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In The
Supreme Court of the United States

NORMAN BARTSCH HERTERICH, PETITIONER

v.

MARY E. WISS, *ET AL.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A — COURT OF APPEALS MEMORANDUM DISPOSITION IN NINTH CIRCUIT CASE NO. 21-16746 (JULY 21, 2022)

A

FILED
JUL 21 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. MARY E. WISS; et al., Defendants-Appellees.	No. 21-16746 D.C. No. 3:21-cv-04078-LB MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding**

Submitted July 12, 2022**

Before: SCHROEDER, R. NELSON, and VANDYKE, Circuit Judges.

Norman Bartsch Herterich appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations arising from California state court proceedings involving his father's estate. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(1). *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015). We affirm.

The district court properly dismissed Herterich's action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because it was a "forbidden de facto appeal" of prior state court decisions and Herterich raised claims that were "inextricably intertwined" with those

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** The parties consented to proceed before a magistrate judge. See 28 U.S.C. § 636(c).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

state court decisions. *See Noel v. Hall*, 341 F.3d 1148, 1163-65 (9th Cir. 2003) (discussing the *Rooker-Feldman* doctrine); *see also Cooper v. Ramos*, 704 F.3d 772, 782 (9th Cir. 2012) (explaining that claims are "inextricably intertwined" with state court decisions where federal adjudication "would impermissibly undercut the state ruling on the same issues" (citation and internal quotation marks omitted)).

The district court did not abuse its discretion by denying Herterich's motion under Federal Rule of Civil Procedure 59(e) because the correction Herterich sought was not an error of law or fact upon which the judgment was based. *See Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (grounds upon which a Rule 59(e) motion may be granted); *see also Kaufmann v. Kijakazi*, 32 F.4th 843 (9th Cir. 2022) ("Rule 59(e) provides an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" (*quoting Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)).

The district court did not abuse its discretion by dismissing Herterich's complaint without leave to amend because further amendment would be futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper if amendment would be futile).

All pending motions and requests are denied.

AFFIRMED.

APPENDIX B — DISTRICT COURT ORDER REGARDING MOTION TO DISMISS NORTHERN DISTRICT OF CALIFORNIA CASE NO. 3:21-CV-04078-LB (SEPTEMBER 20, 2021)

B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

NORMAN BARTSCH HERTERICH, Plaintiff, v. MARY E. WISS; et al., Defendants.	Case No. 21-cv-04078-LB ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT Re: ECF No. 13

INTRODUCTION

The plaintiff sued a Superior Court judge and nine appellate justices who upheld the Superior Court judge's rulings denying his claim to a share of his alleged father's estate. The plaintiff claimed that their orders violated the U.S. Constitution in several ways: (1) their discriminatory treatment of him violated the Equal Protection Clause of the Fourteenth Amendment; (2) their denial of his share of the estate was without process, in violation of the Due Process

Clause of the Fourteenth Amendment; (3) their denial was an unreasonable seizure in violation of the Fourth Amendment, and (4) it was an unlawful taking in violation of the Fifth Amendment.[1] The defendants moved to dismiss on grounds that include preclusion of the lawsuit under the *Rooker-Feldman* doctrine. The court can decide the motion without oral argument, N.D. Cal. Civ. L. R. 7-1(b), and dismisses all claims with prejudice.

STATEMENT

Hans Herbert Bartsch died on October 25, 2008, leaving a will. Arndt Peltner allegedly transcribed and drafted the will, and Peltner's lawyer, Alice Traeg, "prepared it for execution." In the will, Bartsch said that he had no children. On November 17, 2008, Peltner and Traeg filed a petition in San Francisco County Superior Court to administer Bartsch's estate and probate the will. On April 1, 2009, the plaintiff filed a pretermission petition claiming that he was an omitted child of Bartsch and was entitled to inherit a portion of the Bartsch estate. He alleged that Bartsch did not believe or had forgotten that he had a child (but would have provided for that child in his will had he believed that he had a living child).[2]

On December 30, 2011, after discovery on the issue, the court denied the plaintiff's pretermission petition, finding that the plaintiff was not a

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[1] Compl. – ECF No. 1 at 6. Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *Id.* at 10 (¶¶ 26, 34), 11 (¶ 42), 12 (¶¶ 44, 47).

pretermitted child under California Probate Code § 21622.[3] The plaintiff appealed the decision to the California Court of Appeal, which affirmed. It also denied the plaintiff's petition for rehearing on February 28, 2014.[4] The California Supreme Court denied his petition for review of the lower court's decision.[5] In a separate lawsuit, the plaintiff sued Peltner and Traeg for civil fraud.[6]

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On January 21, 2016, the plaintiff moved for reconsideration of the probate court's denial of the pretermission petition in part based on the California Supreme Court's decision in *Estate of Duke*, 61 Cal. 4th 871 (2015). The court denied the motion on March 4, 2016. The plaintiff then petitioned the California Court of Appeal to recall the remitter and reinstate his appeal, and the court denied the petition on April 27, 2016. The plaintiff petitioned the California Supreme Court to review the Court of Appeal's denial, and the Supreme Court denied review on June 22, 2016.[7]

The plaintiff apparently filed a collateral attack to set aside the pretermission petition and other lawsuits to inherit Bartsch's assets "without disturbing the denial of the Pretermission Petition." The appellate court ruled against him, issuing remittiturs in five cases on July 18, 2019. "Upon issuance of those remittiturs, Herterich exhausted all known and available state remedies

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[3] *Id.* at 20 (¶ 85).
[4] *Id.* at 22 (¶ 97) (Case No. A135322), 24 (¶ 105).
[5] *Id.* at 24 (¶¶ 106, 107) (Case No. S216699).
[6] *Id.* at 25 (¶ 108) (Case No. CGC-12-523942).
[7] *Id.* at 29–30 (¶¶ 121–26).

for the improper deprivation of his right to inherit Bartch's assets."[8]

In this lawsuit, the plaintiff sued the judicial officers who ruled against him: (1) the Honorable Mary E. Wiss, the San Francisco Superior Court judge who denied his pretermission petition; (2) the Honorable Robert L. Dondero (ret.), the Honorable Sandra L. Margulies, and the Honorable Diana Becton, the California Court of Appeal justices who denied his appeal; and (3) the Honorable Tani Cantil-Sakauye, the Honorable Carol Ann Corrigan, the Honorable Kathryn Mickle Werdegar (Ret.), the Honorable Goodwin Hon Liu, the Honorable Mariano-Florentino Cuéllar, and the Honorable Leondra Reid Kruger, all California Court Supreme Court justices.[9] He brings four claims against all defendants, claiming that by denying his pretermission petition and related appeals, they (1) treated him differently than similarly situated persons, in violation of the Equal Protection Clause of the Fourteenth Amendment, (2) denied him his right to property (in the form of the Bartsch estate) without a fair hearing, in violation of the Due Process Clause of the Fourteenth Amendment, (3) unreasonably seized his property interest in the Bartsch estate, in violation of the Fourth Amendment, and (4) took his property without just compensation, in violation

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[8] *Id.* at 31 (¶¶ 129–30) (Case Nos. A155109, A155400, A156231, A156367, A156317; *see also* Case No. A151783).

[9] *Id.* at 4–5 (¶¶ 5–11).

of the Fifth Amendment. He seeks declaratory relief, injunctive relief, and damages.[10]

The defendants moved to dismiss for lack of subject-matter jurisdiction (including under the *Rooker-Feldman* doctrine) and for failure to state a claim (in part based on absolute judicial immunity).[11] All parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.[12]

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LEGAL STANDARD

1. Rule 12(b)(1)

A complaint must contain a short and plain statement of the ground for the court's jurisdiction. Fed. R. Civ. P. 8(a)(1). The plaintiff has the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

A Rule 12(b)(1) motion may either attack the sufficiency of the complaint to establish federal jurisdiction (a facial challenge) or allege a lack of jurisdiction that exists despite the formal sufficiency of the complaint (a factual challenge). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). This is a facial attack. A facial attack asserts lack of federal jurisdiction based on the complaint alone,

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[10] *Id.* at 36–41 (¶¶ 143–53, ¶¶ 155–63, ¶¶ 165–70, ¶¶ 172–81).

[11] Mem. – ECF No. 14.

[12] Consents – ECF No. 9, 15–17

and the court must "accept all allegations of fact in the complaint as true and construe them in the light most favorable to the plaintiffs." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

Dismissal of a complaint without leave to amend should only be granted where the jurisdictional defect cannot be cured by amendment. *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

2. Rule 12(b)(6)

A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does not contain enough facts to state a claim to relief that is plausible on its face. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 557). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief

above the speculative level." *Twombly*, 550 U.S. at 555 (internal citations and parenthetical omitted).

In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. See *id.* at 550; *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). This is particularly true where a plaintiff represents himself. "A document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson*, 551 U.S. at 94.

If the court dismisses the complaint, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

ANALYSIS

The defendants moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on several grounds: (1) the court does not have subject-matter jurisdiction under the *Rooker-Feldman* Doctrine and the Eleventh Amendment; (2) the plaintiff lacks Article III standing; (3) the defendants have absolute judicial immunity; (4) the statute of limitations bars the claims; and (5) the plaintiff does not plausibly plead civil-rights

violations.[13] The court dismisses the case primarily for lack of subject-matter jurisdiction and on the ground that the defendants are immune from suit.

1. *Rooker-Feldman* Doctrine

Under 28 U.S.C. § 1257, only the United States Supreme Court has appellate jurisdiction over state-court judgments. *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam). Thus, under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction to hear direct or de facto appeals from state-court judgments. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 482 (1923); *Fowler v. Guerin*, 899 F.3d 1112, 1119 (9th Cir. 2018); *Noel v. Hall*, 341 F.3d 1148, 1156 (9th Cir. 2003). The doctrine is narrow and confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283– 84 (2005). Put another way, under the doctrine, when a losing plaintiff in state court brings a suit in federal court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto appeal.

When a federal lawsuit is barred, at least in part by the *Rooker-Feldman* doctrine, a federal court must refuse to decide any issue that is

[13] Mem. – ECF No. 14 at 9–15.

"inextricably intertwined" with the state court's decision because "[i]f the constitutional claims presented to United States District Courts are inextricably intertwined with a state court's denial in [a] judicial proceeding . . . , then the District Court is in essence being called upon to review the state court decision. This the District Court may not do." *Feldman*, 460 U.S. at 483 n.16. To determine whether allegations in the complaint are "inextricably intertwined" with the state court's decision, the court considers whether "the relief requested would effectively reverse the state court decision or void its ruling." *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 992 (9th Cir. 2002); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (a claim is inextricably intertwined with a state court judgment if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.").

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The plaintiff wants injunctive relief and the monetary value of the relief he would have received under a "Constitutionally compliant determination of the Pretermission Petition on the merits," including compensation for the alleged taking of his property interest in the Bartsch estate, plus fees and costs.[14] Without reversing the state courts' decisions, the plaintiff would be entitled to no relief at all.

For example, he says, "the Complaint asks the Court to provide him with an alternative outcome which is compatible with [the

[14] Compl. – ECF No. 1 at 41–42 (¶ 180–83).

requirements of the Equal Protection Clause]."[15] This is a de facto appeal of the state courts' decisions. Similarly, his allegations that the state court rulings — disinheriting the plaintiff in a discriminatory way in violation of the Equal Protection Clause, and as a deprivation of property without due process, an unreasonable seizure of property in violation of the Fourth Amendment, and an unconstitutional taking in violation of the Fifth Amendment — do not allow relief by this court without reviewing and reversing the rulings by the state courts.

The plaintiff cites cases where the *Rooker-Feldman* doctrine did not bar claims, but the cases do not change the outcome here. In short, the cases are not collateral attacks on state-court decisions as constitutional violations. *See, e.g.*, *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir. 2004) (challenging a third-party's fraud before a state court that led to an adverse outcome). By contrast, the lawsuit here is a collateral attack on state-court decisions. Under the *Rooker-Feldman* doctrine, the court lacks subject-matter jurisdiction over the plaintiff's claims because they are de facto appeals of the state-court decisions. In similar cases in this district involving the plaintiff, the court has reached the same result. *Herterich v. Goldsmith*, No. C 20-3992 SBA, 2020 WL 6576164, at *7 (N.D. Cal. Oct. 9, 2020); *Herterich v. City & Cnty. of San Francisco*, No. C 19-7754 SBA, Order – ECF No. 47 at 9–15 (N.D. Cal. June 2, 2020).

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[15] Opp'n – ECF No. 23 at 17.

2. Other Grounds for Dismissal

The defendants assert other grounds for dismissal: (1) the Eleventh Amendment's bar of suits against state officials in their official capacity; (2) the plaintiff's lack of standing; (3) judicial immunity; (4) the statute of limitations; and (5) a failure to plausibly plead a civil-rights violation. There are many reasons that bar this lawsuit, in addition to the *Rooker-Feldman* doctrine. For one, this is a lawsuit against judges. They are immune from liability for damages about their decisions arising out of the exercise of their judicial functions. *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Sharnese v. California*, 547 F. App'x 820, 822–23 (9th Cir. 2013). Also, the claims are barred by the statute of limitations, which is two years for the civil-rights claims. *West Shield Investigations & Sec. Consultants v. Super. Ct.*, 82 Cal. App. 4th 935, 953 (2000).

The court touches on these other grounds for dismissal but in short, dismisses the case for lack of subject-matter jurisdiction.

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CONCLUSION

The court dismisses the case with prejudice.

IT IS SO ORDERED.

Dated: September 20, 2021

/s/
LAUREL BEELER
United States Magistrate Judge

APPENDIX C — DISTRICT COURT ORDER REGARDING MOTION TO ALTER OR AMEND JUDGMENT IN NORTHERN DISTRICT OF CALIFORNIA CASE NO. 3:21-CV-04078-LB (OCTOBER 8, 2021)

C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

NORMAN BARTSCH HERTERICH, Plaintiff, vs. MARY E. WISS, et al., Defendants.	Case No: 21-cv-04078-LB ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT Re: ECF No. 28

INTRODUCTION

The plaintiff moved to alter or amend judgment against him filed on September 20, 2021.[1] The court ordered dismissal of the plaintiff's

[1] Mot. to Alter or Amend Judgment – ECF No. 28. Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

complaint against a Superior Court judge and nine appellate justices who upheld the Superior Court judge's rulings. The plaintiff filed this motion under Fed. R. Civ. P. 59(e), which allows judgments to be amended where the court committed an error upon which the judgment is based. Upon review, the court finds none of these errors rise to the level of Rule 59(e) and DENIES the motion.

STANDARD & ANALYSIS

A district court can "reconsider" final judgments under Rule 59(e). *See Balla v. Idaho Bd. of Corr.*, 869 F.2d 461, 466–67 (9th Cir. 1989). Reconsideration is appropriate when (1) the court is presented with newly discovered evidence, (2) the underlying decision was in clear error or manifestly unjust, or (3) there is an intervening change in controlling law. *See Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "But amending a judgment after its entry remains an extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011) (cleaned up).

Under this District's Civil Local Rules, a party seeking reconsideration must first request permission from the court before filing a motion for reconsideration. N.D. Cal. Civil L.R. 7-9; *see, e.g.*, *Thomas v. County of Sonoma*, No. 17-cv-00245-LB, 2017 WL 2500886, at *2 (N.D. Cal. June 9, 2017) (Local Rule 7-9 applies to motions for reconsideration under Rule 59(e)). In seeking permission, the party must show that (1) at the time of the motion, a material difference in fact or law exists that was not previously presented to the

court, (2) there has been an emergence of new material facts or a change in law since the court issued the order, or (3) there was a "manifest failure by the Court to consider material facts or dispositive legal arguments" that were presented. N.D. Cal. Civ. L.R. 7-9(b). "No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered." N.D. Cal. Civ. L.R. 7-9(c). A motion to alter or amend judgment may be granted where "necessary to correct manifest errors of law or fact upon which the judgment is based." *Turner v. Burlington Northern Santa Fe Railroad*, 338 F.3d 1058, 1063 (9th Cir.2003) (emphasis omitted) (citations omitted).

None of the three grounds Mr. Herterich put forth in his motion meets this standard. First, the court dismissed this case for lack of subject-matter jurisdiction and issued no other holdings on other grounds for dismissal.[2] The holding is unambiguous and rests entirely on lack of subject-matter jurisdiction. Second, the court's description of Mr. Bartsch as the plaintiff's "alleged father" and the grammatical correction made by the plaintiff are not "errors of law or fact upon which the judgment is based." *Turner*, 338 F.3d at 1063 (emphasis omitted). Thus, the "extraordinary remedy" of amending the judgment is not necessary here.

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[2] Order – ECF No. 26 at 8 ("The court touches on these other grounds for dismissal but in short, dismisses the case for lack of subject-matter jurisdiction.").

Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011).

CONCLUSION

In conclusion, the court denies the motion because the plaintiff has not cited to any error in the court's order that justifies the extraordinary remedy of amending or altering the judgment.

IT IS SO ORDERED.

Dated: October 5, 2021

/s/
LAUREL BEELER
United States Magistrate Judge

APPENDIX D — COURT OF APPEALS ORDER DENYING REHEARING IN NINTH CIRCUIT CASE NO. 21-16746 (OCTOBER 24, 2022)

FILED
OCT 24 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN BARTSCH HERTERICH, Plaintiff-Appellant, v. MARY E. WISS; et al., Defendants-Appellees.	No. 21-16746 D.C. No. 3:21-cv-04078-LB Northern District of California, San Francisco ORDER

Before: SCHROEDER, R. NELSON, and VANDYKE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Herterich's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 32) are denied.

No further filings will be entertained in this closed case.

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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APPENDIX F — COMPLAINT FILED IN NORTHERN DISTRICT OF CALIFORNIA CASE NO. 3:21-CV-04078-LB ON MAY 28, 2021

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORMAN BARTSCH HERTERICH, Plaintiff, vs. MARY E. WISS, ROBERT L. DONDERO, SANDRA L. MARGULIES, DIANA BECTON, TANI GORRE CANTIL-SAKAUYE, MING WILLIAM CHIN, CAROL ANN CORRIGAN, MARVIN RAY BAXTER, KATHRYN MICKLE WERDEGAR, GOODWIN HON LIU, MARIANO-FLORENTINO CUÉLLAR, AND LEONDRA REID KRUGER, Defendants.	Case No. CV 21 4078 JSW COMPLAINT FOR RECOVERY OF, OR JUST COMPENSATION OR MONEY DAMAGES FOR, PRIVATE PROPERTY UNREASONABLY SEIZED IN VIOLATION OF EQUAL PROTECTION AND WITHOUT DUE PROCESS AND TAKEN FOR PUBLIC USE DEMAND FOR JURY TRIAL

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JURISDICTION AND VENUE

1. **Jurisdiction.** This action is brought under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983. Jurisdiction is conferred under 28 U.S.C. §§ 1331 and 1343, as applicable to actions brought for the redress of violations of a plaintiff's constitutional and civil rights under the United States Constitution.

2. **Venue.** Venue in the Northern District of California is proper under 28 U.S.C. § 1391(b) and (c) because the events giving rise to this claim occurred within the district, and because some or all defendants reside and/or maintain an office in the district.

3. **Intradistrict Assignment.** This matter should be assigned to the San Francisco Division of this Court because the events giving rise to this claim occurred in San Francisco County, and

because some or all defendants reside and/or maintain an office in San Francisco.

PARTIES

4. Plaintiff Norman Bartsch Herterich ("Plaintiff" or "Herterich") is, and was at all times relevant, a resident of San Francisco, California.

5. Defendant Mary E. Wiss ("Wiss") is, and was at all times relevant, a Judge of the San Francisco Superior Court ("the Superior Court"). Wiss is employed and maintains an office in San Francisco, California.

6. Defendant Robert L. Dondero ("Dondero") was at all times relevant a Justice of Division One of the First District Court of Appeal of the State of California ("the Appellate Court").

7. Defendant Sandra L. Margulies ("Margulies") is, and was at all times relevant, a Justice of the Appellate Court. Margulies is employed and maintains an office in San Francisco, California.

8. Defendant Diana Becton ("Becton") was at all times relevant a Judge of the Contra Costa County Superior Court and as such was assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution, to the Appellate Court.

9. Dondero, Margulies, and Becton are collectively referred to herein as "the Appellate Justices."

10. Defendants Tani Gorre Cantil-Sakauye ("Cantil-Sakauye"), Ming William Chin ("Chin"), Carol Ann Corrigan ("Corrigan"), Marvin

Ray Baxter ("Baxter"), Kathryn Mickle Werdegar ("Werdegar"), Goodwin Hon Liu ("Liu"), Mariano-Florentino Cuéllar ("Cuéllar"), and Leondra Reid Kruger ("Kruger") (collectively "the Supreme Court Justices") were at all times relevant Justices of the Supreme Court of the State of California ("the California Supreme Court"). Cantil-Sakauye, Corrigan, Liu, Cuéllar, and Kruger are currently employed as Justices of the Supreme Court of the State of California, and as such each maintains an office in San Francisco, California.

11. Wiss, the Appellate Justices, and the Supreme Court Justices (collectively, "Defendants") are all parties defendant in both their individual capacities and their official capacities as judicial officers.

12. Defendants at all times herein mentioned were the agents and employees of their co-defendants and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their co-defendants.

13. Defendants at all times herein mentioned had actual or constructive knowledge of all material facts known to, and all material acts and omissions of, their co-defendants and the agents and employees of their co-defendants. Defendants' acts and omissions were informed by such knowledge.

INTRODUCTION

14. The instant federal case arises from prior state probate court proceedings ("the Probate

Proceedings") concerning the estate of Plaintiff Herterich's father, Hans Herbert Bartsch ("Bartsch"). One of the Probate Proceedings was a proceeding ("the Pretermission Proceeding") which concerned Herterich's claim that he was a pretermitted (or "omitted") child under Bartsch's purported will ("the Will). The Defendants are all state court judges and justices who presided over some aspect of the Pretermission Proceeding. Herterich alleges that Defendants' conduct in the Pretermission Proceeding exceeded the normal bounds of the adjudicative process to such an extent that the conduct violated Herterich's Constitutional rights. In the instant federal case Herterich seeks a remedy for Defendants' violation in the Pretermission Proceeding of Herterich's rights under Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

15. "Pretermission" is a frequently misunderstood legal concept which arises from and gives effect to common-law and statutory requirements that a testator have his or her spouse and children "in mind" when executing a testamentary instrument which reduces or eliminates the inheritance which the spouse or children would otherwise receive in the absence of such an instrument. These common-law and statutory requirements protect from unintended disinheritance the close family members to whom the testator owed numerous duties while alive and for whom the law presumes the testator would provide after death. These requirements do not limit the testator's testamentary freedom in any way and are easily satisfied. The age-old and near-

universal practice of naming one's spouse and children in one's will and identifying them as such conclusively prevents those persons from bringing pretermission claims.

16. The law presumes that Bartsch had Herterich in mind as his child when the Will was executed, and in the Pretermission Proceeding it was Herterich's burden to prove that Bartsch did not have Herterich in mind as his child at that time. To meet that burden Herterich relied on Bartsch's inaccurate but unambiguous declaration in the Will that Bartsch had had no children. In other pretermission cases, involving similar inaccurate declarations in a will that the testator had no children, courts drew the inference from those declarations that the testator did not have his child in mind when executing his will. But here the state courts did not draw such an inference from such a declaration. Here, the state courts ruled on summary judgment that the inference cannot be drawn, from Bartsch's declaration in the Will that he had had no children, that Bartsch did not have Herterich in mind as his child when the Will was executed.

17. Herterich contends that, by failing to draw an inference that always had been drawn in other cases with similar facts, Defendants treated Herterich differently from similarly situated persons, to Herterich's detriment.

18. But the discriminatory treatment did not end there. There were several additional ways in which Defendants, in denying Herterich's pretermission claim, treated Herterich differently

from similarly situated persons, to Herterich's detriment:

- Defendants concluded that Bartsch's declaration in the Will, that he had had no children, showed an intent to disinherit Herterich. In other pretermission cases the courts did not draw such a conclusion from such a declaration.
- Defendants relied on evidence extrinsic to the Will to establish that Bartsch intended to disinherit Herterich. In other pretermission cases evidence extrinsic to a will was inadmissible to establish an intent to disinherit.
- Defendants used evidence extrinsic to the Will without first identifying an ambiguity or mistake in the Will, and Defendants used that evidence for purposes other than resolving an ambiguity or correcting a mistake in the Will. In other probate cases evidence extrinsic to a will was inadmissible unless the court first identified an ambiguity or a mistake in the will and the evidence was used to resolve the ambiguity or correct the mistake.
- Defendants prevented Herterich from pursuing his pretermission claim on the grounds that (1) Bartsch had been aware that Herterich was his child many years or decades prior to executing the Will; (2) Bartsch had provided or was legally obligated to provide financial support for Herterich many decades prior to executing

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the Will; (3) Herterich produced no evidence to indicate that Bartsch was suffering from a lack of memory or other disability or incapacity at the time he executed the Will; (4) Herterich did not rebut the presumption that Bartsch had testamentary capacity when he executed the Will; and (5) Herterich did not offer evidence, such as evidence suggesting that Bartsch suffered from an age-related cognitive impairment when he executed the Will, to show that Bartsch had lost all awareness of Herterich as Bartsch's child. In other pretermission cases the pretermission claimant was not prevented from pursuing his or her claim notwithstanding that (1) at some time prior to executing the will the testator had been aware that the claimant was the testator's child; (2) at some time prior to executing the will the testator had provided or was legally obligated to provide financial support for the claimant; (3) the claimant produced no evidence to indicate that the testator was suffering from a lack of memory or other disability or incapacity at the time he executed the will; (4) the claimant did not rebut the presumption that the testator had testamentary capacity when he executed the will; and (5) the claimant did not offer evidence, such as evidence suggesting that the testator suffered from an age-related cognitive impairment when he executed the will, to show that the testator had lost all

awareness of the claimant as the testator's child.

- Defendants did not limit the inquiry in the Pretermission Proceeding to the issue of whether Bartsch had Herterich in mind when the Will was executed. In other pretermission cases the courts limited the inquiry to the issue of whether the testator had the pretermission claimant in mind when the will was executed.
- Defendants relied on an unauthenticated document. In other cases an unauthenticated document was inadmissible as such, as irrelevant, or as hearsay.
- Defendants decided Herterich's pretermission claim against him on summary judgment on the basis of purported facts that were unsupported by evidence in the record. In other cases the plaintiffs did not have their cases decided against them on summary judgment on the basis of purported facts that were unsupported by evidence in the record.

19. Based on these facts, Herterich here contends that Defendants violated his rights under the U.S. Constitution by discriminating against him and denying him the equal protection of the laws. Alternatively, Herterich contends that Defendants denied him the due process of the laws, unreasonably seized his property interest in Bartsch's estate, or took his property interest in Bartsch's estate for public use without just compensation. Herterich seeks recovery of his

property interest in Bartsch's estate, just compensation for that property interest, or money damages.

COMMON ALLEGATIONS

A. Herterich filed the Pretermission Petition because he was Bartsch's child whom Bartsch did not have in mind when the Will was executed.

a. Herterich was Bartsch's child and only heir.

20. On February 6, 1963, the Superior Court entered an order and judgment (collectively, "the Paternity Order") in case no. 508058 ("the Paternity Proceeding"). The Paternity Order determined that Bartsch was Herterich's father and ordered Bartsch to pay child support for Herterich to Herterich's mother while Herterich was resident in California and until Herterich reached majority or became emancipated.

21. Bartsch died in San Francisco, California, on October 25, 2008.

22. Under California law, Herterich was Bartsch's "child" when Bartsch died. See California Probate Code §§ 6450(a) and 6453(b)(1).

23. Bartsch had had no children other than Herterich. Bartsch had never married. When Bartsch died all of his property was separate property and none of his property was held in trust.

24. Under California law, Herterich was Bartsch's sole heir when Bartsch died. See California Probate Code § 44.

25. Under California law, Herterich was entitled after Bartsch's death to inherit the entire residue of Bartsch's estate unless a will providing otherwise was determined by a court to be valid. See California Probate Code § 6402(a). The residue of Bartsch's estate consisted of the remainder after Bartsch's debts were paid from the assets Bartsch owned when he died.

b. In the Will Bartsch did not mention Herterich, and Bartsch instead declared that he had had no children.

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26. On November 17, 2008, Arndt Peltner ("Peltner"), through his attorney Alice Brown Traeg ("Traeg"), filed a petition ("the Probate Petition") in the Superior Court to administer Bartsch's estate and probate the Will, thereby initiating the Probate Proceedings (more specifically, case no. PES-08-291846). The Probate Petition was granted on December 10, 2008, by written order ("the Probate Order").

27. The Will had been drafted and transcribed by Peltner and then prepared for execution by Traeg.

28. The Will purported to have been executed on January 18, 2007.

29. The Will was "signed" using a rubber stamp which impressed a facsimile of Bartsch's signature onto the Will.

30. The Will provided that the entire residue of Bartsch's estate would be distributed to persons other than Herterich. The largest bequest in the Will was to Peltner.

31. The Will did not mention Herterich.

32. The Will explicitly declared that Bartsch had had no children.

c. There was no indication that Bartsch had Herterich in mind when Bartsch executed the Will.

33. In the Probate Petition, Peltner and Traeg explicitly stated under penalty of perjury that Bartsch was survived by no child.

34. Herterich was not mentioned in the Probate Petition.

35. In the Probate Petition, Peltner and Traeg explicitly stated under oath that Ute Hellauer was one of Bartsch's heirs.

36. Ute Hellauer was a niece of Bartsch—i.e., not a spouse or child of Bartsch.

37. Ute Hellauer was not an heir of Bartsch.

38. Ute Hellauer would have been an heir of Bartsch if Bartsch had had no children when he died.

39. Herterich was not served personal notice of the Probate Petition.

40. Herterich did not learn of the Probate Petition, the Probate Proceedings, or the Will until after the Probate Petition had been granted and the Will had been admitted to probate.

41. After Herterich learned of the Probate Petition, the Probate Proceedings, and the Will, he had his attorneys reach out to the persons named in the Probate Petition. Those who responded all

told Herterich's attorneys that they had never heard of Herterich and did not know that Bartsch had a child, and that Bartsch had never indicated to them that he had a child.

d. Herterich filed the Pretermission Petition so that he could receive a statutory share of Bartsch's assets notwithstanding the Will.

42. Based on these facts, Herterich filed a petition ("the Pretermission Petition") in the Probate Proceedings on April 1, 2009. In the Pretermission Petition Herterich alleged that he was Bartsch's pretermitted or omitted child and as such entitled to distribution of the entire residue of Bartsch's estate, notwithstanding that the dispositive provisions of the Will purported to distribute that residue to others.

43. Herterich filed the Pretermission Petition under California Probate Code § 21622, which in pertinent part provided and still provides that a decedent's child "shall receive a share in the estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instruments" if the court concludes that "at the time of the execution of all of decedent's testamentary instruments effective at the time of decedent's death, the decedent ... was unaware of the birth of the child."

44. Within the meaning of California Probate Code § 21622, "the birth of the child" is a legal term of art. The "birth of a child" is an "event

so momentous" and "so deserving of consideration in framing a testamentary scheme" that the Legislature has enacted the pretermission statute "to secure a specific moral influence upon the testamentary act -- the moral influence of having [that event] in mind" when the testamentary scheme is framed. *Estate of Turkington* (1983) 147 Cal.App.3d 590, 593-594; *Estate of Meyer* (1919) 44 Cal.App. 289, 292-293. At common law, upon the birth of a child "there is such a radical change in the testator's situation that the law should regard the will as revoked regardless of the wishes of the individual testator." Atkinson, *Handbook of the Law of Wills* (1953) § 85, at p. 428-429; 88 A.L.R.2d 616 § 2 (at common law, "birth of a child" can cause "the revocation of a will ... in consequence of a rule or principle of law, independently altogether of the testator's intention.").

45. "Pretermitted heir statutes, or 'pretermission' statutes, ... supersede the operation of an otherwise valid will to provide a statutory share in a decedent's estate for certain heirs of the testator or testatrix who are neither beneficiaries of such will, nor otherwise mentioned or provided for therein." 83 A.L.R.4th 779 § 2[a]. Pretermitted child statutes "reverse the general rule that a testator is presumed to know the contents of his will and to intend that effect shall be given thereto." Page on Wills § 21.105.

46. The California courts have interchangeably stated that the inquiry in a pretermitted child proceeding concerns whether the testator (1) "had [his] child in mind at the time of executing the will" (*Estate of Torregano* (1960) 54

Cal.2d 234, 249) or (2) "was unaware" of the child when the will was executed (*Id.*, 254).

47. In the Pretermission Petition Herterich alleged that when the Will was executed Bartsch either did not believe or had forgotten that Herterich was his child, and Bartsch therefore was unaware of the birth of the child within the meaning of California Probate Code § 21622, but Bartsch would have provided for his child in the Will if he had believed he had a living child when the Will was executed.

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e. After Herterich filed the Pretermission Petition, further discovery confirmed that Bartsch did not have Herterich in mind when Bartsch executed the Will.

48. After filing the Pretermission Petition Herterich propounded discovery and deposed Peltner and Traeg.

49. After discovering the names and contact information of Bartsch's friends and relatives, Herterich through his attorneys reached out to Bartsch's friends and relatives. Those who responded all told Herterich's attorneys that they had never heard of Herterich and did not know that Bartsch had a child, and that Bartsch had never indicated to them that he had a child or that he would not provide for a child if he had one.

50. In discovery Herterich obtained an audio recording wherein Bartsch told Peltner in German that all of his relatives were in Germany. In that audio recording Bartsch explained that he

was generous with his money, paid his relatives' expenses when they visited from Germany, and was careful to leave something in his will for his relatives, as well as for his caretakers. To emphasize his generosity Bartsch told a story about how he was once travelling in Poland and still had a substantial quantity of Polish money as he was about to leave the country by land, so right before leaving Poland he gave the Polish money away to complete strangers who happened to be passengers on a train he was on.

51. In discovery Herterich obtained Bartsch's financial records, which indicated that over the years he had made generous gifts to his friends, relatives, and caretakers, and had paid their expenses when his friends and relatives visited him.

52. Peltner testified that he was Bartsch's fiduciary and Bartsch had given him power of attorney and appointed him executor, and Peltner had had long personal conversations with Bartsch on numerous occasions when he visited Bartsch, helped Bartsch, or brought Bartsch to the doctor, but Peltner did not know of Herterich or the fact that Bartsch had a child until after the Pretermission Petition had been filed.

53. Peltner testified that Bartsch never indicated to him that Bartsch had a child, not even when Peltner transcribed and participated in the drafting of the Will.

54. Traeg testified that she had prepared the final version of the Will and witnessed its execution in 2007, and that at that time Bartsch

did not mention Herterich or indicate that Bartsch had had a child.

55. Traeg testified that when preparing a prior will for Bartsch in 1999 or 2000 she became aware that Bartsch had at some point in the past made payments to Herterich's mother, and when she asked Bartsch about those payments Bartsch told her that the payments had not been made under court order and Herterich was not his child.

56. Traeg testified that she believed Bartsch and concluded that Herterich was not Bartsch's child, and for that reason did not include any mention of Herterich in any of the wills which she subsequently drafted or prepared for Bartsch.

57. Traeg testified that in his wills Bartsch usually named as beneficiaries the friends with whom he had recently been in contact, and all of his relatives except for those with whom he had had a falling out.

58. Peltner and Traeg both testified that, prior to the filing of the Pretermission Petition, they did not know that a court had determined that Bartsch was Herterich's father. Peltner and Traeg both denied knowledge prior to the filing of the Pretermission Petition of any child support payments which Bartsch may have made under court order.

59. Prior to August 8, 2011, Herterich had ample evidence indicating that when Bartsch executed the Will Bartsch did not have Herterich in mind as his child and Bartsch was unaware that Herterich was his child.

60. Prior to August 8, 2011, Herterich had no evidence indicating that when Bartsch executed the Will Bartsch had Herterich in mind as his child or was aware that Herterich was his child.

B. The MSJ sought to defeat the Pretermission Petition by conclusively establishing that in 2007 Bartsch was aware that Herterich was his child.

a. The MSJ relied on extrinsic evidence without claiming there was an ambiguity or a mistake in the Will.

61. On August 8, 2011, Peltner filed a motion for summary judgment ("the MSJ") in the Pretermission Proceeding.

62. In the MSJ Peltner did not dispute that Herterich was Bartsch's child within the meaning of the California Probate Code. To the contrary, Peltner stipulated through counsel that Bartsch's declaration in the Will that Bartsch had had no children was "legally incorrect."

63. In the MSJ Peltner did not take the position that Bartsch's declaration in the Will, that Bartsch had had no children, was ambiguous or the result of a mistake. To the contrary, Peltner argued that the declaration was intentional and had not been the result of a mistake.

64. In the MSJ Peltner did not argue that evidence extrinsic to the Will was necessary to resolve an ambiguity or correct a mistake in the Will. Yet the MSJ nonetheless relied on evidence extrinsic to the Will, as set forth below. That evidence was submitted for the purpose of showing

that when Bartsch executed the Will he was aware that Herterich was his child, notwithstanding that such a showing would conflict with the inference that must be drawn from Bartsch's declaration in the Will that he had had no children. Most of the evidence was inadmissible or non-existent, as set forth below.

b. The MSJ stated without evidence that Bartsch had paid child support for Herterich until Herterich turned 21 in 1982.

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65. In the MSJ Peltner stated that Bartsch had paid child support for Herterich until Herterich turned 21 in 1982. In support of that statement Peltner cited only to the Paternity Proceeding, generally and *in toto*. However, nothing in the Paternity Proceeding indicates that Bartsch paid child support for Herterich until Herterich turned 21, and Peltner produced no evidence from the Paternity Proceeding indicating that such payments had ever been made. The Paternity Order is the only document from the Paternity Proceeding which is in the record of the Pretermission Proceeding.

c. The MSJ relied in part on the 1963 Paternity Order.

66. The MSJ relied in part on the Paternity Order. Peltner asserted that as a matter of law the 1963 Paternity Order conclusively established that Bartsch was aware that Herterich

was Bartsch's child when the Will was executed in 2007.

67. The Paternity Order did not indicate, and Peltner did not claim that the Paternity Order indicated, that Bartsch had paid child support for Herterich.

d. The MSJ relied in part on the unauthenticated Seelander Document, which purported to date from the 1990s.

68. The MSJ also relied in part on a document ("the Seelander Document") which, Peltner asserted, was a testamentary instrument that Bartsch had executed in 1993 and then sent to Ursula Seelander, an attorney in Germany. The Seelander Document was a type-written one-page document which was styled as a testamentary instrument, "signed" using a rubber-stamp facsimile of Bartsch's signature, and not signed by any witness to its purported execution. The Seelander Document bore several dates from the 1990s. The only hand-written text in the Seelander Document were the words "Ursula Seelander 1/10/96."

69. The Seelander Document was not, and could not have been, a testamentary instrument. The Seelander Document did not satisfy the technical requirements under California law of a testamentary instrument.

70. In the Seelander Document Bartsch purportedly stated that (1) he wished that Herterich take no part of his estate; (2) he never

considered Herterich to be his "child or father"; and (3) he had made payments for Herterich to Herterich's mother for 21 years "under constant pre/ssure and threaths [sic]."

71. In the MSJ Peltner claimed that the Seelander Document showed that in 1993 Bartsch intended to eliminate Herterich as a beneficiary of his estate.

72. In the MSJ Peltner did not claim that the Seelander Document showed that Bartsch had made court-ordered child-support payments for Herterich for 21 years. To the contrary, Peltner asserted elsewhere that the Seelander Document could not be construed to imply that Bartsch had made or been compelled to make child-support payments for Herterich under court order. Similarly, Traeg testified elsewhere that she did not construe the Seelander Document as implying that Bartsch had made or been compelled to make child-support payments for Herterich under court order.[1]

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73. In the MSJ Peltner did not attempt to authenticate the Seelander Document or support his assertions about it with evidence. Peltner instead only claimed that Bartsch had given Traeg a copy of the Seelander Document, and in support of that claim Peltner cited a short passage from

[1] Both Peltner and Traeg have asserted that their failure to serve Herterich notice of the Probate Petition was not fraudulent, and their representation under oath to the probate court that Bartsch was survived by no child was not perjurious, because the Seelander Document (which was in their possession at the time) could not be construed to imply that Herterich was Bartsch's child.

Traeg's deposition testimony. However, Traeg did not testify that the Seelander Document was a testamentary instrument or that the Seelander Document had been executed in 1993. Similarly, Traeg did not testify that Bartsch understood the Seelander Document to be a testamentary instrument, had executed the Seelander Document, or had sent the Seelander Document to Ursula Seelander in Germany.

74. In the Traeg deposition testimony cited by Peltner in the MSJ, Traeg explained that she had played no role in preparing the Seelander Document and that her copy of the Seelander Document had already been signed and the hand-written text was already present on her copy when she received the copy. Traeg did not otherwise provide any information regarding the origin and subsequent history of the Seelander Document. The deposition testimony cited by Peltner contained no indication that Bartsch had made any representation to Traeg regarding the Seelander Document.

75. In the Traeg deposition testimony cited by Peltner in the MSJ, Traeg explained that her copy of the Seelander Document was in an envelope that Bartsch brought with him when he met with Traeg in 1999, and she could not remember specifically why Bartsch gave her that envelope. In the cited testimony there is no indication that Bartsch was aware that the copy of the Seelander Document was in that envelope. To the contrary, Traeg testified elsewhere that Bartsch was blind and had to have documents read to him out loud, so Bartsch could have been

unaware of the contents of the envelope which Traeg received from him. Traeg's testimony gave no indication that Bartsch ever acknowledged the existence or purpose of the Seelander Document.

e. The MSJ relied in part on deposition testimony which did not support Peltner's assertion that in 2007 Traeg and Bartsch had a conversation in which they specifically referred to Herterich as Bartsch's child and heir whom Bartsch wanted to disinherit.

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76. The MSJ also relied in part on passages from the deposition testimony of Peltner and Traeg which, Peltner asserted, established that on the day the Will was executed Traeg and Bartsch had a conversation in which they specifically referred to Herterich as Bartsch's child and heir whom Bartsch wanted to disinherit. But the deposition testimony cited by Peltner did not support Peltner's assertion. To the contrary, the cited passage in Traeg's testimony concerned a conversation between Traeg and Bartsch which took place seven years prior to the execution of the Will and in which Bartsch asserted and Traeg concluded that Herterich was not Bartsch's child. The passage did not concern events surrounding the execution of the Will and did not indicate that either Traeg or Bartsch had represented that Herterich was Bartsch's child or heir.

77. In the Peltner deposition testimony passages cited in the MSJ Peltner testified that in his presence Bartsch confirmed that he had had no

children and there was no further discussion of the matter. Peltner did not testify that Herterich was mentioned or that a child of Bartsch was mentioned. Peltner testified elsewhere that he had been present when the Will was executed and at several earlier meetings at which the Will was discussed, and that neither Herterich nor the fact that Bartsch had a child were mentioned at any of those meetings. Peltner testified that he did not hear of Herterich or the fact that Bartsch had a child until long after Bartsch had died.

78. The deposition testimony cited by Peltner in the MSJ did not indicate, and Peltner did not claim that it showed, that Bartsch had paid child support for Herterich.

C. Herterich objected to the extrinsic evidence on which the MSJ relied.

79. Herterich objected to the extrinsic evidence which Peltner offered in support of the MSJ. Herterich argued that Bartsch's declaration in the Will, that Bartsch had had no children, was an unambiguous declaration by Bartsch that he was unaware of any child that he may have had, so under California law evidence extrinsic to the Will was not admissible for the purpose of showing that when Bartsch executed the Will he was nonetheless aware that Herterich was his child.

80. Herterich objected to Peltner's reliance on the Paternity Order, the Seelander Document, and the deposition testimony of Peltner and Traeg, on the grounds that (1) all of that evidence was irrelevant because it did not show

that in 2007 (i.e., when the Will was executed) Bartsch was aware that Herterich was Bartsch's child; (2) the Seelander Document had not been authenticated; and (3) most of Peltner's evidence was inadmissible hearsay.

81. Herterich objected that no evidence supported Peltner's assertion that Bartsch had paid child support for Herterich until Herterich turned 21. Herterich argued that, even if the payments had been made, they would have ended in 1982 at the latest and were thus irrelevant because they did not show that in 2007 (i.e., when the Will was executed) Bartsch was aware that Herterich was Bartsch's child.

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82. Herterich disputed that the deposition testimony of Peltner and Traeg established that on the day the Will was executed Traeg and Bartsch specifically referred to Herterich as Bartsch's child and heir whom Bartsch wanted to disinherit. Herterich contended there was no evidence of such a discussion.

83. Herterich argued that, assuming *arguendo* that the Seelander Document were admissible as evidence, it undermined the MSJ because in it Bartsch stated that Herterich was not his child.

D. Relying on extrinsic evidence, Wiss granted the MSJ.

84. The MSJ was heard and decided by Wiss.

85. On December 30, 2011, Wiss granted the MSJ, thereby denying the Pretermission

Petition, in a written order ("the Pretermission Order") after concluding in the Pretermission Order that Herterich was not a pretermitted child within the meaning of California Probate Code § 21622.

86. In the Pretermission Order Wiss ruled that Herterich was Bartsch's child.

87. In the Pretermission Order Wiss did not identify an ambiguity or mistake in the Will. And Wiss did not rule that evidence extrinsic to the Will was necessary to resolve an ambiguity or correct a mistake in the Will. Yet Wiss nonetheless ruled that evidence extrinsic to the Will was admissible to establish that (1) when the Will was executed Bartsch was aware of Herterich's birth as his child; and (2) Bartsch had complied with the court order to pay child support for Herterich and was aware of that compliance when he executed the Will.

88. In the Pretermission Order Wiss overruled all of Herterich's evidentiary objections concerning the Paternity Order, the Seelander Document, and the deposition testimony of Peltner and Traeg. Wiss ruled that, because the evidence showed that Bartsch was once aware that Herterich was his child, Herterich needed to produce evidence to indicate that Bartsch was suffering from a lack of memory or other disability or incapacity at the time he executed the Will in 2007. Wiss ruled that Herterich needed to rebut the presumption that Bartsch had testamentary capacity when he executed the Will in 2007. Consequently, the evidence was relevant.

89. In the Pretermission Order Wiss did not explain why she had overruled Herterich's

objection that the Seelander Document had not been properly authenticated.

90. In the Pretermission Order Wiss did not explain why she had overruled Herterich's objection that most of Peltner's evidence was hearsay.

91. In the Pretermission Order Wiss ruled that as a matter of law the 1963 Paternity Order by itself defeated Herterich's pretermission claim because, as a result of the Paternity Order, Bartsch could not have been unaware of the birth of the child within the meaning of California Probate Code § 21622.

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92. In the Pretermission Order Wiss ruled that as a matter of law no inference could be drawn, from Bartsch's declaration in the Will that he had had no children, that when the Will was executed Bartsch was unaware that Herterich was his child.

93. In the Pretermission Order Wiss ruled that Herterich failed to produce evidence to show that Bartsch was unaware of Herterich's birth within the meaning of California Probate Code § 21622. Wiss ruled that Herterich failed to produce evidence, which he was required to produce, to indicate that Bartsch was suffering from a lack of memory or other disability or incapacity at the time he executed the Will in 2007. Wiss ruled that Herterich failed to rebut the presumption that Bartsch had testamentary capacity when he executed the Will in 2007.

94. In the Pretermission Order Wiss ruled that Bartsch had paid court-ordered child support

for Herterich for 21 years. Wiss explained that this ruling relied on the Seelander Document.

95. In the Pretermission Order Wiss ruled that at the time the Will was executed in 2007 Bartsch was aware that (1) the court had entered judgment finding that he was the father of Herterich, and (2) he had paid child support for 21 years. Wiss explained that these rulings were grounded on the Seelander Document and Traeg's deposition testimony, as well as Wiss's conclusion that the Seelander Document consisted of statements that had been made by Bartsch.

96. In reliance on the Pretermission Order, Wiss entered judgment against Herterich on the Pretermission Petition on February 15, 2012, and entered an amended judgment against Herterich on the Pretermission Petition on March 22, 2012.

E. Relying on extrinsic evidence, the Appellate Justices affirmed Wiss's Pretermission Order in *Bartsch II*.

97. Herterich timely appealed the Pretermission Order and its resulting judgment. The appeal was heard and decided by the Appellate Justices in case no. A135322 of the Appellate Court.

98. On appeal Herterich argued that (1) Bartsch's declaration in the Will that he had had no children unambiguously indicated that he was unaware that Herterich was his child at the time the declaration was made; (2) because the declaration was unambiguous, extrinsic evidence

was inadmissible to support the conclusion that, to the contrary, Bartsch was aware that Herterich was his child when the Will was executed; and (3) if extrinsic evidence was admissible then summary judgment in Peltner's favor was nonetheless unwarranted because Bartsch's declaration in the Will and to Traeg that he had had no children created a triable issue of fact as to whether at that time Bartsch was aware that Herterich was Bartsch's child.

99. On appeal Herterich also argued that (1) the Seelander Document could not be used as evidence because it was hearsay and had not been authenticated by a competent witness with personal knowledge of its origin; (2) the Paternity Order and the Seelander Document were made, and the deposition testimony of Traeg pertained to events which occurred, many years or decades before the Will was executed and thus could not conclusively establish that Bartsch was aware of Herterich as his child when the Will was executed; (3) Traeg's testimony indicated that in 2000 Bartsch believed that Herterich was not his child; and (4) Peltner's testimony could not and did not establish that in 2007 Bartsch was aware that Herterich was his child.

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100. On January 30, 2014, the Appellate Justices filed an unpublished opinion ("*Bartsch II*") affirming the Pretermission Order and its resulting judgment.

101. In *Bartsch II*, the Appellate Justices ruled that (1) Bartsch's declarations in the Will and to Traeg, that he had had no children, did not support an inference that when the declarations

were made Bartsch was unaware that Herterich was his child; (2) Bartsch's declaration in the Will, that he had had no children, can be interpreted to express an intent to disinherit Herterich; (3) extrinsic evidence was admissible to establish that when the Will was executed Bartsch was aware that Herterich was Bartsch's child; (4) Peltner presented extrinsic evidence that persuasively demonstrated that when the Will was executed Bartsch was aware that Herterich was Bartsch's child; (5) Bartsch paid monthly child support until 1982, when Herterich turned 21 years of age, after making approximately 228 monthly child support payments; (6) as a result of making those child support payments, Bartsch understood that Herterich was his child in the eyes of the law; (7) Herterich was required to show that Bartsch subsequently lost all awareness of Herterich as Bartsch's child; and (8) Herterich did not offer evidence, such as evidence suggesting that Bartsch suffered from an age-related cognitive impairment when he executed the Will, to show that Bartsch lost all awareness of Herterich as Bartsch's child.

102. In *Bartsch II*, the Appellate Justices stated generally and without further elaboration that they found no abuse of discretion in Wiss's evidentiary rulings. The Appellate Justices did not mention Herterich's evidentiary objections that Peltner's evidence was irrelevant, unauthenticated, and/or hearsay. The Appellate Justices did not explain why Wiss had not abused her discretion when overruling those objections.

103. As an unpublished opinion, *Bartsch II* may only be cited when relevant under the

doctrines of law of the case, res judicata, or collateral estoppel. *See* California Rules of Court, Rule 8.1115(b)(1); Northern District of California, Civil Local Rule 3-4(e). None of those doctrines are applicable to the claims raised herein.

104. Herterich timely petitioned for rehearing of *Bartsch II*, arguing that (1) there was no evidence in the record that Bartsch had made child support payments for Herterich for 21 years; (2) as a legal matter it does not follow, from the fact that at a time in the distant past Bartsch was aware that Herterich was his son, that Bartsch must have been aware of the birth of his son at the time of the making of the Will; and (3) it was error to conclude that the inference that Bartsch was unaware of the birth of his child cannot be drawn from Bartsch's declaration in the Will that he had had no children.

105. On February 28, 2014, the Appellate Justices denied the petition for rehearing without explanation.

F. The Supreme Court Justices declined to review *Bartsch II*.

106. On March 12, 2014, Herterich timely petitioned the California Supreme Court for review of *Bartsch II* in California Supreme Court case no. S216699. Herterich argued that review should be granted because under then-existing California probate law evidence extrinsic to a will was only admissible for the purpose of resolving an ambiguity in the will, yet *Bartsch II* allowed such evidence to be admitted where there was no

ambiguity in the Will and, indeed, the evidence conflicted with Bartsch's unambiguous declaration in the Will that he was unaware of any children that he had had. Herterich also argued that review should be granted because in prior cases pretermission claimants had prevailed even though the testator had been aware of the child at some earlier time, but *Bartsch II* barred Herterich from pursuing his pretermission claim because of Bartsch's purported awareness of Herterich as Bartsch's child many years or decades prior to the execution of the Will.

107. On April 23, 2014, the Supreme Court denied the petition for review without explanation. Remittitur issued on the Pretermission Petition on April 24, 2014. All of the Supreme Court Justices other than Cuéllar participated in the decision to deny the petition for review.

G. After the Pretermission Petition was finally determined Peltner and Traeg, under oath in the Civil Fraud Action, contradicted their earlier material assertions in the Pretermission Proceeding that on the day the Will was executed Traeg and Bartsch referred to Herterich as Bartsch's child and heir whom Bartsch wanted to disinherit.

108. After the Pretermission Petition had been finally determined Herterich propounded written discovery to Peltner and Traeg, and Herterich took the depositions of Peltner and Traeg, in a state court civil fraud action, specifically San Francisco Superior Court case no. CGC-12-523942 ("the Civil Fraud Action"). The

Civil Fraud Action was related to but separate and distinct from the Probate Proceedings.

109. In their deposition testimony and interrogatory responses provided in the Civil Fraud Action, Peltner and Traeg under oath made representations that conflicted with the claims which Peltner and Traeg had previously made in the Pretermission Proceeding and on which the state courts had relied when granting and affirming the granting of the MSJ. More specifically, Peltner and Traeg represented under oath in the Civil Fraud Action that at no time on or around the day the Will was executed did Traeg or Bartsch refer to Herterich as Bartsch's child or heir or as a person whom Bartsch wanted to disinherit.

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110. To the contrary, Peltner and Traeg represented under oath in the Civil Fraud Action that (1) Herterich was not mentioned at or around the time the Will was executed; (2) Bartsch never in any way informed Peltner or Traeg that Bartsch had had a child; (3) Bartsch had previously told Traeg that he had no children and Traeg thereafter believed that Bartsch did not have a child; and (4) neither Peltner nor Traeg knew that Bartsch had a child prior to 2009 when Herterich filed the Pretermission Petition. Peltner and Traeg made these representations in (1) Peltner's verified responses in the Civil Fraud Action, dated April 23, 2015, to Herterich's Special Interrogatories, Set 1; (2) Traeg's verified responses in the Civil Fraud Action, dated October 3, 2015, to Herterich's Special Interrogatories, Set 1; (3) the deposition testimony of Peltner, taken in the Civil Fraud Action on October 19, 2015; and (4) the deposition

testimony of Traeg, taken in the Civil Fraud Action on October 23, 2015. Similar but unsworn representations were made in (1) the memorandum filed by Peltner in the Civil Fraud Action on September 8, 2015; (2) the separate statement filed by Peltner in the Civil Fraud Action on September 8, 2015; and (3) the brief filed by Peltner in the Civil Fraud Action on November 19, 2015.

H. In *Duke* the Supreme Court retrospectively held that an unambiguous will can be reformed if specific requirements are met.

111. While the Pretermission Petition was pending and before the Appellate Justices issued *Bartsch II*, the California Supreme Court on March 21, 2012, granted review in California Supreme Court case no. S199435, the Estate of Duke ("case no. S199435"). According to the California Supreme Court's website, case no. S199435 presented the following issue: "Should the 'four corners' rule (see *Estate of Barnes* (1965) 63 Cal.2d 580) be reconsidered in order to permit drafting errors in a will to be reformed consistent with clear and convincing extrinsic evidence of the decedent's intent?"

112. While case no. S199435 remained pending before the California Supreme Court, the Appellate Justices issued *Bartsch II*, Herterich petitioned for review of *Bartsch II*, and the Supreme Court Justices denied review of *Bartsch II*.

113. After the Pretermission Petition had been finally determined, the California Supreme

Court on July 27, 2015, decided case no. S199435 by filing an opinion which may be cited as *Estate of Duke* (2015) 61 Cal.4th 871 ("*Duke*"). All of the Supreme Court Justices other than Baxter signed the opinion in *Duke*.

114. In *Duke* the Supreme Court explained that it had granted review in order to reconsider the historical rule that extrinsic evidence was inadmissible to reform an unambiguous will, and that upon reconsidering that historical rule the Supreme Court had concluded that the categorical bar on reformation of wills was not justified. The Supreme Court held that an unambiguous will may be reformed if clear and convincing evidence establishes that the will contains a mistake in the expression of the testator's intent at the time the will was drafted and also establishes the testator's actual specific intent at the time the will was drafted. See *Duke* at 875.

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115. *Duke* was a judicial decision and as such operated retrospectively. See *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79. *Duke* applied to the Pretermission Petition even though that petition had been finally determined when *Duke* was decided.

I. **Herterich unsuccessfully asked the state courts to bring the adjudications in the Pretermission Proceeding into compliance with the retrospectively effective requirements for reformation set forth in *Duke*.**

a. **Wiss refused to reconsider the Pretermission Order *sua sponte*.**

116. On November 9, 2015, Herterich sent a letter to the probate department of the Superior Court, addressed to the Hon. Andrew Cheng, wherein Herterich informed the Superior Court of the decision in *Duke* and urged the Superior Court—on its own motion under California Code of Civil Procedure § 1008(c)—to reconsider the Pretermission Order on the ground that its decision granting the MSJ was inconsistent with *Duke*. Herterich explained that, under *Duke*, a court may consider extrinsic evidence, regarding a decedent's declaration in his will that he has no children, only if (1) the declaration is ambiguous and the evidence resolves the ambiguity, or (2) the evidence clearly and convincingly establishes that the decedent intended to insert a different declaration into the will. Herterich explained that, because Peltner had met neither of these requirements, the Superior Court should reconsider its decision to grant the MSJ. Herterich explained that the Superior Court found neither an ambiguity in Bartsch's declaration that he had had no children, nor an intent by Bartsch to insert a different declaration into the Will, so the Superior Court was not allowed to rely on extrinsic evidence either to construe or to reform the Will to establish a state of mind contrary to

Bartsch's clear expression in the Will of his belief that he had no children, yet the Superior Court nonetheless admitted and relied on extrinsic evidence when it found that Bartsch was aware he had a child when he executed the Will.

117. On November 30, 2015, Herterich received an unsigned communication from the probate department of the Superior Court informing him that the Superior Court was unable to give consideration to his request to reconsider the Pretermission Order unless that request was in the form of a petition or objection which was set for hearing and duly served on parties entitled to notice.

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118. On December 18, 2015, Herterich filed a petition for *sua sponte* reconsideration by the Superior Court of its decision to grant the MSJ. The petition was grounded on the fact that the MSJ and the Pretermission Order relied on extrinsic evidence which was not admissible under the retrospectively applicable requirements set forth in *Duke*. The petition also informed the Superior Court that in the Civil Fraud Action Peltner and Traeg had effectively disavowed and retracted all of the extrinsic evidence regarding Bartsch's state of mind when the Will was executed, on which the Superior Court had relied when it granted the MSJ.

119. In the petition Herterich explained that in the Civil Fraud Action Peltner and Traeg had under oath contradicted the material factual representations which Peltner and Traeg had made in the Pretermission Proceeding, and on which the Superior Court had relied when granting the MSJ,

that on the day the Will was executed Traeg and Bartsch had a conversation in which they specifically referred to Herterich as Bartsch's child and heir whom Bartsch wanted to disinherit. Herterich attached to the petition sworn deposition testimony, verified interrogatory responses, and other papers from the Civil Fraud Action wherein Peltner and Traeg denied that such a conversation had taken place. Herterich also attached to the petition papers which Peltner and Traeg had filed in the Pretermission Proceeding, and on which the Superior Court had relied when granting the MSJ, wherein Peltner and Traeg claimed that such a conversation *had* taken place.

120. On January 19, 2016, an employee of the Superior Court called Herterich's counsel and left a voice mail message informing Herterich's counsel that the hearing date for the petition for *sua sponte* reconsideration had been dropped and Herterich must re-file his papers as a motion instead of as a petition.

121. On January 21, 2016, Herterich re-filed, as a motion, his papers petitioning for *sua sponte* reconsideration by the Superior Court of its decision to grant the MSJ.

122. On March 4, 2016, Wiss made an order denying Herterich's motion for *sua sponte* reconsideration by the Superior Court of its decision to grant the MSJ.

b. The Appellate Court refused to recall the remittitur in *Bartsch II*.

123. On April 25, 2016, Herterich moved the Appellate Court under California Rules of Court, Rule 8.272(c)(2), to recall the remittitur and reinstate the appeal in case no. A135322 on the grounds that (1) after the issuance of the remittitur, the California Supreme Court in *Duke* provided new retrospectively effective authority and that *Bartsch II* was incompatible with that new authority; and (2) during subsequent discovery in the Civil Fraud Action, Peltner and Traeg made representations under oath that contradicted the assertions which Peltner and Traeg had made in the Pretermission Proceeding and on which the Appellate Court had relied when it issued *Bartsch II*. Herterich explained that these circumstances mandated a rehearing of the appeal because the new law required a different outcome of the appeal and because fraud had been perpetrated on the Appellate Court.

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124. On April 27, 2016, the Appellate Court without further explanation denied Herterich's motion, filed two days earlier, to recall the remittitur and reinstate the appeal in case no. A135322.

c. The California Supreme Court denied Herterich's petition to review the Appellate Court's refusal to recall the remittitur in *Bartsch II*.

125. On May 9, 2016, in California Supreme Court case no. S234369, Herterich

petitioned the California Supreme Court to review the Appellate Court's denial of Herterich's motion to recall the remittitur and reinstate the appeal in Appellate Court case no. A135322. Herterich explained that review should be granted because (1) *Bartsch II* was not in accord with the retrospectively effective new law established in *Duke*; and (2) *Bartsch II* was procured by fraud on the part of Peltner and Traeg. Herterich explained that recalling the remittitur was necessary to secure uniformity of decision and because the new law and new facts retroactively required a different outcome to the appeal.

126. On June 22, 2016, the California Supreme Court without further explanation denied Herterich's petition for review in California Supreme Court case no. S234369. Corrigan was absent and did not participate.

J. After *Bartsch II* Herterich diligently exhausted state law remedies.

127. After the California Supreme Court denied Herterich's petition for review in California Supreme Court case no. S234369, Herterich in the Civil Fraud Action diligently continued to pursue state law remedies for the improper denial of the Pretermission Petition. Herterich also in the Probate Proceedings diligently pursued alternative state law remedies, which could at least potentially allow Herterich to inherit Bartsch's assets without disturbing the denial of the Pretermission Petition.

128. In the Civil Fraud Action Herterich was unable to remedy the improper denial of the

Pretermission Petition. Notwithstanding the evidence that when the Will was executed Bartsch was unaware that Herterich was Bartsch's child, and notwithstanding the absence of evidence to the contrary and the absence of evidence that Bartsch had made child support payments pursuant to court order, a panel of the Appellate Court nonetheless reiterated in the Civil Fraud Action that "substantial evidence supported the conclusion that Bartsch was aware of [Herterich's] existence when he executed his will, particularly because there was evidence that he had reluctantly made court-ordered child support payments to plaintiff's mother for many years." *Herterich v. Peltner*, 20 Cal.App.5th 1132, 1136 (2018), *as modified on denial of reh'g* (Mar. 28, 2018). The Appellate Court ruled in the Civil Fraud Action that, to the extent Peltner and Traeg had in the Pretermission Proceeding made material representations which conflicted with those they had made in the Civil Fraud Action or in procuring the Probate Order, Herterich's remedy was not to sue in tort but to mount a collateral attack to set aside the Probate Order on the grounds that the Probate Order had been procured by extrinsic fraud. *Id.*, 1146-1147.

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129. Herterich had already initiated a collateral attack to set aside the Probate Order when the Appellate Court ruled in *Herterich v. Peltner* that mounting such an attack was a remedy for the fact that Peltner and Traeg had in the Pretermission Proceeding made material representations which conflicted with those they had made in the Civil Fraud Action. But notwithstanding the Appellate Court ruling in

Herterich v. Peltner, another panel of the Appellate Court subsequently ruled in case no. A151783 that Herterich did not have such a remedy. Remittitur issued in Appellate Court case no. A151783 on May 31, 2019.

130. On July 18, 2019, remittitur issued in Appellate Court case nos. A155109, A155400, A156231, A156367, and A156317. Those cases all arose from and concerned Herterich's efforts to inherit Bartsch's assets in the Probate Proceedings without disturbing the denial of the Pretermission Petition. Upon the issuance of those remittiturs Herterich exhausted all known and available or potentially available state law remedies for the improper deprivation of his right to inherit Bartsch's assets.

131. On June 21, 2019, in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), the United States Supreme Court overruled the state law exhaustion requirement explicated in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

132. The federal claims stated herein ripened on July 18, 2019, or alternatively on June 21, 2019, or on May 31, 2019.

K. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment.

133. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's

detriment, by refusing to draw the inference that Bartsch was unaware that Herterich was his child, from Bartsch's declaration in the Will that he had had no children. In other pretermission cases in which a testator had a child when executing a will but nonetheless incorrectly stated in the will that he had no child the court drew the inference that the testator was unaware of the child. See, e.g., *Estate of Torregano* (1960) 54 Cal.2d 234, 251-252 ("The will must be interpreted as a whole, giving effect to all of its clauses. While Torregano did not say in so many words that he never had issue, the language of clause Second is meaningless unless it was intended to convey the impression that Torregano was childless. To give it any effect whatsoever, we must presume that testator thought he was without lineal issue.").

134. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by concluding that Bartsch's statement in the Will indicating that he had had no children showed an intent to disinherit Herterich. In other pretermission cases in which a testator had a child when executing a will but nonetheless incorrectly stated in the will that he had no child the court did not conclude that the testator intended to disinherit the child. See, e.g., *Estate of Smith* (1973) 9 Cal.3d 74, 80 ("The statement in the will indicating that Dale had no children does not show an intent to disinherit.").

135. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's

detriment, by relying on evidence extrinsic to the Will to establish that Bartsch intended to disinherit Herterich. In other pretermission cases evidence extrinsic to a will was inadmissible to establish an intent to disinherit. See, e.g., *Estate of Smith* (1973) 9 Cal.3d 74, 80 ("an intent to disinherit...may not be established by extrinsic evidence").

136. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by using evidence extrinsic to the Will without first identifying an ambiguity or mistake in the Will, and by using that evidence for purposes other than resolving an ambiguity or correcting a mistake in the Will. In other probate cases evidence extrinsic to a will was inadmissible unless the court first identified an ambiguity or a mistake in the will and the evidence was used to resolve the ambiguity or correct the mistake. See, e.g., *Estate of Barnes* (1965) 63 Cal.2d 580; *Estate of Duke* (2015) 61 Cal.4th 871.

137. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by preventing Herterich from pursuing his pretermission claim on the grounds that (1) Bartsch had been aware that Herterich was his child many years or decades prior to executing the Will; (2) Bartsch had provided or was legally obligated to provide financial support for Herterich many decades prior to executing the Will; (3) Herterich produced no evidence to indicate that Bartsch was suffering from a lack of memory or

other disability or incapacity at the time he executed the Will; (4) Herterich did not rebut the presumption that Bartsch had testamentary capacity when he executed the Will; and (5) Herterich did not offer evidence, such as evidence suggesting that Bartsch suffered from an age-related cognitive impairment when he executed the Will, to show that Bartsch lost all awareness of Herterich as Bartsch's child. In other pretermission cases the pretermission claimant was not prevented from pursuing his or her claim notwithstanding that (1) at some time prior to executing the will the testator had been aware that the claimant was the testator's child; (2) at some time prior to executing the will the testator had provided or was legally obligated to provide financial support for the claimant; (3) the claimant produced no evidence to indicate that the testator was suffering from a lack of memory or other disability or incapacity at the time he executed the will; (4) the claimant did not rebut the presumption that the testator had testamentary capacity when he executed the will; and (5) the claimant did not offer evidence, such as evidence suggesting that the testator suffered from an age-related cognitive impairment when he executed the will, to show that the testator lost all awareness of the claimant as the testator's child. See, e.g., *Estate of Turkington* (1983) 147 Cal.App.3d 590; *Estate of Smith* (1973) 9 Cal.3d 74; *Estate of Kretschmer* (1965) 232 Cal.App.2d 789; *Estate of Falcone* (1962) 211 Cal.App.2d 40; *Estate of Guerin* (1961) 194 Cal.App.2d 566; *Stevens v. Torregano* (1961) 192 Cal.App.2d 105; *Estate of Stickelbaut* (1960) 54

Cal.2d 390; *Estate of Torregano* (1960) 54 Cal.2d 234; *Estate of Percival* (1956) 138 Cal.App.2d 494; *Estate of Cochran* (1953) 116 Cal.App.2d 98; *Estate of Rawnsley* (1949) 94 Cal.App.2d 384; *Estate of Smith* (1948) 86 Cal.App.2d 456; *Estate of Lund* (1945) 26 Cal.2d 472; *Estate of Philippi* (1945) 71 Cal.App.2d 127; *Estate of Skinner* (1944) 65 Cal.App.2d 528; *Estate of Stahl* (1942) 54 Cal.App.2d 565; *Estate of Stahl* (1942) 54 Cal.App.2d 562; *Estate of Connors* (1942) 53 Cal.App.2d 484; *Estate of Klepsch* (1940) 36 Cal App 2d 483; *Estate of Conkey* (1939) 35 Cal.App.2d 581; *Estate of Grazzini* (1939) 31 Cal.App.2d 168; *Estate of Flood* (1933) 217 Cal. 763; *Estate of Lee* (1927) 200 Cal. 310; *Estate of Loyd* (1915) 170 Cal. 85; *Smith v. Olmstead* (1891) 88 Cal. 582; *Estate of Stevens* (1890) 83 Cal. 322; *Estate of Grider* (1889) 81 Cal. 571; *Estate of Wardell* (1881) 57 Cal. 484; *Pearson v. Pearson* (1873) 46 Cal. 609; *Bush v. Lindsey* (1872) 44 Cal. 121; *Estate of Garraud* (1868) 35 Cal. 336.

138. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by not limiting the inquiry in the Pretermission Proceeding to the issue of whether Bartsch had Herterich in mind when the Will was executed. As to pretermission claimants other than Herterich the courts inquired only whether the testator "had them in mind when the will was executed." See, e.g., *Estate of Price* (1942) 56 Cal.App.2d 335, 338. The claims of pretermission claimants other than Herterich failed only if the courts concluded that, when the will was executed,

"the testator had the omitted person in mind, and having him in his mind, has omitted him from the provisions of the will." See, e.g., *Estate of Eggleston* (1954) 129 Cal.App.2d 601, 607.

139. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by relying on the unauthenticated Seelander Document. In other cases an unauthenticated document was inadmissible as such, as irrelevant, or as hearsay. See, e.g., *People v. Seumanu* (2015) 61 Cal.4th 1293, 1318-1319; *People v. Melendez* (2016) 2 Cal.5th 1, 23; *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 990-991; *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 49-50; *Serri v. Santa Clara Univ.* (2014) 226 Cal. App. 4th 830, 854-855; *In re Cruse* (2003) 110 Cal.App.4th 1495, 1500; California Evidence Code §§ 1400-1401 (authentication); 1200 (hearsay rule).

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140. Defendants knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment, by deciding Herterich's pretermission claim against him on summary judgment on the basis of purported facts that were unsupported by evidence in the record. No evidence in the record of the Pretermission Proceeding supported, and no evidence in the record of the Pretermission Proceeding could have conclusively established on summary judgment, the determinations that: (1) when the Will was executed Bartsch was aware that Herterich was Bartsch's child; (2) Bartsch paid monthly child support until 1982, when Herterich

turned 21 years of age, after making approximately 228 monthly child support payments; (3) when Bartsch executed the Will he was aware that the Court had entered judgment finding that he was the father of Herterich; and (4) when Bartsch executed the Will he was aware that he had paid child support for Herterich for 21 years. In other cases the plaintiffs did not have their cases decided against them on summary judgment on the basis of purported facts that were unsupported by evidence in the record.

141. On information and belief Herterich alleges that, had Defendants not treated Herterich differently from similarly situated persons, a reasonable adjudication of the Pretermission Petition on the merits in a Constitutionally compliant, fair adversary hearing would have resulted in a determination in Herterich's favor. As a matter of law Bartsch's unambiguous declaration in the Will that he had had no children would have compelled the state courts to conclude that when the Will was executed Bartsch was unaware of the birth of his child within the meaning of California Probate Code § 21622. No evidence indicated otherwise, and no evidence extrinsic to the Will would have been admissible.

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CLAIM 1: FOR DENYING HERTERICH EQUAL PROTECTION OF THE LAWS

Against all Defendants

142. All preceding paragraphs herein are part of this claim.

143. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("the Equal Protection Clause") provides that no state may deny to any person within its jurisdiction the equal protection of the laws.

144. At all times relevant Herterich was within the jurisdiction of the State of California, and Defendants were prohibited by the Equal Protection Clause from denying Herterich the equal protection of the laws.

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145. Defendants denied Herterich the equal protection of the laws when, as set forth above, they knowingly and intentionally treated Herterich differently from similarly situated persons, to Herterich's detriment.

146. Defendants had the opportunity and power under state law to take actions that would have prevented Herterich from being treated differently from similarly situated persons. As state officials having such opportunity and power, Defendants had the sworn duty under state and federal law to take such actions, but Defendants knowingly and intentionally failed to take such actions.

147. The difference in the treatment of Herterich and those similarly situated caused Herterich to be deprived of his property interest in

the relief he would otherwise have obtained from a ruling on the merits of the Pretermission Petition. This deprivation violated the Equal Protection Clause. Persons situated similarly to Herterich were not similarly deprived of their property interests arising from their claims.

148. There was no rational basis for the difference in treatment of Herterich and those similarly situated. The difference in treatment was not rationally related to a legitimate state interest.

149. The difference in the treatment of Herterich and those similarly situated amounted to, and cannot reasonably be explained as anything other than, intentional and arbitrary discrimination.

150. The Equal Protection Clause gave Herterich the right to be treated similarly to other similarly situated persons.

151. Defendants had a duty to abide by and give effect to the guarantees of the Equal Protection Clause to equal treatment.

152. Defendants had a duty to treat Herterich similarly to other similarly situated persons and to protect Herterich from being treated dissimilarly.

153. Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the equal protection of the laws pertaining to his property interest in the relief he would otherwise have obtained from a ruling on the merits of the Pretermission Petition. Herterich's right to the equal protection of the laws was a right secured by

federal law, and the denial and violation of that right deprived Herterich of his property interest in the relief he would otherwise have obtained from a ruling on the merits of the Pretermission Petition. Therefore, Defendants are liable to Herterich for Herterich's injuries resulting from the deprivation.

CLAIM 2: FOR DEPRIVING HERTERICH OF PROPERTY WITHOUT DUE PROCESS OF LAW

Against All Defendants

154. All preceding paragraphs herein are part of this claim.

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155. The Due Process Clause of the Fourteenth Amendment to the United States Constitution ("the Due Process Clause") provides that no state may deprive any person of property without due process of law. The Due Process Clause gives owners of property the right to a fair adversary hearing before being deprived of that property.

156. The relief which Herterich would have obtained from a determination of the Pretermission Petition on the merits in a fair adversary hearing is property within the meaning of the Due Process Clause. The Due Process Clause gave Herterich the right not to be deprived of that property by any state without due process of law.

157. Defendants had a duty to abide by and give effect to the guarantees of the Due Process Clause. They had a duty not to deprive any person of property without due process of law. They had a duty not to deprive Herterich without due process of law of the relief which Herterich would have

obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits.

158. By treating Herterich differently from those similarly situated, as set forth above, Defendants deprived Herterich of the relief which Herterich would otherwise have obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits, without due process of the law within the meaning of the Due Process Clause.

159. Defendants did not provide a fair procedure or adequate process when depriving Herterich of his constitutionally protected property rights. Other persons situated similarly to Herterich benefitted from procedure and process which Defendants did not provide to Herterich.

160. Denying Herterich the relief which he would have obtained in a fair adversary hearing from a determination on the merits of the Pretermission Petition was arbitrary, capricious, and without any legitimate governmental objective.

161. Defendants took Herterich's property interest purely for the private purpose of benefitting the beneficiaries named in the Will, and therefore the taking is void.

162. Through their acts and omissions, Defendants violated Herterich's procedural and substantive due process rights under the Due Process Clause.

163. Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the relief which he

otherwise would have obtained in a fair adversary hearing from a determination on the merits of the Pretermission Petition. Herterich's right to that relief was a right and a property interest secured by federal law. Therefore, Defendants are liable to Herterich for Herterich's injuries resulting from the deprivation.

CLAIM 3: FOR UNREASONABLE SEIZURE OF HERTERICH'S PROPERTY

Against All Defendants

164. All preceding paragraphs herein are part of this claim.

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165. The Fourth Amendment to the United States Constitution ("the Fourth Amendment") provides that the right of the people to be secure in their houses, papers, and effects against unreasonable seizures shall not be violated. The Fourth Amendment protects property from unreasonable seizure by the government.

166. The relief which Herterich would have obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits was protected by the Fourth Amendment from unreasonable seizure by the government. The Fourth Amendment gave Herterich the right not to have the government unreasonably seize that property interest.

167. Defendants had a duty to abide by and give effect to the guarantees of the Fourth Amendment. They had a duty not to unreasonably seize property. They had a duty to prevent and mitigate the unreasonable seizure of property by

the government. They had a duty not to unreasonably seize, and a duty to prevent and mitigate the unreasonable seizure by the government of, the relief which Herterich would have obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits.

168. It was not reasonable, and there was no legally valid reason, for Defendants through their actions and omissions to treat or cause Herterich to be treated differently from other persons similarly situated and on the basis of that difference seize Herterich's property interest in the relief sought in the Pretermission Petition.

169. By unreasonably depriving Herterich of his property interest in the relief sought in the Pretermission Petition, and by unreasonably treating Herterich differently from other persons similarly situated, Defendants meaningfully interfered with Herterich's possessory interest in the relief which Herterich otherwise would have obtained from a determination on the merits of the Pretermission Petition. The unreasonable and meaningful interference with Herterich's possessory interest in such relief was an unreasonable seizure of Herterich's houses, papers, and effects, within the meaning of the Fourth Amendment to the United States Constitution, and violated Herterich's right to be secure against the unreasonable seizure of houses, papers, and effects.

170. Defendants are persons who, under color of state law, caused Herterich to be subjected to the deprivation of his right to the relief which he otherwise would have obtained in a fair adversary

hearing from a determination on the merits of the Pretermission Petition. Herterich's right to that relief was a right and a property interest secured by federal law. Therefore, Defendants are liable to Herterich for Herterich's injuries resulting from the deprivation.

CLAIM 4: FOR JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FROM HERTERICH FOR PUBLIC USE

Against All Defendants

171. All preceding paragraphs herein are part of this claim.

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172. The Fifth Amendment to the United States Constitution ("the Fifth Amendment") provides that private property shall not be taken for public use without just compensation.

173. The relief which Herterich would have obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits is property within the meaning of the Fifth Amendment. The Fifth Amendment gave Herterich the right to just compensation if that property was taken for public use.

174. By their acts and omissions regarding Herterich's property interest in the relief which Herterich would have obtained in a fair adversary hearing from a determination of the Pretermission Petition on the merits, Defendants took Herterich's private property for public use, within the meaning of the Fifth Amendment.

175. Herterich has not received just compensation.

176. Herterich's right to just compensation is secured by the Constitution.

177. Defendants are able and required by the Constitution to provide just compensation for the taking of Herterich's property for public use, but under color of state law and in violation of the Constitution they have not done so.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Norman Bartsch Herterich prays for relief, as follows:

178. A declaration that the relief which Herterich would have obtained from a Constitutionally compliant determination of the Pretermission Petition on the merits was: (1) an interest that was subject to the equal protection of the laws under the Equal Protection Clause; (2) property within the meaning of the Due Process Clause and the Fifth Amendment; and (3) protected by the Fourth Amendment from unreasonable seizure by the government;

179. A declaration that by their acts and omissions in the Pretermission Proceeding Defendants: (1) denied Herterich the equal protection of the laws, within the meaning of the Equal Protection Clause; (2) deprived Herterich of property without due process of law, within the meaning of the Due Process Clause; (3) unreasonably seized Herterich's property, within the meaning of the Fourth Amendment; and (4) took Herterich's private property for public use without just compensation, within the meaning of the Fifth Amendment;

180. A declaration determining according to proof the relief, the monetary value of the relief, and/or just compensation for the taking of the relief which Herterich would or should have obtained from a Constitutionally compliant determination of the Pretermission Petition on the merits;

181. An injunction ordering Defendants to transfer to Herterich the relief, the monetary value of the relief, and/or just compensation for the taking of the relief which Herterich would or should have obtained from a Constitutionally compliant determination of the Pretermission Petition on the merits;

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182. An injunction ordering Defendants to reimburse Herterich for his attorney's fees and costs incurred in the Pretermission Proceeding, in an amount to be determined according to proof;

183. Attorney's fees in an amount to be determined according to proof; and

184. Such other and further relief as the Court deems appropriate and just.

Dated: May 27, 2021

/s/ Norman Herterich
NORMAN BARTSCH HERTERICH
Pro Se Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff Norman Bartsch Herterich demands a trial by jury on each claim.