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

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ISSUES PRESENTED

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

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHY REVIEW IS NECESSARY

I.

CALIFORNIA LAW REGARDING IMPLIED TESTAMENTARY GIFTS IS CONFUSED AND CONFLICTING.

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

1. The source of the four corners rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

THE FOUR CORNERS RULE IS OBSOLETE AND SHOULD BE ABANDONED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

(Rest. 3d Property, § 12.1.)[11]

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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Dated: January 17, 2012

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