No. SI99435

**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 County Superior Court
Hon. Mitchell Beckloff, Los Angeles County Superior Court Case No. BP108971

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# REPLY IN SUPPORT OF PETITION FOR REVIEW

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## INTRODUCTION

The Answer's theme seems to be that regardless of how outdated California law has become, the Court should leave well enough alone—*Barnes* decided the issue, and that should be the end of it.

That kind of thinking has never been good enough for this Court, which is why the casebooks at national law schools feature so many California cases: "[T]he California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation." (Dear & Jessen, *'Followed Rates' And Leading State Cases, 1940-2005* (2007) 41 U.C. Davis L.Rev. 683, 693 (*Followed Rates*).)

Addressing "difficult issues of broad application" (*id.* at pp. 707-709), even when doing so bucks well-established law, has long been one of the hallmarks of this Court's jurisprudence. It was well settled that manufacturers were not strictly liable for product defects until *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57. It was well settled that there was no such thing as comparative fault until *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. And the role of extrinsic evidence in interpreting ambiguity in wills and contracts was bound in "'stiff formalism'" until *Estate of Russell* (1968) 69 Cal.2d 200, 210 and *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33.

The present case involves the same kind of anachronism as those landmark decisions. This isn't, as the Radins imply, an idea that the charities have pulled out of thin air, or an unreal view of how California courts have been deciding will cases. It's the view of multiple courts, legislatures and respected scholars, including the authors of the

Restatement. And the need to revisit *Barnes* is the view of the Court of Appeal here, which felt itself bound to follow outdated precedent. Far from undermining that view, the Radins' own discussion of the case law supports it.

It would be hard to imagine a more compelling demonstration of the illogic and injustice of the four corners rule than our facts. The Court of Appeal found that even though Irving Duke's true intent was "clear," the four corners rule requires his estate to go to the very heirs that he expressly disinherited. The result makes no sense. When that happens, there is a problem with the law.

The Court should grant review.

## ARGUMENT

### I.

### THE DIFFICULTIES LOWER COURTS HAVE REPEATEDLY ENCOUNTERED IN APPLYING AN OUTDATED RULE, COUPLED WITH ADVANCES IN THINKING ABOUT TESTAMENTARY INTENT, DEMAND RECONSIDERATION OF THE NEARLY 50-YEAR-OLD DECISION IN *BARNES*.

The Court of Appeal's reluctant affirmance urges this Court to reconsider the rules for interpreting wills, because existing rules make it impossible to correct even obvious errors. (Slip Opn., p. 12.) The Petition demonstrates that the Court of Appeal's discomfort is consistent with modern thinking by scholars and the Restatement. They advocate the simple idea that courts should be able to do explicitly what they now do sub rosa: fix proven mistakes in wills by reforming the wills, just as courts have been doing with contracts for generations, rather than by pretending to find ambiguities where none exist.

The Radins' response is to ignore everything the Court of Appeal said about the need for this Court's review and to derogate the critical thinking of courts and scholars about how to better effectuate testamentary intent. They hope that this Court will ignore recent progress in the law. The Court should not do so.

### A. Contrary To The Radins' Suggestion, Courts Have Repeatedly Had To Confront The Tension Between The Four Corners Rule And True Testamentary Intent.

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." (Slip Opn., p. 12.) As the court observed, it was "clear" that Irving intended for the charities to take if his wife predeceased him. (*Ibid.*) But it felt constrained by the four corners rule.

The Radins argue that "this is a rare case" that does not call for review because "no cases have been decided *on this exact issue* since *Estate of Barnes* (1965) 63 Cal.2d 580." (Answer, pp. 1-2, 4, italics added.) While the statement may be literally true, it ignores reality.

As scholars have noted, both California and other courts have frequently faced the same difficulty the Court of Appeal faced here. (Langbein & Waggoner, *Reformation of Wills on the Grounds of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa. L.Rev. 521, 557-558 (*Reformation of Wills*); Haskell, *When Axioms Collide* (1993) 15 Cardozo L.Rev. 817, 825.) The only difference is that most of those courts were more determined to effectuate testator intent and were willing to bypass the limitations of the four corners rule on the doctrine of implied gifts—what the Radins call "the exact issue." So, those courts phrased their holdings as the interpretation of supposed ambiguities. But as the Petition shows—and as *Reformation of Wills* confirms—that label was a proxy for the real issue: an error in an unambiguous will that could not be corrected without considering extrinsic evidence, which in California would violate

the four corners rule. (Petition, pp. 19-25.) These cases demonstrate the recurring and important nature of the problem.

That the Restatement Third of Property (Wills & Donative Transfers) took up the issue at all—much less that it embraced reformation of wills—further shows that this is not a rare issue that has escaped attention or debate. (Petition p. 31.) So does the fact that other courts and legislatures have considered allowing reformation, regardless of the result they reached. (Petition, p. 32, fn. 12.)[1]

The Radins ignore all of this, with the exception of their failed attempt to argue that the strained California cases really did involve ambiguities. (Answer, pp. 16-19.) Of course that's what the courts *said.* But the Radins' parroting of the courts' statements does not withstand the scrutiny of Justice Traynor's dissent in *Estate of Akeley* (1950) 35 Cal.2d 26 (*Akeley*) or the scholarly works that criticize those cases.

In fact, the Radins' discussion of *Akeley*, *supra*, 35 Cal.2d 26 directly *supports* our position. In *Akeley*, a holographic will left the residue of the estate to three charities, but provided that each was to receive "25 percent"—leaving 25 percent unaccounted for. Despite the undeniable

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[1] There is no practical way to determine how often similar situations have arisen in nonpublished cases before they became available online in 2001. We know of two nonpublished cases in the Second District: *Estate of Cole* (2006) 2d Civil No. B185707, 2006 WL 2666120 [substantively identical facts to those here, except that the will was not holographic; court found ambiguity and allowed bequest instead of intestacy]); *Estate of Kingdon* (1997) 2d Civil No. B096528 [condition of spouses' "joint death" held ambiguous and to include predecease of one].) We do not rely on these as any kind of authority, but only to demonstrate that our facts are not at all rare, as the Radins claim.

precision of the term "25 percent," this Court found it ambiguous, construing it to mean "one-third." (*Id.* at pp. 29-30.) In dissent, Justice Traynor maintained that "25 percent" could not be an ambiguous term that meant "one-third." (*Id.* at pp. 31-33 (dis. opn. of Traynor, J.).)

Seeking to defend the majority opinion, the Radins say that "it might be reasonable to conclude that the testator [*sic*] simply did not know her math in reaching the conclusion the court did." (Answer, p. 17.)

That's exactly right—and it's exactly our point. If the testatrix "did not know her math," *that was an error, not an ambiguity.* The testatrix intended to bequeath one-third to each charity but expressed that intent imperfectly with the unambiguous words "25 percent." That error could easily have been corrected, either under the implied gift doctrine or by reformation, with the use of the extrinsic evidence that the Court considered, *if* the four corners rule did not exist. Instead, the Court avoided the problem by labeling as "ambiguous" language that plainly wasn't.

To look at *Akeley* another way: The Radins rely heavily on *Estate of Dye* (2001) 92 Cal.App.4th 966, which they quote for the proposition that "'[i]t 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.'" (Answer, p. 10, quoting *Estate of Dye*, *supra*, 92 Cal.App.4th at p. 973.) But by that logic, this Court surely should have charged Ms. Akeley with knowing that 25 percent is one-quarter, not one-third. Likewise, the courts in the other cases cited in the Petition and Answer should have charged the testators with knowing what the terms "heirs" and "executor" meant. (Petition, pp. 19-25; Answer, pp. 16-19.) The courts didn't do this, and for

good reason—but *not*, in reality, because of ambiguities. The true but unacknowledged reason was that the extrinsic evidence showed that the testators' unambiguous wills contained obvious *mistakes*, plain and simple, that were at odds with the testators' otherwise easily-divined intent. But the mistakes couldn't be fixed under the law as it then existed and still exists in California; all the courts could do was interpret ambiguities.

So while it is true that no other California cases "have been decided on [*Barnes*'] exact issue" (Answer, pp. 1-2), the central problem—how to fix a testator's clear mistake so as to effectuate his or her intent—has recurred again and again. That is the issue this Court should revisit.

### B. Contrary To The Radins' Suggestion, This Case Raises Important Policy Issues.

The Petition and the Court of Appeal's decision clearly delineate the harm caused by the four corners rule and importance of revisiting that rule. Yet the Radins claim that "Petitioners identify no significant harms caused by the current law" or important policies that are at stake. (Answer, pp. 1, 20.) Not so.

There is no room for debate about the proposition that "[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.) Underscoring the importance of that policy, the Legislature has repeatedly worked to liberalize probate law with the aim of effectuating testator intent, particularly in the context of holographic wills. (Petition, pp. 26-27.)

The harm here—and in every similar case where extrinsic evidence cannot be used to correct a testator's mistake—is the failure to effectuate the testator's intent because of formalistic adherence to the outdated four corners rule. As the Court of Appeal put it, "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." (Slip Opn., p. 12.) Although it was "clear" to the court that Irving intended for the charities to take if his wife predeceased him, and although the court found it "difficult to imagine" that he really intended to make specific gifts to charities in loving memory of family members only if he and his wife died "at the same moment," the court was forced to rule that his estate had to go to heirs he expressly did *not* want to receive it.

There is harm every time something like this happens. There is harm to the testator. There is harm to the intended beneficiaries. And even when a court does effectuate a testator's intent by interpretational legerdemain, there is harm to the credibility of the legal system—the result comes at the expense of forthright decisionmaking, which forces parties to litigate because they have no idea which doctrine trial courts and reviewing courts may apply.

And there is still further harm when the reason the court cannot effectuate the testator's intent is a lawyer's drafting error: There may well be a follow-on malpractice suit against the lawyer. While that does provide the frustrated beneficiary with a remedy, it is hardly the best solution. As *Reformation of Wills* observes, "[t]he malpractice solution is also objectionable because it would channel mistake cases into the tort system. When translated into a tort claim and discounted for the litigation expenses

and counsel fees, and for the unpredictability and delay incident to the jury-dominated tort system, a devise frustrated by mistake would be worth but a fraction of the value in the testator's estate. [¶] More fundamentally, the change in theory from devise to tort raises a serious problem of unjust enrichment. Whereas most forms of malpractice inflict deadweight loss that can only be put right by compensation, in these testamentary mistake cases a benefit is being transferred from the intended beneficiary to a mistaken devisee. That devisee is a volunteer lacking any claim of entitlement or justified reliance. The malpractice solution would leave the benefit where it fortuitously fell, thereby creating a needless loss to be charged against the draftsman (or his insurer)." (*Reformation of Wills, supra,* 130 U. Pa. L. Rev. at p. 589.)

The "malpractice solution" also unavoidably puts lawyer-drafters in a conflict: They can seek to avoid a claim by asserting that their erroneous work actually does reflect the testators' intent, or they can risk malpractice liability by confessing their mistake in an effort to uphold the testators' true intent, in hopes that the court will use their testimony to construe an "ambiguity" rather than reject it under the four corners rule.

## II.

## AS THE COURT OF APPEAL SUGGESTED, THIS CASE PROVIDES AN IDEAL OPPORTUNITY TO REVISIT THE FOUR CORNERS RULE.

### A. There Is No Basis For The Radins' Claim That The Relief The Charities Seek Could Not Assist Them Because They Could Not Rely On Post-Will Extrinsic Evidence.

The Court of Appeal reluctantly affirmed while explaining that it appeared a different result would be in order if this Court revisited and overruled *Barnes.* (Slip Opn., p. 13.) The court did so because changing the law may well change the outcome of the case. Nonetheless, the Radins claim that reversing the Court of Appeal will not aid the charities because they cannot rely on evidence of what happened after Irving wrote his will. (Answer, pp. 8-9.) This isn't even close to right.

The Radins correctly note that in *Estate of Russell*, *supra*, 69 Cal.2d 200, the Court spoke in terms of evidence of "the circumstances under which a written instrument was made." (*Id.* at p. 211, cited at Answer, p. 9.) But the Court also made clear just a few sentences later that "what is here involved is a general principle of interpretation of written instruments, applicable to wills as well as to deeds and contracts." (*Id.* at p. 212.)

Another such principle, which the Court of Appeal itself invoked, is the rule of practical construction, which "is predicated on the common sense concept that 'actions speak louder than words.'" (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754; see Slip Opn., p. 13 ["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," italics added]; Code Civ. Proc., § 1856, Law Revision Commission Comment 1987 Amend. ["the course of actual performance by the parties is considered the best indication of what the parties intended the writing to mean"].) Applying this rule does not involve evidence of post-document *intent*, as the Radins claim, but rather post-document *evidence* of intent *at the time the document was created.* This is an entirely conventional mode of proof. Here, Irving's *conduct*, consisting in part of his statements to Sherrie Vamos, showed that he believed that the will *he had already written* bequeathed his estate to the charities—i.e., that this was his intent *at the time he wrote the will.* (See Slip Opn., p. 12.)

The Radins correctly note that in *Barnes,* the Court found certain extrinsic evidence irrelevant. (Answer, p. 8; *Barnes, supra,* 63 Cal.2d at pp. 582-583.) But there is no parallel here. In *Barnes*, the extrinsic evidence concerned the relationship between the testatrix and her nephew, who would have inherited if the testatrix had died at the same time as her spouse. (*Ibid.*) The Court observed that this evidence explained why the will mentioned the nephew at all, but was not relevant to show an intent that he inherit under circumstances that did not occur. (*Ibid.*) Here, in contrast, the Court of Appeal believed that Irving's intent *at the time he made his will* was that the charities would inherit even if he and his wife did not die at the same moment, based *both* on the language of the will *and* on Irving's statements after his wife died. (Slip Opn., p. 12.)

There is a clear record of what Irving intended, and because this appeal arose from a summary judgment, it must be accepted as true. The Radins' criticism of the charities' evidence ultimately goes only to its

weight at trial, not its admissibility. It is no basis for claiming that the charities cannot even try to establish their entitlement to Irving's estate.

### B. No Statute Bars Review.

The statutory landscape is very different today from what it was when this Court decided *Barnes*. As the Petition explains, today's Probate Code does not contain the limits of former section 105 that appear to have been the basis for the four corners rule. (Petition, pp. 14-16.) The current statutes and their legislative histories indicate that the Legislature's primary concern was preserving the availability of extrinsic evidence as developed by this Court's jurisprudence, particularly *Estate of Russell*, *supra*, 69 Cal.2d 200. (*Ibid.*) The legislative history does not suggest that the Legislature gave any consideration to the use of extrinsic evidence in other situations.

The Radins' reading of the relevant statutes underscores, rather than undermines, the need for review. The sea change in probate law in the 50 years since *Barnes* did not include any pronouncements explicitly addressing the law governing implied gifts, much less the four corners rule. We believe the Legislature's silence necessarily leaves further development in this area to the courts, but only this Court can make any definitive pronouncements on the subject.

### C. The Radins' Other Supposed "Substantial Obstacles" To Review Pose No Obstacle At All.

The Radins pose a variety of what they claim are obstacles to review (Answer, pp. 5-8), but these kinds of obstacles have never deterred this Court from intervening in appropriate cases.

#### 1. This Court is fully capable of providing a reasoned opinion for any approach it might adopt.

It is true that the Court would not simply overrule *Barnes* in a one-liner and be done with the case. (Answer, pp. 7-8.) Rather, the Court would need to shape the contours of any new law, principally "the evidentiary standards to be applied when considering extrinsic evidence" in the context of implied gifts or to reformation if the Court chooses that route. (*Ibid.*) The need for such an effort is neither surprising nor unusual for a Court that has traditionally authored opinions that are "more extensive, explanatory, and analytical" than those of other state high courts. (*Followed Rates, supra,* at pp. 704-705.)

#### 2. The facts are as fully developed as they can ever be.

The Radins don't explain why they think the supposedly "limited facts and procedural posture of this case" would prevent the Court from deciding the standard to be applied when considering whether to admit extrinsic evidence or to permit reformation. (Answer, p. 7.) The only possible explanation is their earlier, unexplained theory that this Court should not consider anything besides the will's language and the fact that Irving died after his wife. (Answer, pp. 2-3.) But under that approach, no case could ever be sufficiently developed to permit review of the four

corners rule: The evidence would always have been excluded under that rule and the case would always involve "limited facts."

### 3. Any "floodgates" fears are groundless.

Nor should the Court be deterred by the Radins' sky-is-falling concerns about opening the floodgates to frivolous suits or claims of oral wills. (Answer, pp. 9, 13.) That is never a justification for refusing to reconsider anachronistic rules that have proven unworkable and unfair. The solution to any floodgates fear is an appropriate evidentiary standard, which the Radins agree will be an appropriate subject for discussion if the Court grants review. The Restatement urges that the standard be clear and convincing evidence, at least for reformation. (Rest. 3d Property, § 12.1.) This Court has recognized that strict standards of proof are a sufficient bulwark against frivolous litigation. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 745 [approving malicious prosecution actions despite prior settlement; "A party filing a malicious prosecution action still faces strict requirements that should militate against an opening of the floodgates for this type of litigation"].)

Excluding *all* evidence of clear testamentary intent might seem to be a bullet-proof solution to any possible abuse, but it throws the baby out with the bath water—and in any event doesn't avoid litigation in any case where a court is inclined to find an ambiguity. Besides, it's not as though present law imposes bright-line rules that keep cases out of court. If that were true, cases like *Akeley, supra*, 35 Cal.2d 26, *Estate of Karkeet* (1961) 56 Cal.2d 277 and *Estate of Taff* (1976) 63 Cal.App.3d 319 would never have made it out of the starting gate.

## CONCLUSION

The Petition demonstrates a compelling basis for review. Nothing in the Answer comes even close to suggesting otherwise. If anything, it confirms the need.

The Court should grant review.

Dated: February 10, 2012

Respectfully submitted,

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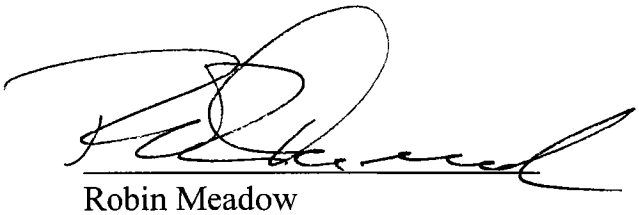
## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to California Rules of Court, rule 8.204(c)(1) the **REPLY IN SUPPORT OF PETITION FOR REVIEW** is produced using 13-point Roman type including footnotes and contains **3,506** 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: February 10, 2012



Robin Meadow

## 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 February 10, 2012, I served the foregoing document described as: **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the parties in this action by serving:

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Executed on February 10, 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