injection (water quantity), cryptosporidium issues (water quality), pipeline easement (land use) and pipeline rupture (tort) issues
- Served as environmental counsel for a municipal water district, including the removal of silt and debris from behind a dam, lake land use matters, and steelhead trout (endangered species) issues in a river
- Served as environmental counsel for a large land and farming company, including endangered species issues (least bell's video and stickleback) in and around the Santa Clara River, federal 404 permits, and 1603 permits arbitrations
- Represented a variety of clients on numerous state and federal subsurface and airborne regulatory contamination issues, including petroleum hydrocarbon removal, stripping of toxic solvents from groundwater, and elimination of airborne contaminants from manufacturing operations, including Clean Air Act, Clean Water Act and CERCLA compliance
- Represented numerous clients seeking land use entitlements through the entire CEQA process, including local administrative planning, consultation with prospective project opponents and scientific subject matter experts, scoping, EIR preparation, and public hearing
- Represented numerous clients in CEQA litigation at all trial and appellate levels, involving the full panoply of biota, air quality, hydrological, geological and archaeological and land use compatibility issues
- Successfully represented litigants challenging CEQA compliance and the associated environmental documents
- Appointed by the Superior Court for a number of years as lead counsel in mass toxic tort litigation (landowner group) where a residential subdivision was built upon an oil field waste dump (BTX and solvents), balancing multiple client interests and multiple CGL insurer concerns, including environmental coverage; successfully drafted and advocated for the initial "Cottle" motion in California
- Appointed by the district attorney as Special Prosecutor and successfully prosecuted an independent oil company for criminal negligence resulting in a catastrophic oil spill resulting in significant environmental damage to coastal wetlands, including substantial loss of avian wildlife
- Served as Ventura County's only designated CEQA judge for more than a decade, resolving numerous statewide matters involving, inter alia, air quality including greenhouse gas emissions, wetlands, surface water quality/quantity/hydrology, groundwater quality/quantity/hydrology, climate change and coastal sea level rise, migratory fowl, endangered fauna and flora, historic preservation, jet aircraft safety, noise and traffic impacts, land subsidence, agricultural impacts, and numerous other litigated environmental concerns
- Stipulated judge for various California cities, counties and special districts on a variety of CEQA project challenges including multiple cases involving the Kern River delta, the current Los Angeles International Airport modernization, and a January 2019 decision involving water

banking of San Joaquin River resources through the Central Valley Project. Issues in the latter case included dilution of Sierra snow melt to lesser Prop 65 drinking water standards, and associated impacts to crops with greater sensitivity thresholds
- Trial judge on a lengthy inverse condemnation matter involving hydrologic scouring of the banks of the Ventura River due to a combination of flood control projects redirecting surface water

Agricultural Business

- Successfully mediated the first party fire coverage claims of a San Joaquin Valley ranch owner
- Tried successfully through judgment an easement dispute between adjoining lemon ranch owners
- Represented several thousand crates of concentrated orange juice belonging to a major beverage company that were confiscated by the Department of Agriculture for alleged regulatory "second squeezing" violation promulgated by the Florida orange lobby
- Represented a major sod farm and other row crop farmers seeking inverse condemnation recourse from upstream entities for massive flood damage exacerbated by upstream development approvals, through trial and appellate review
- Represented for many years the farming side of a, then-publicly traded, major farming company on a variety of regulatory and land use issues, including Clean Water Act, federally endangered species and statutory streambed alteration arbitrations
- Represented a large San Francisco/San Mateo greenhouse flower grower in challenging regulatory watercourse drainage maintenance restrictions
- Represented agricultural interests with historic pesticide/herbicide practices challenged by homeowners buying in neighboring residential developments
- Represented a farmer adjacent to the Ventura River whose operations became adversely impacted by newly-imposed local regulatory limitations
- Successfully represented a citrus grower in an eminent domain action brought by a large public water agency wanting to develop on site aquifer recharge facilities and appurtenant rights [subsequently hired as general counsel for the public water agency]
- Litigated water rights for private agricultural water companies
- Represented a large provider of orchard maintenance/harvesting/co-op contracting services
- Successfully prosecuted injunctive action brought to protect an avocado orchard from further root rot damage
- As a judge, managed for many years several iterations of litigation, predominantly CEQA, involving appropriative rights issues to receive irrigation water from the Kern River, interpretation of Tulare County forfeiture rulings, and impacts to the associated subsurface aquifers, involving many tens of thousands of acres of farmland along the Kern Delta
- As a judge, managed for many years through jury trial and a multi-year injunctive phase, litigation

arising from flood damage after a protective levee erected by a watercress farmer on the north bank redirected storm flows across a tangerine ranch on the south bank
- Last case as a judge was adjudicated between various San Joaquin Valley agricultural interests, in which a large water banking project sought Friant-Kern Canal rights from the Bureau of Reclamation, proposed exercise of eminent domain rights to build spreading ponds across many acres of farm land, in exchange for return irrigation water to be stored within the highly contaminated and heavily subsided Tulare Basin
- As a judge, managed many large family trusts in which ranch lands needed interim operation and management as ownership interests passed to the successive generations
- As a judge, operated and managed vineyards in Northern California pending delayed resolution of legal issues with the assistance of a receiver in Sonoma County
- As a judge, required to value avocado acreage through conflicting experts pursuant to trust distribution litigation
- As a judge, required to instruct on the economic wisdom of maintaining viticulture operations in trust management litigation

Honors, Memberships, and Professional Activities

Completed Virtual ADR training conducted by the JAMS Institute, the training arm of JAMS.

- Judge of the Year, Ventura County Trial Lawyers Association, 2016
- Frequent lecturer in a wide variety of civil litigation and ADR topics, including CEQA, trusts, probate, conservatorships, family law and case management
- Member, Probate Law Curriculum Committee, Center for Judicial Education and Research, Judicial Council of California, 2015–2019
- Member, Emerging Technologies Ad Hoc Working Group, Governing Committee of the Center for Judicial Education and Research, Judicial Council of California, 2015–2016
- Vice-Chair, Court Technology Advisory Committee; Chair, Projects Subcommittee; Judicial Council of California; 2012–2014
- Member, Technology Planning Task Force, Judicial Council Technology Committee, 2012–2014
- Chairman, Technology Committee, Ventura County Superior Court, 2005–2016
- Member, Court Technology Advisory Committee, Judicial Council of California, Administrative Office of the Courts, 2005–2012
- Member; Technology Services Subcommittee, Outreach Subcommittee and Appellate e-Filing Subcommittee; Judicial Council of California; Administrative Office of the Courts; 2005–2012
- Co-Sponsor, Judicial Branch Technology Initiatives Working Group, “Statewide Technology Vision,” Judicial Council Technology Committee, 2012–2013
- Member, AB 2073 Mandatory E-Filing Working Group, Administrative Office of the Courts, 2012–2013
- Member; Ad Hoc Advisory Committee on Court Efficiencies, Cost Savings and New Revenue;

Administrative Office of the Courts, 2012–2014

- Chairman, California Case Management System (CCMS) Operational Advisory Committee, Administrative Office of the Courts, 2010–2012
- Member; Judicial Review/Testing Group; California Case System Software; “V4” Criminal, Juvenile, Family Applications; 2007–2011
- Member; Judicial Review/Testing Group; California Case System Software; “V3” Civil, Probate, Small Claims Applications; 2004–2006

Background and Education

- Judge, Ventura County Superior Court, 1998–2019
  - 2010–2019: Probate, conservatorships, trusts, guardianships, CEQA
  - 2008–2010: Civil trials and motions, CEQA
  - 2004–2008: Criminal trials, arraignments, motions, preliminary hearings
  - 2002–2004: Probate, conservatorships, trusts, guardianships, family law
  - 2000–2002: Criminal trials, arraignments, motions, preliminary hearings (Superior Court Appellate Division)
  - 1998–2000: Civil trials and motions
- Of Counsel; Ferguson, Case, Orr, Paterson & Cunningham, LLP; 1997–1998
- Principal, Law Office of Glen M. Reiser, 1992–1997
- Partner; Nordman, Cormany, Hair & Compton; 1978–1992
- Graduate, National Institute for Trial Advocacy, National Session, 1981
- J.D., University of California, Los Angeles, 1978
- B.A., High Honors, University of California, Santa Barbara, 1975
- United States Military Academy, 1971–1972

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PERSPECTIVE

The Case Whisperer

Mediator Glen Reiser has a gentle way of helping attorneys and parties see the strengths and weaknesses of the claims, attorneys say.

By Don DeBenedictis
Special to the Daily Journal

Justin L. Stewart / Special to the Daily Journal

Disputes over family trusts can stir high emotions among relatives when they are drawn into litigation over the assets. They and their counsel may arrive at a mediation session making extravagant or unreasonable demands.

Glen Reiser has an uncanny ability to quiet those emotions and moderate those demands, according to lawyers who work with him regularly.

"He has a great way about him to disarm clients while at the same time allowing them to be heard," Shawn S. Kerendian of Keystone Law Group said. "He asks questions that demonstrate the clients may not have as strong a case as they feel they have, but he does it very respectfully."

Mark A. Lester of Jones, Lester, Shuck, Becker & DeHesa LLP has brought 17 cases to Reiser to mediate. He said the retired Ventura County Superior Court judge manages to gently educate attorneys and parties about the strengths and weaknesses of their cases. "He truly understands the issues, and he will look the attorneys in the eye, and say, 'Do you really understand what your case is about and its value?'"

When a civil litigator inexperienced in probate matters comes to a mediation demanding $10 million from a trust that only holds $4 million, Tara L. Cooper responds, "Let's just wait and let Judge Reiser do his magic."

"He has a unique ability to deal with very difficult attorneys and their clients who have unreasonable expectations," she said.

Reiser's ability to gauge the value of a case comes from the roughly dozen years he spent hearing probate, trust and conservatorship matters on the Ventura court. He estimated he handled 10,000 to 15,000 conservatorships over those years.

He knows the field so well that he teaches it to California judges newly assigned to hear probate cases. He spent five years on the probate law curriculum committee of the Center for Judicial Education and Research.

"I think he trained most, if not all, of the probate judges in Southern California," Kerendian said. "He has the substantive knowledge down pat."

The combination of his knowledge of people and of the law means he can size up a case and the parties quickly, according to Susan B. Devermont of Hinojosa & Forer LLP. "He's so quick to get deep and read between the lines," she said. "No matter which side you're on … he finds the best way to help you resolve the matter."

Other attorneys commented on Reiser's talent for finding creative

Glen M. Reiser

JAMS
Los Angeles

Areas of Specialty:
Trusts

Probate and Conservatorships

California Environmental Quality Act

solutions to problems. Santa Barbara lawyer Cristi Michelon Vasquez recalled one case in which a woman was pressing a claim for the loss of her eye against the estate of a decedent. During the mediation, "we all kind of danced around the topic" of the woman's eye, Michelon Vasquez said.

Reiser took a very unusual approach to the issue when he met with the woman privately. When he returned, he told the lawyers, "I held her [artificial] eye in my hand." He recommended that the woman send the judge, who would have to approve any settlement, a photo of her holding her eye. "It's really powerful," he told them.

"He's really got great ideas and creativity, and I think that's just critical," Michelon Vasquez said.

Reiser credits his ability to connect with and persuade attorneys and clients to settle their disputes to his training in conflict dynamics at Pepperdine University's Strauss Institute for Dispute Resolution.

"I learned about human psychology and ... how to deal with difficult litigants, how to listen to them, how to do empathic learning, how to really acknowledge their issues and their concerns and their anxieties," he said.

Now in mediations, he works hard on those skills but "without spending all day letting somebody vent," he said. "And I try not to be too evaluative."

As a mediator since early 2019, Reiser has handled some environmental and property matters and arbitrated some commercial disputes and emergency relief petitions. But about 90% of his cases concern trusts, probate or conservatorships, where his empathic skills are especially important.

And that's the way he likes it. "The reason the cases are so great is they're layered with 50, 60, 70 years of family history ... that may or may not be the catalyst for the litigation," he said. Disputes about trusts can have a half dozen or more parties, each with individual interests and goals.

Serving as a mediator to help resolve those complex battles, Reiser said, is more rewarding than anything else he has done in his career.

Originally from Calaveras County, where his father was a California Youth Authority counselor, he grew up primarily in La Habra in Orange County. He started college at the U.S. Military Academy at West Point, which he found challenging but oppressive, so he transferred to UC Santa Barbara.

Not sure what to do next, he went to law school at UCLA, graduating in 1978. "I loved it. It was fabulous," he said.

He joined an Oxnard law firm called Nordman, Cormany, Hair & Compton, which for a time was the largest in Ventura County. He started as a transactions lawyer but soon switched to litigating real property, environmental, trusts, family and other civil cases. Later, when the firm added an appellate practice, he took on many appeals.

In 1992, he opened his own firm. Then in 1997, he became of counsel to the county's other large firm, Ferguson, Case, Orr, Paterson & Cunningham LLP, so that his clients would have a home if he were appointed to the bench. That happened the next year. He was Gov. Pete Wilson's final judicial appointee.

As a litigator and appellate attorney, he handled several noteworthy cases, including winning some at the California Supreme Court. In one, he successfully defended Oxnard's school desegregation plan against a challenge by some parents. *McKinny v. Oxnard Union High School District Board of Trustees*, 31 Cal.3d 79 (Cal. 1982).

In 1994, he won a pair of cases at the high court. The first allowed no-contest clauses in trusts. *Burch v. George*, 7 Cal.4th 246 (Cal. 1994). The second upheld his client's trial victory in a defamation case over whether she had used surgery to improve the unique gait of her Peruvian Paso show horses. *Lundquist v. Reusser*, 7 Cal.4th 1193 (Cal. 1994).

When he was in solo practice, he often represented the county's district attorney, including one case in which a Los Angeles deputy sheriff sued the office for defamation over its report that criticized how the deputy came to shoot and kill a drug suspect. The appellate court ruled the DA's office could dismiss the lawsuit through an anti-SLAPP motion. *Bradbury v. Superior Court* (Spencer), 49 Cal. App.4th 1108 (Cal. App. 2nd Dist. Oct. 1, 1996).

But that wasn't Reiser's favorite part. When Ventura County District Attorney Mike Bradbury was being deposed, the LA deputy arrived carrying his service gun in a pouch. Reiser said it was outrageous for the plaintiff to show up armed. After many minutes of argument, the deputy gave the gun to Reiser, who put it under his chair.

"He stared at me like I'd taken some bodily part from him for the rest of the depo," Reiser said. "He was so upset with me. It was the best deposition ever."

As a judge, at various times he handled civil, criminal, family and, of course, probate cases. He also was the court's primary judge for cases under the California Environmental Quality Act. He eventually had so much experience with those lawsuits that attorneys would sometimes maneuver out-of-county cases to him.

"I did the LA airport modernization case. So if you're looking at the construction now and you hate it, you can blame me," Reiser said.

He retired from the court in 2018, after 20 years on the bench, and joined JAMS in 2019.

Even with his heavy caseload of trust and probate matters, he occasionally must arbitrate some aspects of a case he is mediating. But he doesn't really like it.

"It's just work. It's being a judge, and I did that for so long," Reiser said. "Mediation is much more dynamic and far more rewarding than any adjudicatory fact-finding. It doesn't even compare."

Here are some attorneys who have used Reiser's services: Tara L. Cooper, Los Angeles; Susan B. Devermont, Hinojosa & Forer LLP; Abbas K. Gokal, Gokal Law Group; Lisa M. Kajani, Kramer Radin LLP; Shawn S. Kerendian, Keystone Law Group; James P. Lamping, San Francisco; Mark A. Lester, Jones, Lester, Shuck, Becker & DeHesa LLP; Cristi L. Michelon Vasquez, Santa Barbara; Scott Rahn, RMO LLP; Carmen D. Sinigiani, Spaulding McCullough & Tansil LLP; Vatche Zetjian, Jeffer Mangels Butler & Mitchell LLP.

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PERSPECTIVE

Courts can order trust and probate cases to mediation

By Glen Reiser, Mark Lester and Eric Hirschberg *Daily Journal Staff Writer*

California Probate Code Section 17206 provides broad discretion to the probate court to "make any orders and take any other action necessary or proper to dispose of the matters presented." In Breslin v. Breslin, 2021 DJDAR 869 (Jan. 26, 2021), the 2nd District Court of Appeal majority specifically affirmed the probate court's authority under Section 17206 to order all interested parties to mediation.

Expanding upon the principles set forth in its earlier decision in Smith v. Szeyller, 31 Cal. App. 5th 450 (2019), the Breslin majority held that parties who have received a notice of mediation with the opportunity to participate, but who elect not to attend, are bound by the settlement agreement reached at the mediation and forfeit their right to object to settlement terms, even if the settlement is unfavorable to the non-participant.

In Breslin, Don F. Kirchner died with no surviving spouse and no children. Kirchner's estate was held in a revocable living trust. The trust provided that the residuary estate was to be distributed to the "persons and charitable organizations listed on exhibit A." At the time of Kirchner's death, the trust document was found, but no exhibit A was located. The notebook containing the trust, however, contained a one-page worksheet that identified 24 charities with handwritten numbers next to their names, many of which had been crossed out and changed. Nowhere on the worksheet was there any reference to "exhibit A." The handwritten numbers across the 24 charities on the worksheet added up to 100.

Confronted with a trust agreement that may have lacked the requisite distribution document, the trustee, Kirchner's nephew, filed a petition for instructions seeking directions from the court. The trustee asked the court for directions on how to distribute the trust, or whether Kirchner's estate should pass by intestacy.

In response to the petition for instructions, one of the charities filed a response asserting that the worksheet was intended to be exhibit A to the restated trust. Kirchner's nephews and nieces argued that there was no exhibit A, because their uncle was still contemplating which shares would go to whom. Faced with cogent arguments from both sides, the trial court ordered all parties to an early mediation to attempt to resolve their competing positions before spending down estate funds and potentially litigating for years.

> *Breslin* suggests that a litigating family member challenging either an estate planning document or a trustee's actions no longer needs to 'carry the sword' for all non-participating siblings and other similarly situated beneficiaries.

Five charities and various intestate beneficiaries agreed upon a mediator and selected a mutually convenient date. A little over two weeks before the scheduled mediation date, the participating charities sent out a notice of mediation to all charities that had been included on the worksheet as well as to potential intestate beneficiaries. The notice advised all prospective parties of the date, time and place of the mediation, and, citing Smith v. Szeyller expressly warned that the mediation could result in an agreement in which non-participants could lose their claims.

Only five of the 24 listed charities elected to show up at the mediation. The parties that did appear were able to reach an agreement allocating distribution of Kirchner's estate. With some minor adjustments, the five participating charities received the entirety of their stated numbers on the worksheet as a trust share percentage, with the balance of the estate distributed to Kirchner's intestate heirs. The 19 non-participating charities received nothing.

One of the participating charities petitioned the court to approve the settlement. A consortium of the non-attending charities made their first appearance and filed objections. The trial court found that the objecting charities had received adequate and timely notice of the mediation, and that their failure to participate in the court-ordered mediation constituted a waiver of their right to object to the petition to approve. The objecting charities appealed.

On appeal, the objecting charities argued that the probate court lacked the authority to order the parties to mediation, the non-participants were denied their right to an evidentiary hearing and the trustee breached the duty of impartiality by not adequately protecting their interests.

The appellate court affirmed the trial court's decision. The Breslin court held that a probate court ordering the parties to an estate dispute to mediation is consistent with the exercise of its broad powers under Probate Code Section 17206.

The appellate court in Breslin found that the objecting beneficiaries' failure to respect the trial court's pre-trial mediation order forfeited their right to an evidentiary hearing on the merits. Finally, the Breslin court found that the trustee had not violated the duty of impartiality. Implicit in the Breslin holding is the court's acquiescence to a fiduciary's use of a petition for instructions as a proper and impartial method for presenting competing interpretations of a trust instrument.

Though the objecting parties in Breslin are charities, a significant percentage of intra-family trust litigation matters in California includes unrepresented family members who do not wish to retain counsel or to self-represent in family disputes. It is also accurate that the vast majority of trust litigation matters in California resolve by way of settlement. Trust litigation matters, particularly undue influence and capacity challenges, as well as complex trust accounting disputes, are highly fact intensive and greatly deplete judicial, estate and personal resources when forced to trial.

Breslin suggests that a litigating family member challenging either an estate planning document or a trustee's actions no longer needs to "carry the sword" for all non-participating siblings and other similarly situated beneficiaries. Rather, that litigating family member can and should ask the court to direct the trust estate to mediation. Given proper notice, any non-participating bene-ficiaries can essentially be defaulted, with their gift reallocated or percentage diminished by failing to protect their own interests, effectively freeing the assets and dollars necessary for timely resolution.

The dissent takes the position, inter alia, that the settlement was not a proper reflection of the settler's estate plan, effectively resulting in a terminating sanction to all potential beneficiaries who failed to engage in "costly mediation."

Blood may be thicker than water, but it need not always come at the expense of bankrupting the estate and its litigants. Breslin provides a powerful tool to trust, probate and conservatorship litigation attorneys in creating hybrid resolution strategies adding a risk/reward component not previously available.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney. ■

Judge Glen M. Reiser (Ret.) *is an arbitrator, mediator and special master at JAMS. He has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator. Judge Reiser was the mediator in Breslin. He can be reached at greiser@ jamsadr.com.*

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PERSPECTIVE

Smith v Szeyller: If you snooze, you lose

The potential ramifications in conflicts involving trusts are significant

By Glen Reiser

A substantial percentage of trust and probate litigation involves one or more nonparticipating family members sitting on the sidelines, which forces the petitioning family member to absorb the cost and risk of "carrying the sword." Rather than litigating to create a common fund, what if the petitioning family member cuts a private deal that adversely impacts his or her relatives' inheritance rights?

After *Smith v. Szeyller*, 31 Cal. App. 5th 450 (2019), the failure of the nonparticipating family members to formally engage in the litigation may be dangerous or even fatal to their unprotected inheritance rights. This case represents a paradigm shift in how trust litigation may now be negotiated and resolved, as well as how nonparticipants should be counseled.

Don and Gladys Smith executed a standard, "ABC" revocable inter vivos trust in which each of their five children were to share equally. When Don died, the trust contained $14 million in combined subtrust assets. Daughter JoAnn eventually moved in with Gladys.

Gladys amended her survivor's subtrust several times, ultimately removing JoAnn's sisters, Donna and Dee, as beneficiaries, principally in favor of JoAnn. Gladys gifted JoAnn a house in Palm Desert, one-half of a house in Big Bear and all of her personal property. When Gladys died, JoAnn became the successor trustee on all of the subtrusts. By that time, JoAnn had succeeded to one-half of the survivor's subtrust.

JoAnn, with her husband, Edward, as co-trustee, began selling trust properties. JoAnn's brother, Don Jr., became concerned and demanded financial information and an accounting. The accounting turned out to be woefully incomplete, so Don Jr. petitioned to remove and surcharge JoAnn and her husband for breach of trust. In addition, Don Jr. filed a civil elder abuse action against JoAnn.

The three remaining beneficiaries — Donna (who was under conservatorship), Dee and Dave — did not participate in Don Jr.'s litigation. Don Jr.'s claims did not resolve, and the breach of trust case proceeded to trial in probate court. Dee and Dave were subpoenaed to appear at trial as witnesses.

After several days of trial, JoAnn's prospects of a favorable result looked bleak, and she decided to settle with Don Jr. Witnesses Dee and David were sent home.

After Smith v. Szeyller, 31 Cal. App. 5th 450 (2019), the failure of the nonparticipating family members to formally engage in the litigation may be dangerous or even fatal to their unprotected inheritance rights.

Don Jr. and JoAnn reached agreement on the terms of a settlement. Under its terms, JoAnn agreed to pay Don Jr. a confidential sum of money. A referee was appointed to prepare the final accounting and the federal estate tax return. Future attorney fees and costs incurred by both Don Jr. and JoAnn to close the estate would be collectively paid by the trust. Most notably, however, the settlement required that $721,258.28 of Don Jr.'s prior attorney fees and costs be paid across *all three subtrusts*, including the 60.61% of the trust estate shared equally by all five children.

Prior to *Smith v. Szeyller*, the standard of practice in trust litigation was for such a settlement to be vetted by the nonparticipating beneficiaries and the trial court through a properly noticed petition to approve settlement, which is a commonly recognized subcategory of a petition to instruct the trustee under Probate Code Section 17200(b)(6). This did not happen here. Rather, Don Jr. and JoAnn handed their settlement to the trial judge as a stipulation and order, which was signed without prior notice to Donna's conservator, Dee or David.

No common fund was created by this settlement, which favored Don Jr. only. The trial court noted on the record, however, that Don Jr.'s attorney fees should be recoverable under the "substantial benefit doctrine," concluding, inter alia, that such expenses "benefited all of the beneficiaries of the [family] trust … by acting as a catalyst to the improved preparation of the accountings."

Donna's conservator was aghast at the prospect of paying Donna's share of $721,258.28 for Don Jr.'s attorney fees and costs. No attorney fees had been requested in any of Don Jr.'s petitions other than for JoAnn's removal, and JoAnn was not removed. There were no attorney fees declaration anywhere in the court file. Don Jr.'s attorney fees and costs had not been allocated solely to services devoted to "improved preparation of the accountings." More important, none of the three nonparticipating beneficiaries had any notice that they would be paying for a significant portion of Don Jr.'s attorney fees and costs without receiving any of Don Jr.'s financial benefit.

Donna's motion for new trial was denied as improper. On appeal, Donna contended that the probate court's order, without prior notice, was outside the trial court's jurisdiction and a violation of her due process rights. The court of appeal disagreed with Donna, who died pendente lite.

The court held that Donna "forfeited her objections to the fee award when she did not object to [Don Jr.'s] petitions and objections"

Very much akin to a default in civil court, the court held that "Donna chose not to participate in the trial and cannot now second-guess the resolution of [Don Jr.'s] objections"

Donna's procedural due process arguments were similarly rejected: "Donna does not dispute that she received notice of every pleading and the evidentiary hearing" The trial court's judgment was affirmed, and Don Jr.'s $721,258.28 fee award was upheld under the substantial benefit doctrine: "[T]his litigation maintained the health of the subtrusts; raised the standards of fiduciary relations, accountings and tax filings; and prevented abuse"

The potential ramifications of *Smith v. Szeyller* in conflicts involving trusts are significant. If a nonparticipating family member receives notice of every pleading, what difference would it make if the impacting settlement is negotiated at a noticed mediation rather than at trial? In cases in which the right to a beneficial share itself is in question, what prohibition is there against distributing the nonparticipants' entire potential claim among the parties that have chosen to litigate?

Another problem from the practitioner perspective is that it may no longer be within the standard of care to advise a nonparticipating family member to sit on the sidelines while other family members litigate over an inheritance. How would an attorney advise a family member who does not wish to "pick sides" between his or her siblings or other family members?

These questions remain unanswered, but the import of *Smith v. Szeyller* is clear and unequivocal: If you snooze, you lose. ■

Judge Glen M. Reiser (Ret.) *is an arbitrator, mediator and special master at JAMS. He has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator. He can be reached at GReiser@jamsadr. com.*

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In the (Virtual) Rooms Where It Happens: How ADR Has Kept Probate, Estate and Trust Dispute Resolution Going Throughout the Pandemic

Three distinguished JAMS neutrals share their insights

Featuring:
Hon. Kevin R. Culhane (Ret.)
Hon. Risë Jones Pichon (Ret.)
Hon. Glen M. Reiser (Ret.)

Virtually every part of society has been affected by the pandemic. In particular, probate, estate and trust cases were adversely impacted as most courts shut down their civil divisions out of an abundance of caution to prevent parties from exposure to the virus.

In order to address the growing backlog of cases, alternative dispute resolution (ADR) has rapidly become an attractive option. Given the complex family dynamics of these types of cases, it is not surprising that ADR has taken on greater currency, as mediation presents an opportunity to talk through differences and explore options for settlement.

"Litigation is notoriously poor at sorting out many of the problems that are associated with family disputes," explained Hon. Kevin R. Culhane (Ret.), JAMS mediator, arbitrator and special master/referee. "Cases involving deeply held emotions can often benefit from ADR because the parties have an opportunity to talk through issues that may predate the current dispute. Rather than simply having a winner and a loser, mediation offers a chance at a more durable outcome. ADR is uniquely suited to these challenging family disputes."

Virtual ADR Has Become the Norm

Over the past few years, probate, estate and trust disputes that have been mediated have largely been handled virtually—for obvious reasons. But virtual ADR has proven to be advantageous for a number of additional reasons.

"In those instances where parties are deeply at odds with each other, they might avoid appearing in court altogether, instead relying on their attorneys to handle the dispute," stated Hon. Risë Jones Pichon (Ret.), JAMS mediator, arbitrator and special master. "But in a virtual mediation, clients may feel more inclined to participate because they won't be compelled to be in the same physical space. Sometimes the feelings are so intense they don't even want to see each other on camera, which we can easily accommodate with separate virtual breakout rooms. In this way, virtual ADR offers some real advantages."

Judge Pichon was quick to point out that virtual ADR and in-person mediation are equally effective in resolving disputes.

How Participants Should Approach Mediation

It's important for attorneys to set expectations with clients as they approach mediation. At the same time, attorneys should be candid with the mediator, which will allow the neutral to be more effective in doing their job and helping to achieve a resolution.

"Because everything is confidential between the neutral and litigants, it is better for the parties to be completely straightforward," offered Hon. Glen M. Reiser (Ret.), JAMS mediator, arbitrator and special master. "The more information the mediator has—good, bad or indifferent—the better resolution it's going to be, because this way the risks and the rewards are much more apparent. Obviously, everyone comes into these mediations with expectations, which are almost immediately undercut. The more straightforward everyone is at the outset, the more quickly the litigants can begin to recalibrate their thinking about the case and come to some mutual understanding. This takes time and an awful lot of discussion."

Judge Pichon added that in her experience, probate lawyers are highly skilled and very professional. They tend to be extremely effective advocates for their clients. Her only advice is to remember to consider both sides of the issues and to acknowledge those areas where there is, or can be, agreement.

"With regard to the discovery phase, I would recommend considering how you as an attorney or as a client would respond to your own discovery request. Are all the requests necessary? Would you find them overwhelming? Is it worth shutting down positive communications with opposing counsel by asking for as much as you have during the discovery phase?" shared Judge Pichon.

The Impact of *Breslin* on Mediation

One recent court ruling in particular has had a significant impact on the mediation landscape. In April 2021, the California Court of Appeal expanded the authority of California probate courts to compel beneficiaries to mediate or risk forfeiting their interests in a disputed trust. As a result of *Breslin v. Breslin*, when mediation is mandated, parties have a greater incentive to be active participants in trust proceedings.

"*Breslin* does make the job of the mediator more difficult, because more concerns and more positions must be taken into consideration," explained Judge Culhane. "For instance, the interests of contingent beneficiaries will have to be discussed and satisfied in a negotiated resolution. Increasing the number of participants certainly complicates matters, but because a *Breslin*-oriented mediation compels everyone to come to the table, it becomes possible to achieve a greater understanding of all parties' positions and, as a result, achieve a more durable agreement."

How Neutrals Deal With Impasses and High Emotions

Leading parties to settlement is something of an art form for mediators. Every mediator

brings their own unique skills and experience to the table in seeking to resolve disputes.

"As a mediator, I feel it's important for me to remain positive and regularly acknowledge the progress being made and the areas where there is agreement," said Judge Pichon. "It's incumbent on me to let the parties know that I understand what's driving their position and acknowledge their feelings and emotions. Oftentimes, the parties have villainized each other, so I try to remind them that the opposing side is just as concerned about resolving the case and that settlement is equally important to them. When emotions run high, I encourage them to try to put aside those feelings in order find a mutually agreeable settlement."

Judge Pichon went on to point out that developing trust is crucial for mediators. Mediators must be viewed as truly neutral. She begins by working to develop a rapport with the parties and show them that she understands their positions. Further, she will, under all circumstances, accurately convey those positions to the opposing parties.

Judge Culhane focuses on anticipating where impasses may potentially surface during pre-mediation work. He likes to remind the parties that unlike litigation, where there is a clear winner and loser, mediation is about building an agreement. It behooves all parties to be open to some degree of change in their positions. "There is no recipe for settling an impasse," explained Judge Culhane. "A mediator will attempt to identify the stumbling blocks and then look for ways to collectively work to resolve them. You can't have a mediated resolution if both sides don't eventually reach an agreement. In most cases, this is better than the alternative, where one party wins and the other loses."

Experience Matters in Cases of Undue Influence and Capacity

In cases involving wills and trusts, there is frequently a petition to declare a will or trust invalid because it was procured through undue influence. Judge Reiser believes that approximately one-third of all probate, estate and trust litigation that comes to a neutral involves the efficacy of an instrument and, almost invariably, such challenges are a result of undue influence or capacity.

"When contested conservatorships are involved, judges tend to be very protective, taking on a far more active role in such cases," stated Judge Reiser. "In these cases, it's helpful to have a strong former judge to serve as a neutral who can educate the parties on what's likely to happen."

Judge Pichon sees mediation as a viable alternative in disputes involving conservatorships. "This is a situation where the parties can fight it out in court or instead choose mediation, which will afford an opportunity to sit and talk without all the procedures that come with a court proceeding," added Judge Pichon. "Mediation allows differences to be discussed in a less adversarial setting. Perhaps there's something in the middle where some of the restrictions can be relaxed a little bit for the conservatee. This might present an agreeable arrangement for all involved parties."

A provision in the probate code called "substituted judgment," where an estate plan can be created for a person who has no capacity or limited capacity, is another viable option, according to Judge Reiser. "This is a pretty effective tool that creates a conservatorship simply for the purpose of creating an estate plan, and then the conservatorship is ended," he explained.

The Role of Mediation in Probate/Estate/Trust and Family Law Crossover

Judge Pichon pointed out that it is not unusual to have a probate case that has family law issues mixed in. "Family court and probate can be completely intertwined because probate has so many issues regarding community property," concluded Judge Pichon. "These types of cases can be resolved through mediation rather than litigated. It's often easier to simply talk these issues through rather than trying to resolve them through court proceedings."

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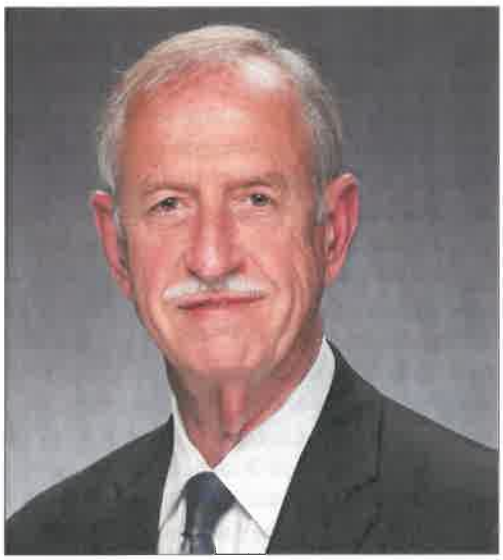

Hon. Kevin R. Culhane (Ret.) serves as an arbitrator, mediator and special master/referee, handling family law, real property/real estate, probate/estate/trust, professional liability, employment, health law/elder care, insurance, personal injury and torts, class action/mass torts, government and discovery/civil procedure disputes. He joined JAMS following a distinguished legal career spanning over four decades.

Hon. Risë Jones Pichon (Ret.) serves as a mediator, arbitrator and special master for a wide array of disputes, including probate/estate/trust matters, personal injury/torts and business/commercial matters. She joined JAMS after a distinguished judicial career spanning more than 35 years.

Hon. Glen M. Reiser (Ret.) is an arbitrator, mediator and special master at JAMS. He has vast experience adjudicating and resolving thousands of complex commercial, real property/environmental, trust and family law disputes as a respected trial judge and litigator.

JAMS ADR Insights

[PODCAST] JAMS Neutrals on the Evolution of Trusts and Estates Disputes and Considerations for Selecting the Right Mediator

A podcast from JAMS featuring Hon. Glen Reiser (Ret.) and Lisbeth Bulmash, Esq., on the rise of trusts and estates disputes and the role of mediation in successful resolutions

LISBETH M. BULMASH, ESQ.

JAMS Mediator and Arbitrator

HON. GLEN M. REISER (RET.)

JAMS Mediator, Arbitrator, Referee/Special Master, Judge Pro Tem
Published November 12, 2021

In this podcast, JAMS neutrals Hon. Glen Reiser (Ret.) and Lisbeth Bulmash, Esq., discuss how the pandemic and a shifting landscape around wealth transfers is fueling increased trusts and estates disputes. They weigh in on how preparing adequately and selecting the right mediator are crucial for getting ahead of a conflict and finding a solution that meets the parties' goals, as well as how the approach to mediation differs across states. The neutrals also discuss capacity and undue influence, two factors that impact estate planning, including how analyses of those factors vary and are impacted by advancements in physiological and psychological science. Finally, Judge Reiser and Ms. Bulmash offer their thoughts on how to select a thoughtful and creative mediator.

JAMS · [PODCAST] The Evolution of Trusts and Estates Disputes and Selecting the Right Mediator

[00:00:00] **Moderator:** Welcome to this podcast from JAMS. Since the start of the pandemic, estate planning has taken on a new urgency and given rise to scores of conflicts. To discuss some of these issues and how mediation can help, we have two JAMS neutrals with us. Our first guest is Judge Glen Reiser. He serves as educational trainer for all trust and probate judges throughout California.

Before coming to JAMS, he spent more than 20 years with the Superior Court in Ventura County, California and before that, more than two decades as a civil litigator. We also have Lisbeth Bulmash who has been a full-time neutral since 2002. Before practicing in the state of Texas, where she is currently based, she had an active ADR practice in Michigan and Ohio. And before starting her ADR practice, she served as a litigation attorney in a diverse array of firms.

Thank you both for being with us. Lisbeth, I'll start with you. What kinds of estate planning disputes have you seen arise over the last two years and have you noticed any patterns?

[00:00:59] **Lisbeth Bulmash:** Yes. We have seen a high number of deaths resulting from COVID, and these large numbers of unexpected and sudden deaths have meant more confusion and have resulted in a high number of airship disputes where the parties have left and died without a will or any proper estate planning.

I've also seen a large number of will contests and disputes arising from blended families and sibling rivalry. That's really what we've seen as of late.

[00:01:34] **Moderator:** And Judge Reiser, what have you been seeing?

[00:01:35] **Judge Reiser:** So actually, it's over a course of years, you know, in America, wealth transfers happen differently than they used to happen a lot. In the old days, there was a significant self-made wealth and today, while that still exists in certain pockets, more frequently wealth is transferred through family deaths and trusts and estate matters. So that seems to be where large amounts of capital are exchanged. Those types of contests have risen dramatically, especially over the last five years.

[00:02:11] **Moderator:** Lisbeth, can you talk about what attorneys can do to get ahead of these conflicts and talk a little bit about the role mediation plays in helping attorneys resolve estate disputes?

[00:02:20] **Lisbeth Bulmash:** Well, first of all, I'd like to say that most judges, and maybe Judge Reiser can comment on this, do not want to insert themselves in estate conflicts.

Mediation is that tool that gives the parties an opportunity to not only save time but save money and offer solutions to their clients that the court cannot offer. Attorneys can work with the mediator and other parties to dispute, to craft often creative solutions to family conflict stemming from these estate disputes and not everyone wants the same thing.

So, in being creative, we can have attorneys see more client satisfaction by using the tool of mediation.

[00:03:09] **Moderator:** Judge Reiser, any advice you'd give to attorneys to get ahead of these disputes?

[00:03:13] **Judge Reiser:** So it's important to appreciate how judges think about these cases, right? I know in a lot of states will contests and trust contests can be jury matters, but historically trust contests arise in equity and in chancery.

So not in all states, but in most states, these are very judge-centric type cases and because they arise in equity, typically, not always, but typically they're court trials. When you have a court trial, that means the judge at the end of a case, in these cases, tend to be very fact intensive and physician expert intensive.

So, trials last a long time and the judge at the end of the case, instead of asking the jury to return a verdict, will have to sit down and write a 20- or 30- or 40-page opinion and judges' calendars don't usually allow for that. So many of my colleagues are loath to wanting to engage in this exercise because it is so time-consuming and any opportunity to reallocate that resource outside of the court and get it resolved is a blessing to my colleagues' lives.

So that's a very practical answer, but that's the reality.

[00:04:22] **Moderator:** What would have been the consequences for parties and lawyers who have not been prepared?

[00:04:29 **Lisbeth Bulmash:** I think with the advent of zoom mediations recently with the pandemic, there is a real disparity that is evident in the negotiations at mediation. It's pretty obvious when parties come to mediation, and they're prepared. They know what they want, and they educated the mediator ahead of time so that the mediator's in the best position to help the parties. It's pretty obvious if parties and their attorneys are not prepared, and have not thought through why they're at mediation, what they really want to get out of the case at the end of the mediation. So, it's really a cautionary tale that parties need to prepare.

They need to not only know their case but know in and out where their clients coming from and what makes them tick and what they really want to get out of resolving the case, if possible.

[00:05:30] **Moderator:** Judge Reiser, anything you would add?

[00:05:33] **Judge Reiser:** So, different courts do it differently, right? Because quite often a court will want an early mediation to resolve a case before a lot of attorney fees become the tail wagging the dog in terms of case resolution and making it difficult to resolve.

But, quite frequently, all these cases or most of them involve a testamentary instrument, right? The testamentary instrument is either a trust or a will. That document in most cases, not always, was drafted by an estate planner or a lawyer who dabbles in estate planning. And so, I see very frequently council who hasn't interviewed, if the estate planner is still living or still practicing or available, hasn't interviewed the estate planner to see what their notes say, to see what their recollection is, even as it relates to issues, such as capacity, undue influence, document interpretation, settler's intent -- all those things.

So that's a critical component of preparation. The second part, I think, really relates to the science, and has the lawyer consulted at least in a work product since with a geriatric psychiatrist or a PhD psychologist with expertise in geriatrics to sort of get a direction on where they ought to go if they have a capacity or undue influence case.

[00:06:57] **Moderator:** You mentioned capacity and undue influence. Well, let's start with undue influence. Can you help explain that? What role it plays in these kinds of disputes?

[00:07:06] **Judge Reiser:** So undue influence is a bit of a free for all, right? Because it involves somebody who prevails upon typically an elder to either create or modify a testamentary instrument. Quite often, especially in our mobile society, many family members either move away or aren't as close and someone stays and helps to take care of the parent, normally, or grandparent or aunt or uncle. So, when that person naturally changes their instrument to benefit the person who's taking care of them, the others, wherever they are around the world, sort of look at it as an attempt to influence an equal estate plan. So, it's a very common circumstance. But there's a common law to undue influence and there's rules that everyone knows around the country as to the presumptions associated with undue influence.

But a lot of states now are enacting statutes that more specifically define undue influence. So, it's a state-by-state analysis, but those are free for alls because it really what's going on in somebody's life. You know, are they isolated? Are they competent to write emails? Who's taking who to the lawyer's office? Whose lawyer is it? Who's sitting in on in the meeting with the estate planner? I mean, all these questions arise, and these are not brief trials. They're at least a week.

[00:08:31] **Moderator:** What about capacity? Can you talk a little bit about how that plays out?

[00:08:35] **Judge Reiser:** Capacity is interesting because every lawyer in America learns the same rule and it comes from Victorian England.

It comes from Lord Cockburn, who was the Lord Chancellor in the Mid-1800s under Queen Victoria. The rule was if you know who your kids are, the natural objects of your bounty, and you know what your property is and you know you're making a will or estate trust, then that's all the capacity you need.

But medical science is different now in terms of capacity because capacity involves cognitive deficits that correlate to decision-making. So, the rules vary from state to state, but whether it is the old, learned Cockburn rule from Victorian England or some more modern analyses that correlate the decision-making to cognitive deficit, it's not a lawyer determination, normally, except, perhaps, at the most fundamental level. It really evolves in medical science to a large degree and what's going on in someone's mind. It's more of a scientific analysis, although I've seen more and more psychiatrist and PhD psychologists getting involved in undue influence because of co-dependencies that arise, not just with cognitive dysfunction, but also with physiological issues that cause people to be reliant on others.

[00:09:53] **Moderator:** Lisbeth, have you seen these issues play out? What's been your experience with capacity and undue influence?

[00:09:59] **Lisbeth Bulmash:** Well, I have to say that given what's what we've been through recently, there's been a significant cognitive decline in the elderly population. So, when we're seeing undue influence issues, they're so fact specific and with all the seclusion brought on by the pandemic, we've

seen a lot of undue influence cases coming up where we have to look at the relationships, the circumstances, the hurried drafting of estate planning before someone's untimely death, perhaps. Look at what the parties' intent was and they're very fact specific as a Judge Reiser has indicated, and they're not a slam dunk. There's a lot of science now that looks at capacity and understanding someone's mental ability to make decisions regarding a will. Now, sometimes that's a low bar, depending on what state you're in, but there's a lot of pitfalls.

If you know one side can bring in a professional that's going to point to the cognitive deficits and there's a lot to point to that someone's brain matter declines over time. So, I think that the issues of both undue influence and capacity are continuing to be unraveled as the science catches up with the circumstances that we're in now.

It really is tricky for attorney professionals to advise their clients as to whether they have a good opportunity to win at trial with some of these issues looming. Sometimes, you know, parties don't want to spend the money on the science, because it's very costly to have experts testify in court and be deposed ahead of time and to gather all the records that are needed and the analysis. There's analysis on the other side.

So that prolongs the trial increases the expense, and there's still someone that's going to lose in this action. So, your client is still taking a great risk in going to trial, you know, perhaps the compromise is a better option to try and get what your client wants at mediation.

[00:12:21] **Moderator:** Judge Reiser, in California where you are based, how does the court system rely on mediation?

How does it incorporate mediation into the resolution of these estate disputes?

[00:12:31] **Judge Reiser:** Well, that's actually a really interesting question because the landscape is changing a lot. In California, historically, mediation has been voluntary only under an older appellate authority that said the court system needs to be free and, therefore, if you send people to a cost basis ADR solution, that is contrary to the rights of people and free access to the courts. But now in a case that came out just a few months ago that I happened to be involved in, the appellate court said exactly the opposite and said that probate court has the absolute right to send a matter to mediation and quite often ought to and the California State Supreme Court denied the publication to review, which shows, at least in my mind, that there's a resource limitation with respect to the courts, at least in California. And that the policy body, which is the state Supreme Court, is looking for ADR solutions. So, it's opening up the courts to thinking about compelling mediation, as opposed to just suggesting it.

[00:13:36] **Moderator:** Lisbeth, how does it work in Texas?

[00:13:39] **Lisbeth Bulmash:** In Texas, it's different than other parts of the country because Texas has really embraced the use of mediation.

Especially in the probate court setting in across a number of counties in the Dallas Fort Worth area, I have seen the courts order the cases to mediation. Mediation is really an integral part of the court system. They have not only ordered it, but embraced it. They still leave it up to the parties to select the mediator in some circumstances or tell the judge who they want appointed as the mediator, but it really varies on a court-by-court basis.

But overall, I would suggest that all the courts are integrating mediation into the process and making mediation part of the scheduling order for any case.

[00:14:36] **Moderator:** Judge Reiser, how should parties go about finding a mediator? What should they look for? How does that process work?

[00:14:42] **Judge Reiser:** So, that's the art as opposed to the science, right?

Because you want to think about your client, recognize who they connect with or might connect with and find a mediator who can build rapport with the client. Then you want a mediator who can be value added. So, you don't want to carrier pigeon who's just going to go back and forth between rooms, either virtually or physically, and to say offer demand, offer demand.

You want someone who can relate to the client, talk to the client, talk about risks and rewards and add value by experience in the subject matter and saying, “well, here's concerns, here's where you ought to try to leverage the other side,” and can be very frank with the client, as opposed to somebody who is the equivalent of a note passing between rooms.

[00:15:38] **Moderator:** Lisbeth, what characteristics would you look for in a mediator and what kind of questions should clients and lawyers be asking?

[00:15:46] **Lisbeth Bulmash:** Well, I agree with Judge Reiser and what he has recommended in terms of what you should look for. I think it's important for parties to interview a mediator and ask them how they conduct their mediation and how they go about preparing for their mediation.

I think that's a really integral part of understanding if a mediator is going to be just carrying messages back and forth or going to roll up their sleeves, understand the issues and the facts and the law relating to particular case and add value to that mediation. So, in my particular practice, I approach every mediation that I have differently as a separate case. I look specifically at how best to orient that case to the parties and the circumstances. I may not start with the joint session if there is a high conflict and it's not going to lend itself to getting somewhere constructive. I use different tools in the toolbox and in terms of what circumstances demand it. But you want a mediator that is going to be creative, and that is going to take the time to do the appropriate preparation, to be more than just carrying the one offer from one room to the other.

Do they meet with your clients ahead of time? Do they read things ahead of time? Do they call you and talk about what they've read and ask you questions that are not on the paper that may help get to yes in

a particular mediation? I think those are all things that you want to know about. You want to know how hard this mediator is going to work, how passionate they are about their craft to get the parties to yes.

[00:17:35] **Moderator:** Very good points and a great conversation. I want to thank Judge Reiser and Lisbeth. Thank you so much. You've been listening to a podcast from JAMS, the world's largest private alternative dispute resolution provider. Our guests have been Lisbeth Bulmash and Judge Glen Reiser. For more information about JAMS, please visit www.jamsadr.com.

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