

**Beverly Hills Bar Association – Trusts & Estates Section**  
**February 2023 Legal Updates**

***Estate of Franco / Moreno v. Bertuccio***, Court of Appeal Case No. A165840, First District, Division Three, Filed January 30, 2023.

In this case, Bertuccio was issued letters of administration for his biological father, Franco's estate. Franco's sister and niece (the "Morenos") both filed petitions to remove Bertuccio and along with a joint motion for summary judgment seeking a declaration that Bertuccio is not an heir entitled to inherit from Franco's estate under intestate succession.

Marilyn and Frank Sr. were married at the time of Bertuccio's conception and birth. Frank Sr. was named as Bertuccio's father on his birth certificate and paid child support for Bertuccio after he and Marilyn divorced. As an adult, Bertuccio discovered that Franco was his biological father. Bertuccio and Franco connected and forged a relationship. Franco told his girlfriend and neighbor that Bertuccio was his son. Franco died intestate, where the entire estate would pass to his 'issue' (Bertuccio if determined to be Franco's issue), or to his 'next of kin' (the Morenos).

The probate court granted Morenos motion for summary judgment holding that Bertuccio was a child of the marriage of Marilyn and Frank Sr. under the Family Code section 7540 marital presumption and that consistent with California Supreme Court's decision in *Cornelius*, Bertuccio is barred from proving Franco was his natural parent from whom he could inherit under Probate Code section 6453(b)(2). Bertuccio appealed.

Probate Code Section 6453(b)(2) would give Bertuccio an opportunity to establish paternity with clear and convincing evidence that Franco openly held him out as his child. However, Family Code section 7540 provides that, "the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage." A child of a marriage under 7540's marital presumption is barred from proving a parent-child relationship existed with a third party decedent for purposes of inheritance under intestate succession.

Although the marital presumption, as a matter of social policy, promotes the integrity of the family and the stability of inheritance. Here, the court erred in applying the marital presumption without first making the requisite finding that Marilyn and Frank Sr. were cohabiting at the time of Bertuccio's conception and birth. The appellate court reversed and remanded.

***Starr v Ashbrook***, Court of Appeal Case No. G060597, Fourth District, Division Three, Filed January 3, 2023.

In this case, Jonathan Starr filed a petition challenging M. Thomas Ashbrook, actions as the acting trustee of, his father, Arnold Starr's revocable trust. The petition alleged that Ashbrook had wasted and misused trust assets by pursuing a meritless petition for instructions and using trust assets to fund elder abuse litigation against Jonathan Starr and his brothers. Jonathan alleged four causes of action: (1) "Suspend Purported Trustee Thomas Ashbrook"; (2) "Enjoin Trustee from Further Breach of Trust"; (3) "Remove Purported Trustee Thomas Ashbrook"; and

(4) Surcharge Purported Trustee Thomas Ashbrook for Breach of Trust.” Soon after filing Ashbrook resigned as trustee and requested dismissal of the petition for instructions. The fourth cause of action continued, where Jonathan Starr requested that the court surcharge Ashbrook “for all trust monies expended and dissipated since purportedly becoming trustee, including all legal fees expended by Ashbrook as purported trustee in litigating this action and funding [the elder abuse lawsuit].” Ashbrook responded by filing a special motion to strike the surcharge cause of action pursuant to California’s anti-SLAPP statute.

California’s anti-SLAPP statute, Section 425.16(b)(1) provides that “a cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

The court concluded that the surcharge cause of action was based on allegations that Ashbrook, as trustee, spent trust money in a manner that did not benefit the trust and wasted trust assets without authority, AND even if it arose out of a protected activity, Jonathan Starr had submitted admissible evidence to meet his burden of showing potential liability for breach of duties of care and loyalty. Therefore, the court denied the anti-SLAPP motion. Ashbrook appealed.

The core issue on appeal is whether, as Ashbrook asserts, the surcharge cause of action arises from allegations of pursuing and funding litigation, which are constitutionally protected activities under section 425.16(b)(1), OR as Jonathan Starr asserts, from allegations of waste and misuse of trust assets, which are not protected activities. The appellate court analyzed analogous opinions in *Greco*, *Gaynor*, and *Manlin* where the court acknowledged the protected activity of litigation, but also treated the misuse of trust assets allegations as a separate claim that is not protected.

Therefore, the appellate court affirmed, concluding the surcharge cause of action does not arise from the litigation in and of itself, but rather the waste and misuse of trust assets, which is not a protected activity. Additionally, the appellate court concluded that Jonathan Starr’s allegations of his father’s incompetence are sufficient to confer standing.