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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of HANS HERBERT BARTSCH,
Deceased.

ARNDT PELTNER, as Executor, etc.,
Petitioner and Respondent,

v.

NORMAN BARTSCH HERTERICH,
Objector and Appellant.

A135322

(San Francisco City & County
Super. Ct. No. PES-08-291846)

Objector Norman Bartsch Herterich appeals from the probate court's ruling on a motion summary judgment in favor of respondent Arndt Peltner. The probate court granted summary judgment, holding that objector is not a pretermitted heir within the meaning of Probate Code¹ section 21622. That section permits a child to correct a mistaken or inadvertent omission from a testamentary instrument upon proof that the decedent was unaware of the child's birth at the time of execution. The court further found decedent Hans Herbert Bartsch had intentionally disinherited objector, having included a valid disinheritance clause in the subject will. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is the second time we have considered an appeal in this case. (See *Estate of Bartsch* (2011) 193 Cal.App.4th 885 (*Bartsch I*.)

¹ All further statutory references are to the Probate Code except as otherwise indicated.

The Parties and the History of This Estate Proceeding

We quote at length from our discussion of the facts in our prior opinion.²

“On January 18, 2007, decedent executed his last will and testament. In the document, decedent states ‘I declare that I am not currently married and I have had no children, stepchildren or foster children.’ The will names approximately 20 beneficiaries, including family members and friends, most of whom are said to reside in Germany. The will gives 14 percent of the estate to respondent, who is also named as the will’s executor. It makes no provision for objector, and further provides: ‘I have intentionally and with full knowledge omitted to provide for all of my heirs and relatives who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, any and all persons whomsoever [*sic*] claiming to be, or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this Will, and I direct that any claim or contest that may be made against the distribution of my estate by any person or persons be repudiated by my Executor, and if any beneficiary or other person shall make or file any contest to or seek to impair or invalidate any of the provisions of this, my Last Will and Testament, or shall conspire with or voluntarily assist anyone attempting to do any of those things, they shall be barred from receiving any bequest or benefit from my estate, direct or indirect, and if they successfully contest or claim, they shall receive the sum of ONE DOLLAR (\$1.00) in lieu of any such bequest, benefit or award.’

“Decedent reportedly died on October 25, 2008.

“On November 17, 2008, respondent filed a petition for probate of decedent’s will and for letters testamentary.

“On December 10, 2008, the probate court appointed respondent as the personal representative of the estate.

“On April 1, 2009, objector filed a petition to determine distribution rights under section 11700 et seq. In his petition, he claims he is the only child of decedent and that

² We take judicial notice of our opinion in *Bartsch I*, and of the record in that case.

he is entitled to succeed to decedent's entire estate under the laws of intestate succession. He alleges his mother had a relationship with decedent, resulting in objector's birth in May 1961, and that a court in a 1963 paternity proceeding found decedent to be his father and imposed child support obligations. He also alleges decedent either did not believe objector was his child or had forgotten that he was his child, rendering objector an omitted child under section 21622.^[3] Objector's petition prays for an order directing the personal representative to distribute the entire estate to him.

“On June 19, 2009, respondent filed an answer in his capacity as executor of the estate stating his opposition to objector's petition. None of the other beneficiaries have appeared in this matter.” (*Bartsch I, supra*, 193 Cal.App.4th at pp. 888–889.)

On March 22, 2011, we issued our opinion in *Bartsch I*, upholding the probate court's ruling approving an interim award of attorney fees and costs incurred by respondent in the ongoing will contest based on our determination that respondent could participate “as a party to assist the court” under section 11704, subdivision (b). (*Bartsch, supra*, 193 Cal.App.4th at p. 888.)

On August 8, 2011, respondent filed the motion for summary judgment, asserting there is no triable issue of fact and objector fails to meet the criteria required for relief under the provisions of section 21622. Respondent argued that decedent was aware of objector's existence when he executed his will, and therefore the provisions of section 21622 had no application. He further asserted extrinsic evidence demonstrates objector's exclusion from decedent's will was intentional and not the result of any mistake.

On December 30, 2011, the probate court granted the motion for summary judgment.

³ “Section 21622 provides: ‘If, at the time of the execution of all of decedent's testamentary instruments effective at the time of decedent's death, the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was unaware of the birth of the child, the 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.’ ”

On March 22, 2012, the probate court filed its amended judgment in favor of respondent. This appeal followed.

DISCUSSION

I. *Standard of Review*

Summary judgment is proper only if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c), (f).) “On appeal after a motion for summary judgment has been granted, we review the record de novo” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) “[W]e determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff’s case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.” (*Ibid.*)

If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff’s opposing evidence and the motion must be denied. However, if the moving papers make a prima facie showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*); *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002–1003.)

In determining whether the parties have met their respective burdens, “the court must ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (*Aguilar, supra*, 25 Cal.4th at p. 843.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fn. omitted.) Thus, a party “cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a

triable issue of fact.” (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.)

II. Summary Judgment Was Properly Granted

A. Undisputed Facts

Respondent’s motion for summary judgment asserts six allegedly undisputed facts: (1) That decedent was a party to the 1963 paternity action; (2) that the paternity order declared decedent to be objector’s father and ordered him to pay child support; (3) that decedent did in fact pay child support until objector turned 21; (4) that in 1993, approximately 15 years before he died, decedent executed a will in which he stated his intent to disinherit objector; (5) that decedent instructed his attorney who drafted the operative will to eliminate specific reference to objector and to instead utilize a general disinheritance clause in the will; and (6) that after decedent’s death respondent discovered letters in decedent’s residence purportedly from objector’s mother, urging him to contact his son.⁴ Relying on these facts, respondent asserted that, as a matter of law, objector could not show decedent was unaware of his birth. He also argued that operation of the general disinheritance clause in the will entitled him to summary judgment. Finally, respondent sought summary judgment on the basis that objector could not prove his father failed to provide for him “solely” because he was unaware of his birth, as set forth in section 21622.

As to the facts themselves, objector did not dispute their existence. Instead, he disputed the inferences to be drawn from the facts. Specifically, he asserted that facts surrounding the 1963 paternity action were irrelevant to proving decedent’s state of mind in 2007, when the operative will was drafted. He also denied that decedent had instructed

⁴ On November 3, 2011, objector filed his opposition to the motion for summary judgment. He raised several objections to the evidence offered by respondent. The probate court overruled all the objections with respect to the first five material facts set forth by respondent. Of the objections made regarding the letters allegedly authored by objector’s mother, the court sustained four out of five, including the objection that the letters were not relevant.

his attorney to retain a general disinheritance clause in the will, instead claiming that the attorney includes an almost identical clause in every will she prepares.

B. Burden of Proof as to Objector's Status as an Omitted Child

Objector contends the trial court erred in ruling there is no dispute as to whether he is entitled to a share of the estate as an omitted child. He claims the face of the will shows that decedent erroneously believed he had no children, and therefore respondent cannot negate the possibility that decedent was unaware that objector was his child. He also claims the court erred in relying on extrinsic evidence to grant summary judgment. He asserts that unless an omitted child relies on extrinsic evidence to prove lack of awareness of his birth, or a lack of intent to disinherit, the proponent of a will *is barred* from offering extrinsic evidence on those issues in the first instance. Consideration of the issues raised by objector requires some historical background.

Preliminarily, we note that although this case is before us on appeal from a summary judgment, the burden of proof on the ultimate issue was on objector: “Under the current version of the summary judgment statute, a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party’s case. Instead, the moving defendant may (through factually vague discovery responses or otherwise) point to *the absence of evidence to support the plaintiff’s case*. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet [his or her] burden of proof regarding an essential element of [his or her] case, all other facts are rendered immaterial.” (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482.)

Former section 90, as relevant here, provided: “ ‘When a testator omits to provide in his will for any of his children, . . . *whether born before or after the making of the will* or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator’s property bestowed on them by way of advancement, *unless it appears from the will* that such omission was intentional, such child or such issue succeeds to the same share in the estate of the

testator as if he had died intestate.’ ” (*Estate of Della Sala* (1999) 73 Cal.App.4th 463, 468, italics added (*Della Sala*).)

This statute, by its terms, made extrinsic evidence inadmissible to show an intent to omit a child. The Supreme Court, however, held that extrinsic evidence *was* admissible to show *lack* of intent to omit a child. (*Estate of Torregano* (1960) 54 Cal.2d 234, 243–248 (*Torregano*)). It reasoned: “[I]t is obvious, by very definition, that a pretermission can exist only through oversight. It occurs only when there has been an omission to provide, absent an intent to omit. . . . [T]he mistake or accident which caused the testator to omit provision for his child cannot possibly appear from the will itself. Extrinsic evidence for this purpose must be contemplated by the statute. Otherwise pretermission could never be proven.” (*Id.* at p. 246.) Thus, for example, a child had to be allowed to introduce extrinsic evidence that the decedent mistakenly believed the child was dead. (*Id.* at pp. 241–242, 246.)

Effective January 1, 1985, however, the Legislature repealed section 90. (Stats. 1983, ch. 842, § 18, p. 3024.) In its stead, it enacted former sections 6570, 6571 and 6572. (Stats. 1983, ch. 842, § 55, pp. 3049, 3090.) These have since been renumbered (with minor changes not significant for our purposes) as sections 21620, 21621 and 21622. (Stats. 1997, ch. 724, §§ 17, 34; see also Stats. 1990, ch. 79, § 14, p. 463.)

Section 21620 provides: “Except as provided in Section 21621, if a decedent fails to provide in a testamentary instrument for a child of decedent born or adopted *after* the execution of all of the decedent’s testamentary instruments, the omitted child shall receive a share in the decedent’s estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instrument.” (Italics added.)

Section 21621, as relevant here, provides: “A child shall not receive a share of the estate under Section 21620 if any of the following is established: [¶] (a) The decedent’s failure to provide for the child in the decedent’s testamentary instruments was intentional and that intention appears from the testamentary instruments.”

Finally, section 21622 provides: “If, *at the time of the execution* of all of decedent’s testamentary instruments effective at the time of decedent’s death, the decedent failed to provide for a *living child solely* because the decedent believed the child to be dead or *was unaware of the birth of the child*, the 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.” (Italics added.)

Unlike former section 90, the present statutes draw a deliberate distinction between children born before and born after the making of the will. With respect to a child born *after* the making of the will, the burden of proving that the decedent intended to omit the child still is on the party opposing the child’s claim, and still cannot be met with extrinsic evidence. But with respect to a child born *before* the making of the will, the burden of proving that the decedent did *not* intend to omit the child—because the decedent thought the child was dead, or was unaware of the child’s birth—is on the *child*. (*Estate of Mowry* (2003) 107 Cal.App.4th 338, 343 (*Mowry*); *Della Sala, supra*, 73 Cal.App.4th 463, 465, 469–470; see also Evid. Code, § 500.)

In asserting that a triable issue of material fact exists, objector relies heavily on *Estate of Smith* (1973) 9 Cal.3d 74 (*Smith*) in his opening brief. In *Smith*, the decedent’s will stated: “ ‘I hereby declare that I am divorced from Victoria Jo and I have no children by my marriage’ ” (*Id.* at p. 77.) However, he did have a daughter from an earlier marriage. (*Id.* at p. 76.) Extrinsic evidence was offered to show that he believed this daughter had been adopted. (*Id.* at pp. 76–77.)

The Supreme Court held, citing (former) section 90 and *Torregano*, that there was insufficient evidence of intent to omit the daughter: “[A] child of the testator is disinherited only when the intent to disinherit the child appears in strong and convincing language on the face of the will. [Citations.] When this intent does not appear the ‘presumption of law that the failure to name a child or grandchild in a will was unintentional’ rules the case.” (*Smith, supra*, 9 Cal.3d at pp. 78–79.) “The statement in the will indicating that [the decedent] had no children does not show an intent to disinherit, and, as we have seen, such an intent may not be established by extrinsic

evidence.” (*Id.* at p. 80.) Importantly, however, the holdings in both *Smith* and *Torregano* were based on former section 90 and its rule that an intent to disinherit a child must appear in the will. With respect to a child born before the making of the will, such as objector, these cases are no longer good law.

In *Della Sala*, a son brought an action under section 21622 claiming he was inadvertently omitted from a bequest because his father thought he was dead. The appellate court rejected the omitted child’s bid to apply former section 90 and the case law developed under that provision. The court observed that “by repealing section 90 and replacing it with the current statutory scheme, the Legislature intended to change the law. [Citations.] The legislative history we have recounted confirms an intent to change the law.” (*Della Sala, supra*, 73 Cal.App.4th at p. 469.) The court refused the son’s attempt to shift the burden of proof to the proponent of the will, confirming under section 21622 it is the child who bears the burden to prove each fact essential to his or her claim for relief. (*Della Sala*, at p. 469.)

Here, objector was born in 1961, almost 46 years before the making of the operative will. Thus, as is apparent, neither section 21620, which deals with a child born after the making of the will, nor section 21621, which creates an exception to section 21620, applies. (*Mowry, supra*, 107 Cal.App.4th at p. 341.) The only relevant statute is section 21622. Accordingly, objector had the ultimate burden of proving that decedent was unaware of his birth at the time the will was executed.⁵

C. Admissibility of Extrinsic Evidence

On appeal, objector claims the adoption of section 21622 did not abolish the rule stated in *Torregano* and *Smith* to the effect that extrinsic evidence “must be strictly limited to its rebuttal function and may not be used as affirmative evidence against the presumptive heir to establish that the omission of the heir was intentional. [Citation.] A contrary rule would violate the specific language in section 90 that an intention to omit

⁵ Objector acknowledges this allocation of the burden of proof.

must appear in the will.” (*Smith, supra*, 9 Cal.3d at p. 80.) As noted, with respect to a child, like objector, who is born *before* the making of a will, *Smith* is no longer good law. While he acknowledges that the main difference between former section 90 and section 21622 is that such an omitted child now has the burden of proving lack of awareness on the part of the testator, objector claims there is no evidence that the Legislature intended to change the applicable rules of evidence that would permit introduction of evidence of awareness of the existence of a living heir. In light of the fact that section 21622 explicitly reversed the burden of proof with respect to children born before the execution of a will, we find this argument unpersuasive.

We also note the probate court overruled objector’s evidentiary protests below. For example, objector had objected to evidence of the 1963 paternity action, claiming evidence of decedent’s “state of mind or intent to disinherit that is extrinsic to his own statements in the Will itself are inadmissible except when offered to rebut evidence of his state of mind or intent to not disinherit, which evidence [objector] has not offered in this case and does not need.” Evidentiary rulings made in conjunction with a motion for summary judgment are reviewed under the abuse of discretion standard. (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.) We find no abuse of discretion here.

Objector himself introduced evidence of the 1963 paternity proceeding when he filed his petition to determine distribution rights. Decedent was named as a party in that action, and the resulting order included the requirement that decedent pay monthly child support until the child reached the age of majority. This evidence creates the inference that decedent was aware of objector’s birth, and clearly put his status as an intentionally omitted heir at issue. Thus, even without the extrinsic evidence set forth in respondent’s motion, the probate court still could have found that respondent had made a prima facie case based on the facts set forth in objector’s petition alone, obligating objector to meet his burden of demonstrating the existence of a disputable material fact. This he has not done.

D. No Evidence Supports the Inference that Decedent was Unaware of Objector's Birth or Legal Status

Objector does not contend that decedent thought he was dead. Instead, he claims a triable issue exists as to whether decedent was aware that objector was *his* child at the time that he made the operative will in 2007. We note respondent presented extrinsic evidence that persuasively demonstrates decedent was aware of objector's birth *and* of his status as the purported father. He was subjected to a paternity lawsuit in 1963 and was ordered to pay child support. It is undisputed that decedent paid monthly child support until 1982, the year in which objector turned 21 years of age. There is no plausible explanation for decedent's conduct in making these payments other than that he understood objector to be his child, at least in the eyes of the law.

As noted above, objector further contends that because decedent stated in his will that he *did not* have any children, this denial created a triable issue as to his awareness of objector's status. He concedes that "In order for the child to inherit under Section 21622 it is necessary that the father be unaware of the child's inheritance rights as his child, and the child is required to prove that the father was unaware of those rights." He claims he can meet that burden because decedent's will states his father's belief that he has no children. However, the language on which objector relies can be interpreted to express an intent to omit objector from his will, rather than an indication of a lack of awareness as to objector's existence. As respondent notes, the fact that decedent denied having fathered any children is not inconsistent with his having had an abiding awareness of objector's legal status as his presumed child. This conclusion is supported by evidence of the 1993 will, which specifically disinherited objector by name.⁶

We conclude that the trial court properly found there is no triable issue of fact as to whether decedent was unaware of objector's birth. It follows that the court properly concluded he is not entitled to a share of the estate as an omitted child. Candidly, it

⁶ That will contains the following statement: "It is also my will, that a certain NORMAN HERTERICH take no part of My estate!! I never considered this person to be my child or father!! [*Sic.*] Payments for this illegitimate [*sic*] person by me for 21 Years was made under constant pressure and threat[s] by his mother MARGOT HERTERICH."

stretches credulity to posit that after making approximately 228 monthly child support payments, decedent would have lost all awareness of objector's birth or of his status as objector's presumed father. Apart from pure speculation, objector does not offer any evidence suggesting otherwise. For example, he did not offer any evidence suggesting that decedent suffered from an age-related cognitive impairment when he executed his will. Speculation alone does not create a triable issue of fact. Accordingly, objector has failed to show that the probate court erred in finding there is not a triable issue of fact as to whether decedent was aware that objector was his child when he executed the 2007 will.

E. The Disinheritance Clause is Valid

Objector claims the trial court erred in finding the disinheritance clause of the subject will valid as a matter of law. His argument presupposes that he is entitled to recover as an unintentionally omitted heir. As we have already concluded that he does not qualify as an omitted heir under section 21622, this argument fails. Accordingly, he has failed to demonstrate the existence of a triable issue of material fact as to decedent's intent to exclude him from receiving anything from the subject estate.

DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P.J.

Becton, J.*

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.