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

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S199435 - DUKE, ESTATE OF

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
There are no interested entities or persons that must be listed in this certification.			
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
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SUPREME COURT
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INTRODUCTION

Irving Duke's holographic will expressly disinherited all of his relatives except his much younger wife. If she survived him, his estate was to go entirely to her. If he and she died simultaneously, his estate was to go to two charities, City of Hope and Jewish National Fund in loving memory of deceased family members. When she predeceased him, he continued to express his desire to benefit the charities, providing gifts and telling at least one of them that it was a beneficiary of his will. The Court of Appeal thought Irving's intent was "clear." But, feeling constrained by this Court's precedent, it held that his estate had to go to the disinherited heirs because in writing his own will Irving did not state the possibility that his younger wife might predecease him.

The result is at odds with the primary goal of will interpretation—effectuating the testator's intent. It cannot be the law's goal to confer windfalls on those whom the testator sought to disinherit, or to create "gotchas" to penalize testators for drafting missteps.

Yet under California law as it currently stands, even when it is absolutely clear that a testator's language is at odds with his true intent, wills are slaves to the written word. That approach has proven unworkable, inconsistent, and theoretically unsupportable. It is out of step with the rules that California applies to the interpretation of all other writings. And it is out of step with modern jurisprudence and scholarship.

It has forced courts seeking to effectuate testators' intent to find ambiguities on the slimmest of excuses, so as to look beyond the will's language to extrinsic evidence. Some courts find them; others, like the trial

court and the Court of Appeal here, can't or won't. In this environment, lawyers cannot hope to predict litigation outcomes, and clients cannot hope to make wise decisions about their litigation positions. And outcomes will unavoidably either defeat the testator's intent—and therefore unjustly enrich unintended beneficiaries— or compromise the integrity of the judicial system through judicial sleight-of-hand.

There is a better way. The Restatement Third of Property's comprehensive approach permits will reformation under appropriate circumstances. It unites error correction in wills with error correction in all other writings—contracts, trusts, and other donative documents, all of which can be reformed even after the death of those whose intent must be ascertained. Through heightened evidentiary standards, the Restatement's approach finds the appropriate balance between the competing concerns of honoring testator intent and avoiding abuse. And it makes express what many courts have been doing in a roundabout manner.

A growing number of states have adopted the Restatement's approach. It is time for California to join them.

ISSUES PRESENTED

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

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

STATEMENT OF THE CASE

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

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

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

I hereby give and bequeath to such person or persons the sum of one dollar ($1.00) and no more, in lieu of any other share or interest in my estate." (AA 121-123; Slip Opn., pp. 2-3.)

B. After His Wife Dies, Irving Confirms His Intended Charitable Testamentary Bequests.

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

In early January 2004, Irving again invited Vamos to his apartment, executed a second annuity agreement, and gave City of Hope another $100,000. (Slip Opn., p. 3; AA 168, 176-178.) He told Vamos he was "leaving his estate to City of Hope and to Jewish National Fund." (Slip Opn., pp. 3-4; AA 168.) Vamos understood from this conversation that Irving had already prepared a will that included gifts to City of Hope and Jewish National Fund (collectively the charities), not that he intended to do so in the future. (Slip Opn., p. 4.)

Later that month, Irving executed a third annuity agreement and gave City of Hope a further $100,000. (Slip Opn., p. 4; AA 168, 180-182.)

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

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

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

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

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

D. The Probate Court Finds That Irving's Will Resulted In A Complete Intestacy And That The Estate Must Therefore Pass To The Very Relatives Irving Expressly Disinherited.

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

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

The trial court agreed and granted summary judgment to the Radins, relying on *Estate of Barnes* (1965) 63 Cal.2d 580 (*Barnes*). (AA 251-255.)

E. The Court Of Appeal Reluctantly Affirms.

The Court of Appeal deemed *Barnes* controlling and indistinguishable because it, too, involved a will (though not holographic) that contained a bequest (though to a relative, not to charities) in the event of the simultaneous death of the testatrix and her spouse, but did not provide what would happen if the spouse predeceased the testatrix. (Slip Opn., p. 8 ["the *Barnes* decision is directly on point and controls our decision here"].)

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

The court concluded: "The question is whether extrinsic evidence should always be inadmissible when the language in a will is otherwise clear on its face. The *Barnes* court held the answer is 'yes.'" (Slip Opn., p. 12; see *id.* at p. 11.)

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

> 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.) The court further noted that while in *Barnes* this Court found that the extrinsic evidence "did not assist in interpreting the will," "that is not the case here, as there is evidence of Irving's intentions after the

death of his wife." (*Ibid.*) It called upon this Court to reexamine the law as embodied in *Barnes*: "Perhaps it is time for our Supreme Court to consider whether there are cases where deeds speak louder than words when evaluating an individual's testamentary intent." (*Id.* at pp. 12-13.)

ARGUMENT

I.

CALIFORNIA'S TREATMENT OF WILL DRAFTING ERRORS IS INCONSISTENT AND ILLOGICAL.

A. Terminology: Two Types Of Drafting Errors.

At issue here is a distinction that California law draws between two categories of errors in the drafting of wills. Before exploring this distinction, we must define the categories.

1. Ambiguity: The language's meaning is unclear.

An "ambiguity" is an uncertainty in the meaning of words that leaves the document's meaning "fairly susceptible of" multiple reasonable interpretations. (E.g., *Estate of Russell* (1968) 69 Cal.2d 200, 211-212 (*Russell*) [ambiguity in wills]; *Pacific Gas & Elec Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38-40 [ambiguity in contracts]; *San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1237 [ambiguity in statute]; *Estate of Dye* (2001) 92 Cal.App.4th 966, 976 [in wills, ambiguity means the existence of "more than one semantically permissible" reading].)

As the Restatement puts it, "[a]n ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text." (Rest.3d Property, Wills & Other Donative Transfers ("Restatement"), § 11.1.) Typical examples result from the drafter's imperfect description of people, things and acts. (*Russell, supra,* 69 Cal.2d at pp. 207-208.) But an ambiguity also exists when circumstances reveal

that the drafter intended to use a term in a way that differs from the term's ordinary meaning. (*Id.* at pp. 208-209; Restatement, § 11.1, com. a [ambiguity created when "donor's customary usage of terms differs from the ordinary meaning of the terms used"].)

Words may be ambiguous even if they appear clear and definite to the reader (so-called "latent" ambiguity). Because words "do not have absolute and constant referants," the author's intent "can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (*Russell, supra,* 69 Cal.2d at p. 209, internal quotations omitted; see *id.* at pp. 207-208; *G.W. Thomas Drayage & Rigging Co., supra*, 69 Cal.2d at pp. 38-39, internal quotations omitted.)

2. Mistake: The language is clear, but the drafter intended something else.

A different kind of drafting error exists when unambiguous language is at odds with what the drafter really meant. The drafter's writing misspeaks: Its language contradicts the drafter's true intent, fails to include an intended term or gift, or includes one that was not intended. (See § I.B.1., *post*; Restatement, § 12.1, com. i.) It may result from a mis-expression, a scrivener's error, or a factual or legal misunderstanding.

B. Under Current California Law, Only Will-Drafting *Ambiguities* May Be Corrected, Not *Mistakes*.

A single, fundamental principle governs judicial interpretation of every type of writing: Courts seek to ascertain and enforce the author's intent. That is the primary aim in interpreting and enforcing contracts, wills, trusts, deeds, and statutes.[1]

In every context *except* wills, California courts routinely consider extrinsic evidence in efforts to determine the authors' intent and to correct *both* ambiguities *and* mistakes to conform to that intent. But while extrinsic evidence is admissible to interpret ambiguities in a will, a "four corners" rule uniquely prohibits consideration of extrinsic evidence to show

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[1] Contracts: *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 ("'contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.)").

Wills: *Estate of Kime* (1983) 144 Cal.App.3d 246, 264 ("the paramount rule in the interpretation of wills: a will is to be construed according to the intention of the testator, and not his imperfect attempt to express it").

Trusts: *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888 ("'In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker.' (*Estate of Gump* (1940) 16 Cal.2d 535, 548.)").

Deeds: *Riley v. North Star Min. Co.* (1907) 152 Cal. 549, 556 ("Of course, in a proper case and by a proper proceeding, a deed may be reformed or declared void on account of mistake or fraud"); *Merkle v. Merkle* (1927) 85 Cal.App. 87 (reforming, after grantor's death, mistaken property description in deed).

Statutes: *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 (the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute").

mistakes. That rule is an absolute bar in will interpretation, no matter how clear the evidence of mistake or how absurdly inconceivable it is that the testator intended the literal language of the will—or intended the default intestate rules if the will's language inadvertently omitted something.

1. For every kind of document besides wills, extrinsic evidence is admissible to correct all drafting errors —ambiguities and mistakes alike.

California law permits extrinsic evidence both to interpret ambiguities and to correct mistakes in every kind of writing—except wills. In most contexts, mistake-correction is referred to as "reformation," and protection against abuse is provided by the clear-and-convincing evidence standard. (See p. 38, *post*).

Contracts. Extrinsic evidence is admissible to resolve ambiguities in disputed contract terms, but it "can also support reformation of a memorandum to correct a mistake." (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 767; see also *Hess, supra,* 27 Cal.4th at p. 525 [extrinsic evidence is always admissible to prove mutual mistake, even in integrated contracts]; *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 382 [reformation properly "correct[s] a mistake in reducing the contract to writing" to reflect the "real agreement" the parties' intended].) "Extrinsic evidence is necessary because the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions." (*Hess, supra*, 27 Cal.4th at p. 525.)

Trusts, Life Insurance Policies, And Other Donative Devices.

When a trust instrument contains ambiguous language, the trial court may consider extrinsic evidence to resolve the uncertainty. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 74.) But trust instruments can also be reformed to contain the terms that the trustor actually intended but mistakenly omitted or incorrectly stated. (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1602-1604 (*Giammarrusco*); *Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 368-370; *Adams v. Cook* (1940) 15 Cal.2d 352, 358-359.) This equitable power existed at common law. (*Giammarrusco, supra*, 171 Cal.App.4th at p. 1604.)

This is true even though trusts function virtually indistinguishably from wills. (Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* (1982) 130 U.Pa. L.Rev. 521, 524 (*Reformation of Wills*).) Indeed, equity intervenes to "'reform an inter vivos trust even after the settlor is dead.'" (*Giammarrusco, supra*, 171 Cal.App.4th at pp. 1603-1604, quoting Radford et al., The Law of Trusts and Trustees (3d ed. 2006) § 991, at pp. 133-134, italics omitted.)

The same rules apply to other nonprobate estate-planning transfers: "Reformation lies routinely to correct mistakes, both of expression and of omission, in deeds of gift, inter vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death." (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at p. 524.; see *Merkle v. Merkle* (1927) 85 Cal.App. 87 [reforming, after grantor's death, mistaken property description in deed intended to convey gift upon death]; *Jones v. First American Title Ins. Co.* (2003) 107

Cal.App.4th 381 [post-foreclosure sale, reforming document appointing substitute trustee under deed of trust; *Merkle* illustrates "[t]he broad reach of reformation"].) Alternatively, courts remedy mistakes by imposing a constructive trust on the mistakenly-named beneficiary in favor of the intended beneficiary. (*Reformation of Wills*, *supra,* 130 U.Pa. L.Rev. at p. 524.)

Statutes. Extrinsic evidence, in the form of legislative history, is even available to correct mistakes in unambiguous statutory language. "[W]hile ambiguity is generally thought to be a condition precedent to [statutory] interpretation, this is not always the case. 'The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole.'" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 7, quoting *Silver v. Brown* (1966) 63 Cal.2d 841, 845.) "Once a particular legislative intent has been ascertained, it must be given effect even though it may not be consistent with the strict letter of the statute." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, internal quotations omitted, disapproved on another point in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-899.)

2. In contrast, for wills, extrinsic evidence is admissible only to clarify ambiguities, not to correct mistakes.

Ambiguities. *Russell, supra*, 69 Cal.2d 200 broadly approved using extrinsic evidence to interpret will ambiguities, both patent (on the document's face) and latent (as may be revealed by extrinsic evidence). (*Id.* at pp. 206-207.) As to the latter, "[t]he exclusion of parol evidence regarding [what the testator meant] merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended." (*Id.* at p. 209, internal quotations omitted.) But *some* ambiguity is required. (*Id.* at p. 212 ["any proffered evidence attempting to show an intention different from that expressed by the words therein, giving them the only meaning to which they are reasonably susceptible, is inadmissible"].)

Russell broke new ground in allowing extrinsic evidence to determine whether an ambiguity exists in the first place. It founded its holding on "the modern development of rules governing interpretation" of contracts, recognizing that the law had abandoned "stiff and superstitious formalism" and moved "to a flexible rationalism" aimed at showing the drafter's actual intent. (*Id.* at pp. 209-210, quoting 9 Wigmore on Evidence (3d ed. 1940) § 2461.) The Court found no reason why these rules should be limited to contracts, since they address a problem common to all writings. (*Id.* at pp. 210, 212.)

Mistakes. Nonetheless, California courts still adhere to a traditional aversion to reformation of mistakes in wills. (E.g., *Estate of Townsend* (1963) 221 Cal.App.2d 25, 27-28; *Estate of De Moulin* (1950) 101

Cal.App.2d 221, 224; but see *Giammarrusco, supra,* 171 Cal.App.4th at p. 1604 [suggesting that "the continuing validity of (this approach) is doubtful"].) The rationale is that reformation means adding a provision to a will that would not comply with the requirement that a testamentary gift can only be made in writing. (*Estate of Townsend, supra,* 221 Cal.App.2d at pp. 27-28; Restatement, § 12.1, com. c.)

Implied Gifts. California law provides one narrow exception to its no-reformation rule: the implied gifts doctrine. "Bequests by implication have from remote times been sustained where no direct language in a will is found to support them, but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest." (*Estate of Blake* (1910) 157 Cal. 448, 466-467 (*Blake*), disapproved on another point in *Estate of Stanford* (1957) 49 Cal.2d 120, 129.)

When courts find implied gifts, they are not construing ambiguities. The whole point is that the will is *not* ambiguous, just imperfectly expressed—"no *direct* language" supports the gift, but the instrument's overall tenor does. (*Blake, supra,* 157 Cal. at p. 466, italics added; accord, *Brock v. Hall* (1949) 33 Cal.2d 885, 887-888 (*Brock*) ["[I]t is well settled that, where the intention to make a gift clearly appears in a will, although perhaps imperfectly expressed, the court will raise a gift by implication"].)

But there is a substantial restriction on the implied gift doctrine: "[T]he intention to make a gift [must] clearly appear[] *from the instrument taken by its four corners* and read as a whole . . . ." (*Brock, supra,* 33 Cal.2d at p. 889, italics added.) Thus, a "court may not indulge in conjecture or speculation simply because the instrument seems to have

omitted something which it is reasonable to suppose should have been provided"; rather, "a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended." (*Ibid.*) To establish an "implied gift," a party must show that the absence of such a gift would "defeat the dominant plan of distribution" shown in the document. (*Id.* at p. 891.)

Barnes, *supra*, 63 Cal.2d 580, which the Court of Appeal found dispositive here, illustrates the point. There, the testatrix's will bequeathed all her property to her husband. (*Id.* at p. 581.) It directed that if she and her husband died "simultaneously or within two weeks," her property would go to her nephew, whom she named as an alternate executor to her husband. The will disinherited all other heirs. (*Id.* at p. 581 & fn. 5.) But no provision addressed what would happen if the husband predeceased the testatrix, as he did. The trial court received evidence regarding the nephew's long and close relationship with the testatrix; found the will ambiguous; and construed it to include a bequest to the nephew. (*Id.* at p. 582.)

This Court reversed. It found no ambiguity in the will. Rather, it found that the will unambiguously failed to address the circumstance where the testatrix's husband predeceased her. It concluded that it was not authorized "under the guise of construction to supply dispositive clauses lacking from the will. [Citation.] No such 'dominant dispositive plan' as referred to and held to warrant a gift by implication in *Brock v. Hall* [*supra*, 33 Cal.2d at p. 892], cited by petitioner, is demonstrated by the provisions of the will now before us." (63 Cal.2d at p. 584.)

Here, the Court of Appeal could find neither ambiguity nor implied gift. The court found it "difficult to imagine" that Irving intended the omission of what should occur if his wife predeceased him, or that he intended that, if she did, his estate would go to those that he was expressly disinheriting rather than to charities in beloved memory of deceased parents. (Slip Opn., p. 12.) But it concluded that under *Barnes*, the extrinsic evidence of Irving's actual intent—his post-will donations to City of Hope, and his statement that he had prepared a will leaving his estate to the charities—was off limits.

C. The Current Rule Is Unjustifiable And Has Proven Unworkable.

Thus, alone among writings, mistakes in wills cannot be corrected by the use of extrinsic evidence. The injustice and bankruptcy of this four corners rule is perhaps best illustrated by the lengths to which courts have gone to evade it.

The rule has done little to deter courts in California and elsewhere from finding ways to carry out testator intent. They do this through "doctrinal sleight-of-hand." (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 552, 557-558; see also Haskell, *When Axioms Collide* (1993) 15 Cardozo L.Rev. 817, 825 (*Axioms*).) Courts find "ambiguities" in unambiguous language so that they can bypass the implied gift doctrine and other no-reformation rules. (*Axioms*, *supra*, 15 Cardozo L.Rev. at pp. 819-820.)

It is no secret that these courts are hammering a square peg mistake into a round hole of ambiguity: "We recognize and regret, however, that

the foregoing interpretation perpetuates the recent tendency of our courts to make subtle and often questionable distinctions in order to circumvent the statutory prohibition of section 105 in attempting to produce just results by giving effect to the paramount rule in the interpretation of wills: a will is to be construed according to the intention of the testator, and not his imperfect attempt to express it." (*Estate of Kime* (1983) 144 Cal.App.3d 246, 264, footnote omitted.)[2] A few California examples suffice:

Estate of Akeley. A holographic will left the estate's residue to three charities, but provided that each was to receive "25 percent." (*Estate of Akeley* (1950) 35 Cal.2d 26, 28 (*Akeley*).) The State sought to escheat the 25 percent unaccounted for. (*Ibid.*) Relying on extrinsic evidence—"the surrounding circumstances, namely that the testatrix was unmarried, that she had no relatives of any degree of kindred, that this condition was contemplated by the testatrix, and that she drafted the Will herself"—this Court found that "25 percent" was ambiguous and that the testatrix really meant one-third. (*Id.* at p. 30.) Justice Traynor in dissent pointed out that "25 percent" cannot mean "one-third." (*Id.* at pp. 31-33 (dis. opn. of Traynor, J.).)

A mathematical error—even an obvious one—is a *mistake*, not an ambiguity. So, under the guise of interpreting an ambiguity, *Akeley* effectively reformed the will to correct the mistake and thereby to effectuate the testatrix's intent.

Estate of Taff. The testatrix made a bequest to her sister, with the residue, should the sister not survive her, to "pass to my heirs in accordance

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[2] Section 105 is no longer the law. See pp. 44, 46-47, *post.*

with the laws of intestate succession." (*Estate of Taff* (1976) 63 Cal.App.3d 319, 322 (*Taff*).) Relying on extrinsic evidence—the testatrix's communications with her lawyer and a letter she wrote—the trial court construed "heirs" to mean only the testatrix's sister's children and not her husband's line; the Court of Appeal affirmed. (*Id.* at p. 327.) *Taff* reasoned that the extrinsic evidence "exposed a latent ambiguity, i.e., that when the testatrix used the term 'my heirs' in her will, she intended to exclude the relatives of her predeceased husband, Harry." (*Id.* at p. 325.)

This was an astonishing conclusion: If the phrase "heirs in accordance with laws of intestate success" is ambiguous, many a will would be ambiguous. So it is not surprising that, in one author's words, "*Taff* thus turned *Russell* upside down, making it stand for a proposition it had expressly rejected. . . . The disputed term in *Taff* that had been mistakenly employed was quite unambiguous. The effect of the decision in *Taff* was to substitute a phrase such as 'my natural heirs' for the inapt phrase that the will had employed ('my heirs in accordance with the laws of intestate succession, in effect at my death in the State of California') in order to carry out what the court conceived to be the actual or subjective intent of the testatrix." (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 557-558; see also *Axioms*, *supra*, 15 Cardozo L.Rev. at p. 825 ["In effect, the court created an ambiguity in the word 'heirs' and subsequently resolved the ambiguity by reference to extrinsic evidence"].)

Estate of Karkeet. The entire substance of the holographic will stated: "'This is my authorization to Miss Leah Selix [address], to act as executrix of all and any property and personal effects (and bank accounts) to act without bond or order of Court.'" (*Estate of Karkeet* (1961)

56 Cal.2d 277, 279 (*Karkeet*).) Selix petitioned to receive the estate's residue. (*Id.* at p. 280.) Explicitly relying on extrinsic evidence, the court read "executrix" to mean "beneficiary": "[H]aving prepared the will herself and not being familiar with the more modern technical meaning of the term 'executrix' the decedent designated her close friend as such intending that she be the residuary legatee . . . ." (*Id.* at p. 283.) Again, the essence of the result was to correct a drafting *mistake* based on extrinsic evidence outside the will's four corners. (Accord, *Estate of Kime*, *supra*, 144 Cal.App.3d at p. 264 [extrinsic evidence admissible to determine whether divorcing wife in holographic will really meant to designate friend as "beneficiary" rather than "executrix" so that friend would take instead of soon-to-be ex-husband].)

* * *

In order to effectuate true testator intent, courts have stretched to create ambiguities where none really exists. They have reformed wills under the guise of interpretation, giving only lip service to doctrinal limitations. Under a competing, doctrinally-pure approach, reformation is absolutely barred and a testator's true intent cannot be plumbed, regardless of what the extrinsic evidence shows. Such a two-strand system creates unfairness and disparate results, undermining credibility, consistency and predictability in the law.

When the primary goal of effectuating testator intent cannot be reconciled with governing legal doctrine, it is time to change the doctrine.

II.

THIS COURT SHOULD ABANDON CALIFORNIA'S NO-REFORMATION RULE AND ADOPT THE RESTATEMENT APPROACH, OR AT LEAST LIBERALIZE THE IMPLIED GIFTS DOCTRINE.

A. This Court Should Adopt The Restatement's Reformation-Friendly Approach, Evolved From Over A Decade Of Inquiry By Recognized Experts.

For a number of years, scholars have compellingly urged that courts should embrace reformation as an available remedy, rather than disingenuously and inconsistently treating mistakes as ambiguities. (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 528-543; *Axioms*, *supra*, 15 Cardozo L.Rev. at pp. 820-828; de Furia, *Mistakes in Wills Resulting From Scriveners' Errors: The Argument for Reformation* (1990) 40 Cath.U. L.Rev. 1, 8-12, 21-26 (*Mistakes in Wills*).) They have pointed out that there is no principled basis for distinguishing error correction in wills from other donative devices that are the functional equivalent of wills. (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 524-528; *Mistakes in Wills*, *supra*, 40 Cath.U. L.Rev. at pp. 29-35.) And they have demonstrated that policy considerations strongly favor reformation. (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at pp. 524-528, 587-590; *Axioms*, *supra*, 15 Cardozo L.Rev. at p. 828.)

In 2003, the Restatement weighed in with a reasoned approach that tracks the scholarly analysis. Eschewing courts' strained efforts to find

ambiguity in order to effectuate testators' intent, section 12.1 proposes reformation:

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

(Restatement, § 12.1 (Section 12.1).)[3] Section 12.1 "unifies the law of wills and will substitutes by applying to wills the standards that govern other donative documents," as "[e]quity has long recognized that deeds of gift, inter vivos trusts, life-insurance contracts, and other donative documents can be reformed." (*Id.*, com. c.)

The Restatement approach is measured, considered and balanced. It circumscribes both the scope of reformation and the requisite quantum of proof, thereby (1) according appropriate respect to will formalities,

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[3] The term "donative document" includes a will. (Restatement, § 3.1, com. a.) A mistake of expression exists when a will contains a term that misstates the testator's intent, fails to include a term that was intended to be included, or includes a term that was not intended to be included. (§ 12.1, com. i.) "A mistake in the inducement arises when a donative document includes a term that was intended to be included or fails to include a term that was not intended to be included, but the intention to include or not to include the term was the product of a mistake of fact or law." (*Ibid.*)

(2) preventing abuse, and (3) maximizing the reliability of the assessment of testator's intent:

First, reformation can never remedy a testator's failure to prepare and execute a will. (*Id.*, com. h.) Nor is it available to modify a will's original intent based on the testator's post-execution change of heart. (*Ibid.*) Rather, reformation is only available to correct mistakes of expression and of inducement.

Second, reformation is only available when intent is proven by clear and convincing evidence. (*Id.*, com. e.) This heightened standard:

- Alerts parties to the requisite high level of proof and deters those who will be unable to carry that burden;
- Imposes a "heightened sense of responsibility" upon the trial court and enables appellate courts to more closely scrutinize the trial court's detailed findings; and
- Appropriately "[t]ilt[s] the risk of an erroneous factual determination" in favor of the literal will and against reformation.

(*Ibid.*)

Third, a will may only be reformed when the petitioner proves *with particularity* both (1) that a mistake affected the will and (2) what the testator's "true intention was." (*Id.*, com. j.) "For example, a claim that 'if only my aunt had known how much I loved her, she would have left me more' lacks sufficient particularity to support" reformation. (*Ibid.*)

California courts have long recognized the persuasiveness of the various Restatements: "Although the Restatement Second of Contracts

(Restatement) is not binding authority, 'considering the circumstances under which it has been drafted, and its purposes, in the absence of a contrary statute or decision in this state, it is entitled to great consideration as an argumentative authority.'" (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1200, fn. 3, quoting *Canfield v. Security–First Nat. Bank* (1939) 13 Cal.2d 1, 30-31 [following Restatement of Trusts]; see *Giammarrusco, supra*, 171 Cal.App.4th at p. 1607.)

The Restatement Third of Property (Wills & Other Donative Transfers) continues the long tradition of scholarly excellence. It represents the culmination of years of detailed inquiry by leading experts in the field of wills and other donative documents. The reporter prepared his first draft in 1991. The back-and-forth revision process spanned from 1991 to 2010 and included an additional 13 preliminary drafts directed to the 22 advisors and 76 members of the Consultative Group, 7 council drafts prepared by the advisors for the 63 members of the ALI Council, and 6 tentative drafts presented by the Council for the ALI membership.[4] The ALI put the topic of reformation at the front of the line, addressing it in the first three preliminary drafts, the first council draft, and the first tentative draft. (Restatement (Prelim. Draft No. 1, Oct. 30, 1991) § 11.3 at p. 49, § 11.5 at

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[4] Restatement, pp. III-VIII (listing members of ALI bodies); Hein Online Catalog, *available at* http://home.heinonline.org/content/list-of-libraries/?c=58&t=6834 (listing all drafts); see American Law Institute, How ALI Works, *available at* http://www.ali.org/index.cfm?fuseaction=about.instituteworks (describing revision process); Harvard Law School Library; Restatement Drafting Process, *available at* libguides.law.harvard.edu/content.php?pid=103327&sid=1036689 (same).

pp. 79-93; Restatement (Prelim. Draft No. 2, Sept. 11, 1992) §§ 13.1-13.2 at pp. 175-198; Restatement (Prelim. Draft No. 3, Sept. 29, 1994) § 12.1 at pp. 151-201; Restatement (Council Draft No. 1, Nov. 4, 1994) § 12.1 at pp. 135-191; Restatement (Tent. Draft No. 1, Mar. 28, 1995) § 12.1 at pp. 113-165.)

The ALI pursues the same goal that this Court has historically pursued: "[T]he [ALI] in its restatement work does not deem itself to be constrained by a count of jurisdictions, but rather undertakes to weigh all of the considerations relevant to the development of common law that our policy calls on the highest courts to weigh in their deliberations." (Rest.2d, Property (Donative Transfers), Foreword, p. VIII.)

Section 12.1's reasoning is thorough and detailed. It consumes thirty-six pages that describe the history of reformation doctrines, jurisprudential evolution away from strict compliance with formalities, and the growing trend of courts to engage in reformation of wills whether they use that terminology or not. (§ 12.1, comments and reporter's note.) Section 12.1 engages in a careful balancing of policies in order to devise a reformation doctrine that is limited in scope and that operates with appropriate evidentiary safeguards designed to ensure that the testators' actual intent is carried out. (See pp. 24-25, *ante*; pp. 50-55, *post.*)

And yet, the approach is hardly radical. California already applies the same approach and safeguards to the reformation of other writings. (See § p. 38, *post.*)

The Restatement provides a road map of the modern, progressive law on this subject. This Court should follow it.

B. The Restatement Approach Represents The Modern Trend In The Law.

Even before its adoption, the Restatement's view represented a growing trend among sister states. (§ 12.1, reporter's note, p. 367.) For example, the Connecticut Supreme Court held extrinsic evidence admissible to correct a scrivener's error in a will, if the error was established by clear and convincing evidence. (*Erickson v. Erickson* (Conn. 1998) 716 A.2d 92, 98-100 (*Erickson*).) In doing so, it overruled its own no-reformation precedent, weighed the policy issues and determined that, with appropriate safeguards, none of the traditional concerns warranted further resistance to reformation. (*Ibid.*; see § III.C., *post.*) Quoting the decision it overruled, the court observed that "'principles of law which serve one generation well may, by reason of changing conditions, disserve a later one . . . . Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.'" (*Id.* at p. 99, modifications in original.)[5]

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[5] Much earlier, the New Jersey Supreme Court adopted what it called the "probable intent" rule. (*Fidelity Union Trust Co. v. Robert* (N.J. 1962) 178 A.2d 185, 18-189, cited in *Engle v. Siegel* (N.J. 1977) 377 A.2d 892.) In *Engle*, as here, a residuary legatee predeceased the testators, a possibility that the will did not provide for. Relying on extrinsic evidence, the New Jersey Supreme Court held that the residue should pass to the deceased legatee's heirs. (377 A.2d at pp. 895-897.) "Within prescribed limits, guided primarily by the terms of the will, but also giving due weight to the other factors mentioned above, a court should strive to construe a testamentary instrument to achieve the result most consonant with the testator's 'probable intent.'" (*Id.* at p. 894; see also *Darpino v. D'Arpino* (N.J.Super.Ct.App.Div. 1962) 179 A.2d 527, 531 [similar predecease case; "The power of this court to effectuate the manifest intent of a testator by inserting omitted words, by altering the collocation of sentences or even by

(continued...)

Since the Restatement weighed in, a growing number of courts and legislatures have followed its well-reasoned approach:

- The Indiana Supreme Court "adopt[ed] the Restatement's view" in *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos* (Ind. 2009) 895 N.E.2d 1191, 1198-1201. There, the court considered a testamentary trust provision in a will, followed Section 12.1 and determined that clear and convincing evidence established the mistaken expression and the testator's true intent. (*Id.* at pp. 1200-1201.)
- Likewise, New York has followed the emerging trend reflected in the Tentative Draft of Section § 12.1. (*Estate of Herceg* (N.Y.Sur.Ct. 2002) 747 N.Y.S.2d 901, 904-905.)
- Other states have adopted statutes substantially similar to the Restatement formulation. (Colo. Rev. Stat. § 15-11-806; Fla. Stat. § 732.615; Wash. Rev. Code § 11.96A.125.)

Those few cases that have spurned the Restatement's approach offer no reasoned basis for doing so.

Flannery v. McNamara (Mass. 2000) 738 N.E.2d 739 (*Flannery*) comes closest to explaining its reasoning. In a single sentence, it asserts that reformation would violate a Massachusetts statute. (*Id.* at p. 746.) The decision then states that reformation would "open the floodgates of

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[5] (...continued)
reading his will directly contrary to its primary signification is well established. This power, when necessary, is exercised to prevent the intention of the testator from being defeated by a mistaken use of language"].)

litigation." (*Ibid.*; see § III.C.2., *post.*) But *Flannery* offers no explanation for this view—it just disagrees, ipse dixit, with the Restatement and *Erickson* that a heightened evidentiary standard alleviates the concern. (*Flannery, supra*, 738 N.E.2d at p. 746 & fn. 9.) The concurring opinion, citing section 12.1, *supports* reformation in principle. (*Id.* at pp. 748-749 (conc. opn. of Greanery, J.).) And the majority did not even explain its retreat from an earlier Massachusetts Supreme Judicial Court observation, quoted in the concurring opinion (*id.* at p. 748), that "[f]or reasons that may no longer be meaningful, we have been less willing to recognize the possibility of proof of mistake in the drafting of a will (as opposed to an inter vivos trust) that is unambiguous on its face. The case may be hard to make, however, for denying reformation of a will where, in substantively similar circumstances, we would allow reformation of a trust instrument." (*Putnam v. Putnam* (Mass. 1997) 682 N.E.2d 1351, 1353, fn. 3, citing the 1995 draft of § 12.1.)

The other cases rejecting the Restatement contain even less reasoning. (*In re Lyons Marital Trust* (Minn.App. 2006) 717 N.W.2d 457, 462 [stating that Restatement has found little support among other states and citing several cases, only one of which actually considered and rejected the Restatement—*Flannery*]; *In re Last Will & Testament of Daland* (Del.Ch. 2010) 2010 WL 716160, *5 [trial-level court declined to follow Restatement "for the reasons stated" in *Flannery* and because "I am constrained to follow current Delaware law"].)

The modern, reasoned trend has been to allow reformation of wills to conform to actual testator intent. This Court should do the same.

C. Sound Policy Reasons Support Recognizing Will Reformation.

The Restatement not only reflects the modern trend, but even more important, it also embodies sound public policy. As a matter of common law development, such sound public policy considerations should be primary. (See, e.g., *Rowland v. Christian* (1968) 69 Cal.2d 108, 118-120 [looking at public policy considerations in revising common law]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 810-813 [same]; *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 591-598 [same].)

1. Allowing reformation achieves the primary objective: effectuating testator intent.

"[T]he paramount rule in the interpretation of wills [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, supra,* 144 Cal.App.3d at p. 264; see also § 12.1, com. b.) Strict adherence to the four corners rule abandons any attempt to find true testator intent.

This Court long ago warned that, with regard to *ambiguities*, "[t]he exclusion of parol evidence regarding [the way a testator used words] merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended." (*Russell, supra,* 69 Cal.2d at p. 209.) That concern prompted the Court to abandon "stiff and superstitious formalism" in favor of

a "flexible rationalism" aimed at determining the testator's actual intent in the ambiguity context. (*Ibid.*) But the same logic applies to *mistakes*.[6]

A mistake—a misspeaking or an inadvertent omission—can undermine testator intent just as surely as an ambiguity, perhaps more so. Considering evidence outside the document's four corners might well be the *only* way to honor the testator's actual wishes. Admittedly, one may well be skeptical of contrary evidence when a will is unambiguous. But that is true in the reformation of any writing. The risk does not justify categorically excluding extrinsic evidence of testator intent. While categorical exclusion protects against the risk that extrinsic evidence might distort actual intent, it does so at the price of *guaranteeing* that in some instances the testator's mistaken language *will* distort actual intent.

By contrast, allowing reformation with appropriate safeguards reasonably assures that the result really does reflect the testator's intent. It allows correct results either way—both when the document embodies a testator's true intent and when it does not. (§ 12.1, com. b ["Only high-safeguard allowance of" reformation "achieves the primary objective of giving effect to the donor's intention"].)

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[6] The questions presented here were not before the Court in *Russell*, which may explain the decision's rote repetition of the then-existing rule barring the admission of extrinsic evidence "attempting to show an intention different from that expressed by the words therein." (*Russell*, *supra*, 69 Cal.2d at p. 212.) If the Court decides to allow extrinsic evidence under facts like ours, it need not disapprove countless reiterations of what will be an anachronistic rule; it need only disapprove *Barnes* and announce the new rule. (See *Li v. Yellow Cab Co.*, *supra*, 13 Cal.3d at pp. 808-809, 812-813.)

The present case well demonstrates the point. The will clearly expresses Irving's desire to bequeath his assets to charities that would use that wealth for causes near to his heart, and to do so "in the names and loving memory" of his mother, father and sister. It would be nothing short of bizarre for him to intend this bequest only in the unlikely event of simultaneous death and to intend that the rules of intestacy would otherwise apply. But holding fast to the outdated four corners rule would achieve exactly this bizarre result, rigidly imposing on Irving a presumed intent that would deprive him of the bequests he actually made, deprive the charities of the ability to do the good work that he intended, and dishonor his beloved relatives.

2. Allowing reformation both ensures that bequests go where the testator intended and avoids unjust enrichment of those who were not intended beneficiaries.

Permitting reformation does equity in another respect as well: It prevents unjust enrichment.

An unintended beneficiary who collects under a will is unjustly enriched at the expense of the intended beneficiary. Equity bars such windfalls. (E.g., *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 78 [equity prevents unjust enrichment by taking advantage of others' mistakes, not just from wrongful conduct]; *F.D.I.C. v. Dintino* (2008) 167 Cal.App.4th 333, 346-347 [same].)

If anything is clear from his will, it is that Irving did not want his estranged family members to get his estate. (AA 121-123; Slip Opn., p. 2.)

But under the four corners rule, his drafting mistake means that his entire estate passes to those same disinherited persons—they had no relationship with him despite living within walking distance, did not assist with his funeral and interment, thought he was "evil," and only learned about his death through an heir hunter. (AA 18, 20-21, 31, 36, 70-71, 81.) It is an inherently illogical and unjust result.

3. Allowing reformation aligns error correction in all writings and promotes consistency in the law and predictability in outcomes.

Affording consistent error correction throughout all kinds of writings will unify and simplify the law and litigation practice. It will foster greater predictability in an area where parties and practitioners are never sure whether the court will adhere to the four corners rule or stretch the ambiguity doctrine to produce just results.

As we have shown, California law has long accepted the use of extrinsic evidence and reformation to correct mistakes in all types of writings other than wills. (See §§ I.B.1., *ante*; II.A., *ante*.) There is no principled reason to treat wills differently. (*Reformation of Wills, supra*, 130 U.Pa. L.Rev. at pp. 524-527.) The problem of mistaken expression runs through all writings. It is the result of a human's putting pen to paper. Just as this Court applied to wills the interpretive rules regarding ambiguity that had been developed in contract law, the solution to mistakes is solvable by "a general principle applicable to all." (*Russell, supra*, 69 Cal.2d at p. 210.) Adopting the Restatement approach, and thereby unifying error correction in all writings, creates simplicity and uniformity.

Even as to will interpretation, recognizing reformation creates consistency in approach. There is no discernable policy difference between using extrinsic evidence to prove that a portion of a will was induced by fraud, duress, or undue influence and using it to prove that a portion of a will was induced by an innocent mistake. (*Erickson, supra*, 716 A.2d at p. 99.) "In each instance, extrinsic evidence is required to demonstrate that a will, despite its formally proper execution, substantially misrepresents the true intent of the testator." (*Ibid.*)

Perhaps more importantly, adopting the Restatement approach will allow greater predictability of results. Parties, practitioners, and courts will no longer need to engage in "subtle and often questionable distinctions" to fit the square peg of mistaken expression into the round hole of ambiguity. (*Estate of Kime, supra*, 144 Cal.App.3d at p. 264, footnote omitted; see § pp. 19-24, *ante*.) Parties need not spend time, effort and expense gambling on whether the court will stretch the law to produce a just result or adhere to strict distinctions between mistakes and ambiguities. Instead, they can measure their evidence against the heightened evidentiary requirements in deciding whether to bring suit or how to respond to a suit.

4. Allowing reformation avoids follow-up malpractice litigation.

Reformation also promotes public well-being in another way: It will limit the inefficient tort alternative—possible legal malpractice claims by intended beneficiaries against attorney-scriveners.[7]

Under current law, one whose bequest has been frustrated by an attorney-scrivener's mistake is relegated to a legal malpractice action. Even assuming that there was malpractice and that the attorney is alive and can pay a judgment, that is a poor solution compared to reformation:

- Tort recovery inherently under-compensates the intended beneficiary: "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." (*Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at p. 589.)
- Tort recovery leaves untouched the unjust enrichment of unintended beneficiaries.

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[7] Although, because Irving's will was holographic, there is no possible malpractice claim under our facts, there can be no question that the Restatement approach affects any case in which the mistake resulted from lawyer malpractice. Indeed, scrivener error was the specific focus of one of the early advocates of will reformation. (*Mistakes in Wills*, *supra*, 40 Cath.U. L.Rev. at p. 3.) In evaluating a potential rule of general application, it is appropriate for the Court to consider ramifications beyond a case's specific facts.

- Relying on the tort system inevitably hides drafting errors. The person in the best position to know the testator's true intent is often the attorney who supposedly made the mistake. (*Id.* at p. 587-588.) But exposure to malpractice claims without the possibility of mistake correction creates a "strong disincentive[]" to forthrightly admit to a drafting error. (*Ibid.*) Without the attorney coming forward, the intended beneficiary might not even suspect an issue.

- The tort approach unnecessarily taxes an overstretched judicial system, potentially requiring a jury trial that would not be available in a probate proceeding. (See pp. 53-54, *post.*)

5. A heightened evidentiary standard affords adequate protection against abuse.

Of course, public policy should also discourage false and inappropriate claims. The primary—and long-trusted—mechanism for doing so throughout the law is simple: Trial by a neutral factfinder, combined with appropriate evidentiary standards.

As courts and scholarly commentary recognize, appropriate procedural safeguards can minimize the risk of erroneous reformation. (Pp. 23-25, *ante*; pp. 50-55, *post*; *Reformation of Wills*, *supra*, 130 U.Pa. L.Rev. at p. 568 ["The safeguard that prevents reformation from being abused—for example, by being employed to interpolate a spurious term—is the ancient requirement of an exceptionally high standard of proof in reformation cases"]; *Mistakes in Wills*, *supra*, 40 Cath.U. L.Rev. at p. 3

["Any danger of evidentiary fraud could be minimized, if not eliminated, by requiring the mistake to be proven by clear and convincing evidence"].)

The same clear and convincing standard approved by the Restatement has stood the test of time as to reformation of the numerous other types of writings, whether the authors are alive or not. (E.g., *R & B Auto Center, Inc., supra,* 140 Cal.App.4th at p. 382 ["A written contract is presumed to express the parties' actual intention, and the party seeking reformation bears the burden by clear and convincing evidence to overcome that presumption," citing *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 25]; *Ike, supra,* 61 Cal.App.4th at pp. 86-88 [the party seeking to reform a trust bears the burden of establishing the trustor's actual intent by clear and convincing evidence]; pp. 50-51, *post.*) There is no reason why the danger is any greater or the solution any less apt in a will context.

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A rule that allows correcting genuine mistakes—inadvertent misstatements or omissions—is preferable to one that enforces a mistake, unjustly enriches a third party, and relegates recompense to another layer of collateral and expensive litigation.

D. At Very Least, The Implied Gift Doctrine Should Be Liberalized To Allow Evidence Beyond The Document's Four Corners.

The Restatement's objectives might be partially, though less elegantly, achieved through revamping the implied gift doctrine. That doctrine is limited to ascertaining the testator's "dominant dispositive plan"

as evidenced within the will's four corners. Those constraints can and should be relaxed.

The reality is that an implied gift is an imposter for reformation, and a poor one at that. It lacks the benefit of extrinsic evidence or the protections of a clear and convincing evidence rule. It is a relic of another time to afford a reformation-like remedy without allowing full reformation. Its central goal is similar to what reformation seeks when a will fails to address all scenarios, but it is limited to inferences from the four corners of the will. "[W]here a testator makes a will disposing of his property he ordinarily has in mind transferring the entire property and does not intend any interest to pass by intestacy." (*Brock, supra*, 33 Cal.2d at p. 888.) That factor "may be considered by the court in ascertaining the intent" of the will. (*Ibid.*) Courts may then need to look beyond the will's unambiguous language in order to satisfy the primary dispositions of carrying out testator intent. (*Id.* at pp. 887-888, 891-892 [gift implied to conform with "dominant dispositive plan"].) But supplying an omitted gift requires "a conviction" that the will imperfectly expresses the testator's intent. (*Id.* at p. 889.)

The Restatement approach is the easiest, most accurate, and most comprehensive way to address error correction. That is the course we urge. But, at a minimum, the strictures on implied gifts should be relaxed to allow more accurate determinations of testators' intent in omitted gift situations.

First, the implied gift doctrine reflects the notion that where, as here, a will is incomplete, courts should try to determine testator intent before resorting to intestacy rules. It serves that goal to allow consideration of extrinsic evidence. (See *Engle v. Siegel*, *supra*, 377 A.2d 892 [applying

a "probable intent" rule in just such a case].) Here, as the Court of Appeal explained, the extrinsic evidence confirms what the will's language implies—intent is "clear." (Slip Opn., p. 12.) After his wife died, Irving expressed his belief that, under the will he had already drafted, his estate would go to the charities. (P. 5, *ante*; see *Estate of Mohr* (1970) 7 Cal.App.3d 641, 648-649 [post-will expressions of intent relevant to interpreting ambiguity].) Such clear evidence could be used to imply a gift where, as here, the problem with the will is that it is incomplete (i.e., where instead of "reforming" contrary language, a court is simply backfilling into a less-than-comprehensive will based on testator intent).

Second, the implied gift doctrine can be liberalized in cases involving holographic wills. (E.g., *Estate of Atkinson* (1930) 110 Cal.App. 499, 504-506 [implying gift in holographic will based on how layman would understand will].) Mistaken expressions are far more likely when laypersons wade into the murky waters of inheritance law by themselves. It is only natural to construe holographic wills liberally and to allow error correction more readily.

The present case demonstrates the point. *Barnes* warned attorney-scriveners about the use of simultaneous death provisions that do not account for a predeceased spouse. In its wake, one might presume that attorneys know to avoid a *Barnes*-style omission. But one cannot reasonably make the same presumption about laypersons. They do their best to secure their testamentary wishes, however imperfectly, often based on forms and other consumer-level tools. Their wills should get the benefit of the doubt.

Third, on its face, the will here strongly suggests that Irving intended a gift to the charities, not to his disinherited heirs, if his wife predeceased him. When "reading of the entire instrument produces a conviction that a gift was intended," implying a gift is *not* "conjecture or speculation simply because the instrument seems to have omitted something which it is reasonable to suppose should have been provided." (*Brock, supra*, 33 Cal.2d at p. 889.) The reasonable reading here is that Irving intended his estate to go to his wife or to the charities rather than to the individuals that his will took pains to disinherit. (Slip Opn., p. 12 [any other reading is "difficult to imagine"].)

We recognize that *Barnes* appears to hold otherwise, but *Barnes* is wrong to belittle the significance of a disinheritance clause (*Barnes, supra*, 63 Cal.2d at p. 583, cited at Slip Opn., p. 7), a matter obviously of great significance to any testator. And, *Barnes* was out of step with the results reached by courts of other states under comparable facts. (E.g., *Russell v. Russell* (N.J.Super.Ct.App. 1951) 85 A.2d 296, 297, 299 (Brennan, William J.) [a will contemplated simultaneous death, but made no provision for the spouse's earlier death; gift implied to beneficiaries who were to receive on simultaneous death as "small recompense for their kindness and devotion to (the testator)," where otherwise child who had been disinherited because he "has been a very ungrateful and undutiful son" would inherit under intestacy]; *Estate of Hardie* (N.Y.Sur.Ct. 1941) 26 N.Y.S.2d 333 [gift implied in similar circumstances based on will's statement of the testator's negative attitude toward family members *and* because the simultaneous death provision made gifts to favored charities that could not reasonably have been intended only in the event of simultaneous death].)

At very least, the nature of the will here—its gifts to charities in beloved memory of cherished family members—is sufficiently different from *Barnes* to create a conviction that Irving could not have intended that gift only in the unlikely event of simultaneous deaths.

The Court should disapprove *Barnes* and its unjust and illogical results and liberalize the implied gift doctrine. Doing so will save incomplete wills from intestacy where, as here, the testator's intent can easily be determined by reference to all available sources—the will's four corners, the tenor of the document and extrinsic evidence.

* * *

The overwhelming scholarly consensus, the modern trend in the law, and public policy considerations all point one way. This Court should overrule the half-century-old *Barnes* decision and replace it with a modern rule that allows discovery and enforcement of true testator intent when a will inadvertently fails to address a particular circumstance.

III.

NO STATUTE OR POLICY LIMITS THIS COURT'S ABILITY TO ALLOW WILL REFORMATION.

A. No Statute Bars Will Reformation.

The issue here has always been one of common law. In the three decades since *Barnes*, the Legislature has twice revised the Probate Code, consistently aiming to ensure that a testator's intentions—rather than the laws of intestacy—govern distributions. But the Legislature has left courts free to develop the law for determining testator intent, including by extrinsic evidence.

Where, as here, the Legislature has not foreclosed development of the law, this Court is free to alter common law rules to be consistent with modern judicial thinking. (*American Motorcyle Assn.*, *supra*, 20 Cal.3d at pp. 599-604 [statute providing for pro rata contribution did not bar development of fault-based partial equitable indemnity].) The current circumstance has much in common with *American Motorcycle*. Here, as there, nothing in the statutory scheme expressly forbids the development of the law. Here, as there, the legislative history specifically indicates that the Legislature intended further judicial development of the law.

Judicial concerns created the bar. The four corners rule and the prohibition against will reformation are creatures of case law. They stem from policy concerns that because the testator is no longer alive to testify about his or her intent, courts—rather than testators—would be making testamentary gifts. (E.g., *In re Page's Trusts* (1967) 254 Cal.App.2d 702, 719; *Estate of Townsend, supra,* 221 Cal.App.2d at pp. 27-28; *Estate of*

Lyons (1939) 36 Cal.App.2d 92, 95.) As shown below, those concerns do not withstand scrutiny under modern jurisprudence. (§ III.C., *post.*) For present purposes, all that matters is that judges can change judge-made law.

Demise of former Probate Code section 105.[8] If the four corners rule ever had a statutory basis, it was section 105 as it existed before the 1983 Probate Code revision. That section provided "when an uncertainty arises *upon the face of a will*, as to the application of any of its provisions, the testator's intention is to be ascertained *from the words of the will*, taking into view the circumstances under which it was made, excluding such oral declarations [of intent by the testator]." (Former § 105, Deering's Cal. Civ. Prac. Codes (1983 ed.) Probate, § 105, p. 1822, italics added.)

This Court long ago interpreted that statute as defining how extrinsic evidence might be used in one particular circumstance—patent ambiguity. This was necessary for extrinsic evidence to be admissible to suggest latent ambiguity (that is, an uncertainty *not* "upon the face of a will"). "In short, we hold that while section 105 delineates the manner of ascertaining the testator's intention 'when an uncertainty arises upon the face of a will,' it cannot always be determined whether the will is ambiguous or not until the surrounding circumstances are first considered." (*Russell, supra,* 69 Cal.2d at pp. 212-213.)

Today's Probate Code contains no such limitation. Section 105 was repealed in 1983. (Stats. 1983, ch. 842, § 18, operative Jan. 1, 1985; see Tentative Recommendation Relating to Wills and Intestate Succession (Nov. 1982) 16 Cal. Law Revision Com. Rep. (1982) p. 2503.) Further

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[8] Unless indicated otherwise, further citations are to the Probate Code.

statutory changes resolve any remaining doubt. (See *Giammarrusco, supra,* 171 Cal.App.4th at pp. 1603-1604.)

Section 6111.5. Section 6111.5 was adopted in 1984 to expand the use of extrinsic evidence beyond ambiguities: It allowed extrinsic evidence for the purpose of ascertaining whether a document's author intended it to be a will. (Charities' Motion for Judicial Notice (MJN) Ex. B, Tab 3, pp. 17-19 [Analysis of SB 1984 prepared by Senate Commitee on Judiciary].)[9] In doing so, the Legislature incautiously added language acknowledging that extrinsic evidence was also available to address ambiguities. But the legislative history strongly suggests an intent to *expand* the law without foreclosing the use of extrinsic evidence to determine ambiguity—*not* to circumscribe extrinsic evidence to just two categories.

As originally proposed, the new statute addressed only using extrinsic evidence to prove the testamentary nature of a document claimed as a holographic will. (MJN Ex. B, Tab 1, pp. 3-6 [SB 1984 as introduced on Feb. 13, 1990 and as amended on Mar. 29, 1990].) At the Law Revision Commission's request, the Legislature amended the bill to explicitly preserve using extrinsic evidence to resolve ambiguities: "[E]xtrinsic evidence is admissible . . . to determine the meaning of a will or a portion of the will if the meaning is unclear *on the face of the document.*" (MJN Ex. B, Tab 1, p. 8 [SB 1984 as amended on Apr. 17, 1990], emphasis added; Tab 12, pp. 84-85 [Apr. 2, 1990 memo to Sen. Robbins from staff person Joan Hall].) But that language raised its own concern about limiting

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[9] Section 6111 was amended at the same time to liberalize the requirements for a valid holographic will. (MJN Ex. B, Tab 1, pp. 3-13. [SB 1984 drafts and as chaptered].)

extrinsic evidence to patent—not latent—ambiguities. (MJN Ex. B, Tab 12, pp. 94-97 [Letters from Andrew Garb and Clark Byam re: SB 1984].) The Legislature then eliminated the italicized face-of-the-document language in the final enactment. (MJN Ex. B, Tab 1, p. 10 [SB 1984 as amended on May 21, 1990].)

Nothing in the brief legislative history suggests that the Law Revision Commission or the Legislature considered the weighty issue of reformation. Section 6111.5 is an expansion of extrinsic evidence to solve a narrow concern about holographic wills, not a limitation on extrinsic evidence generally.

Section 21102. Section 21102 makes the appropriate interpretation of section 6111.5 all the more clear. Section 21102 is the modern and far more liberal counterpart to former section 105. It mandates that a testator's intent trumps rules of construction. (§ 21102; Recommendation on Rules of Construction for Trusts and Other Instruments (Nov. 2001) 31 Cal. Law Revision Com. Rep. (2001) pp. 174-175.) What's more, both its text and its legislative history explicitly do not constrain the courts' ability to further develop the law with regard to extrinsic evidence and reformation—topics the Legislature considered open questions.

The statute's text directs that it in no way "limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor." (§ 21102, subd. (c).)

Its legislative history is even more clear: The Law Revision Commission, which crafted the statutory text, intended neutrality—the statute neither limits nor expands the law regarding extrinsic evidence in

interpreting a will. (Recommendation on Rules of Construction for Trusts and Other Instruments (Nov. 2001) 31 Cal. Law Revision Com. Rep., *supra*, p. 175; Cal. Law Revision Com. com., West's Ann. Prob. Code (2011 ed.) foll. § 21102, p. 54.) The statute was not intended to address (much less statutorily foreclose) the availability of reformation for drafting mistakes—a subject that the Law Revision Commission thought required separate consideration. (Recommendation on Rules of Construction for Trusts and Other Instruments (Nov. 2001) 31 Cal. Law Revision Com. Rep., *supra*, p. 175; Cal. Law Revision Com. com., West's Ann. Prob. Code (2011 ed.) foll. § 21102, p. 54; Cal. Law Revision Commission Staff Memo 2001-85, p. 1 (Nov. 8, 2001) available at http://www.clrc.ca.gov/pub/2001/MM01-85.pdf.); see *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 947 [Law Revision Commission Reports "are entitled to substantial weight in construing the statutes"; "there is ordinarily strong reason to believe that the legislators' votes were based in large measure upon the explanation of the commission proposing the bill"].)

That said, section 21102 nonetheless suggests the result the charities advocate here. The Legislature enacted the statute to create uniformity among the rules of construction for all testamentary instruments including wills, trusts and beneficiary designations. (Recommendation on Rules of Construction for Trusts and Other Instruments (Nov. 2001) 31 Cal. Law Revision Com. Rep., *supra*, p. 172.) Although the Law Revision Commission was not certain whether trusts could be reformed, courts have since recognized that the power to reform trusts has long existed. (*Giammarrusco*, *supra*, 171 Cal.App.4th at p. 1604.) Bringing uniformity to the treatment of all testamentary instruments—section 21102's goal—

is all that remains to be done. And section 21102's basic premise—that testator intent governs over rules of construction—supports recognizing reformation.

Code of Civil Procedure. Like the Probate Code, Code of Civil Procedure section 1856 explicitly leaves open the question of will reformation. That statute applies to contracts, deeds and wills. (Code Civ. Proc., § 1856, subd. (h).) The statute defines the use of extrinsic evidence to resolve ambiguity, conforming statutory law to existing case law. (*Id.*, subds. (a)-(d); Recommendation Relating To Parol Evidence Rule (Dec. 1977) 14 Cal. Law Revision Com. Rep. (1977) pp. 147-149.) But the Legislature was clear that the statute does not prevent the use of extrinsic evidence to show "a mistake or imperfection of the writing . . . ." (Code Civ. Proc., § 1856, subd. (e).) As with the Probate Code sections on extrinsic evidence, the Legislature was following the courts' lead—not limiting their ability to develop the law.

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The Legislature's general policy in developing the Probate Code has been to relax formalities and other impediments to the carrying out of testator's actual intentions. Presumably recognizing the courts' greater expertise in considering and weighing the issues, the Legislature has left the development of extrinsic evidence law to the courts. The impediment to testator intent created by the courts can and should be removed by this Court.

B. Stare Decisis Should Not Bar Will Reformation.

We readily acknowledge that *Barnes*' holding is contrary to the position we advocate. But that should not deter the Court from adopting the modern and correct rule of law. Stare decisis is a guide, but it has never been a straitjacket in California. (E.g., *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 disapproving *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880 [holding there is no private right of action under Insurance Code section 790.03]; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 disapproving *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 [holding there is no tort claim for bad faith denial of contract]; *Sei Fujii v. California* (1952) 38 Cal.2d 718 disapproving *Porterfield v. Webb* (1924) 195 Cal. 71 [holding California Alien Land Act unconstitutional].)

As the Court observed in *Freeman & Mills, Inc. v. Belcher Oil Co.*, *supra*, 11 Cal.4th at p. 93, it is "well established" that stare decisis "is sufficiently flexible to permit this court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case" and that it "should not shield court-created error from correction." (See also *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 695 [stare decisis not mechanically applied to prohibit overruling prior decisions interpreting statutes].)

In evaluating whether to follow stare decisis, this Court looks at a number of factors, including how the rule has worked in practice, scholarly criticism and commentary, the trend in the law and the theoretical basis for the rule. (E.g., *Moradi-Shalal v. Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at pp. 296-303; *Freeman & Mills, Inc. v. Belcher Oil Co.*, *supra*,

11 Cal.4th at pp. 93-102.) As we have shown, those factors all point to overturning *Barnes*.

C. There Are No Sound Policy Arguments Against Will Reformation.

Cases refusing to allow reformation traditionally have relied upon two interrelated policy arguments: (1) that the testator is no longer available to defend his true intent and (2) interlopers therefore will have an undue incentive to assert an intent at odds with the will, opening the litigation floodgates. Neither argument withstands scrutiny.

1. The testator's unavailability poses no greater problem than in other contexts where reformation has long been permitted.

Because "the testator's lips have been sealed" (*Symonds v. Sherman* (1933) 219 Cal. 249, 256), some argue that the will's express language must be enforced no matter what because it is the testator's only protection against fabricated evidence—and so extrinsic evidence should be excluded and reformation prohibited. The answer is simple: A relevant witness' unavailability does not preclude reformation in any other context. Rather, the clear and convincing evidence standard resolves the problem.

1. Reformation of other writings is routinely available after the death of the person whose intent is being determined. That is true of trusts, life insurance policies, and other inter vivos transfers. (*Giammarrusco, supra*, 171 Cal.App.4th at p. 1603 [courts may "'reform an inter vivos trust even after the settlor is dead'"]; *Merkle v. Merkle, supra*, 85 Cal.App. 87

[reforming deed after grantor's death]; *Reformation of Wills, supra,* 130 U.Pa. L.Rev. at p. 524.)

2. Former Code of Civil Procedure section 1880, the "dead man statute," prohibited testimony about a decedent's statements as to his or her intent in the creation of a writing. But that statute was discontinued when the Evidence Code was enacted in 1965. (Cal. Law Revision Com. com., West's Ann. Evid. Code (1995 ed.) foll. Evid. Code, § 1261, pp. 308-309.) Evidence of a deceased witness's intent is not barred.

3. The concern is not even generally applied in the will context. California law permits a will or a portion of it to be disregarded if induced by fraud, duress, or undue influence rather than the testator's actual intent. (Prob. Code, § 6104; *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 602-603.) Evidence on these issues is necessarily extrinsic. And extrinsic evidence is admissible to construe ambiguities. (*Russell, supra,* 69 Cal.2d at pp. 209-210.) If the testator's unavailability presents no insurmountable hurdle in those circumstances, it can hardly pose one in determining whether a portion of a will was affected by a mistaken expression. (*Erickson, supra,* 716 A.2d at p. 99.)

4. Concerns about distorted intent can apply even when the party is still alive. In all cases, the question is the individual's intent *at the time of the writing*; that a living trustor or contracting party is still alive does not mean that their testimony about historical intent is inherently trustworthy. That is why a party seeking reformation bears the burden of establishing actual intent by clear and convincing evidence. (Pp. 25, 38, *ante.*) The same standard can protect the testator's intent.

5. The risk of subverting the testator's intent through extrinsic evidence is counterbalanced by the "risk of blindly enforcing a testamentary disposition that substantially misstates the testator's true intent." (*Erickson, supra,* 716 A.2d at p. 99.) This case is a textbook example. One cannot realistically contend that Irving Duke really *intended* for his estate to go to his estranged nephews, when he took pains to make clear they were to be disinherited.

The remedy for concerns about the testator's lips being sealed is to properly constrain reformation and the use of extrinsic evidence through appropriate evidentiary standards—the same solution used throughout the law.

2. A clear and convincing evidence standard protects against abuse and baseless litigation.

The other customary objection to reformation is "that allowing extrinsic evidence of mistake will give rise to a proliferation of groundless will contests." (*Erickson, supra*, 716 A.2d at p. 100 [rejecting this objection and allowing reformation].) As the Supreme Judicial Court of Massachusetts put it, the fear is that allowing reformation "would open the floodgates of litigation" and that "[t]he number of groundless will contests could soar." (*Flannery, supra*, 738 N.E.2d at p. 746.) The concern is baseless.

There is no reason to expect any increase in litigation. Nor does the availability of reformation of wills make abuse more likely than in any other context.

1. The judicial system has experienced no such unmanageable explosion of groundless suits in cases involving contracts, trusts, or any other areas that consider extrinsic evidence for reformation purposes. (*Erickson, supra*, 716 A.2d at p. 100.) Neither *Flannery* nor any other authority of which we are aware even attempts to explain why groundless will reformation claims would prove uniquely tempting.

2. Here, too, the remedy for the risk is to place an appropriate evidentiary constraint on the remedy—not to foreclose it. The Restatement approach is designed to keep any potential problem in check by warning counsel and client alike if an intended challenge does not meet the rigorous standard. (See §§ II.A.– B., II.C.5., *ante*.) *Flannery* rejects these safeguards as insufficient ipse dixit. (*Flannery, supra*, 738 N.E.2d at p. 746 & fn. 9.) It doesn't offer a hint of an explanation as to why a standard good enough for contract and trust reformation is insufficient for will litigation.

3. To the extent any "floodgates" fears reflect concern about the unpredictability of juries, there is no basis for that concern in California: Since 1988, probate cases, particularly those involving will interpretation, are tried to the court.[10] The Law Revision Commission recommended the change to section 8252 expressly because of jury unpredictability, the high

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[10] Former § 7200, Stats. 1988, ch. 1199, § 80.5 ("Except as otherwise expressly provided in this division [Administration of Estates of Decedents], there is no right to a jury trial in proceedings under this division"); § 825 ("Except as otherwise expressly provided in this code, there is no right to a jury trial in proceedings under this code"); § 8252, subd. (b), Stats. 1988, ch. 1199, § 81.5 and Stats.1990, ch. 79, § 14 ("The court shall try and determine any contested issue of fact that affects the validity of the will"); see also §§ 1452, 4504, 4754, 17006. The exceptions relate to conservatorships. (§§ 1823, 1827, 1863, 2351.5.)

reversal rate of jury verdicts, and the fact that the length of the process "gives unmeritorious contestants leverage to obtain compromise settlements to which they should not be entitled." (Recommendation Relating To Opening Estate Administration (Oct. 1987) 19 Cal. Law Revision Com. Rep. (1987) pp. 793-794.)

What this means is that California parties have the protection not only of a clear and convincing evidence standard, but also of a bench trial in which the admissibility of evidence "is different from the requirements in jury trials because a judge by virtue of training and knowledge of the law is capable of disregarding any impropriety and of differentiating between sound evidence and unsound evidence in deciding the case." (75B Am.Jur.2d (2012) Trial § 1671, footnotes omitted.) There is no such protection in non-will extrinsic evidence situations, and yet no one worries about floodgates there.

4. Certainly the unavailability of reformation didn't deter the claimants in the many cases discussed above and in the academic literature in which courts reformed wills under the guise of interpreting ambiguities. (§§ I.C., II.A., *ante*.) The "floodgates" argument suggests that without reformation, lawyers representing truly intended beneficiaries (such as those here) will—and should—advise their clients not to sue. But history proves otherwise, as does our fundamental expectation that lawyers be zealous advocates.

5. As for unscrupulous counsel or clients, the reality is that they exist in every area of litigation. There is no reason to expect a greater population in this kind of case. And those proven to be unscrupulous may be liable for malicious prosecution.

6. The fundamental call of equity to ensure that testamentary gifts reach their intended beneficiaries outweighs whatever amorphous speculation might exist about groundless suits. The Restatement's safeguards are very substantial constraints on baseless litigation. The fundamental question is whether truly intended beneficiaries—such as the charities here—should be denied their due just because *others*, in *other* cases, might be tempted to resort to baseless litigation. The answer must be "no."

* * *

There is no policy or other basis for a rule that *precludes* searching for and finding true testator intent in appropriate cases. The Court is free to abandon outdated restrictions on this process, and it should do so.

IV.

TO THE EXTENT THAT AMBIGUITY IS REQUIRED BEFORE SEEKING TO EFFECTUATE THE TESTATOR'S TRUE INTENT, IT EXISTS HERE.

As we have urged above, California should abandon the pretense of ambiguity when what is really happening is reformation. The Court should resolve this case by adopting the Restatement's progressive view and allowing reformation in accordance with Section 12.1.

But if ambiguity must remain a requirement, Irving's will is indeed ambiguous.

On one hand, Irving was explicit about wanting to disinherit every possible heir at law besides his wife and to make gifts to treasured charities in loving memory of his deceased mother, father, and sister. On the other

hand, Irving's failure to provide for his wife's earlier death ordinarily would require the estate to pass by intestacy to the same heirs at law whom the will expressly disinherited.

So which result did Irving intend? The two are in conflict—irreconcilable conflict. That makes the will ambiguous, because an ambiguity exists where provisions of a writing contradict one another. (Restatement, § 11.1, com. b ["ambiguity can arise in a variety of settings, for example, in a case in which two portions of a document conflict with one another"]; see *Shepard v. CalFarm Life Ins. Co.* (1992) 5 Cal.App.4th 1067, 1076 [internal inconsistency in insurance policy may result in ambiguity]; but see *Estate of Dye*, *supra*, 92 Cal.App.4th at p. 976 [claim of ambiguity requires "propos(ing) an alternative, plausible candidate of meaning" of particular language].)

We recognize that *Barnes* refused to find an ambiguity in the tension between a disinheritance clause and a provision that left a high likelihood of intestacy. (*Barnes*, *supra*, 63 Cal.2d at p. 583.) But even if *Barnes* was right on this point—we do not think it was—Irving's desire to benefit the charities makes this case substantially different. As the Court of Appeal put it, focusing just on the text of the will, "[i]t 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.) *Russell*—decided after Barnes—directs that extrinsic evidence is relevant to determine whether multiple meanings are proper, regardless of what a court might think the words mean without considering the extrinsic evidence. (*Russell*,

supra, 69 Cal.2d at p. 209.) The text of Irving's will, taken as a whole, at least suggests an uncertainty in Irving's intent.

Although deciding this case by finding an ambiguity in Irving's will would fail to clear up the broader issues discussed above, it would at least allow Irving's obvious intent to be honored—and unjust enrichment prevented.

CONCLUSION

California's approach to mistake correction in wills is out of step with modern jurisprudence and with California's own law regarding error correction in writings. It unnecessarily and formalistically sacrifices the testator's actual intent even when, as here, that intent is entirely clear.

The result is inconsistent outcomes, confused doctrinal lines, and suits in which parties must gamble that courts will blur the lines between mistakes and ambiguities in order to do justice.

It is time to retire the limited implied gifts doctrine to the history books and to replace it with the modern Restatement rule. It is time to recognize will reformation as advanced by scholars, the Restatement and a growing number of states. If not, the implied gifts doctrine should be revamped and liberalized. At a minimum, justice should be done under the clear facts of this case, regardless of doctrinal framework. The trial court's and the Court of Appeal's judgments should be reversed.

Dated: May 21, 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 **OPENING BRIEF ON THE MERITS** is produced using 13-point Roman type including footnotes and contains **13,422** 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: May 21, 2012

/s/ 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.

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(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