IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brianna McKee Haggerty, Plaintiff and Appellant, v. Nancy F. Thornton et al. Defendants and Respondents.	S271483 4th Civ. No. D078049 San Diego County Superior Court No. 37-2019-00028694.PR.TR.CTL

Notice of Supplemental Authority

Appeal from the Superior Court of
San Diego County
Hon. Julia C. Kelety, Judge

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March 31, 2023

California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Notice of Supplemental Authority

Re: *Bartenwerfer v. Buckley*

Chief Justice Guerrero and Honorable Associates:

Appellant Brianna McKee Haggerty invites this Court to consider the United States Supreme Court's recent decision in *Bartenwerfer v. Buckley* (2023) 143 S.Ct. 665, which has several important implications for the instant case. *Bartenwerfer* is instructive for how it construes disparities in comparable statutory provisions; how it weighs supposed policy imperatives in the face of the text's plain meaning; and how it assigns the burden of proof among the parties offering competing interpretations.

I. Textual disparities

Textual disparities played in important role in *Bartenwerfer*, *supra*, 143 S.Ct. 665, as they do in our case. Appellant's core argument asserted the textual disparity between Probate Code sections 15401 and 15402 showed the Legislature intended different rules for revocation and modification. (See AOB 31: "Though the Legislature could have retained the congruence between revocation and modification law, the textual disparity between sections 15401 and 15402 demonstrates it **chose not to do so**." (AOB 31, emphasis added.) To prove the textual disparity reflected a legislative desire for disparate treatment of revocation and modification, the brief cited *Rashidi v. Moser* (2014) 60 Cal.4th 718, 726 (emphasis added), which explained, "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that **a different intention existed**." (AOB 33.)

Bartenwerfer confirmed this analysis. Petitioner Kate Bartenwerfer sought to discharge a debt she had accrued due to her husband's fraud, asserting she was unaware of and uninvolved in the fraud. The relevant provision of 11 U.S.C. §523, subdivision (a)(2)(A) barred discharge for debts for money "obtained by . . . fraud"; the question was whether

the discharge bar applied to all fraud, or only that which the party committed or knew about. Although subparagraph (A)'s plain text encompassed the subject fraud (whether or not Bartenwerfer committed or knew of it), she asked the court to consider subparagraphs (B) and (C) of that same provision. Both of these subparagraphs required agency: Subparagraph (B) deemed non-dischargeable any debts "*the debtor caused to be made,*" and subparagraph (C) rendered non-dischargeable only debts "*incurred by an individual debtor*" or "*obtained by an individual debtor.*" (*Bartenwerfer*, *supra*, 143 S.Ct. at p. 673.) Bartenwerfer contended that because subparagraphs (B) and (C) both (explicitly) require the debtor's agency, subparagraph (A) also (implicitly) requires the debtor's active conduct for the debt to be non-dischargeable. This echoes respondent's contention that because section 15401 (explicitly) includes a fallback method, section 15402 includes one implicitly.

The Supreme Court held otherwise, finding the contrast militated *against* Bartenwerfer's contention. (*Bartenwerfer*, supra, 143 S.Ct. at p. 673: "This argument flips the rule . . . . that '[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we generally take **the choice to be deliberate**." (*Bartenwerfer*, at p. 673, quoting *Badgerow v. Walters* (2022)

142 S.Ct. 1310, 1318, emphasis added.) Because subparagraph (A) did not require agency, while subparagraphs (B) and (C) did, the Court enforced Congress' choice to omit such a requirement, and held Bartenwerfer's debt was not dischargeable.

This Court should draw the same conclusion: Because the Legislature included a fallback method in one section (15401) but omitted it from another provision of the same enactment, this Court should find the omission was deliberate. This is especially true in our case, since the Legislature revised what is now section 15401, subdivision (c) to encompass modifications (to "make clear that the rule applicable to revocation by an attorney in fact applies to modification") but made no such clarification for subdivision (a)(2).

II. Legislative goals

Another question raised in the briefing concerns how much an asserted legislative goal should control, even in the face of a textual disparity. Amicus Mary Nivala Balistreri, for example, asserted the case should be controlled by the legislative goal of facilitating trust revocation. She quoted the Law Revision Commission's observation that the pre-codification rule could be "criticized as defeating the clear

intention of the settlor who attempts to revoke a revocable trust by the statutory method in circumstances that do not involve undue influence or a lack of capacity." (MB 18, citing Recommendation Proposing the Trust Law (Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) p. 1271.) Respondent Scientists likewise discern a "clear legislative intent to liberalize and make more flexible the power to both revoke and modify a trust instrument." (SB 26-27.) Both amicus and respondents thus contend this Court should follow this supposed policy imperative and conclude trustors may modify through the fallback method, even though none appears in the text of section 15402.

Kate Bartenwerfer likewise contended the Supreme Court should weigh the policy imperative more heavily than the text. She urged the Court to narrowly construe dischargability bars due to modern bankruptcy law's "fresh start" imperative. (*Bartenwerfer*, *supra*, 143 S.Ct. 665, 675.) But the Supreme Court recognized the Bankruptcy Code, "like all statutes, balances multiple, often competing interests." (*Ibid.*) The Court declined to read the law to effect an "unadulterated pursuit of the debtor's interest," because the law recognized other, countervailing considerations: "[I]f a fresh start were all that mattered, [dischargability restrictions] would not exist." (*Ibid.*) Ultimately, the Court

refused to override the plain text of the law due to *one* policy imperative, which Congress wished to balance with others. "No statute pursues a single policy at all costs, and we are not free to rewrite this statute (or any other) as if it did." (*Bartenwerfer*, *supra*, 143 S.Ct. at p. 675.)

This Court should reach the same conclusion. Though the Legislature on the one hand wished to enable trustors to effect their distributional preferences without excessive restriction "in circumstances that do not involve undue influence or a lack of capacity," it also wished to protect trustors from the consequences of future senility or undue influence by enabling them to effect their procedural preferences in revoking the trust—much as some people who bank online use a "two-step" security method, which impedes transactions but protects against fraud. Unlike amicus curiae's brief, appellant's opening brief cited both of these imperatives.[1]

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[1] [T]he settlor may wish to establish a more complicated manner of revocation than that provided by statute where there is a concern about 'future senility or future undue influence while in a weakened condition.' On the other hand, the case-law rule may be criticized as defeating the clear intention of the settlor who attempts to revoke a revocable trust by the statutory method, in circumstances that do not involve undue influence or a lack of capacity. (AOB 40,

Due to the competing interests involved, this Court should not construe the law to favor an "unadulterated pursuit" of easier revocation, let alone modification. This Court should consider both imperatives, and not ignore either. (See Rule 8.520(f)(7) Brief 8: "[T]he goal of facilitating revisions should not always control over the goal of preventing coercion.")

III. Burden of proof

Bartenwerfer, supra, 143 S.Ct. 665, also confirms appellant's observation that the party favoring the natural textual construction (i.e. that disparities in text support disparities in application) does not bear the burden of proving the wisdom of the Legislature's differentiation; the burden of proof rests with the party contending that *disparate* texts should have the *same* legal effect. (See ARB 39: "[I]t is not appellant's burden to prove conclusively *why*

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quoting Recommendation Proposing the Trust Law ((Sept. 1986) 18 Cal. Law Revision Com. Rep. (1986) pp. 1270-1271.)

As appellant showed in her reply brief, the Commission **did not extend this sentiment to modifications**. (ARB 27-28.)

the Legislature differentiated between revocations and modifications; it is enough for her to show the Legislature did so, and this decision will not produce absurd results [citing] *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.") Courts can, should, and do construe provisions with different texts differently, even where the reason for the difference is "unarticulated." (See MB 26.) Indeed, appellant noted *Rashidi*, *supra*, 60 Cal.4th 718, justified its decision to invest disparately-worded statutes with different meanings by citing a *possible* justification for the textual disparity: "[T]he Legislature *may have felt* that the fixed $250,000 limit would promote settlements." (*Rashidi*, *supra*, 60 Cal.4th at p. 726, emphasis added, cited in AOB 39.)

The U.S. Supreme Court likewise relied on such "possible" justifications in *Bartenwerfer*. The high Court recalled its decision in *Field v. Mans* (1995) 516 U.S. 59, which "offered a possible answer" to explain why one subparagraph favored debtors more than another: "Congress *may have* 'wanted to moderate the burden on individuals . . . .' " (*Bartenwerfer*, 143 S.Ct. at p. 674, quoting *Fields*, at p, 76, emphasis added.) *Bartenwerfer* offered another possible answer: "This concern *may also have* informed Congress's decision to limit (B)'s prohibition on discharge to fraudulent conduct by the debtor herself." (*Bartenwefer*, at p. 674,

emphasis added.)

Ultimately, however, what mattered was not which rationale applied but whether *any* conceivably could have existed. "Whatever the rationale, it does not "def[y] credulity" to think that Congress established differing rules for (A) and (B)." (*Bartenwerfer*, *supra*, 143 S.Ct. at p. 674.)

Appellant offered a possible explanation for authorizing looser procedures for revocation than modification: intestacy laws limit the potential for profitable elder abuse through revocation, but there is no comparable defense against modifications obtained through coercion. (AOB 42-43.) The the Legislature "may have" rationally decided to distinguish the revocation procedure in section 15401 from the modification procedure in section 15402 even if, as amicus contends, such distinction was not "necessary" to prevent undue influence (see MB 26)---or even sufficient. (See GB 34 [noting "Someone determined to unduly influence a settlor will find a way"].)

To be sure, as Galligan noted, the legislation may fail to prevent coercion by relatives, who could benefit by inducing revocation. (GB 34.) According to this reasoning, the law would provide more protection if it provided a fallback provision for *neither* modification *nor* revocation. As Section II, showed, however, the Legislature, pursuing multiple goals,

"may have felt" the resulting legislation best balanced the competing perspectives. As this Court has observed, "The choice between reasonable alternative methods for achieving a given objective is generally for the Legislature, and there are a number of reasons why the Legislature may have made the choice it did." (*Fein v. Permanente Med. Group* (1985) 38 Cal.3d 137, 163.)

Reasonable minds might differ on the wisdom of the distinction ultimately adopted by the Legislature, but the only question here is whether such a rule produces an "absurd result" (*Ornelas*, *supra*, 4 Cal.4th at p. 1105), or "defies credulity." (*Bartenwerfer*, *supra*, 143 S.Ct. at p. 674.) It does not.

Conclusion

Bartenwerfer confirms appellant's arguments. First, this Court should give effect to the Legislature's decision to enact different sections with different texts by construing them with different meanings: section 15401 has a fallback provision for revocations but section 15402 lacks one for modifications. Second, this Court should give effect to all competing policy imperatives, rather than authorize an "unadulterated pursuit of the [revoker]'s interest" (and even that would not apply to modifications). Finally, this Court need not weigh the competing policy arguments; this Court should construe the text according to its plain meaning so long as it does not defy credulity or produce absurd results. Because it does not, this Court should recognize that section 15401 provides a fallback method for revocations but section 15402 provides no such analogue for modifications. Therefore, the fallback method was not available for the instant modification, so this Court should find Bertsch did not validly modify the trust.

Respectfully submitted,

Dated: April 10, 2023

Mitchell Keiter

Mitchell Keiter
Counsel for Appellant
Brianna McKee Haggerty

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4/10/2023

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/s/Mitchell Keiter

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