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

Petitioners and Respondents,

vs.

JEWISH NATIONAL FUND and CITY OF HOPE,

Claimants and Appellants.

California Court of Appeal, Second District, Division 4 2nd Civil No. B227954
Appeal from the Los Angeles County Superior Court
Hon. Mitchell Beckloff, Los Angeles County Superior Court Case No. BP108971

REPLY OF BRIEF ON THE MERITS

OLDMAN, COOLEY, SALLUS, GOLD, BIRNBERG, & COLEMAN, LLP
Susan Cooley, SBN 93664
16133 Ventura Boulevard, Penthouse A
Encino, California 91436-2408
(818) 986-8080 / Fax (818) 789-0947

RODRIGUEZ, HORII, CHOI & CAFFERATA, LLP
Reynolds Cafferata, SBN 160484
777 South Figueroa Street, Suite 2150
Los Angeles, California 90017
(213) 892-7700 / Fax (213) 892-7777

BENEDON & SERLIN
Gerald Serlin, SBN 123421
Douglas Benedon, SBN 110197
21700 Oxnard Street, Suite 1290
Woodland Hills, California 91367
(818) 340-1950 / Fax (818) 340-1990

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow, SBN 51126
Robert A. Olson, SBN 109374
Jeffrey E. Raskin, SBN 223608
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Claimants and Appellants
JEWISH NATIONAL FUND and CITY OF HOPE

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

Petitioners and Respondents,

vs.

JEWISH NATIONAL FUND and CITY OF HOPE,

Claimants and Appellants.

California Court of Appeal, Second District, Division 4 2nd Civil No. B227954
Appeal from the Los Angeles County Superior Court
Hon. Mitchell Beckloff, Los Angeles County Superior Court Case No. BP108971

REPLY OF BRIEF ON THE MERITS

OLDMAN, COOLEY, SALLUS, GOLD, BIRNBERG, & COLEMAN, LLP
Susan Cooley, SBN 93664
16133 Ventura Boulevard, Penthouse A
Encino, California 91436-2408
(818) 986-8080 / Fax (818) 789-0947

RODRIGUEZ, HORII, CHOI & CAFFERATA, LLP
Reynolds Cafferata, SBN 160484
777 South Figueroa Street, Suite 2150
Los Angeles, California 90017
(213) 892-7700 / Fax (213) 892-7777

BENEDON & SERLIN
Gerald Serlin, SBN 123421
Douglas Benedon, SBN 110197
21700 Oxnard Street, Suite 1290
Woodland Hills, California 91367
(818) 340-1950 / Fax (818) 340-1990

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow, SBN 51126
Robert A. Olson, SBN 109374
Jeffrey E. Raskin, SBN 223608
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Claimants and Appellants
JEWISH NATIONAL FUND and CITY OF HOPE

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued) **Page**

TABLE OF CONTENTS
(Continued) **Page**

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Continued) **Page**

OTHER AUTHORITIES

INTRODUCTION

The Radins' choice of authority to "sum[] up" their argument perfectly captures why their argument is wrong: A 95-year-old New Jersey decision that refused to correct a mistake in a will. (Answer, p. 33, quoting *In re Gluckman's Will* (N.J. 1917) 101 A. 295.)

Ninety-five years ago.

Before strict product liability. Before comparative fault. Before the abandonment of stiff formalism. Before the comprehensive liberalization of probate law. Before a host of other modernizing reforms.

And forty-five years before New Jersey *changed course*.

Since 1962, New Jersey has permitted extrinsic evidence to determine the testator's "probable intent" when a will is silent about what should occur when a designated beneficiary predeceases the testator. (*Engle v. Siegel* (N.J. 1977) 377 A.2d 892, 893-897 [rejecting principle that "controlling consideration is the effect of the words as actually written rather than what the testator actually intended"—the meaning of chosen terms rather than what "he was minded to say," citing *Fidelity Union Trust Co. v. Robert* (N.J. 1962) 178 A.2d 185, 188-189]; *Darpino v. D'Arpino* (N.J.Super.Ct.App.Div. 1962) 179 A.2d 527, 531.)

We have seen none of the Radins' prophesied opening of "the floodgates of litigation"—no complaints about problems with will reformation in New Jersey or in any of the other states that have adopted it. Rather, the result has been the creation of a limited and focused means to protect true testator intent and avoid unjust enrichment.

It's time for California to join this modern approach.

ARGUMENT

I.

REFUSING TO RECTIFY WILL MISTAKES—NO MATTER HOW OBVIOUS AND NO MATTER HOW CLEAR THE EVIDENCE—DEFEATS THE GOAL OF EFFECTUATING TESTATOR INTENT AND FOSTERS INJUSTICE.

A. When There Is A Clear Mistake In A Will, Reformation Is Necessary To Honor True Testator Intent.

Current California law *guarantees* that there will be some cases in which the court is powerless to honor the testator's true intentions, even when clearly demonstrated by the will and overwhelming evidence. (Opening Brief, pp. 31-32.) That is the unavoidable consequence of a zero-tolerance policy for correcting even the most obvious errors of testamentary expression.

This approach cannot be squared with "the paramount rule in the interpretation of wills," which is that "a will is to be construed according to the intention of the testator, and not his imperfect attempt to express it." (*Estate of Kime* (1983) 144 Cal.App.3d 246, 264; Rest.3d Property, Wills & Other Donative Transfers (Restatement), § 12.1, com. b.)

The answer brief ignores this inevitable consequence of its favored zero-tolerance rule.

B. When There Is A Mistake In A Will, Reformation Avoids Unjust Enrichment.

The opening brief demonstrated that reformation prevents the unjust enrichment of unintended beneficiaries—here, the Radins—at the expense of intended beneficiaries. (Opening Brief, pp. 33-34.)

The Radins offer three meritless responses.

First, they suggest that because a testator can "leave his or her property to whomever he or she chooses" and "[n]o party can claim a right to an inheritance" (Answer, p. 23), no one can complain if property goes to unintended beneficiaries. The premise may be true, but the conclusion does not follow. If the testator or his attorney made a drafting mistake, without reformation his intent to reward a kindness or to support future good works will go unfulfilled. Instead, someone whom the testator did not intend to benefit—perhaps even specifically intended to exclude—will get the property. That is classic unjust enrichment. It does not matter that the intended beneficiary had no inherent right to the property. Disregarding testator intent creates unintended—and thereby unjust—enrichment.

Second, they argue that reformation would unjustly enrich the charities. (*Id.* at pp. 23-24.) This turns the analysis on its head.

At issue here is a *policy* question—whether reformation of wills should be allowed when there is, in fact, clear and convincing evidence that the testator made a mistake. But the Radins assume just the opposite: that Irving did *not* make a mistake and did *not* intend to benefit the charities. That assumption renders the inquiry meaningless.

Third, the Radins argue that the charities would be unjustly enriched by inheriting Irving's property because they "had no knowledge of Irving in the first 73 years of his life" and "provided virtually nothing to Irving during his life . . . ." (Answer, pp. 23-24.) They also claim (citing plainly inadmissible evidence) that Irving's money originally came from their mother and father. (*Id.* at p. 4.) But the unjust enrichment question turns on—and *only* on—what Irving *intended*. It doesn't matter whether the Radins think it was unfair for Irving to leave his estate to charities rather than to relatives whom he expressly disinherited, with whom he had no relationship, and who considered him "evil." (See Opening Brief, p. 6; § V.B., *post*.) In any case, these are, at most, arguments for the fact-finder.

II.

THE CLEAR AND CONVINCING EVIDENCE STANDARD IS THE COMPLETE ANSWER TO THE RADINS' OVERBLOWN FLOODGATES ARGUMENTS.

A. This Court Has Repeatedly Rejected Attempts To Deny Legitimate Claims For Fear Of Fraud And Floodgates.

Prophesies of rampant fraud and opened floodgates are nothing new to this Court. (Answer, pp. 1-2, 15-20, 25-29, 31.) Neither is their rejection.

The Court has repeatedly been warned that its holdings will "open the floodgates." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 57 [insurer's right to reimbursement]; *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171 [negligent infliction of emotional distress does not require sudden occurrence]; *Dillon v. Legg* (1968) 68 Cal.2d 728, 744 [negligent

infliction of emotional distress].) Each time, the Court "rejected the argument that recovery should be denied because of possible administrative difficulty" (*Dillon, supra*, 68 Cal.2d at p. 744): "'[We] should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions." (*Ochoa, supra*, 39 Cal.3d at p. 171, quoting *Dillon, supra*, 68 Cal.2d at p. 744.) Beyond denying redress in appropriate cases, such an approach "necessarily implies a certain degree of distrust, which [we] do not share, in the capacity of legal tribunals to get at the truth . . . ." (*Ibid.*, internal quotation marks omitted.) "[T]he possible invocation of this right—or any other—is not a sufficient basis for its abrogation or disapproval." (*Buss, supra,* 16 Cal.4th at p. 58.)

"Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of 'administrative convenience' to sweep away a class of claims a number of which are admittedly meritorious." (*Dillon, supra*, 68 Cal.2d at p. 737.)

As for the specter of fraudulent claims, it "does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." (*Id.* at p. 736.)

B. History Has Proven That A Heightened Evidentiary Standard Provides Adequate Protection Against Abuse.

1. As the Restatement and multiple state legislatures and courts have recognized, a heightened evidentiary standard protects against abuse.

Reformation of wills is allowed in at least six states. (Opening Brief, pp. 28-29.) And New Jersey permits what is effectively reformation under its "probable intent" rule. (*Engle, supra*, 377 A.2d at pp. 894-897; Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa. L.Rev. 521, 561-562.)

There is no hint that any parade of horribles ever afflicted these jurisdictions in the years—and sometimes decades—since they recognized will reformation. In fact, our research hasn't revealed any real-world complaints at all.

Legal reforms often engender fevered speculation that the sky will fall. But it hasn't before, and it won't now.

2. In a similar probate context, this Court has determined that a clear and convincing evidence standard adequately protects against abuse.

Forsaking historical experience in favor of speculation, the Radins posit three reasons why, they say, "[w]ills are more susceptible to additional claims" than other contexts: "the absence of a living representative, the ease of asserting a claim, and the emotional attachment family members may have to certain property." (Answer, p. 26.) But this Court and our

Legislature have already wrestled with and rejected *identical* floodgates concerns: California has long recognized that the clear and convincing standard sufficiently tempers the temptation to bring questionable suits seeking to rewrite a will.

In 1935, this Court recognized the enforceability of an oral contract to make a will, even though the promise is enforced after the testator's death and effectively supplants the written will. (*Notten v. Mensing* (1935) 3 Cal.2d 469.) In doing so, the Court was "well aware that in such cases the temptation is strong from those who are so inclined to fabricate evidence giving color to the claim that the parties entered into such an oral agreement as is here alleged." (*Id.* at p. 477.) But that was not a sufficient reason to prohibit the category of claims altogether. Rather, the Court imposed a heightened evidentiary burden, the same clear and convincing standard that would be required for will reformation. (*Ibid.*; *Cameron v. Crocker-Citizens Nat. Bank* (1971) 19 Cal.App.3d 940, 943-944 [increased burden addresses "the manifest danger of fraud, perjury, and injustice" that exists because of the testator's absence].)

The Radins' concern is identical to that in *Notten*: A party who is inclined to fabricate evidence to support a reformation claim could just as easily fabricate evidence of an oral agreement to make a will. But as far as we can determine *Notten* didn't open any floodgates. To the contrary, the Legislature's codification of *Notten* in 2000 confirmed that nothing akin to the Radins' parade of horribles resulted. (Prob. Code, § 21700, subds. (a)(4) & (5).)

If anything, reformation should engender less concern than oral agreements to make a will because of the broader scope of relevant

evidence, including writings and the terms of the will itself. Here, for instance, the Court of Appeal considered the language of the will in finding it difficult to imagine that Irving actually intended to make charitable gifts in loving memory of deceased family members only under the extremely unlikely circumstance of dying "at the same moment" as his wife and to have his estate go to otherwise disinherited relatives if she predeceased him. (§ V.B., *post.*)

3. There is nothing unique about will reformation.

There is no reason to think that wills present a uniquely tempting target for false reformation claims.

First, will disputes are hardly unique in generating high emotions. Although family members may be emotionally attached to particular property (Answer, p. 26), the same is true in marital dissolutions and *Marvin* litigation, where property agreements may be reformed and property ownership disputes resolved by showings of clear and convincing evidence. (*Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487 [transmutation of separate property into community property may be proven by clear and convincing evidence]; *Tannehill v. Finch* (1986) 188 Cal.App.3d 224 [*Marvin* claims asserting oral agreement that ownership differ from legal title may be established by clear and convincing evidence of former cohabitants' agreement].) And high emotions undoubtedly abound in a host of claims ranging from partnership disputes to employment litigation. But amorphous floodgate fears don't cut off reformation or consideration of extrinsic evidence in those contexts.

Second, there is no reason to think that emotional attachment to particular property makes frivolous suits any more likely than in big-money cases, whether arising from contracts, partnerships, or trusts.

Third, the Radin's concern about the "absence of a living representative" to testify about the testator's intent is ill founded. (Answer, p. 26.) For one thing, attorneys or other representatives often can fill this role in will reformation. For another, a living representative—a trustee, for instance—does not necessarily know a deceased trustor's intent on a particular issue. Nor is a living representative required or even always available in other areas. (§ II.B.4.a.-b., *post.*)

4. Other areas of the law that allow reformation are indistinguishable and no floodgates have opened.

As courts and scholars have noted, no principled distinction exists between reformation of wills and reformation of other documents. (Opening Brief, pp. 13-15, 23.) Nonetheless, the Radins maintain that reformation is permitted for other documents only because they offer "peculiar safeguards." (Answer, pp. 15-18.) According to the Radins, "[c]ourts only allow reformation of documents other than wills when they can be assured safeguards will preserve the author's intent, and the number of individuals who may seek reformation is limited." (*Id.* at p. 15.)

The Radins cite nothing to support this, undoubtedly because the law is directly against them.

a. The only safeguard in contract reformation is the clear and convincing evidence standard.

The Radins offer two reasons why courts permit contract reformation. (*Id.* at pp. 16-17.) Both are wrong.

Party availability. The Radins claim that "[r]eformation of a contract is permitted because the presence of the contracting parties makes the evidence more reliable." (*Id.* at p. 16.) But party presence is *not* required, and sometimes not even possible:

- Contracts may be reformed after the death of one of the contracting parties. (E.g., *Schaefer v. California-Western States Life Ins. Co.* (1968) 262 Cal.App.2d 840 [insurer entitled to reformation of life insurance policy after insured's death]; *Orcutt v. Ferranini* (1965) 237 Cal.App.2d 216 [beneficiary entitled to reformation of life insurance policy after insured's death]; *Hotle v. Miller* (1959) 51 Cal.2d 541, 543-544 [reformation of deposit agreement after death of two parties].)

- California repealed the "dead man statute," which until 1965 prohibited testimony about a decedent's statements as to his or her intent in the creation of a writing. (Opening Brief, p. 51.)

- A trust may be reformed "even after the settlor is dead" (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1603-1604) and a deed may be reformed after the grantor's death (*Merkle v. Merkle* (1927) 85 Cal.App. 87).

In fact, the Radins can't seem to make up their minds. They argue that reformation is allowed for contracts because party availability "makes

the evidence *more reliable*," but then say that "[t]he issue is *not* reliability." (Answer, pp. 16, 17 fn. 6, emphasis added.)[1]

"Natural limits." The Radins say that "[t]he number of contract reformation claims is also naturally limited by the number of parties to the contract . . . ." (*Id.* at p. 17.) Again they offer no citation. And again they are wrong. Anyone "aggrieved" by a mistake can seek reformation (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 276):

- A plaintiff injured in a car accident can seek to reform an insurance agreement to name the defendant as an additional insured on his parents' policy, even though the plaintiff is a complete stranger to that contract. (*Beach v. U.S. Fidelity & Guaranty Co.* (1962) 205 Cal.App.2d 409, 410, 413.)

- A mortgagor's grantee may exercise the mortgagor's right to reform the underlying note. (*Watson v. Collins* (1962) 204 Cal.App.2d 27, 32.)

- A third party beneficiary may seek reformation even after the death of a contracting party. (*Lane v. Davis* (1959) 172 Cal.App.2d 302, 308-309; *Orcutt, supra,* 237 Cal.App.2d at p. 223; *Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1180.) Contractual terms do not limit the number of persons who can claim to be third party beneficiaries entitled to

---

[1] The Radins' footnote also says that in other situations, a decedent's statements "are allowed to address a question that has arisen as to the decedent's intent, not to create an issue as to intent where none previously exists." (*Ibid.*) Their meaning is unclear. If they are saying that a decedent's statements are not admissible unless and until other evidence has raised some issue of intent, they are mistaken, as the above authorities show.

reformation—one can show that status through extrinsic evidence that the promisor understood the intent to benefit the third party. (*Schauer v. Mandarin Gems of California* (2005) 125 Cal.App.4th 949, 957-958; *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348-349; *Cantlay v. Olds & Stoller Inter-Exchange* (1932) 119 Cal.App. 605 [reforming contract to name individual as additional insured at his request].) The number of people who might seek to reform a life insurance policy to be added as beneficiaries is surely no smaller than the number who might claim to be will beneficiaries.

b. The only safeguard in trust reformation is the clear and convincing evidence standard.

The Radins' supposed limited-parties principle would bar trust reformation, since theoretically anyone could claim to be an intended trust beneficiary. But reformation is nonetheless available. (Opening Brief, p. 14.)

Ignoring this problem, the Radins conjure another flawed rationale. They claim that trust reformation is permitted because trust administration "frequently begins before" the trustor's death and "the trustor's and trustee's acts during this time provide objective indicia of intent." (Answer, p. 16.) According to the Radins, reformation is designed so that the trustor has "the opportunity to amend the trust and correct misapprehensions before he dies." (*Ibid.*) Yet again, the Radins cite no authority. That's because there is none.

First, California only recently recognized a trustor's standing to unilaterally seek reformation; the more familiar context is beneficiaries

seeking reformation. (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 369-371 [prior California cases "involved petitions to reform a trust filed by a beneficiary or a trustor who was also a beneficiary"; holding as a matter of first impression that non-beneficiary trustor has standing]; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51 [beneficiary seeking reformation]; *Lissauer v. Union Bank & Trust Co.* (1941) 45 Cal.App.2d 468 [same].)[2] So the doctrine's purpose cannot be only—or even primarily—to give trustors the opportunity to correct their own mistakes.

Second, it is well established that a trust may be reformed after the trustor's death. (*Giammarrusco, supra,* 171 Cal.App.4th at pp. 1603-1604.) There is no authority suggesting that reformation is limited to mistakes that come to light during the trustor's lifetime. To the contrary, cases ordinarily involve mistakes that were not and could not have been recognized by the trustor, emerging only after the trustor's death. For instance, in *Lissauer, supra,* 45 Cal.App.2d 468, all trust administration during the trustor's lifetime was for the trustor's own benefit. The issue requiring reformation came to light after the trustor died, when knowledgeable parties recognized that the trustor had mistakenly expressed her intent regarding what was to occur after her death. (*Id.* at pp. 468, 471-472.) Recent examples are no different. (See *Giammarrusco, supra,* 171 Cal.App.4th at pp. 1595-1599, 1603-1607; *Ike, supra,* 61 Cal.App.4th at pp. 62-63, 66, 70-71, 79-83.)

---

[2] The Probate Code contemplates that the trustor can compel modification or termination of the trust, but only with the consent of all beneficiaries. (Prob. Code, § 15404, subd. (a).)

* * * *

The clear and convincing evidence standard "is not new." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) This Court described the test more than 110 years ago and it has retained its vitality ever since. (*Ibid.*, citing *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) The bench and bar are familiar with it. The Radins have not shown any reason to think that imposing this familiar higher-proof standard "would 'lead to untold confusion in the probate of wills.'" (Answer, pp. 26-27.)

5. The clear and convincing evidence standard has teeth.

a. The standard deters abusive claims.

Courts and scholars have repeatedly recognized that the clear and convincing evidence standard effectively deters weak or fabricated claims. (E.g., *Notten, supra*, 3 Cal.2d at p. 477 [heightened standard sufficient to protect against those with strong "temptation" to "fabricate evidence" of oral will]; *In re Clark* (1993) 5 Cal.4th 750, 801 (conc. opn. of Lucas, J.) [heightened standard "more easily eliminate(s) the frivolous petitions while still retaining an avenue of relief for those who have legitimate claims"]; *Pivnick v. Beck* (N.J.Super.Ct.App.Div. 1999) 741 A.2d 655, 661 [heightened standard "discourage(s) fraudulent claims" of legal malpractice based on failure to draft will that conforms with testator's intent and "also deters the more common problem of suits based on the sincerely held belief that the claimant deserved more than the will provided"].) As the Restatement puts it, a clear and convincing evidence standard

"alerts potential plaintiffs to the strength of evidence required in order to prevail . . . ." (Restatement, § 12.1, com. e.)

The Radins claim that there is no "substantial evidence that the clear and convincing evidence standard will deter fraud," citing Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice* (2002) 34 Conn.L.Rev. 453, 473-474 (*Search for Compromise*). (Answer, p. 28.) But the article says no such thing. In fact, it only uses the word "fraud" when describing the grounds justifying reformation and in the phrase "Statute of Frauds." (*Search for Compromise, supra,* at p. 475.)[3]

Nor does *Search for Compromise* dispute that a heightened standard will influence parties to "decline to pursue claims in the first place." (Answer, p. 27.) Quite the opposite: "It may be fair to assume that a high standard of proof *would tend to reduce the total number of claims asserted* on the basis of informal expressions of intent, as claimants assessed the strength of their claims." (*Search for Compromise*, *supra*, 34 Conn.L.Rev. at p. 471, emphasis added.) The article does assert that a heightened standard may not have a "substantial effect" on the *settlement* of claims actually brought, seemingly because most claimants have already estimated

---

[3] *Search for Compromise* doesn't address reformation at all. It examines Restatement section 3.3's proposed "dispensation" rules allowing a court to determine—based on clear and convincing evidence—whether a document was intended to be a will despite its noncompliance with will formalities. (*Id.* at pp. 458-463) That involves entirely different functions of will formalities. (Compare *id.* at pp. 466-468 with § III.C., *post.*) The article mentions reformation only as another doctrine to which the clear and convincing standard applies.

that they met whatever the applicable burden. (*Id.* at pp. 471-472.) But that conclusion, even if true, is irrelevant to the issue of potential abuse.

In any event, California has rejected Professor Sherwin's skepticism about Restatement section 3.3's use of the heightened evidentiary standard to liberalize will formalities, which is the article's focus. (Fn. 3, *ante*.) Probate Code section 6110, subdivision (c)(2) permits probate of improperly executed wills as long as clear and convincing evidence establishes that the testator intended the document to be his will—adopting Restatement section 3.3. (Sen. Com. on Jud., Analysis of Sen. Bill No. AB 2248 (2007-2008 Reg. Sess.) as amended Mar. 24, 2008.)

b. The standard can be applied effectively.

The heightened standard "'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" (*Addington v. Texas* (1979) 441 U.S. 418, 423; see Restatement, § 12.1, com. e.) Because judges rather than juries decide probate issues (Opening Brief, pp. 53-54), one can be confident that the standard will be understood and accorded great seriousness. There is no basis for the Radin's distrust of courts—their fear that judges will rewrite wills based on insufficient evidence. (Answer, p. 20.) Indeed, the risk is just the opposite: The heightened evidentiary standard means that judicial errors more often result in enforcing a will's literal terms even when that was not the testator's intent. (Restatement, § 12.1, com. e.; c.f., *Search for Compromise, supra*, 34 Conn.L.Rev. at pp. 462-463.)

Contrary to the Radins' suggestion (Answer, pp. 26-27), the heightened standard does allow summary adjudication. That is because the summary judgment inquiry must be undertaken through the lens of the ultimate burden of proof. (E.g., *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 762; *Food Pro Intern., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 994.) Cases pursued without clear and convincing evidence can be thrown out, and claimants can face malicious prosecution claims.

C. Barring Reformation Would Do Nothing To Avoid Whatever Risk Of Fraud And Floodgates Persists.

A final answer to the Radin's fraud concern is the reality that barring will reformation will not dissuade those willing to pursue claims based on fabricated evidence. Parties so inclined already have multiple other options. They can fabricate evidence of an oral agreement to make a will, or to support challenges based on lack of capacity, undue influence, fraud, or duress. And since truth is no hindrance, they can easily craft their claims and fabricated evidence so as to avoid summary judgment. Instead of deterring these abusive claims, barring reformation would foreclose *legitimate* claims.

III.

RIGID FORMAL RULES MAY BE ADMINISTRATIVELY EASIER THAN EVIDENCE-BASED DECISIONMAKING, BUT THEY ARE INEVITABLY LESS FAIR AND LESS EFFECTIVE IN HONORING TRUE TESTATOR INTENT.

The modern trend has been to steadily move away from stiff formalism towards "flexible rationalism" aimed at ascertaining testator intent. (*Estate of Russell* (1968) 69 Cal.2d 200, 209-210.) Acknowledging a remedy for clear mistakes of expression is the necessary next step.

The Court should reject the Radins' argument that the search for truth should take a back seat to administrative convenience.

A. Any Administrative Burden Of Taking Evidence In The Occasional Case Where A Beneficiary Seeks Reformation Is Far Outweighed By The Significant Opportunity To Honor True Testator Intent.

The Radins argue that "[e]ven if more suits do not occur, the administrative burden will rise as courts will be required to take testimony in more cases rather than resolving them as a matter of law." (Answer, pp. 26-27.) They urge the Court not to allow judicial resources to be "'squander[ed]'" by considering evidence. (*Id.* at p. 27.)

Turning a blind eye to clear testator intent is certainly expedient. But it comes at too high a price. It embodies a view that this Court has consistently rejected because it disregards courts' "basic responsibility" and "destroys the public confidence" in the judicial system. (§ II.A., *ante*.)

And it indisputably *guarantees* that in some cases clear testator intent will be denied and clearly unintended beneficiaries will be unjustly enriched.

Besides, adopting reformation does not foreclose courts' ability to decide the issue as a matter of law—the heightened standard must be considered on summary judgment. (P. 17, *ante*.) And the absence of jury trials minimizes any administrative burden.

B. Any Administrative Convenience In Will Proceedings Is Offset By The Potential For Follow-On Malpractice Litigation.

Allowing reformation also limits the need for inefficient tort alternatives against attorney-scriveners. (Opening Brief, pp. 36-37.) The Radins claim there can be no such benefit because, they say, there are no tort alternatives—California attorneys owe no duty of care to non-client "potential beneficiaries." (Answer, pp. 24-25.) But that is only part of the story.

This Court has adopted a multi-factor test for determining duty in such malpractice claims. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 588-589 (*Lucas*); *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.) The case-specific factors easily support a duty of care for mistakes that reformation would fix: The "'end and aim' of the transaction" was clearly to benefit the intended beneficiaries and thus (1) "the transaction was intended to affect" them; (2) harm was foreseeable in that the attorney "must have been aware" that failing to properly document the testator's clear intent would harm the intended beneficiaries; (3) the harm became certain upon the testator's death; and (4) the attorney's negligence was closely connected with the

injury. (*Biakanja, supra*, 49 Cal.2d at p. 650.) Moreover, courts must consider "moral blame." (*Id.* at pp. 650-651.) Thus, attorney liability is appropriate if "the innocent beneficiary" would otherwise "bear the loss." (*Lucas, supra,* 56 Cal.2d at p. 589.) So, if reformation is not available, these factors would support malpractice liability.

In denying the existence of malpractice liability, the Radins rely on *Chang v. Lederman* (2009) 172 Cal.App.4th 67, which drew a novel line between "intended" and "potential" beneficiaries based on the final *Lucas* factor, the policy factor of "burden on the profession." (*Lucas, supra,* 56 Cal.2d at p. 589.) Under *Chang*, it does not matter that the testator's intent was absolutely clear and that the attorney understood it: The attorney owes no duty to the testator's intended beneficiary unless the attorney wrote that beneficiary's name in the will, and even then only as to property "expressly set forth in the testamentary document." (172 Cal.App.4th at pp. 82-85.)[4]

The Radins cite *Chang* as though it eliminated for all time the potential for malpractice claims against attorneys for failing to properly document a testator's clear intent, but that's not true. This Court has not

---

[4] The Radins also cite *Radovich v. Lock-Paddon* (Answer, p. 25), but that case doesn't address any relevant issue. There, the "narrow question [was] whether attorneys" owe a duty to beneficiaries named in a *draft* will to ensure that the testator "execute[s] a will consistent with" that draft. (*Radovich v. Lock-Paddon* (1995) 35 Cal.App.4th 946, 954-955.) *Radovich* recognized that the *Biakanja* factors favored a duty, but held that "[c]ountervailing policy considerations" counseled otherwise: Requiring attorneys to push their clients to execute wills consistent with the first draft would compromise the attorney's duty of loyalty to the client, who might change his or her mind and choose other beneficiaries. (*Id.* at pp. 959-960, 963-966.)

addressed *Chang*'s narrow view of duty. And sister states are split on the issue, with at least two Supreme Courts permitting malpractice claims by individuals not named in the will because of the attorney's failure to properly document the testator's intent. (4 Mallen & Smith, Legal Malpractice (2012 ed.) § 36:6 & fns. 3-4, pp. 1197-1198; *Hale v. Groce* (Or. 1987) 744 P.2d 1289, 1290, 1292; *Ogle v. Fuiten* (Ill. 1984) 466 N.E.2d 224 [relying on California cases and discounting floodgate concerns].) Likewise, the Restatement Third on the Law Governing Lawyers imposes a duty to carry out the testator-client's clear intent. (*Id.* at § 51, com. f [this duty will "serve to fulfill the lawyer's obligations to the client"; allegedly intended beneficiary must prove client's intent by clear and convincing evidence].) Malpractice claims therefore remain a very real possibility notwithstanding *Chang*.

Chang's goal of avoiding malpractice burdens is better accomplished through reformation: There will be no need to impose tort liability on an attorney for failing to implement testator intent, because the intended beneficiary will receive what the testator intended. There can be little moral blame when the intended beneficiary suffers no loss. (P. 20, *ante*.) And relying on reformation rather than tort is more likely to bring drafting errors to light, allowing attorneys to carry out their deceased clients' wishes without fear of liability. (Opening Brief, p. 37.)

And if the Radins are correct that clearly-intended beneficiaries have no malpractice remedy, then reformation is all the more important. It would be the *only* way to vindicate testator intent and to redress injury to intended beneficiaries.

C. Adopting The Restatement Will Not Vitiate The Purpose Of Will Formalities.

The Radins argue that reformation "disregards will formalities and undermines the functions they serve." (Answer, pp. 18-20; see also *id.* at pp. 37-38 [allowing extrinsic evidence "jettisons the formalities"].) Not so.

The centerpiece of the Radins' argument is an article by Professor John Langbein that discusses the functions of will formalities. (*Id.* at pp. 18-20, repeatedly citing Langbein, *Substantial Compliance with the Wills Act* (1975) 88 Harv. L.Rev. 489.) But Professor Langbein was also the Restatement's Associate Reporter, and he co-authored the leading article urging the value of reformation and explaining why will formalities should not be an obstacle to reformation.

As he put it in that article, "[w]hen a testator executes a will that is afflicted by a mistakenly rendered or mistakenly omitted term, only the evidentiary function of the Wills Act is seriously in question." (Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa. L.Rev. 521, 529 fn. 27.) "Because the rest of the will was properly written, signed, and witnessed," will formalities served all other functions: (1) "warning the testator of the seriousness and finality of the instrument," (2) making it difficult for "crooks to deceive or coerce the testator," and (3) electing the probate channel for resolution. (*Ibid.*) As to the sole remaining function—the evidentiary function—"courts have shown themselves able to deal effectively with the concern about the quality of the proofs in mistake cases." (*Id.* at p. 529.) Thus, the "problem raises a technical or formal rather than a purposive question." (*Ibid.*) As Professor Langbein argues,

honoring will formalities should not require turning a blind eye to clear and convincing evidence of mistaken expression. (*Id.* at pp. 524-529, 577-590.)

Indeed, California no longer requires slavish adherence to formalities even to prove that a document was intended as a will—the circumstance where all formality functions are in play. Probate Code section 6110, subdivision (c)(2) allows probate of a noncompliant document when clear and convincing evidence establishes that the testator intended it as a will. Contrary to what the Radins argue (Answer, pp. 21-22), nothing in the statutory language or the cited legislative history limits section 6110 to holographic wills. Undoubtedly, part of the Legislature's impetus was the recognition that more people were drafting their own wills on computers without following the necessary formalities to execute them. But there is no reason to excuse formalities only in holographic wills, and the Legislature didn't attempt to do so. To the contrary, the source of section 6110 is Restatement section 3.3 (p. 16, *ante*), which specifically applies to attorney-drafted wills as well as holographic wills. (Restatement, § 3.3, com. a, p. 217, com. b, illus. 2-4, pp. 219-220.) And even if the Radins were correct, their argument would counsel less adherence to formalities here, since Irving's will is holographic.

The Radins' argument boils down to fear that a fact-finder might wrongly interpret testator intent. (Answer, pp. 19-20.) That is always possible. But it is *certain* that by categorically prohibiting reformation, courts will refuse to enforce wills that testators thought they were making. And although it is possible that a testator might lie about a will's content because of social pressure (*id.* at p. 20), that concern addresses the quality of the evidence and whether the party seeking reformation can carry its

burden, and then only in a particular circumstance. It isn't a reason to categorically prohibit reformation regardless of the type or strength of the evidence.[5]

D. Allowing Reformation Is Not An "Attack" On Intestacy Laws.

The Radins claim that urging reformation reflects "distrust of the intestacy laws" and amounts to an "attack [on] the wisdom of the intestacy laws." (Answer, pp. 22-23.) Melodramatic, and wrong.

Reformation reflects the desire to identify and carry out clear testator intent. There is no aim to "avoid the intestacy statutes at all costs" (*ibid.*), although in fact the law does seek to avoid intestacy (*In re Estate of Goyette* (2004) 123 Cal.App.4th 67, 74 [noting "the rule that prefers a construction of a term of a will that avoids complete or partial intestacy"]). To the contrary, the clear and convincing standard puts a heavy burden on the party seeking reformation: The default is to *deny* reformation, even when that results in intestacy.

No one doubts the "wisdom" of intestacy laws in their proper context. As the Radins state, intestacy laws do indeed support valuable social functions, including encouraging wealth accumulation and ensuring

---

[5] Here, any such argument is extremely weak. For one thing, the will itself suggests the gift. For another, Irving did not mention the gift in some unplanned social encounter with someone who might expect a gift. *He* set up the meeting with City of Hope to discuss multiple annuities, and that was why he described his will. (See Opening Brief, p. 5.) What's more, Irving told City of Hope about his intent with respect to Jewish National Fund—an unrelated entity that was not present and as to which there could be no conceivable social pressure.

passage of clean title. (Answer, p. 22.) But passing property according to the testator's intent serves those same purposes. The wisdom of intestacy laws is to provide an order of disposition *when testator intent does not.* It is no attack on that wisdom to seek out the testator's true intent.

IV.

THIS COURT NEED NOT AWAIT LEGISLATIVE ACTION TO MODERNIZE THE COMMON LAW, A TASK TRADITIONALLY WITHIN THE COURT'S PURVIEW.

A. The Parties Agree That No Statute Bars Will Reformation.

The opening brief demonstrated that judicial concerns created the bar to will reformation and that no statute forecloses judicial reconsideration. (Opening Brief, pp. 43-48.) The Radins do not disagree. Indeed, their only statutory argument is that statutory liberalizations should not be read as encouraging judicial adoption of reformation. (Answer, pp. 21-22, 39-40.)

B. This Court Has Traditionally Taken The Lead In Beneficially Evolving The Law.

The Radins suggest that the Court should leave the issue to the Legislature. (*Id.* at pp. 39-40.) But this Court has never shied away from addressing "difficult issues of broad application . . . ." (Dear & Jessen, *'Followed Rates' And Leading State Cases, 1940-2005* (2007) 41 U.C. Davis L.Rev. 683, 707-709.) That is among the reasons why "the California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation." (*Id.* at p. 693.)

Nor has the Court expected the Legislature to act on the Court's behalf in developing common law principles. It is "well established" that stare decisis must be "sufficiently flexible to permit this court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case." (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 93.) The policies served by stare decisis "'should not shield court-created error from correction.'" (*Ibid.*) "This is especially so when, as here, the error [in a prior opinion] is related to a 'matter of continuing concern' to the community at large." (*Ibid.*)

Likewise, "reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration" based on modern scholarly criticism, decisions of other states, and the recognition that the precedent has created "inequitable results" and "will continue to produce such effects unless and until [this Court] overrule[s] it." (*Id.* at pp. 93, 98-102.) Indeed, the Court undertook such a reexamination just days before the filing of this brief. (*Leung v. Verdugo Hills Hospital* (Aug. 23, 2012, No. S192768) __ Cal.4th __ [2012 WL 3601616] [overturning common law rule regarding effect of release of joint tortfeasor].)

Fulfilling the Court's common law role is particularly appropriate here, where resolution of the issue involves core judicial functions—balancing policies regarding legal presumptions and the use of extrinsic evidence.

C. Overwhelming Scholarly Commentary Supports The Restatement, As Does The Experience Of States That Have Adopted Reformation.

All relevant factors point to adopting the Restatement: Reformation reflects the overwhelming scholarly consensus and has been accepted by a growing number of sister states. It recognizes that clearly-established testator intent should not be sacrificed on the altar of stiff formalism. And in practice, there is no indication that courts or parties have suffered the Radins' imagined parade of horribles. (§ II.B.1-2, 4, *ante*.)

Scholarship. "The unwillingness of courts to reform wills on the ground of mistake has been strongly criticized by modern scholars." (Bogert's Trusts And Trustees (2011) § 991 fn. 11, citing the work of numerous scholars.) The Radins don't cite a single scholar opposing will reformation. (See pp. 15-16 & fn. 3, *ante*.)

Sister states. According to the Radins' tally, seven states have adopted reformation (Answer, pp. 29-30), three states have rejected the Restatement (*id.* at p. 30), and many states continue to mechanically apply the traditional rule without pausing to reconsider it (*id.* at p. 32 fn. 8). The Radins say this just isn't enough. (*Id.* at pp. 33-34.)[6]

---

[6] The Radin's count neither includes nor explicitly excludes New Jersey's "probable intent" rule, which is a reformation look-alike. (Pp. 1, 6, *ante*; Opening Brief, p. 28 fn. 5.)

They also claim that one of the cases involved "a trust, rather than a will." (Answer, p. 30.) Wordplay: *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos* (Ind. 2009) 895 N.E.2d 1191 involved "the reformation of trust provisions in two wills" that were "admitted to probate" after the death of the "Testators." (*Id.* at pp. 1193-1194.)

Nonsense.

This Court has never hesitated to adopt a minority rule when it is the fair and right thing to do. (E.g., *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566 fn. 10 [adopting minority rule on damage limits]; *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 718-719 [joining "respectable minority" in recognizing evidence to be considered for severance damages].) Moreover, the Radins' argument ignores those cases that actually resort to reformation without expressly invoking the doctrine. (Restatement, § 12.1, reporter's notes 4, pp. 367-370; Opening Brief, pp. 19-22.)

Nor do the Radins say much to defend the three courts that have expressly rejected the Restatement's view. That's because there isn't much to say. As the opening brief demonstrated, *Flannery v. McNamara* (Mass. 2000) 738 N.E.2d 739, contains little reasoning. The majority asserted that reformation would violate Massachusetts statutes, which obviated the need for further policy analysis. (Opening Brief, pp. 29-30.) It then stated that it disagreed with the Restatement's and other cases' rejection of floodgates fears. (*Ibid.*)

The other two cases offer even less: One intermediate appellate court refused to follow the Restatement because no critical mass of other states had yet done so (*In re Lyons Marital Trust* (Minn.App. 2006) 717 N.W.2d 457, 462)—an approach this Court has consistently rejected. And a trial-level court declined to follow the Restatement because (1) the court felt it was constrained by precedent and (2) "for the reasons stated"

in *Flannery*. (*In re Last Will & Testament of Daland* (Del.Ch. 2010) 2010 WL 716160, *5.)

Given that these courts felt constrained by existing law and that they said precious little about policy considerations, it is difficult to understand how the Radins can claim that "[i]t is clear" that they "considered the public policy" behind reformation in deciding to reject the Restatement. (Answer, pp. 31-33.)

V.

THE RECORD CONTAINS MORE THAN SUFFICIENT EVIDENCE TO ALLOW REFORMATION.

The Radins claim that even if the Court permits will reformation, it should not be available in *this* case. Not so. This case is a prime candidate for reformation.

A. Reformation Is Not Limited To Scriveners' Errors.

According to the Radins, "[t]he Restatement allows reformation for mistakes arising from 'scriveners' errors.'" (Answer, p. 34.) That is true enough—various comments illustrate reformation to cure scriveners' errors or quote cases discussing scriveners' errors. But the Radins are wrong to suggest that the Restatement *only* allows reformation of scriveners' errors—an attorney's mistake, but not a mistake of expression in a holographic will. (*Ibid.*)

Nothing in the Restatement even hints at such a limitation. And once again, the Radins don't cite anything. Indeed, they seem to contradict themselves just one paragraph later: "[T]he Restatement itself makes no

such distinction" between holographic wills and wills prepared by attorneys. (*Id.* at p. 35.)[7]

The Restatement is premised on reformation's availability for all other documents and the lack of any principled reason to except wills—any kind of wills. (Restatement, § 12.1, com. c.) We are aware of no scrivener-only limitation with respect to other documents, and the Restatement's authors would hardly have introduced a novel limitation for will reformation without explanation. The notion is even more strained given that Section 12.1 applies to all "donative documents," which would mean that, according to the Radins, the Restatement *reduced* reformation's scope for donative documents other than wills.

If anything, the need for reformation for holographic wills is even stronger than for attorney-drafted wills. Mistakes of expression—either by accidentally including an unintended term or by accidentally omitting an intended term—are a function of being human. It makes no sense to expect layman to be less susceptible to errors than trained professionals.

---

[7] The Radins elsewhere cite *Giammarrusco, supra*, 171 Cal.App.4th at p. 1604 as holding that reformation of inter vivos trusts is limited to "a scrivener's error." (Answer, p. 16.) If they mean only an attorney's drafting error, *Giammarrusco* doesn't say that. Instead, it refers to the court's common law power to correct a "drafting error." (171 Cal.App.4th at p. 1604.) Likewise, courts have observed that contract reformation is available for errors "due to an oversight *or* due to an error of a scrivener." (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 21, emphasis added.)

B. The Record Contains More Than Sufficient Evidence To Support A Finding Of Clear And Convincing Evidence Consistent With The Restatement's View.

The Court of Appeal thought Irving's intent was plain:

> It is clear that [Irving] 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.) Irving "intentionally omitted all other persons, whether heirs or otherwise" (AA 122-123)—individuals who had ceased all contact with him and who considered him "evil." (AA 18, 20-21, 31, 36, 70-71, 79, 81.) The court further found that, unlike in *Estate of Barnes* (1965) 63 Cal.2d 580, extrinsic evidence confirmed the evident intent of Irving's will: Irving continued to make donations to the charities and told City of Hope that he had previously made a will that left his estate to City of Hope and Jewish National Fund. (Slip Opn., p. 12.) Indeed, the Court of Appeal thought Irving's intent was so clear that its reluctant affirmance called on this 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.)

Against this backdrop, the Radins make several meritless arguments.

First, themselves relying on extrinsic evidence, the Radins argue that Irving would have intended to benefit his nephews and other surviving family members who supposedly continued to think of him as their uncle. (Answer, pp. 3-4, 23-24, 38 & fn. 10.) The argument misstates the evidence and relies on testimony that would be excluded at trial.[8] But in any event, these sorts of disputes are for the trier of fact. They do not undercut the existence of evidence from which a judge could find, by clear and convincing evidence, that Irving intended to benefit the charities if his wife predeceased him—an intent that the Court of Appeal thought "clear." (Slip Opn., p. 12.)

Second, the Radins say that interpreting Irving's intent is "simply speculation." (Answer, pp. 37-39.) Again, that is a matter for the fact-finder. As the Court of Appeal indicated, both the terms of Irving's will and the extrinsic evidence provide more than enough basis for a judge to determine that Irving clearly intended to benefit the charities. The Radins just dismiss that evidence. For instance, they say that Irving might have intended to make charitable gifts in loving memory of deceased family members only in the odd event of simultaneous death (*id.* at p. 39), improbable though that would be. And they ignore Irving's statements to City of Hope.

---

[8] For instance, the Radins claim that "Irving specifically disinherited his brother Harry" whereas the Radins are "sons of Irving's 'beloved sister' Rose." (Answer, p. 38 & fn. 10.) But Irving's will gave Harry $1 and in a separate provision specifically omitted everyone else, including the Radins: "I have intentionally omitted all other persons, whether heirs or otherwise, who are not specifically mentioned herein . . . ." (AA 122-123.)

Third, the Radins claim that what happened here was not a mistake of expression but rather Irving's failure to plan for what should occur if his wife predeceased him. (Answer, pp. 24, 34-35, 37-39.) Yet again, that is a question for the trier of fact. As the Court of Appeal explained, there is more than enough evidence to find Irving's "clear" intent, torpedoed by mistaken expression. Nothing suggests that he just failed to consider the possibility that his wife could die before him or that he did not care what would happen in those circumstances.

Fourth, the Radins note that the Restatement does not authorize reformation to "modify a document in order to give effect to the donor's post-execution change of mind or to compensate for other changes in circumstances." (Restatement, § 12.1, com. h.; Answer, pp. 34-35.) That isn't at issue here. The charities have never suggested that Irving's intent changed after he executed his will. Nor have they suggested that his wife's death was an unanticipated event (i.e., a changed circumstance when it happened). Rather, they contend that Irving always intended the charities to be his beneficiaries if his wife did not survive him—an intent unartfully expressed. The Radins are free to argue that Irving never considered the matter. But once again, that is an argument for the fact-finder.

VI.

THE IMPLIED GIFT DOCTRINE AFFORDS A VIABLE, IF LIMITED, PATH TO REACH THE FAIR AND EQUITABLE RESULT IN THIS CASE.

In the alternative, the opening brief urged that the Court could alter the implied gift doctrine to allow extrinsic evidence to better determine the testator's actual intent. (Opening Brief, pp. 38-42.)

The Radins respond that implied gifts are limited for policy reasons and that consideration of extrinsic evidence would "undercut the whole notion of implied gifts." (Answer, pp. 36-37.) Well, sure. That is why the charities sought review—to change the law to reflect a more modern approach that better balances policy considerations.

The Radins do not address the unjust enrichment issues or the policy goal of effectuating testator intent. Nor do they address the implied gift doctrine's fundamental premise—that where a will is incomplete, courts should try to determine testator intent before resorting to intestacy rules. Instead, they raise only one policy argument: That abandoning the four corners rule "will jettison[] the formalities required for wills." (*Id.* at pp. 37-38.) We have already demonstrated that slavish adherence to those formalities should not stand in the way of honoring actual testator intent. (§ III.C., *ante*.)

Beyond this, the Radins offer no real response to the charities' demonstration that the four corners rule should at least be liberalized (1) as regards of holographic wills (where mistakes are far more likely) or (2) where the will itself strongly suggests that the literal language contains

a mistake and extrinsic evidence serves a confirming role (as the Court of Appeal thought occurred here).

Although the charities continue to believe that reformation is the simplest approach, liberalizing the implied gift doctrine remains an alternative that permits justice to be done in this and similar cases.

CONCLUSION

As the Restatement and a number of sister states have recognized, there is no principled reason to allow strict formalism to trump testator intent established by clear and convincing evidence. History proves that the Radins' fears of opening the floodgates of litigation have no basis in reality. It is time for California to modernize its view of testamentary documents. The Court of Appeal's and trial court's judgments should be reversed.

Dated: August 28, 2012

Respectfully submitted,

OLDMAN, COOLEY, SALLUS, GOLD, BIRNBERG, & COLEMAN, LLP
Susan Cooley

RODRIGUEZ, HORII, CHOI & CAFFERATA, LLP
Reynolds Cafferata

BENEDON & SERLIN
Gerald Serlin
Douglas Benedon

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow
Robert A. Olson
Jeffrey E. Raskin

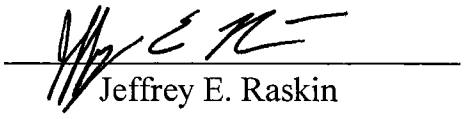
By _____
Jeffrey E. Raskin

Attorneys for Claimants and Appellants
JEWISH NATIONAL FUND and CITY OF HOPE

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 BRIEF ON THE MERITS** is produced using 13-point Roman type including footnotes and contains **8,220 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: August 28, 2012



Jeffrey E. Raskin

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 August 28, 2012, I served the foregoing document described as: **REPLY OF BRIEF ON THE MERITS** on the parties in this action by serving:

Richard Caplan
8200 Wilshire Boulevard, Suite 200
Beverly Hills, California 90211
Counsel for Estate of Duke Administrator

Wilfrid Roberge
Donahue Gallagher Woods
1999 Harrison Street, 25th Floor
Oakland, California 94612
Counsel for Respondents Robert and Seymour Radin

Margaret Lodise
Sacks, Glazier, Franklin & Lodise
3500 South Grand Avenue, Suite 3500
Los Angeles, California 90071
Counsel for Respondents Robert and Seymour Radin

Mary-Christine Sungaila,
Snell & Wilmer LLP
600 Anton Blvd., Suite 1400
Costa Mesa, California 92626
Counsel for Plaintiffs and Respondents Robert and Seymour Radin

Clerk of the Court
California Court of Appeal
Second Appellate District, Division Four
300 S. Spring Street, Floor 2 North Tower
Los Angeles, California 90013-1213
(Court of Appeal Case No. B227954)

Clerk for
The Honorable Mitchell Beckloff
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012
(LASC Case No. BP108971)

(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 August 28, 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