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No. S _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ESTATE OF DUKE

ROBERT B. RADIN and SEYMOUR RADIN

Petitioners and Respondents,

vs.

JEWISH NATIONAL FUND and CITY OF HOPE,

Claimants and Appellants.

SUPREME COURT
FILED

JAN 17 2012

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Deputy

California Court of Appeal, Second District, Division Four 2nd Civil No. B227954
Appeal from the Los Angeles County Superior Court
Hon. Mitchell Beckloff, Los Angeles County Superior Court Case No. BP108971

PETITION FOR REVIEW

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ISSUES PRESENTED

"Perhaps it is time for our Supreme Court to consider whether there are cases where deeds speak louder than words when evaluating an individual's testamentary intent." (Slip Opn., p. 13.) So wrote the Court of Appeal on the facts presented here.

Irving Duke's holographic will disinherited everyone but his wife, and provided that if he and his wife died simultaneously his estate would pass to City of Hope and Jewish National Fund. After his wife died, Irving told a City of Hope representative that he was "leaving his estate" to these charities. (Slip Opn., p. 3.) Though the will did not expressly say so, the Court of Appeal found it clear from extrinsic evidence that Irving meant for the charities to take if his wife died before him. But it felt bound to the four corners of the will under this Court's half-century-old decision in *Estate of Barnes* (1965) 63 Cal.2d 580, which bars consideration of extrinsic evidence in support of implied gifts. So, intestate succession rules applied, and Irving's estate went to the very heirs he had tried to disinherit.

Is *Barnes* at odds with the primary goal of effectuating testators' intent? Specifically:

1. Should courts be able to consider extrinsic evidence in determining whether to construe a will as containing an implied gift?

2. Should courts be able to reform an unambiguous will, as the Restatement and leading scholars urge and as a growing minority of states have already recognized?

INTRODUCTION

California law regarding implied gifts is confused, conflicting and anachronistic.

Evidence can make it absolutely clear that a testator made a mistake in expressing his intent, either by omitting a beneficiary or failing to describe the conditions under which a beneficiary will inherit. But the law of implied gifts as it now exists bars courts from considering that evidence—courts can only look to the four corners of the will. This four corners rule is out of step with modern legal jurisprudence and scholarship as well as with the rules that California applies to interpret other writings. Alone among the potential subjects of written instruments in California, wills are slaves to written language at the expense of effectuating the author's true intent.

As a result, courts seeking to effectuate testators' clear intent have strained to find ambiguities on the slimmest of excuses. Some courts find them; others can't or won't. The predicament for the bench and bar is similar to what one court concluded about testator's oral declarations under prior law: "'[I]t is impossible to determine when the testator's oral declarations would be deemed admissible in any given case [citation] because the courts, in an understandable effort to circumvent the harshness of the rule [excluding those declarations] have attempted to create multiple exceptions or, oftentimes, simply ignored its existence.'" (*Estate of Kime* (1983) 144 Cal.App.3d 246, 265 (*Kime*).)

In this environment—exacerbated by the present decision—lawyers cannot hope to provide dependable predictions of the potential outcome of

probate proceedings, and clients cannot hope to make wise decisions about whether to assert a position in those proceedings.

In the nearly 50 years since this Court last considered the admissibility of extrinsic evidence to imply a gift in a will—in *Estate of Barnes*, *supra*, 63 Cal.2d 580, a short and enigmatic opinion with virtually no analysis on the point—California legislative policy, the courts of other states, and academic thought have significantly liberalized the interpretation of wills. Our Legislature discarded former Probate Code section 105, replacing it with the more liberal Probate Code section 21102. And the Restatement and leading scholars go beyond easing evidentiary restrictions on implied gifts: They urge allowing reformation of wills that unambiguously omit a bequest when it can be clearly shown that the testator intended it.

The Court of Appeal rightly questioned *Barnes*' continuing vitality. Regardless of whether *Barnes* correctly stated the law in 1965, extrinsic evidence of a testator's true intent should no longer be relegated to irrelevance when evaluating implied gifts. Rather, it should be admissible and persuasive. There is ample basis for making that the law, and this Court should grant review to do so.

STATEMENT OF THE CASE

A. Irving Duke Prepares A Holographic Will That Expressly Disinherits All Heirs Besides His Wife And Names City Of Hope And Jewish National Fund As The Sole Contingent Beneficiaries.

In 1984, when he was 73 and his wife was 56 (see AA 109, 111), Irving Duke prepared a holographic will. It contained four key articles:

- "First—I hereby give, bequeath and devise all of [my] property . . . to my beloved wife, Mrs. Beatrice Schecter Duke [address]."
- "Second—To my brother, Mr. Harry Duke, [address], I leave the sum of One Dollar ($1.00) and no more."
- "Third—Should my wife Beatrice Schecter Duke and I die at the same moment, my estate is to be equally divided [¶] One-half is to be donated to the City of Hope in the name and loving memory of my sister, Mrs. Rose Duke Radin. [¶] One-half is to be donated to the Jewish National Fund to plant trees in Israel in the names and loving memory of my mother and father—Bessie and Isaac Duke."
- "Fourth—I have intentionally omitted all other persons, whether heirs or otherwise, who are not specifically mentioned herein, and I hereby specifically disinherit all persons whomsoever claiming to be, or who may lawfully be determined to be my heirs at law, except as otherwise mentioned in this Will. If any heir, devisee or legatee, or any other person or persons, shall either directly or indirectly, seek to invalidate this Will, or any part thereof, then

I hereby give and bequeath to such person or persons the sum of one dollar ($1.00) and no more, in lieu of any other share or interest in my estate." (AA 121-123; Slip Opn., p. 2.)

B. After His Wife Dies, Irving Confirms His Intended Charitable Testamentary Bequests, Making Three $100,000 Gifts To City Of Hope And Stating That He Is "Leaving His Estate To City Of Hope And Jewish National Fund."

Beatrice died in July 2002. (Slip Opn., p. 3.) In August 2003, Irving invited a City of Hope Senior Gift Planning Officer, Sherrie Vamos, to his apartment. (*Ibid.*; AA 167-168.) Consistent with his will's charitable bequest, Irving executed a "City of Hope Gift Annuity Agreement" and gave Vamos checks totaling $100,000. (Slip Opn., p. 3; AA 172-174; see also AA 168.)

In early January 2004, Irving again invited Vamos to his apartment, executed a second City of Hope Charitable Gift Annuity Agreement and gave Vamos another $100,000. (Slip Opn., p. 3; AA 168, 176-177.) He told Vamos he was "leaving his estate to City of Hope and to Jewish National Fund." (Slip Opn., pp. 3-4; AA 168.) It was Vamos' understanding from this conversation that Irving had already prepared a will that included gifts to City of Hope and Jewish National Fund (collectively the charities), not that he intended to do so in the future. (Slip Opn., p. 4.)

Later that month, Irving executed a third City of Hope Charitable Gift Annuity Agreement and provided a further $100,000. (Slip Opn., p. 4; AA 168.)

C. Upon Irving's Death, An Heir Hunter Locates The Radins—Nephews With Whom Irving Had No Contact For Decades.

Irving died childless in November 2007. (Slip Opn., p. 3; AA 105 [¶ 5], 116, 164 [¶ 5].) A Los Angeles Deputy Public Administrator found Irving's will in Irving's safe deposit box at First Federal Bank. (Slip Opn., p. 3; AA 183.) While he left an estate valued at over $5 million (Slip Opn., p. 3; AA 32, 72), Irving had lived like a pauper (AA 70).

Irving's sole surviving relatives were his nephews, Robert and Seymour Radin. (Slip Opn., p. 3; AA 134-146; see also, e.g., AA 106 [¶ 6], 164 [¶ 6].) Irving had no ongoing relationship with either, and neither assisted with his funeral and internment. (See AA 31, 70-71.)

Robert last spoke with Irving during the 1970s. (AA 18.) They never visited, even though they lived within walking distance. (AA 36.) Robert never met or spoke to Irving's wife, Beatrice. (AA 18, 20.) Robert only learned of Irving's death because an heir hunter found him. (AA 21.)

Seymour last saw Irving in 1965, and made no effort to contact him. (AA 71, 79.) In Seymour's view, Irving was evil. (AA 81.) Seymour did not know anyone in contact with Irving, and, like his brother only learned of Irving's death through an heir hunter. (AA 70-71.)

D. The Probate Court Enters Summary Judgment For The Radins, Finding That Irving's Will Results In A Complete Intestacy And The Estate Passes To The Very Relatives Irving Had Expressly Disinherited.

The charities—the only surviving beneficiaries named in Irving's holographic will—petitioned for probate. (Slip Opn., p. 3; AA 114-130; see also AA 1-2.)

The Radins countered with a Petition For Determination Of Entitlement To Estate Distribution. (Slip Opn., p. 3; AA 134-146.) While agreeing that Irving's will was valid, they argued that the charities could only take if Irving and Beatrice died "at the same moment," which did not occur. (AA 136-137.) Since Irving's will contained no other clauses controlling estate distribution, they argued that there was a complete intestacy and the estate must pass to them as his closest living relatives. (AA 137.)

The trial court granted summary judgment to the Radins, relying heavily on *Estate of Barnes*, *supra*, 63 Cal.2d 580 (*Barnes*).

E. The Court Of Appeal Reluctantly Affirms In A Published Opinion.

In its published opinion, the Court of Appeal deemed *Barnes* controlling and indistinguishable because it too involved a will (though not holographic) that contained a bequest (though to a relative, not to charities) in the event of the simultaneous death of the testatrix and her spouse, but did not provide what would happen if the spouse predeceased the testatrix.

(Slip Opn., p. 8 ["In summary, we conclude that the *Barnes* decision is directly on point and controls our decision here"].)

According to the Court of Appeal, under *Barnes* "[w]e cannot engage in conjecture as to what the testator may have intended but failed to express in order to avoid a conclusion of intestacy. (*Barnes*, *supra*, 63 Cal.2d at pp. 583-584.)" (Slip Opn., p. 8.) The court also believed that *Barnes* precluded it from considering relevant out-of-state authority. (*Ibid.* ["We decline, as we must, appellants' invitation to look to cases from other states in which courts construed wills similar to the one now before us as implying a testamentary intent not stated on the face of the will. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)"].)

The court concluded: "[T]he question is whether extrinsic evidence should always be inadmissible when the language in a will is otherwise clear on its face. The *Barnes* court held the answer is 'yes.'" (Slip Opn., p. 12; see *id.* at p. 11 [reading Probate Code section 6111.5, allowing admission of extrinsic evidence in the event of ambiguity, as further supporting the exclusion of such evidence where issue is whether gift should be implied].)[1]

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[1] All California statutory citations are to the Probate Code.

But the court also made clear that it was not comfortable with the result that it felt *Barnes* compelled, because that result was at odds with Irving's evident intent:

> We are mindful of the fact that the ultimate disposition of Irving's property, seemingly appropriate when strictly examining only the language of his will, *does not appear to comport with his testamentary intent.* It is clear that *he meant to dispose of his estate through his bequests, first to his wife and, should she predecease him, then to the charities.* It is difficult to imagine that after leaving specific gifts to the charities in the names and memories of beloved family members, Irving intended them to take effect only in the event that he and his wife died "at the same moment."

(Slip Opn., p. 12, italics added.)

The court further noted that while in *Barnes* this Court found that the extrinsic evidence "did not assist in interpreting the will," "that is not the case here, as there is evidence of Irving's intentions after the death of his wife." (Slip Opn., p. 12.) It called upon this Court to reexamine the law as embodied in *Barnes*:

> Recognizing "that a will is to be construed according to the intention of the testator, and so as to avoid intestacy" ([*Barnes*] at p. 583), perhaps the rule regarding the admission of extrinsic evidence should be more flexible when a testator's conduct after an event that would otherwise cause his will to be ineffective brings into question whether the

written word comports with his intent. *Barnes* takes that option out of our hands. Perhaps it is time for our Supreme Court to consider whether there are cases where deeds speak louder than words when evaluating an individual's testamentary intent.

(*Id.* at pp. 12-13.)

WHY REVIEW IS NECESSARY

I.

CALIFORNIA LAW REGARDING IMPLIED TESTAMENTARY GIFTS IS CONFUSED AND CONFLICTING.

A. Historical Overview: The Four Corners Rule As Judge-Made Law.

1. The source of the four corners rule.

Implied gifts—that is, effectuating intended testamentary gifts that may be "imperfectly expressed" in a will—date back in California at least a century. This Court described the basic rule in *Brock v. Hall* (1949) 33 Cal.2d 885 (*Brock*):

> The implication of gifts in wills rests upon the primary rule of construction that the duty of the court in all cases of interpretation is to ascertain the intention of the maker from the instrument read as a whole and to give effect thereto if possible, and it is well settled that, where the intention to make a gift clearly appears in a will, although perhaps imperfectly expressed, the court will raise a gift by implication.

(*Id.* at pp. 887-888, citing among others *Estate of Blake* (1910) 157 Cal. 448, 467-468 (*Blake*), disapproved on another point in *Estate of Stanford* (1957) 49 Cal.2d 120, 129; see *Blake*, *supra*, 157 Cal. at pp. 466-467 ["Bequests by implication have from remote times been sustained where no direct language in a will is found to support them but where from informal

language used such reasonable construction can be placed on it as implies an intention to make a bequest"].)

The key feature of the rule—which apparently drove the decision in *Barnes* and definitely drove the Court of Appeal's decision here—is that "the intention to make a gift [must] clearly appear[] from *the instrument taken by its four corners* and read as a whole . . . ." (*Brock*, *supra*, 33 Cal.2d at p. 889, italics added.) This rule limits courts to textual analysis; extrinsic evidence is forbidden. (Slip Opn., p. 12, citing *Barnes*, *supra*, 63 Cal.2d at pp. 582-583.)

A concomitant of the four corners rule is that when courts find implied gifts, they are not construing ambiguities. Indeed, the whole point of implied gifts is that the will is *not* ambiguous, just imperfectly expressed—"no *direct* language in a will is found to support" the gift, but the overall tenor of the instrument does support it. (*Blake*, *supra*, 157 Cal. at p. 466, italics added.) To find an implied gift, courts have focused on whether the will's "dominant dispositive plan" supports the gift. (*Brock*, *supra*, 33 Cal.2d at p. 892 [implying gift in a trust].)

2. *Barnes* applied the four corners rule to bar extrinsic evidence of true testator intent.

Following the four corners rule, *Barnes* held that absent a textually apparent "dominant dispositive plan" there can be no implied gift. (See *Barnes*, *supra*, 63 Cal.2d at p. 584.)

In *Barnes*, the testatrix's will bequeathed all her property to her husband. (*Id.* at p. 581.) It provided that if she and her husband died simultaneously or nearly so, her property would go to her nephew, whom

she named as an alternate executor to her husband. The will contained a disinheritance clause. (*Id.* at p. 581 and fn. 5.) But no provision addressed what would happen if the husband predeceased the testatrix, as he did. The trial court received evidence regarding the nephew's long and close relationship with the testatrix; found the will ambiguous; and construed it to include a bequest to the nephew. (*Id.* at p. 582.)

This Court reversed. It found no ambiguity in the will. Rather, it found that the will unambiguously did not address the circumstance where the testatrix's husband predeceased her. In *Barnes*' view, nothing in the extrinsic evidence regarding Henderson's relationship with the testatrix was relevant—"[t]he extrinsic testimony sheds no light on the intention of testatrix with respect to the situation which actually had come into existence by the death of testatrix' husband some five years before her own death." (63 Cal.2d at pp. 582-583.) And, in one summary sentence, it also found no basis for implying a gift: "No such 'dominant dispositive plan' as referred to and held to warrant a gift by implication in [*Brock*], cited by petitioner, is demonstrated by the provisions of the will now before us." (*Id.* at p. 584.)[2]

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[2] *Barnes* did not evaluate residual bequests to charities, much less ones named in honor of beloved relatives—the *Barnes* petitioner was the testatrix's nephew. Gifts to charity are liberally construed to accomplish the testators' charitable intent. (*In re Estate of Tarrant* (1951) 38 Cal.2d 42, 46.) Nor, since it did not involve a holographic will, did *Barnes* consider the rule that a will drawn by a layperson is liberally construed. (*Estate of Karkeet* (1961) 56 Cal.2d 277, 282 (*Karkeet*).)

3. If there ever was a statutory basis for the four corners rule, it no longer exists.

Although the four corners rule may once have had some statutory underpinning, as far as we can determine the rule exists today only by virtue of judicial decisions.

The rule seems to have its roots in the Statute of Wills and its descendants in California, particularly section 105 as it existed before the 1983 Probate Code revision. That section stated that "when an uncertainty arises *upon the face of a will*, as to the application of any of its provisions, the testator's intention is to be ascertained *from the words of the will*, taking into view the circumstances under which it was made, *excluding such oral declarations* [of intent by the testator]." (Former § 105, italics added (Deering's Cal. Civ. Practice Codes (1983 ed.) Probate, § 105, p. 1822).) But the statute did not prevent this Court from allowing consideration of extrinsic evidence to determine whether, in fact, a will was ambiguous. (*Estate of Russell* (1968) 69 Cal.2d 200, 212-213 (*Russell*) ["In short, we hold that while section 105 delineates the manner of ascertaining the testator's intention 'when an uncertainty arises upon the face of a will,' it cannot always be determined whether the will is ambiguous or not until the surrounding circumstances are first considered"].)

In any case, today's Probate Code contains no such limitations. Section 105 was repealed in 1983. (Stats. 1983, ch. 842, § 18, operative Jan. 1, 1985; see Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. Law Revision Com. Rep. (1982) p. 2503.) Its counterpart today is section 21102. It states that "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the

dispositions made in the instrument" (subd. (a)), but it introduces various rules of construction that apply "where the intention of the transferor is not indicated by the instrument" (subd. (b)), and it further states that "[n]othing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor" (subd. (c)).

Section 6111.5, cited by the Court of Appeal (Slip Opn., p. 11), does not impose any limitations: It *allows* extrinsic evidence in interpreting ambiguities.[3] The statute's legislative history makes clear that it was designed to ensure the availability of extrinsic evidence, under existing legal standards, in connection with evaluating holographic wills. (Motion for Judicial Notice (MJN); see in particular Ex. B, pp. 19, 25, 32-33, 68, 84, 94.) In fact, section 6111.5 was amended before passage to *omit* four corners language. As originally proposed, the statute would have allowed extrinsic evidence "to determine the meaning of a will or a portion of a will if the meaning is unclear *on the face of the document*." (MJN, Ex. B, pp. 7-8.) The italicized language was eliminated in the only amendment to the statute before it was enacted. (MJN, Ex. B, pp. 9-14, 33 [bill "codifies existing law "], 68 [same], 94 [letter in bill author's file urging deletion of "on the face" language as contrary to *Russell*]; see *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532 ["'Generally the Legislature's rejection of a specific provision which appeared in the original version of an act supports the conclusion that the act should not be construed to include the omitted provision'"].) That section 6111.5 allows extrinsic evidence in

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[3] Section 6111.5 states: "Extrinsic evidence is admissible to determine whether a document constitutes a will pursuant to Section 6110 or 6111, or to determine the meaning of a will or a portion of a will if the meaning is unclear."

cases of ambiguity certainly does not limit its admissibility in implied gift cases.

Since this leaves *Barnes* and its predecessors as the sole basis for the four corners rule, nothing limits this Court's power to revisit the rule.

B. California Courts Vary Widely In Their Views Of Whether The Law Favors Or Disfavors Implied Gifts.

Despite *Blake*'s statement that implied gifts have been sustained "from remote times" (*Blake*, *supra*, 157 Cal. at p. 466), California's courts are deeply divided on their attitude toward implied gifts.

One court went so far as to claim that "[t]he doctrine of implied gifts, as suggested by appellant, has not been recognized in California, though discussed in *Estate of Walkerly* [(1895)] 108 Cal. 627." (*Estate of Swallow* (1962) 211 Cal.App.2d 359, 364.) At the spectrum's other end—just five years later—is *Estate of Campbell* (1967) 250 Cal.App.2d 576, 582: "The doctrine of an implied bequest to issue in similar situations appears to be well established in California law."

Other courts display varying degrees of favor or disfavor. For example, in *Blake*, *supra*, 157 Cal. 446, this Court said that "[a] strong probable implication of a devise arising from the will is sufficient (*Coale v. Smith*, 4 Pa. St. 376), and the tendency of modern cases is rather to extend than narrow the rule of raising devises by implication (2 Powell on Devises, 211)." (157 Cal. at p. 468.) Another court, citing the primacy of "the testator's intent as expressed in the will" and the principle "that the language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator,"

observed that "[r]easoning from these canons of construction, the courts have encountered no barrier to finding testamentary gifts by implication." (*Estate of Petersen* (1969) 270 Cal.App.2d 89, 95.)

In contrast, *Estate of Burson* (1975) 51 Cal.App.3d 300, 307, although finding an implied gift, referred to "the principle disfavoring bequests by implication"; and *Estate of Sandersfeld* (1960) 187 Cal.App.2d 14, quoting a post-*Blake* decision of this Court, said that "[a]lthough a devise or bequest may arise by implication, before a court is warranted in so declaring, the probability of an intent to make the same 'must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind.' *Estate of Franck* [1922] 190 Cal. 28, 32, 210 P. 417, 418 [(*Franck*)]."

The middle ground seems to be held by *Brock*, *supra*, 33 Cal.2d 885, in which this Court said that "a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended." (*Id.* at p. 889.) In support of this statement *Brock* cites both the relatively liberal *Blake* and the very strict *Franck*, as well as several other cases that quote *Franck*.[4]

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[4] *Brock* also cites *Metcalf v. First Parish in Framingham* (1880) 128 Mass. 370, 374, which is evidently the source of the "conviction" language: "[I]f a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

And finally there is *Barnes*—the Court's most recent decision on this subject, which provides no analysis, just strict application of the four corners rule.

That courts have struggled with defining the implied gift test suggests discomfort with the required four corners approach. There's a good reason: Deprived of information they have available in every other interpretational context, courts must act in a self-imposed evidentiary vacuum that unavoidably requires speculation about the testator's intent—even though "[i]n the interpretation of wills, ascertainment of the intention of the testator is the cardinal rule of construction, to which all other rules must yield." (*Estate of Salmonski* (1951) 38 Cal.2d 199, 209.)

As we next demonstrate, this need not be the case. There is ample basis for discarding the four corners rule.

II.

THE FOUR CORNERS RULE IS OBSOLETE AND SHOULD BE ABANDONED.

A. Strict Application Of The Four Corners Rule Has Led Courts In California And Elsewhere To Strain To Create Ambiguities In Order To Be Able To Consider Extrinsic Evidence.

The Court of Appeal recognized that "the ultimate disposition of Irving's property, seemingly appropriate when strictly examining only the language of his will, does not appear to comport with his testamentary intent"; the court believed it "clear" that Irving intended for the charities to take if his wife predeceased him. (Slip Opn., p. 12.) But, constrained by the four corners rule and finding itself unable to see any ambiguity, the court found intestacy.

Other courts, perhaps less forthright but more determined to effectuate testator intent, have not been so reticent. Bypassing implied gifts and the limitations of the four corners rule, they have fashioned intent-favorable holdings on the basis of supposed ambiguities that are hard if not impossible to discern—and are certainly no more apparent than here.

Estate of Taff. In *Estate of Taff* (1976) 63 Cal.App.3d 319 (*Taff*), the testatrix made a bequest to her sister and provided that if the sister did not survive the testatrix, the residue would "pass to my heirs in accordance with the laws of intestate succession." (*Id.* at p. 322.) Relying on extrinsic evidence that included the testatrix's communications with her lawyer, the trial court construed "heirs" to mean only the testatrix's sister's children and

not her husband's line; the Court of Appeal affirmed. (*Id.* at 523.) Citing *Russell, supra*, 69 Cal.2d 200, the court held that the extrinsic evidence "exposed a latent ambiguity, i.e., that when the testatrix used the term 'my heirs' in her will, she intended to exclude the relatives of her predeceased husband, Harry. Under *Russell, supra*, the extrinsic evidence was properly received both to create the ambiguity in the word 'heirs' and to resolve the ambiguity." (63 Cal.App.3d at p. 325.)

Although this result clearly comported with the testatrix's intent, it is hard to see how one could ever equate "heirs in accordance with the laws of intestate succession" with "only my sister's children." The language is not reasonably susceptible to that meaning, with or without extrinsic evidence. What the court actually did was to imply a gift. (To put the matter more directly, it reformed the will to fix a drafting mistake on the basis of the extrinsic evidence. See §III, *post.*) But since the four corners rule forbade that approach, the court had to speak in terms of ambiguity.[5]

Scholars have criticized *Taff*'s analysis as indefensible under *Russell*: "*Taff* thus turned *Russell* upside down, making it stand for a proposition it had expressly rejected. . . . The disputed term in *Taff* that had been mistakenly employed was quite unambiguous. The effect of the decision in *Taff* was to substitute a phrase such as 'my natural heirs' for the inapt phrase that the will had employed ('my heirs in accordance with the laws of intestate succession, in effect at my death in the State of California') in

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[5] One could exercise similar legerdemain here by construing Irving's gift to the charities if he and his wife were to die "at the same moment" to include if his wife predeceased him. Other courts have made similar interpretation leaps, as the charities showed in their Court of Appeal briefs.

order to carry out what the court conceived to be the actual or subjective intent of the testatrix." (Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa. L.Rev. 521, 557-558 (*Reformation of Wills*); see also Haskell, *When Axioms Collide* (1993) 15 Cardozo L.Rev. 817, 825 (*Axioms*) ["In effect, the court created an ambiguity in the word 'heirs' and subsequently resolved the ambiguity by reference to extrinsic evidence"].)

Estate of Akeley. This Court has not been immune. In *Estate of Akeley* (1950) 35 Cal.2d 26, a holographic will left the residue of the estate to three charities, but provided that each was to receive "25 percent" (*id.* at p. 28)—leaving 25 percent unaccounted for, which the State sought to escheat. The trial court found that the testatrix intended the three charities to share the entire residue of her estate (*ibid.*); this Court affirmed.

Noting that the trial court presumptively considered extrinsic evidence—"the surrounding circumstances, namely that the testatrix was unmarried, that she had no relatives of any degree of kindred, that this condition was contemplated by the testatrix, and that she drafted the will herself" (35 Cal.2d at p. 30)—the Court concluded that "[t]he language showing a purpose and intention to dispose of the entire estate, and the use of the specified percentages aggregating less than the whole, created an ambiguity which it was necessary to resolve before distribution could be ordered." (*Ibid.*) Despite the precision of "25 percent," the Court construed it to mean one-third because "it is the duty of the court so to construe the language that it will conform to the testatrix' intention as disclosed by the will rather than to defeat such intention by strict adherence to the technical sense of particular words." (*Id.* at p. 29.) In dissent, Justice Traynor

argued, in essence, that "25 percent" could not mean "one-third," and that the majority erred by relying on the presumption against intestacy to hold otherwise. (*Id.* at pp. 31-33 (dis. opn. of Traynor, J.).)

Justice Traynor was right—"25 percent" cannot mean "one-third." There was no ambiguity to construe. Yet the result was unquestionably consistent with the testator's intent. What the Court did, without saying so, was to imply a gift of the remaining 25 percent to the three beneficiaries.

Estate of Karkeet. The Court endorsed a similar transformation in *Karkeet*, *supra*, 56 Cal.2d 277. There, the entire substance of the holographic will stated: "'This is my authorization to Miss Leah Selix [address], to act as executrix of all and any property and personal effects (and bank accounts) to act without bond or order of Court.'" (*Id.* at p. 279.) Selix petitioned to have the residue of the estate distributed to her. (*Id.* at p. 280.) The trial court rejected Selix's proffered extrinsic evidence that "Selix was a very near and dear friend [of the testatrix], [whom she] treated as a sister" and that "the testatrix had indicated prior to the date of this will that she was going to make a will for Leah Selix" (*ibid.*), but it nevertheless ruled for Selix. In essence, it found that it would be unreasonable to conclude that the testatrix went to the trouble of making a will without intending to make a bequest. (*Ibid.*)

This Court found it reasonable to conclude that "having prepared the will herself and not being familiar with the more modern technical meaning of the term 'executrix' the decedent designated her close friend as such intending that she be the residuary legatee . . . ." (*Id.* at p. 283.) Explicitly relying on the proffered extrinsic evidence, the Court noted that Selix was the testator's friend and referred to the testatrix's "manifest intention in the

preparation and execution of her will." (*Ibid.*) The Court reversed only so the State, which sought to escheat the residue, could have an opportunity to rebut Selix's extrinsic evidence.

Once again, there is just no way that "executrix" could ever mean "beneficiary"—it is not reasonably susceptible to that interpretation. But this Court found the word ambiguous anyway, and then proceeded to resolve the ambiguity in favor of a bequest and against intestacy. And once again, although the Court did not so describe it, the essence of the result was to imply a gift.

Estate of Kime. Essentially the same thing happened in *Kime*, *supra*, 144 Cal.App.3d 246, in which the will appointed an executrix but did not name a beneficiary. The court held that it was proper to receive extrinsic evidence to prove that the testatrix could have believed that "executrix" meant "beneficiary" and that "appoint" meant "bequeath." (*Id.* at pp. 262-264.) But, the court lamented, "[w]e recognize and regret, however, that the foregoing interpretation perpetuates the recent tendency of our courts to make subtle and often questionable distinctions in order to circumvent the statutory prohibition of [former] section 105 in attempting to produce just results by giving effect to the paramount rule in the interpretation of wills: a will is to be construed according to the intention of the testator, and not his imperfect attempt to express it." (*Id.* at p. 264, footnote omitted.)

All of these cases involved wills that were not truly ambiguous, even in light of the extrinsic evidence. But the extrinsic evidence did plainly show that the unambiguous language of the wills did not fully express the testators' intent. The four corners rule would have precluded the consideration of any extrinsic evidence to imply gifts. So, in order to

effectuate the testators' intent, the courts stretched to create ambiguities so as to be able to imply gifts under the guise of interpretation. As one commentator observed, casting the issue in terms of reformation, "Courts, as in [*In re*] *Kremlick* [(Mich. 1983) 331 N.W.2d 228], frequently avoid express reformation of wills by finding an ambiguity in the terms. A finding of ambiguity allows the courts to hang reformation on the peg of construction, a process tending toward remedy that courts feel more comfortable applying." (*Axioms*, *supra*, 15 Cardozo L.Rev. at pp. 819-820.)[6]

California courts are not alone in their frustration. *Reformation of Wills* discusses a number of similar situations, using *Taff* and *Engle v. Siegel* (1977) 74 N.J. 287, as lead examples. The authors state: "In truth, each of the two wills [in *Taff* and *Engle*] was utterly unambiguous. What each court actually did was to prefer the extrinsic evidence of the testator's intent over the contrary but mistaken language in the will." (130 U.Pa. L.Rev. at p. 522.)

Engle is instructive, because it involved a situation similar to that here: A residuary legatee predeceased the testators, a possibility that the will did not provide for. Relying on extrinsic evidence, the New Jersey

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[6] The California decisions—all cited in the charities' Court of Appeal briefs but not discussed by the Court of Appeal—would also support a finding of ambiguity. One need only see how *Karkeet*, *supra*, 56 Cal.2d 277, utilized the presumption against intestacy to support an ambiguity finding, noting that "[c]onstructions leading to intestacy in whole or in part are generally rejected where the language of a will may reasonably be construed to dispose of the entire estate." (*Id.* at pp. 281-282.) Not only does the Court of Appeal's holding here create an intestacy, but the resulting disposition is *exactly contrary* to Irving's stated wish to disinherit everyone but his wife—a factor not always present in other cases.

Supreme Court held that the residue should pass to the deceased legatee's heirs. (74 N.J. at pp. 294-297.) It invoked New Jersey's "probable intent" rule: "Within prescribed limits, guided primarily by the terms of the will, but also giving due weight to the other factors mentioned above, a court should strive to construe a testamentary instrument to achieve the result most consonant with the testator's 'probable intent.'" (*Id.* at p. 291; see also *Darpino v. D'Arpino* (N.J.Super.Ct.App.Div. 1962) 73 N.J.Super. 262, 269 [similar predecease case; "The power of this court to effectuate the manifest intent of a testator by inserting omitted words, by altering the collocation of sentences or even by reading his will directly contrary to its primary signification is well established. This power, when necessary, is exercised to prevent the intention of the testator from being defeated by a mistaken use of language"].) This is substantively no different than implying a gift.

B. This Court And The Legislature Have Eliminated The Four Corners Rule In Every Area Of Document Interpretation But The Implied Gifts.

> 'The history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism.'

(*Russell, supra*, 69 Cal.2d at p. 209, quoting 9 Wigmore on Evidence (3d ed. 1940) § 2461, p. 187.)

In every area but implied testamentary gifts, the law governing consideration of extrinsic evidence in interpreting writings has long followed the liberal approach established in *Russell, supra*, 69 Cal.2d 200

[extrinsic evidence admissible to determine whether ambiguity exists in will] and *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 (*PG&E*) [same re ambiguities in contracts]. These developments strongly suggest that the four corners rule barring extrinsic evidence in the implied gift context is an anachronistic anomaly.

The Legislature, too, has continued the unceasing march toward liberalization of probate law, the better to effectuate testators' intent:

• When *Barnes* was decided, holographic wills had to be "entirely written, dated and signed by the hand of the testator himself." (Former § 53 (Deering's Cal. Civ. Practice Codes (1982 ed.) Probate, § 53, p. 8).) Any deviation could invalidate the will. (See *Estate of Baker* (1963) 59 Cal.2d 680.) But beginning in 1982 the Legislature, through various amendments and enactments, significantly liberalized the requirements, allowing holographic wills to be undated and to include language from commercially printed forms.[7]

• Under former section 51, a bequest to a subscribing witness was void unless there were two other disinterested witnesses. Section 6112, enacted in 1990, substitutes a presumption of undue influence that the beneficiary/witness must rebut.

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[7] Prob. Code, § 53, added Stats. 1931, ch. 281, § 53, repealed Stats. 1982, ch. 187, § 2; Prob. Code, § 53 (operative until 1/1/1985), enacted Stats. 1982, ch. 187, § 2, repealed Stats. 1983, ch. 842, § 18; Prob. Code, § 6111 (operative 1/1/1985), added Stats. 1983, ch. 842, § 55, repealed Stats. 1990, ch. 79, § 13, repeal effective 7/1/1991 by Stats. 1990, ch. 263, § 1; Prob. Code, § 6111 (operative 7/1/1991), added Stats. 1990, ch. 79, § 14, amended Stats. 1990, ch. 710, § 13 (operative 7/1/1991).

• Section 50 once required that the testator declare in the presence of both of two attesting witnesses that the instrument is his or her will, and sign in their presence. Section 6110(c) now allows an exception "if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will."

Why does the four corners rule persist? In fact, *does* it persist? Statutory changes (e.g., sections 21102 and 6111.5 replacing former section 105) and jurisprudential developments that have eliminated the "'stiff formalism'" of the law (*Russell, supra*, 69 Cal.2d at p. 210) seem to have impliedly overruled or abandoned the rule.

As far as we can determine, no other published case since the 1983 amendments to the Probate Code—or indeed since *Barnes*—has applied the four corners rule to exclude extrinsic evidence in connection with an implied gift. (See *Estate of Petersen* (1969) 270 Cal.App.2d 89 [implied gift evaluated solely by reference to testamentary document]; *Estate of Cummings* (1968) 263 Cal.App.2d 661 [same]; *In re Page's Trusts* (1967) 254 Cal.App.2d 702 [same]; *Estate of Campbell* (1967) 250 Cal.App.2d 576 [same]; but see *Estate of Burson* (1975) 51 Cal.App.3d 300, 307, 308 [apparently considering "sketchy extrinsic evidence" in determining that "the only interpretation of decedent's will which avoids intestacy as to the contents of the 'home place' is that which implies a bequest of the content with the devise of the realty"].)

The time to revisit the four corners rule—and *Barnes*—has come. There is no impediment to discarding the rule. This Court should do so.

Allowing extrinsic evidence would make the result in this case straighforward. Irving's intent—always the touchstone of construction—was clear: To leave his estate to his wife if she survived him but otherwise to the charities, and to disinherit his heirs. As the Court of Appeal said, "It is difficult to imagine that after leaving specific gifts to the charities in the names and memories of beloved family members, Irving intended them to take effect only in the event that he and his wife died 'at the same moment.'" (Slip Opn., p. 12.)

III.

THE COURT SHOULD CONSIDER WHETHER TO FOLLOW LEADING COMMENTATORS, THE RESTATEMENT AND THE COURTS OF OTHER STATES AND HOLD THAT COURTS MAY REFORM UNAMBIGUOUS WILLS IN ORDER TO CORRECT MISTAKES.

Allowing extrinsic evidence in support of an implied gift will fully address the concerns of the present case. But it would leave in place a practice that is flawed at its core by its failure to recognize what is really happening: not interpretation, but reformation. This case presents the Court with an opportunity to change course in a way that will simplify and provide more predictability in probate litigation, by holding that reformation is available to correct testators' holographic errors and lawyers' drafting errors.[8]

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[8] The charities did not seek reformation in the trial court or Court of Appeal. But the availability of reformation—a pure issue of law—is clearly (continued...)

Reformation has long been available for trusts and other donative documents besides wills, under both the common law and the Probate Code. (E.g., *Adams v. Cook* (1940) 15 Cal.2d 352, 358; *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1604; §§ 17200, subd. (b)(13), (15), 21220.) But wills have been another matter: Even though in many respects they may be indistinguishable from trusts, courts generally refuse to allow reformation for any reason. (See *Reformation of Wills*, supra, 130 U.Pa. L.Rev. 521, *passim*; 64 Cal.Jur.3d (2011) Wills, § 370 ["A court is not at liberty to supply missing testamentary language, even where there is substantial evidence indicating what the testator might have, or probably, intended. A mistake of omission in a will cannot be corrected"]; Annct., Correcting Mistakes or Supplying Omissions (1935) 94 A.L.R. 26 ["It is a well-settled general rule that equity will not reform a will because of mistakes or omissions"]; de Furia, *Mistakes in Wills Resulting From Scriveners' Errors: The Argument for Reformation* (1990) 40 Cath.U. L.Rev. 1, 3-8 (*Mistakes in Wills*).)

For a number of years scholars have compellingly argued that reformation is actually what courts have been doing all along under the guise of interpretation, and that courts should simply acknowledge reformation as an available remedy under appropriate circumstances and with appropriate safeguards. (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 528-543; *Axioms*, *supra*, 15 Cardozo L.Rev. at pp. 820-828;

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[8] (...continued)
one direction the law can take in cases like this, as it already has in a number of jurisdictions. The Court's evaluation of this case would be incomplete without considering that possibility. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 5-6.)

Mistakes in Wills, *supra*, 40 Cath.U. L.Rev. at pp. 21-27.) Some courts and legislatures have already moved in this direction.[9] Indeed, one California decision, citing a leading practice guide, suggests that California itself is doing so. (*Giammarrusco v. Simon*, *supra*, 171 Cal.App.4th at p. 1604 ["In light of more recent changes in the Probate Code, however, the continuing validity of the older cases (barring will reformation) is doubtful," citing Ross, Cal. Practice Guide: Probate (The Rutter Group 2008) ¶ 15:161.5, p. 15-49, in turn citing §§ 6111.5, 21102, subd. (c)].)[10]

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[9] See fn. 12, *post*. Reformation to avoid violations of the rule against perpetuities dates back to 1891, and is available in a number of jurisdictions including California. (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at p. 546; § 21220.)

[10] The Legislature has been cryptic. The Law Revision Commission's comments to the 2002 amendment to section 21102, which added subdivision (c), state: "Subdivision (c) neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor's intent as expressed in the instrument. [Citations.] Likewise, under the parol evidence rule, extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856. [¶] Nothing in this section affects the law governing reformation of an instrument to effectuate the intention of the transferor in case of mistake or for other cause." (31 Cal. Law Revision Com. Rep. (2001) p. 192.) Whatever the Commission believed was "the law governing reformation," it is judge-made law.

In 2003, the Restatement Third of Property (Wills & Donative Transfers) weighed in. Eschewing courts' strained efforts to find ambiguity in order to effectuate testators' intent, section 12.1 embraces the idea that unambiguous donative documents may be reformed to reflect the testator's true intent:

> A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

(Rest. 3d Property, § 12.1.)[11]

The comments explain that section 12.1 "unifies the law of wills and will substitutes by applying to wills the standards that govern other donative documents," as "[e]quity has long recognized that deeds of gift, inter vivos trusts, life-insurance contracts, and other donative documents can be reformed." (Rest. 3d Property, § 12.1, com. c, p. 354.) "The proposition

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[11] The term "donative document" includes a will. (Rest. 3d Property, § 3.1, com. a, p. 168-169.) "An ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text." (Rest. 3d Property, § 11.1.)

that the text of a will can be reformed represents a minority but growing view." (Rest. 3d Property, § 12.1, reporter's notes, p. 367.)[12]

As both the Restatement and the commentators argue, a clear and convincing evidence standard sufficiently protects against abuses. (Rest. 3d Property, § 12.1, com. e, p. 356; *Reformation of Wills*, *supra*, 130 U.Pa. L. Rev. at p. 568 ["The safeguard that prevents reformation from being abused—for example, by being employed to interpolate a spurious term—is the ancient requirement of an exceptionally high standard of proof in

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[12] Apparently only one California case has considered section 12.1 (when it was still in draft form), refusing to apply it. It did so in a case where reformation surely would not have been granted even if available. (*Estate of Dye* (2001) 92 Cal.App.4th 966, 979-980.)

Our research to date discloses that several states have adopted statutes substantially like the Restatement formulation. (Colo. Rev. Stat. § 5-11-806 (2009); Fla. Stat. § 732.615 (2011); Wash. Rev. Code § 11.96A.125 (2011).) Other states have allowed reformation by judicial decision. (*Erickson v. Erickson* (1998) 246 Conn. 359, 371-376 [scrivener's error]; *In re Estate of Herceg* (N.Y.Sur.Ct. 2002) 193 Misc.2d 201 [747 N.Y.S.2d 901].)

A few courts have rejected the Restatement's approach. (E.g., *Flannery v. McNamara* (2000) 432 Mass. 665, 674 [allowing reformation "would open the floodgates of litigation"]; but see *id.* at pp. 678-679 [concurring opinion supports allowing reformation in principle; "in an appropriate case, the court will conclude that an unambiguous will should be reformed because of a proven mistake in expression or inducement. When that case arrives, the court will either have to reject or revise what is said about reformation in this opinion or struggle to create an ambiguity, where none exists, in order to permit reformation," conc. opn. of Greanery, J.]); *In re Last Will & Testament of Daland* (Del.Ch. 2010) 2010 WL 716160, *5; *In re Lyons Marital Trust* (Minn.Ct.App. 2006) 717 N.W. 2d 457, 462 [stating that "(t)here is little support among other states to adopt the Restatement's position on reformation of wills," but citing only one case that actually considers and rejects Restatement § 12.1, *Flannery v. McNamara*, *supra*, 432 Mass. 665].)

reformation cases"]; *Mistakes in Wills*, *supra*, 40 Cath.U. L.Rev. at p. 3 ["Any danger of evidentiary fraud could be minimized, if not eliminated, by requiring the mistake to be proven by clear and convincing evidence"].)

Like the implied gift approach proposed above, reformation under the Restatement approach would yield a straightforward resolution of this case. The extrinsic evidence clearly and convincingly shows that Irving did not intend for his estranged nephews, or anyone but his wife or the charities, to inherit his estate. Nor is there any reason to believe that Irving—writing a holographic will on his own as in *Karkeet*, *supra*, 56 Cal.2d at p. 283—contemplated, let alone intended, an intestate result. As one court observed, "[t]he idea of any one deliberately purposing to die testate as to a portion of his estate, and intestate as to another portion, is so unusual, in the history of testamentary dispositions, as to justify almost any construction to escape from it." (*Estate of Olsen* (1935) 9 Cal.App.2d 374, 380.) The Court of Appeal acknowledged as much in noting that it was "clear" that Irving intended the charities to take if his wife predeceased him. (Slip Opn., p. 12.)

CONCLUSION

As the Court of Appeal urged, this Court should grant review and revisit the four corners rule as expressed in *Barnes* and its predecessors and bring the law of implied gifts in line with modern statutory, scholarly, and jurisprudential developments.

It should also consider the broader alternative of allowing reformation of wills to comport with testators' true intent.

Dated: January 17, 2012

Respectfully submitted,

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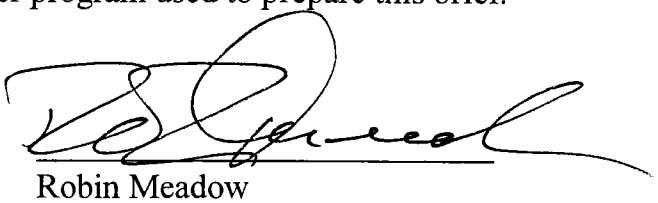
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to California Rules of Court, rule 8.204(c)(1) the **PETITION FOR REVIEW** is produced using 13-point Roman type including footnotes and contains **8,314** words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 17, 2012



Robin Meadow

Filed 12/5/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ESTATE OF IRVING DUKE, Deceased. ROBERT B. RADIN et al., Petitioners and Respondents, v. JEWISH NATIONAL FUND et al., Claimants and Appellants.	B227954 (Los Angeles County Super. Ct. No. BP108971)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Susan Cooley; Rodriguez, Horii, Choi & Cafferata, Reynolds Cafferata; Benedon & Serlin, Gerald Serlin, and Douglas Benedon for Claimants and Appellants.

Sacks, Glazier, Franklin & Lodise and Margaret Lodise for Petitioners and Respondents.

INTRODUCTION

In this proceeding to determine the rights of the parties under the holographic will of Irving Duke,[1] the trial court entered judgment in favor of Robert B. Radin and Seymour Radin, heirs at law of Irving who were not named in the will, and against the Jewish National Fund (JNF) and the City of Hope (COH), two charitable organizations named in the will. The trial court concluded that the will was unambiguous, and did not make any provision for the disposition of Irving's property in the event his wife predeceased him by several years, as actually occurred, and therefore intestacy resulted. Because we fully concur with the trial court's interpretation of the will and conclude that the applicable law compels the result reached by the trial court, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1984, Irving prepared a holographic will. The relevant provisions stated as follows: "I hereby give, bequeath and devise all of the property of which I may die possessed, whether real, personal or mixed, whether heretofore or hereafter acquired to my beloved wife, Mrs. Beatrice Schecter Duke . . . . [¶] Second — To my brother, Mr. Harry Duke, . . . I leave the sum of One dollar ($1.00) and no more. [¶] Third — Should my wife Beatrice Schecter Duke and I die at the same moment, my estate is to be equally divided — [¶] One half is to be donated to the City of Hope in the name and loving memory of my sister, Mrs. Rose Duke Radin. [¶] One half is to be donated to the Jewish National Fund to plant trees in Israel in the names and loving memory of my mother and father — [¶] Bessie and Isaac Duke." Irving indicated he had intentionally omitted all other persons, whether heirs or otherwise, not specifically mentioned, and specifically disinherited all persons claiming to be his heirs. Finally, he included a no contest clause, which provided that "[i]f any heir, devisee or legatee, or any other person

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1 Because the testator and his wife, Beatrice, share the same surname, we refer to them by their first names to avoid confusion. No disrespect is intended.

or persons, shall either directly or indirectly, seek to invalidate this Will, or any part thereof, then I hereby give and bequeath to such person or persons the sum of one dollar ($1.00) and no more, in lieu of any other share or interest in my estate." In August 1997, Irving drafted a holographic codicil that stated: "We hereby agree that all of our assets are community property."

Beatrice, Irving's wife, died in July 2002. Irving died in November 2007, without children, predeceased children, or issue. A Los Angeles Deputy Public Administrator found Irving's will in his safe deposit box at his bank, and the will was admitted to probate. Irving's estate was valued in excess of $5 million.

Respondents Seymour and Robert Radin are Irving's sole surviving relatives; they are his nephews, the sons of Irving's sister, Rose Duke Radin.

In March 2008, COH and JNF filed a petition for probate and for letters of administration with will annexed. They requested the appointment of Matthew Bernstein, an employee of JNF, as administrator. The requested letters were issued and filed in May 2008, and Bernstein was appointed as the administrator with will annexed.

In October 2008, the Radins filed a petition for determination of entitlement to estate distribution, and for removal of Bernstein as administrator. They agreed the will was valid, but argued that the condition under which COH and JNF were to take—if Irving and Beatrice died at the same moment—had not been satisfied. The will did not address distribution of the estate where, as had occurred, Beatrice predeceased Irving by several years. The Radins contended that the result was a complete intestacy, and the estate should therefore pass to themselves as Irving's closest living relatives.

The Radins moved for summary judgment. COH filed opposition to the motion, in which JNF and Bernstein joined. They asserted in opposition that the trial court should consider extrinsic evidence of Irving's testamentary intent. To wit, in August 2003, Irving invited a senior gift planning officer for City of Hope to his home. He executed a "City of Hope Gift Annuity Agreement" and gave the COH representative checks totaling $100,000. On January 7, 2004, he did the same thing. During this second meeting, he told the COH representative that he was "'leaving his estate to City of Hope and to

Jewish National Fund.'" It was the representative's impression from their conversation that Irving had already prepared a will that included gifts to COH and JNF, not that he intended to do so in the future. Later the same month, on January 30, 2004, Irving once again executed a charitable gift annuity agreement, and gave the COH representative checks totaling $100,000.

The Radins filed a reply, asserting that because the will was not ambiguous, the court was not permitted to consider extrinsic evidence.

The trial court initially denied the motion for summary judgment for reasons not relevant here. The Radins filed a motion for reconsideration. The trial court granted the motion for reconsideration, and thereafter ordered entry of judgment in favor of the Radins.

The court found that the will was not ambiguous or uncertain, and therefore the court could not resort to extrinsic evidence in order to ascertain the intent of the testator. In reaching its conclusions, the court relied on *Estate of Barnes* (1965) 63 Cal.2d 580 (*Barnes*). We shall discuss *Barnes* in some detail below because we conclude that it governs the outcome in this case.

This timely appeal followed.

DISCUSSION

I. Standard of Review

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor on a cause of action (i.e., claim) or defense (Code Civ. Proc., § 437c, subd. (a))—a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, subd. (c))—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations]—and that the 'moving party is entitled to a

judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c))." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

"In moving for summary judgment, a 'plaintiff . . . has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (*o*)(1).)" (*Aguilar, supra*, 25 Cal.4th at p. 849.)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact . . . , is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See Civ. Code, §§ 1635-1661; Code Civ. Proc., §§ 1856-1866.) Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. (Civ. Code, §§ 1638, 1639; Code Civ. Proc., § 1856.)" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) In interpreting the will at issue here, we must observe the paramount rule that the will is to be construed according to the intention of the testator as expressed therein. Our

"objective is to ascertain what the testator meant by the language he used." (*Estate of Russell* (1968) 69 Cal.2d 200, 205-206, 213 (*Russell*).)

II. No Ambiguity Exists in the Will, and a Finding of Intestacy Is Inescapable

The will under consideration here is very similar to the one construed by the Supreme Court in *Barnes*, *supra*, 63 Cal.2d 580. There, the testatrix prepared a will declaring she was married, had no children, and intended by the will to dispose of all of her property. The will provided that all of her property was to go to her husband, who was also named the executor. The will further provided that "'[i]n the event that the death of my husband and myself shall occur simultaneously or within two weeks of each other, or in the same common accident or calamity, or under any circumstances causing doubt as to which of us survives the other, then, and in such event, I hereby give, devise and bequeath all of my estate of whatsoever kind and character and wheresoever situated, to Robert Earl Henderson [petitioner].'" The will also included a no contest clause and a disinheritance clause. (*Id.* at pp. 581 & fn. 3, 582.)

The husband of the testatrix predeceased her by more than five years. Upon the death of the testatrix, she was survived by heirs at law that included her brothers and sisters, and a nephew and nieces (children of brothers and sisters who predeceased her). Petitioner was not an heir at law because his mother, the testatrix's sister, survived. (*Barnes*, *supra*, 63 Cal.2d at p. 582.) Petitioner contended that he was entitled to succeed to the entire estate. Over the objection of the heirs at law, the trial court admitted evidence offered by petitioner that a special relationship existed between him and the testatrix when she executed the will (about 13 years before her death) and thereafter. The trial court concluded that there was "some uncertainty on the face of the will," and found in favor of petitioner.

The Supreme Court reversed the judgment, finding that "the will ma[d]e no disposition whatever of the property of testatrix in the event she outlived her husband by several years, as she did." (*Barnes*, *supra*, 63 Cal.2d at pp. 583, 584.) The court observed "that a will is to be construed according to the intention of the testator, and so as

to avoid intestacy." (*Ibid.*, citing former Prob. Code, §§ 101, 102.) "However, a court may not write a will which the testator did not write. 'To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the . . . property. "Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended although not expressed." [Citation.]' (*Estate of Beldon* (1938) 11 Cal.2d 108, 112.)" (*Barnes, supra*, at p. 583.)

The court noted that the will demonstrated an awareness by testatrix that she might have no further opportunity to designate an alternate if she and her husband died simultaneously, so she named petitioner. But she did not include a provision or any indication of her intent if, as occurred, she was afforded sufficient time to review the will following her husband's death. (*Barnes, supra*, 63 Cal.2d at pp. 583, 584.) If she had considered the lack of a disposition of her property after her husband's death, she might have chosen petitioner, or she might have relaxed her disinheritance of other relatives, or selected different beneficiaries. "Under such circumstances any selection by the courts now would be to indulge in forbidden conjecture. (See *Estate of Maxwell* (1958) 158 Cal.App.2d 544, 549-551.) The declared intention of testatrix . . . to dispose of all of her property does not authorize the courts under the guise of construction to supply dispositive clauses lacking from the will. [Citation.]" (*Barnes, supra*, at pp. 583-584.)

The existence of the disinheritance clause did not alter the court's conclusion. "It is settled that a disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate a claim of pretermission. Such a clause does not and cannot operate to prevent the heirs at law from taking under the statutory rules of inheritance when the decedent has died intestate as to any or all of his property. [Citations.]" (*Barnes, supra*, 63 Cal.2d at p. 583.)

The court further concluded that the extrinsic evidence offered by petitioner about his relationship with the testatrix "d[id] not assist in interpreting the will. It may serve to

explain why petitioner was named as alternate beneficiary in the particular situation envisaged by paragraph Sixth of the will . . . , but that situation did not arise. The extrinsic testimony sheds no light on the intention of testatrix with respect to the situation which actually had come into existence by the death of testatrix' husband some five years before her own death." (*Barnes, supra*, 63 Cal.2d at pp. 582-583.) On the subject of extrinsic testimony, the court cited former Probate Code section 105, which provided that "'when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding . . . oral declarations' of the testator as to his intentions." (*Id.* at p. 582, fn. 6.)

Just as the court concluded in *Barnes*, Irving's will is not ambiguous. The will set forth his intent only in the event he predeceased his wife, or if they died "at the same moment."[2] It simply made no disposition whatsoever of the property in the event Irving outlived his wife by several years, as eventually occurred. However, this omission does not render the will ambiguous. We cannot engage in conjecture as to what the testator may have intended but failed to express in order to avoid a conclusion of intestacy. (*Barnes, supra*, 63 Cal.2d at pp. 583-584.) Furthermore, the existence in Irving's will of a disinheritance clause does not prevent respondents from taking under the statutory rules of inheritance where, as here, the decedent must be considered as having died intestate. (*Id.* at p. 583.)

In summary, we conclude that the *Barnes* decision is directly on point and controls our decision here. We decline, as we must, appellants' invitation to look to cases from other states in which courts construed wills similar to the one now before us as implying a testamentary intent not stated on the face of the will. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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2 Although the will in *Barnes* included more extensive, redundant formulations of the notion of simultaneous or near-simultaneous death, we conclude the language "at the same moment" is the functional equivalent of the language used in *Barnes*.

III. No Dominant Dispositive Plan Exists to Warrant Finding an Implied Gift

Appellants argue that "the general scheme of Irving's will produces the unyielding conviction that Irving intended to divide his estate between COH and JNF, rather than have it pass by intestacy to his estranged nephews." They rely on the case of *Brock v. Hall* (1949) 33 Cal.2d 885 (*Brock*), which the *Barnes* court considered but distinguished, stating that "[n]o such 'dominant dispositive plan' as referred to and held to warrant a gift by implication in [*Brock*] . . . is demonstrated by the provisions of the will now before us." (*Barnes, supra,* 63 Cal.2d at p. 584.) We shall briefly discuss *Brock* in order to demonstrate that it is readily distinguishable from the situation here.

In *Brock, supra,* 33 Cal.2d 885, a father established an inter vivos trust for the benefit of his two daughters. The trust instrument provided that upon reaching the age of 18, each daughter would receive half of the net income from the trust property, until reaching the age of 35, when each would receive half of the trust property outright. The trust instrument contained various provisions indicating the trustor's desired disposition of the property if, for example, either daughter died without having married, or if they died having married and leaving issue (or were married but without issue), and so forth. Before reaching age 35, the younger daughter died a widow, without issue. This precise scenario was not addressed in the trust instrument. The trustor contended that, since there was no provision for an express gift to the older daughter under these circumstances, the younger daughter's share of the property should revert to him.

The Supreme Court found applicable the law governing implied gifts in wills. In that regard, the court observed: "The implication of gifts in wills rests upon the primary rule of construction that the duty of the court in all cases of interpretation is to ascertain the intention of the maker from the instrument read as a whole and to give effect thereto if possible, and it is well settled that, where the intention to make a gift clearly appears in a will, although perhaps imperfectly expressed, the court will raise a gift by implication." (*Brock, supra,* 33 Cal.2d at pp. 887-888.) However, in order to imply a gift, "the intention to make a gift [must] clearly appear[] from the instrument taken by its four corners and read as a whole, considering its general scheme, the property involved, and

the persons named as beneficiaries . . . . (*Estate of Franck* [(1922)] 190 Cal. 28, 31.) *Although the court may not indulge in conjecture or speculation simply because the instrument seems to have omitted something which it is reasonable to suppose should have been provided*, a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended." (*Brock, supra*, at p. 889, italics added.) The court concluded that an implied gift to the surviving daughter was necessarily implied in the trust instrument. The instrument did not provide for a reversion to the trustor under any contingency, and the general plan showed the trustor intended a surviving daughter to have all the property in the event the other specified beneficiaries (surviving husbands or issue) were not in existence. The apparent purpose of the trust was "to provide first for each daughter and her issue, and second, in case of her death without issue, for those next entitled to her bounty, namely, her sister and a surviving husband, if any." (*Id.* at pp. 890-891.) The court concluded that "the probability that the trustor intended to make a gift in this contingency *is so strong as to nullify the existence of any other possible intent*." (*Id.* at p. 892, italics added.)

Irving's will cannot be said to necessarily entail a dominant dispositive plan to leave his property to JNF and COH under any possible scenario. Its similarity to the will involved in *Barnes, supra*, is evident, and the Supreme Court's finding *Brock* to be distinguishable is controlling here.

IV. Extrinsic Evidence Is Inadmissible Where the Meaning of a Will Is Clear

Appellants contend that the decision in *Barnes* is no longer controlling because the court relied on a section of the Probate Code regarding extrinsic evidence, which was repealed in 1985. The statute at issue was former Probate Code section 105, which provided that "'when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding . . . oral declarations' of the testator as to his intentions." (*Barnes, supra*, 63 Cal.2d at p. 582, fn. 6.) Appellants assert that under current law (i.e., the general rules of evidence), they

were permitted to introduce extrinsic evidence to demonstrate what Irving meant by the words used in his will, including his statement that he was leaving his estate to COH and JNF.

In fact, the *Barnes* court did consider the existence of extrinsic evidence regarding the relationship between the testatrix and petitioner.[3] However, the court found that such evidence did not assist in interpreting the will. "The extrinsic testimony sheds no light on the intention of testatrix with respect to the situation which actually had come into existence by the death of testatrix' husband some five years before her own death." (*Barnes*, *supra*, 63 Cal.2d at pp. 582-583.)

The admission of extrinsic evidence in matters involving wills is addressed in Probate Code section 6111.5, which provides as follows: "Extrinsic evidence is admissible . . . to determine the meaning of a will or a portion of a will *if the meaning is unclear*." (Italics added.) As we have previously stated, there was no ambiguity in Irving's will that would permit the introduction of extrinsic evidence to explain it.

Appellants point to cases which hold that extrinsic evidence is always admissible, at least provisionally, to establish a latent ambiguity in a testamentary instrument. For example, the court in *Russell*, *supra*, 69 Cal.2d 200, 207, stated as follows: "Extrinsic evidence always may be introduced initially in order to show that under the circumstances of a particular case the seemingly clear language of a will describing either the subject of or the object of the gift actually embodies a latent ambiguity for it is only by the introduction of extrinsic evidence that the existence of such an ambiguity can be shown. Once shown, such ambiguity may be resolved by extrinsic evidence. [Citations.]" In *Russell*, the holographic will stated, "'I leave everything I own Real & Personal to Chester H. Quinn and Roxy Russell.'" (*Id.* at p. 203.) Extrinsic evidence was found to be properly admitted to establish that Roxy Russell was a dog, with the result that the court found that portion of the testamentary gift was void. (*Id.* at p. 214.)

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[3] The testatrix's oral declarations regarding her intentions were apparently not offered into evidence, in accordance with Probate Code section 105.

The extrinsic evidence offered here did not serve to establish the existence of a latent ambiguity in the will at issue. Rather, there was simply an unambiguous failure on the face of the will to include a testamentary provision for the circumstances that occurred. Irving's purported oral declaration of intent cannot be used to fill in *omitted* terms of the will. His statement cannot be used to prove that his dominant dispositive purpose was to leave everything to the charities, because the meaning of the will was not unclear.

We are mindful of the fact that the ultimate disposition of Irving's property, seemingly appropriate when strictly examining only the language of his will, does not appear to comport with his testamentary intent. It is clear that he meant to dispose of his estate through his bequests, first to his wife and, should she predecease him, then to the charities. It is difficult to imagine that after leaving specific gifts to the charities in the names and memories of beloved family members, Irving intended them to take effect only in the event that he and his wife died "at the same moment."

The question is whether extrinsic evidence should always be inadmissible when the language in a will is otherwise clear on its face. The *Barnes* court held the answer is "yes." In reaching this conclusion, it found the proffered extrinsic evidence did not assist in interpreting the will. In this regard, the court stated, "The extrinsic testimony sheds no light on the intention of testatrix with respect to the situation which actually had come into existence by the death of testatrix' husband some five years before her own death." (*Barnes*, *supra*, 63 Cal.2d at pp. 582-583.) However, that is not the case here, as there is evidence of Irving's intentions after the death of his wife. After she died, Irving gave substantial amounts of money to the COH and told its representative that he was "'leaving his estate to City of Hope and to Jewish National Fund.'" The representative believed Irving had already made such a provision in a testamentary instrument. A few weeks after making that statement, Irving again delivered checks to the COH's representative. Recognizing "that a will is to be construed according to the intention of the testator, and so as to avoid intestacy" (*id.* at p. 583), perhaps the rule regarding the admission of extrinsic evidence should be more flexible when a testator's conduct after

an event that would otherwise cause his will to be ineffective brings into question whether the written word comports with his intent. *Barnes* takes that option out of our hands. Perhaps it is time for our Supreme Court to consider whether there are cases where deeds speak louder than words when evaluating an individual's testamentary intent.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 17, 2012, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

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(X) By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 17, 2012, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie