No. S199435

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ESTATE OF DUKE

ROBERT B. RADIN and SEYMOUR RADIN,

Plaintiffs and Respondents,

vs.

JEWISH NATIONAL FUND and CITY OF HOPE,

Defendants and Appellants.

California Court of Appeal, Second District, Division Four 2nd Civil No. B227954

Appeal from the Los Angeles Superior Court

Hon. Mitchell Beckloff, Superior Court Case No. BP108971

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Conceding that this case has been correctly decided under current California law by both the trial and appellate courts, Petitioners now ask this Court, under a factual situation that rarely occurs, to make a sweeping change to California law. This Court should reject Petitioners' effort to rewrite Decedent's last Will when the lower courts have properly declined to do so. Although Petitioners (and even the Court of Appeal) may not like the outcome the law requires under the facts present here, that law is quite sound. Conversely, reversing settled law as Petitioners request would significantly encourage litigation over wills that are clear on their face, as disaffected potential beneficiaries try to rewrite estate plans in their favor.

Citing mainly statutory law concerning the use of extrinsic evidence for the resolution of ambiguities as to whether a document is a will and interpretation of the terms of a will, Petitioners urge this Court to reverse long-settled law and allow extrinsic evidence to create implied gifts in unambiguous wills. Petitioners then go further and request that this Court allow reformation of wills. Petitioners would, essentially, allow oral wills, so long as there is clear and convincing evidence of a decedent's intent. Petitioners identify no significant harms caused by the current law nor any split among the lower courts with regard to this issue -- indeed no cases

have been decided on this exact issue since *Estate of Barnes* (1965) 63Cal.2d 580. Petitioners' proposed change in the law is designed to benefit Petitioners, but it is not even clear that granting their request would create a different result for Petitioners. Regardless, resolution of this case would not settle an important question of law nor resolve any conflict among the lower courts. Thus, this case does not merit review in this Court.

STATEMENT OF THE CASE

As in the briefing below, Petitioners' recitation of the facts is entwined with extrinsic evidence that they propose be considered but which was not considered by the lower courts nor the subject of any trial on the evidence. The relevant facts to this Court's determination are those set forth in the trial court's minute order granting the summary judgment petition. (Appellant's Appendix "AA" at 252.) Decedent Irving Duke executed a holographic will dated October 30, 1984. At the time of the execution of the will, both Irving Duke and his wife, Beatrice Schecter, were alive and the will provided that, should Irving predecease Beatrice, his entire estate should go to her. (AA at 121.) The will also provided that should Irving and Beatrice die at the same time, his estate was to be equally divided between two charities, Petitioners herein. (AA at 122.) Decedent outlived his wife and died in 2009 without surviving spouse, children or

predeceased children. (AA at 116.) Decedent's sole surviving heirs are Seymour Radin and Robert Radin, Respondents herein. (AA at 144.)

Petitioners' recitation of facts concerning Irving Duke's charitable donations and his alleged relationship with his family are not part of the undisputed facts considered by the trial court and thus were not appropriately considered by the Court of Appeal in its *de novo* review of the trial court's determination. Although the appellate court's opinion appears to treat as established fact the issue of Irving's intent (Slip Opn., p. 12), this Court's review should be limited to the undisputed facts set forth below and not rely upon conjecture as to Decedent's intent based on allegations advanced by Petitioners without the benefit of trial or hearing.

REVIEW SHOULD BE DENIED

I. THIS CASE DOES NOT MEET THE STANDARD FOR REVIEW IN RULE OF COURT 8.500

Rule of Court 8.500(b) sets forth the grounds for review:

The Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of

sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

None of these factors is present here. As discussed in detail below, there is no division of authority on these issues in the Courts of Appeal and Petitioners have failed to demonstrate that this case raises an important question of law that this Court must settle. Indeed, what Petitioners request is that this Court unsettle the law by overturning a prior Supreme Court ruling that has stood for almost 50 years; and in connection with a case that is of no concern to anyone other than them. In this case, unfortunately for Petitioners, the Decedent's last Will is clear and does not provide for Petitioners (or anyone else) under the circumstances of Decedent outliving his wife. Petitioners ignore the simple fact that Decedent had many years to change his last Will to make clear his intent and chose not to do so. Accordingly, under California law, the rules of intestate succession apply, and Decedent's heirs receive his estate.

Additionally, as made clear by Petitioners' own Petition, this is a rare case, and not one that creates a clear need for a change in the law. Since *Estate of Barnes*, *supra* (1965) 63 Cal.2d 580, it appears that no other cases have raised this precise issue, although the recent *Estate of Dye* (2001) 92

Cal. App.4th 966 case is similar in nature. Even the non-California cases Petitioners cite for the supposed trend toward allowing informalities in the interpretation of wills involve a mere handful of decisions throughout the country. This is a classic case where "bad facts" would lead this Court to make "bad law." As discussed below, courts are reluctant to change the law to address individual cases where the law, as a whole, is sound. The sweeping changes proposed by Petitioners should not be based upon such limited situations. The Petition should be summarily rejected.

II. THERE ARE SUBSTANTIAL IMPEDIMENTS TO ADOPTION OF THE RULE REQUESTED BY PETITIONERS

Petitioners suggest that this Court need merely issue an opinion overruling *Barnes* and the law allowing reformation of wills will spring into being. Under Petitioners' theory, only *Barnes* prevents extrinsic evidence being admitted and reformation of wills being permitted. Petitioners apparently base this determination on their reading of the legislative changes to Probate Code §§ 6111.5 and the existence of 21102.[1]

Petitioners misconstrue the intent and the extent of the changes to 6111.5 and 21102. The legislative record concerning 6111.5 makes clear

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[1] All subsequent references unless otherwise indicated are to the Probate Code.

that the legislature and the commentators sought to retain the case law under *Estate of Russell* (1968) 69 Cal.2d 200, allowing introduction of extrinsic evidence to explain a latent ambiguity, not to rewrite unambiguous wills. *Estate of Russell* also contains extensive discussion of the rules regarding allowance of extrinsic evidence to explain ambiguities. There is no suggestion in the legislative history of 6111.5 that the drafters would have gone the further step of suggesting that extrinsic evidence should be introduced even where there is no latent or patent ambiguity.

The resulting statute is clear. It reads "[e]xtrinsic 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*." (Emphasis added). Thus, 6111.5, rather than advocating the wholesale allowance of extrinsic evidence, allows it to determine if a document is a will, but only allows extrinsic evidence for interpretation of the meaning of the will if the meaning is unclear. Certainly, this statute does not assist Petitioners' case that extrinsic evidence should be allowed in all cases no matter whether language is clear or not.

Section 21102 is similarly unhelpful to Petitioners. As explained below, the Law Revision Comments to that section refer to the extensive

history of interpretation of ambiguities, and the statute specifically states that it does not affect any other law regarding reformation. Thus, 21102 hardly paves the road for will reformation now.

Implementation of the extrinsic evidence rule and will reformation that Petitioners seek would, therefore, require that this Court overturn not merely *Barnes*, which stands not for the proposition that extrinsic evidence cannot be admitted where there is no ambiguity, but also *Estate of Russell* and every other case in which this Court or the lower courts have held that will interpretation is based on the testator's intent as expressed in the document subject only to extrinsic evidence to explain any apparent ambiguity.

Given the limited facts and procedural posture of this case, Petitioners' request would also necessitate this Court writing implementing language as to the evidentiary standards to be applied when considering the admission of extrinsic evidence. For instance, would extrinsic evidence in the case of an ambiguity still be subject to a preponderance of the evidence standard and only evidence which is not explaining an ambiguity subject to the proposed clear and convincing standard? Would evidence still need to apply only to the circumstances surrounding the execution of the will, as is the current rule in California under statute and case law, or would the

extrinsic evidence be allowed (as Petitioners would need in this case) to extend for decades beyond the execution of the document?

It is clear that what Petitioners request of this Court is not simply overruling *Barnes*. For this and the multitude of other reasons identified in this Answer, this Court should decline to undertake such an endeavor.

III. NOT ONLY DOES THIS CASE NOT RAISE AN IMPORTANT ISSUE OF CALIFORNIA LAW, BUT GRANTING THE RELIEF SOUGHT BY PETITIONERS MAY NOT EVEN AID THE PETITIONERS

Petitioners, at bottom, seek this Court's approval of a law that would allow extrinsic evidence to be admitted regardless of ambiguity. Petitioners assert that "allowing extrinsic evidence would make the result in this case straightforward." (Pet. for Rev. at 28.) In fact, this is not the case -- it is not at all clear that the extrinsic evidence that Petitioners seek to admit would even be received in a trial of this matter given its remoteness in time to the will in question.

In *Barnes,* the court pointed out that there was no evidence of Mrs. Barnes' intent *at the time she signed the will.* The same is true in this case. There is no evidence, other than his Will, of Decedent's intentions at the time he created the Will. Thus, there is no evidence that *at the time the Will*

was created of what Decedent intended, nor is there any evidence of any mistake of law or fact by Decedent at that time. All Petitioners can point to is extrinsic evidence from years after the Will was signed. But the intent of the testator must be ascertained at the time that the Will was signed, not at some point far into the future. *Estate of Russell, supra,* 69 Cal.2d 200, 211-212.

Petitioners do not appear to suggest that this Court should also be changing the law as to the time when intent should be ascertained. Thus, were this Court to adopt Petitioners views, the only extrinsic evidence available would be evidence from nearly twenty years after the document was executed. Surely, the Court could not imply a gift in the Will here by looking at actions and statements twenty years into the future. Would that mean that any gift given by Decedent to any charity or any person during the intervening twenty years must be considered to show his intent to dispose of the residue of his Will? And what is next if Petitioners' view prevails -- oral wills being effective? Such a rule would not create additional certainty in the distribution of estates.

This case is similar to *Estate of Dye, supra*, which Petitioners dismiss as a case where "reformation surely would not have been granted even if available." (Pet. for Rev. at 32, fn. 12.) In *Dye*, decedent died

leaving three children, two from a prior marriage who had been "adopted out" and a third adopted during his second marriage. His will provided that his estate was to be distributed to his second wife, who, unfortunately, predeceased him. Decedent's surviving third child urged the court to consider decedent's intent in that he had no relationship with the adopted out children and would not have intended them to benefit at the expense of the third child if the property could not go to his second wife. Significantly, the Court stated, "**It is presumed citizens know the law, including the intestacy laws, and it is up to any person who does not want those laws applied to his or her estate to opt out by preparing a will setting forth other dispositions.**" *Id.* at 973 (emphasis added).

The court went on to address the fact that appellant sought to "reform" the will to conform to intentions based on extrinsic evidence. As the court set forth the problem, Appellant was "trying to establish his father's probable intention *in the event the disposition in the will failed.*" *Id.* at 977 (emphasis in original). In concluding that reformation should not be allowed under the proposed Restatement Third §12.1 standard, the Court referred to Restatement Third, §12.1, Illustration 2 which provides as follows:

> G validly executed a will that devised his estate to his sister, A. After execution, G formed an intent to alter the disposition in favor of A's daughter, X, in the mistaken belief that he could substitute his new intent by communicating it to X orally.

In explaining that reformation would not be allowed in such a case, the Restatement states that "[a]lthough a donative document exists that could be reformed by substituting "X' for "A," the remedy does not lie because G's will was not the product of mistake. The will when executed stated G's intent accurately." The *Dye* court concluded "Decedent's will said exactly what he wanted to say: Had Eleanor survived, the will would have given her everything. Upon her death, his 'mistake' if any 'was his subsequent failure to execute a codicil or a new will to carry out his new intent. . ." *Id.* at 980. The circumstances here are no different and it is equally likely that reformation would be denied to Petitioners even under their proposed new law.

IV. CALIFORNIA LAW IS WELL-SETTLED AND NO IMPORTANT QUESTION OF LAW REQUIRES ITS CHANGE

A. California Law Allows Appropriate Evidence to Address and Explain Ambiguities

In *Barnes*, *supra*, 63 Cal.2d 580, this Court properly considered and ruled regarding the use of extrinsic evidence to address ambiguities in a will. In that case, this Court found that where there was no ambiguity, either patent or latent, in the will in question, it could not "engage in conjecture as to what the testator may have intended but failed to express in order to avoid a conclusion of intestacy." *Barnes*, at 583-584. A few years later, this Court made clear that, where even a latent ambiguity could be shown, extrinsic evidence would be considered to show and even to resolve the ambiguity. *Estate of Russell*, *supra,* 69 Cal.2d 200.

California courts both before and since have operated with the view that a will is to be interpreted according to its terms and the intent expressed within the will unless there is an ambiguity. Section 21102 with regard to wills in general and section 6111.5 with regard to holographs adopt similar reasoning, focusing on the testator's intent and allowing extrinsic evidence to explain or clarify that intent. What California law has never done, and

should not do at this time, is open the floodgates to claims that unambiguous language in a will should be disregarded or rewritten where there is neither a patent nor a latent ambiguity in the will.

The touchstone of ambiguity is apparent even in the Petitioners' alleged "liberalization" of laws regarding will formalities. For instance, extrinsic evidence is allowed under §6111.5 to determine whether a document is a will and to explain provisions of the instrument that are "unclear." Similarly, while §21102 provides that "nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intent of the transferor," the comment to that section specifically refers to cases allowing extrinsic evidence to explain ambiguities and refers to Code of Civil Procedure §1856, the parole evidence rule, which allows extrinsic evidence to "explain, interpret or supplement *an expressed intention.*" West California Probate Code (2012 Edition), Section 21102, Law Revision Commission Comments, 2002 Amendment.

In their arguments below, Petitioners failed to identify any ambiguity in the Decedent's last Will and thus could not avail themselves of the clear and settled line of authority that would allow extrinsic evidence to explain an ambiguity. The *Barnes* Court addressed exactly the same problem,

acknowledging that *were there an ambiguity*, it might be possible to refer to extrinsic evidence. In fact, the *Barnes* Court even considered and commented on the extrinsic evidence presented in the trial court, but pointed out that the evidence could not help the petitioner in that case as there was no ambiguity.

B. Contrary to Petitioners' Argument, California Law Regarding Implied Gifts is Consistent

Petitioners assert that California law regarding implied gifts is confused, conflicting and anachronistic. Their petition thus assumes that there is an "implied gift" in this case, and then leaps to the conclusion that California law is out of step with other jurisdictions. To fix this supposed "anachronism," they broadly propose that this Court should change the law to allow extrinsic evidence to establish implied gifts even where a bequest is unambiguously omitted. A careful review of the authorities shows that the "ample" support they suggest is present for such a change simply does not exist.

(1) California Allows Implied Gifts in Proper Circumstances

As detailed in Petitioners' application, the law of implied gifts exists in California and has repeatedly been applied to save a bequest that does not

otherwise appear clear in a document so long as a review of the document finds sufficient evidence for such a gift in the form of a "dominant dispositive plan." *Brock v. Hall* (1949) 33 Cal.2d 885. Of course, in this case, neither the trial nor appellate courts found an implied gift as there is no evidence within the document supporting such an implied gift.

In fact, it is unclear whether a dominant dispositive plan could be ascertained in this case even if extrinsic evidence were allowed given that the proposed evidence is so far removed from the will. What about any intervening gifts to other charities, or subsequent gifts to other charities? Would such gifts alter the "dominant plan?" The courts have long recognized that a testator's intentions may change during the course of his life and have therefore required that those intentions be demonstrated in the document at issue so as to avoid the chaos that would ensue were implied gifts to be based not upon evidence in the document but upon actions unrelated to those documents. The Appellate Court's invitation to consider whether "deeds speak louder than words" (Slip Opn. at 13) unfortunately invites this Court to establish a rule creating such chaos. This Court should decline that invitation.

(2) Petitioners' Cited Cases Properly Resolved Ambiguities Rather Than Disguising Implied Gifs

Petitioners cite to four California cases for the proposition that the courts in California feel constrained by the four corners law to find ambiguities where none exist, in reality applying extrinsic evidence to create implied gifts. The cases do not reflect the strained interpretation that Petitioners read into them. Moreover, the cases show that, where, in fact, there is an ambiguity, California courts have the ability to interpret the will according to the testator's intent.

- *Estate of Taff* (1976) 63 Cal.App.3d 319 finds that a testator's use of the word "heirs" was, in fact, intended to refer to her blood heirs rather than to her predeceased husband's heirs. While Petitioners allege that this was nothing more than reformation in accord with the evidence presented by the testator's attorney of what she told him at the time of the drafting, it is in fact in accord with long-standing rules of interpretation in connection with ambiguities related to personal usage. In such a case, the particular usage of a term by one person may be shown, through extrinsic evidence to mean something other than what it appears to mean. §21112 codifies this principle. In *Taff*, the testator, in her conversations with her attorney and in other contemporaneous statements

and writings confirmed what her usage of the term "heirs" in her will meant. The court found that under *Russell* this was the sort of latent ambiguity that could be remedied. *Estate of Taff*, at 325.

- *Estate of Akeley* (1950) 35 Cal.2d 26 concerns the ambiguity created by the use of the words "all the rest, residue and remainder ...I give and bequeath as follows...25 per cent ... 25 percent...25 percent...." In resolving the ambiguity created by a disposition of "all" that only addressed 75 percent, the court concluded that the testator meant 33 1/3 percent to each. *Akeley*, at 28. The *Akeley* court, whether correctly or not, also relied upon the fact that it deemed the trial court's determination to be a reasonable one and thus did not disturb it on appeal. Petitioners, not surprisingly, agree with Justice Traynor's dissent in that case that 25% does not mean one-third and thus, Petitioners conclude that what the majority did was to imply a gift of the excess amounts to the various charities. Petitioners do not address the fact that it might be reasonable to conclude that the testator simply did not know her math in reaching the conclusion the court did. Petitioners do not agree with the court's reasoning and interpretation, but this does not mean that the court improperly implied a gift.

- *Estate of Karkeet* (1961) 56 Cal.2d 277 similarly is grounded on an ambiguity where the term executrix was used without any apparent dispositive provisions. Petitioners state that there is "just no way that 'executrix' could ever mean 'beneficiary.'" (Petn. for Rev. at p. 23) apparently ignoring the discussion within the *Karkeet* opinion itself in which the Court referred to Webster's dictionary for the information that "executor" did at one time mean the residuary heir of the personal estate and concluded that it was possible that the testator was using executrix in that meaning. *Estate of Karkeet*, at 281. While Petitioners object to the Court's finding of an ambiguity in this case, the ambiguity is clearly present.

- *Estate of Kime* (1983) 144 Cal.App.3d 246 again resolved an apparent ambiguity created by the use of the word executrix without other dispositive provisions. As in *Karkeet*, the Court concluded that it was possible to interpret the term as meaning to dispose of the testator's property to the person designated as the executrix. Petitioners point to Court's expressed concern regarding former Probate Code Section 105 and its bar on the use of oral statements by the testator. This complaint, however, was in the context of an ambiguity in the document and the appropriate evidence to be considered in reviewing the ambiguity,

not whether extrinsic evidence should be admitted at all.

Petitioners notably do not point this Court to the *Kime* court's explicit invitation to the legislature to make statutory revisions to allow "admission of all relevant evidence." *Id.* at 265. In the intervening nearly 30 years, despite substantial revisions to the probate code and including revisions to § 6111.5 in 1990 and § 21102 in 1994, as amended in 2002, the legislature has declined that invitation. However, the mere fact of the invitation points out that the change being requested by Petitioners is not a change that should be made in case law alone. It is, rather, a task of the legislature.

Petitioners' argument that these cases do not find real "ambiguities" is simply that, an argument. It is equally reasonable to take the courts' opinions at face value as having found some ambiguity either explicitly in the document or through the application of extrinsic evidence. Petitioners argue that this requirement of ambiguity imposed a supposedly "stiff formalism" which persists only in the will context. In this assertion they are simply wrong. In the contract context, extrinsic evidence is allowed to explain or demonstrate ambiguities. *See,* Code of Civil Procedure §1856 (setting forth standards for allowance of extrinsic evidence to explain or interpret documents.) Similar standards apply to wills. It is only in the

context of an absolutely non-existent provision in a will that the law does and should require that there be a limitation on the admission of extrinsic evidence. That limitation, according to well reasoned California law, is the requirement that there be a latent or patent ambiguity.

C. Petitioners Present No Compelling Case for California To Reverse Long-Standing Law in Favor of a Policy Adopted by a Small Minority of States

Petitioners refer to the above cases not as an important area of California law that is unsettled, but, rather, as representing the frustration of the California courts in applying the four corners rule and favorably recommend Langbein and Waggoner's 1982 Law Review article proposing reformation of wills as a concept this Court should adopt through the within case. (Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa.L.Rev. 521.) According to Petitioners, Langbein and Waggoner rely on *Taff*, discussed above, and to *Engel v. Siegel* (1977) 74 N.J. 287, as lead examples for the concept of reformation.

Petitioners find *Engel* instructive because it addressed a situation where a residuary legatee predeceased the testator and ultimately provided that the estate should pass to the legatee's heirs. To start with, it must be

noted that the *Engel* case was decided under New Jersey's long-standing doctrine of probable intent, a doctrine not in use in California.[2] However, it is possible that *Engel* would have come to the same result in California under the reasoning of *Taff* since in both cases, the drafting attorney testified to having used language which was decidedly different in its meaning than the meaning the testator was advised of by the attorney, thus invoking the personal usage rule already embodied in §21122.

Moreover, although suggesting that allowing extrinsic evidence to create an implied gift would be enough for this case, Petitioners go further and invite this Court to adopt the Restatement Third of Property (Wills & Donative Transfers)'s position concerning reformation of wills. Petitioners' reference to commentators, the Restatement, and the courts of other states, as supportive of their request to allow reformation of law in California overstates their case. In fact, while commentators may seek far reaching revisions to the law, it is the job of the legislature, not this Court, to take up such analysis where, as here, no overriding public concern with

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This difference in the law merely highlights the dangers of adopting a proposed rule for California reversing longstanding California law. As noted by Langbein & Waggoner, states have different rules of succession. The authors, for instance, note that as of the writing of the article (1982) not all states even allowed holographic wills. (Langbein at fn.4) It is difficult, therefore, to ascertain appropriate law for California by reference to states with vastly different schemes.

the present law has been shown.

Petitioners' citations to California law as in line with such a proposal consist of one statement by the Second District Court of Appeal in *Gianmarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1604, which appears to be dicta as the next sentence states that the issue is irrelevant. The cited statutes, 6111.5 and 21102(c) as discussed above, do not allow for reformation of wills using extrinsic evidence in the manner called for by Petitioners.

Thus, Petitioners rely primarily upon the Restatement Third of Property, acknowledging that the Restatement intends to significantly change the law of wills and to bring them into conformity with other donative transfers limiting the inherent potential for fraud by a clear and convincing evidence standard. Only a few states, however, have taken up the Restatement's suggestion and at least one California court has specifically refused to adopt it. *Estate of Dye*, *supra*, 92 Cal.App.4th 996.

Estate of Dye, as discussed above, found in a similar situation to this case that reformation would not be available under the proposed revision to the law, but acknowledged that, in individual cases, the rules could impose a hardship. As the court stated, "[t]he intestacy laws by their nature will defeat many 'true' intentions. Decedent could have prevented such

'injustice,' if any, by making a new will, or by including in the first will language stating his wishes." *Estate of Dye, supra*, at 980. The court then goes on to point out that it must interpret the law having in mind "consequences that transcend the individual case." *Id.* at 981. The same reasoning applies here. Irving Duke could easily have avoided his heirs inheriting by making a provision for other beneficiaries. This Court should not change the law to fix one individual case.

Moreover, even the out of state cases Petitioners cite as having adopted the Restatement's views do not necessarily adopt the theory Petitioners propose. In *Erickson v. Erickson* (1998) 246 Conn. 359, the issue addressed by the Court was the validity of the will itself, not the interpretation of the will. In connection with validity of wills, extrinsic evidence has long been available to determine whether a document is valid. This, of course, is ultimately another question of ambiguity. In *Estate of Herceg* (N.Y.Sur.Ct. 2002) 193 Misc.2d 201, the Court does, indeed, appear to have applied a reformation standard, but cites not merely to the Restatement but to New York law going back to the early 1950s regarding the admission of extrinsic evidence to correct typographical errors in wills. *Id.* at 202.

It appears that only Colorado, Florida and Washington have, *by*

statute, adopted the Restatement formulation. An equal number of states, Delaware, Minnesota and Massachusetts, have emphatically rejected the proposed formulation, citing to concerns about fraud and burden on the courts. *Flannery v. McNamara* (2000) 432 Mass. 665, at 674, goes into considerable detail on the reasons not to adopt the Restatement formulation, including opening the floodgates for litigants to apply to the courts. As that court correctly surmises, the standard of clear and convincing evidence will not address the problem of numerous entreaties to the courts for reform of wills. The standard can only be applied at trial, after cases have worked their way through the system. The *Flannery* court also considers the cases set forth in the Restatement and cited by Petitioners herein and concludes as has been discussed above that the cases did involve ambiguities. Thus, the *Flannery* court declines to join the minority of states that have adopted the Restatement views. [3]

Interestingly, Petitioners promise simplification and more predictability in probate litigation if reformation is allowed, apparently ignoring the fact that scores more litigants, even those nowhere named in a

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[3] Petitioners refer, citing to the Restatement, to a "growing minority" of states adopting the Restatement position. Respondents have only been able to identify the five states discussed herein that either have adopted statutory language embodying the Restatement formulation or case law allowing reformation.

testator's will, will be encouraged to apply to the Court with stories of how they are the true intended heirs of a decedent. Many courts, even when presented with the proposed higher evidentiary standard, have declined to adopt a reformation rule due to its direct contradiction of the Statute of Wills and the likelihood of fraud and burden on the courts.

CONCLUSION

The law regarding latent and patent ambiguity is well established in California and has been a cornerstone of will interpretation, allowing appropriate extrinsic evidence to be admitted so as to explain language appearing otherwise plain on its face. Petitioners want this Court to override over one hundred years of California law so that they may obtain a bequest they think they deserve. This one case should not be allowed to bring about the reversal of well-settled and consistent law. If, indeed, any change to California law should be considered, it should come, not from this Court, but, rather, from the legislature.

Dated: February 2, 2012 SACKS, GLAZIER, FRANKLIN & LODISE LLP

By 

Margaret G. Lodise
Attorneys for Robert Radin and Seymour Radin

CERTIFICATE OF WORD COUNT
Cal. R. Ct 8.204(c)(1)

The text of this brief consists of 5,416 words as counted by the Corel WordPerfect version 11 word-processing program used to generate the brief.

DATED: February 2, 2012

Margaret G. Lodise
Attorneys for Robert Radin and Seymour Radin

PROOF OF SERVICE

California Court of Appeal Case No. No. S199435
Los Angeles Superior Court Case No. BP108971

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I am employed in the County of Los Angles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 South Grand Avenue, Suite 3500, Los Angeles, California 90071-3475.

On **February 2, 2012** I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties by placing true copy(ies) thereof in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

__X__ **BY MAIL** As follows: I am 'readily familiar' with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. 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 the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **February 2, 2012**, at Los Angeles, California.

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

_____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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California Court of Appeal Case No. S199435
Los Angeles Superior Court Case No. BP108971

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