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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.

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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. ■

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