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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ESTATE OF IRVING DUKE, Deceased. ROBERT B. RADIN et al., Petitioners and Respondents, v. JEWISH NATIONAL FUND et al., Claimants and Appellants.	B227954 (Los Angeles County Super. Ct. No. BP108971)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Susan Cooley; Rodriguez, Horii, Choi & Cafferata, Reynolds Cafferata; Benedon & Serlin, Gerald Serlin, and Douglas Benedon for Claimants and Appellants.

Sacks, Glazier, Franklin & Lodise and Margaret Lodise for Petitioners and Respondents.

INTRODUCTION

In this proceeding to determine the rights of the parties under the holographic will of Irving Duke,[1] the trial court entered judgment in favor of Robert B. Radin and Seymour Radin, heirs at law of Irving who were not named in the will, and against the Jewish National Fund (JNF) and the City of Hope (COH), two charitable organizations named in the will. The trial court concluded that the will was unambiguous, and did not make any provision for the disposition of Irving's property in the event his wife predeceased him by several years, as actually occurred, and therefore intestacy resulted. Because we fully concur with the trial court's interpretation of the will and conclude that the applicable law compels the result reached by the trial court, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1984, Irving prepared a holographic will. The relevant provisions stated as follows: "I hereby give, bequeath and devise all of the property of which I may die possessed, whether real, personal or mixed, whether heretofore or hereafter acquired to my beloved wife, Mrs. Beatrice Schecter Duke . . . . [¶] Second — To my brother, Mr. Harry Duke, . . . 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." Irving indicated he had intentionally omitted all other persons, whether heirs or otherwise, not specifically mentioned, and specifically disinherited all persons claiming to be his heirs. Finally, he included a no contest clause, which provided that "[i]f any heir, devisee or legatee, or any other person

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[1] Because the testator and his wife, Beatrice, share the same surname, we refer to them by their first names to avoid confusion. No disrespect is intended.

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." In August 1997, Irving drafted a holographic codicil that stated: "We hereby agree that all of our assets are community property."

Beatrice, Irving's wife, died in July 2002. Irving died in November 2007, without children, predeceased children, or issue. A Los Angeles Deputy Public Administrator found Irving's will in his safe deposit box at his bank, and the will was admitted to probate. Irving's estate was valued in excess of $5 million.

Respondents Seymour and Robert Radin are Irving's sole surviving relatives; they are his nephews, the sons of Irving's sister, Rose Duke Radin.

In March 2008, COH and JNF filed a petition for probate and for letters of administration with will annexed. They requested the appointment of Matthew Bernstein, an employee of JNF, as administrator. The requested letters were issued and filed in May 2008, and Bernstein was appointed as the administrator with will annexed.

In October 2008, the Radins filed a petition for determination of entitlement to estate distribution, and for removal of Bernstein as administrator. They agreed the will was valid, but argued that the condition under which COH and JNF were to take—if Irving and Beatrice died at the same moment—had not been satisfied. The will did not address distribution of the estate where, as had occurred, Beatrice predeceased Irving by several years. The Radins contended that the result was a complete intestacy, and the estate should therefore pass to themselves as Irving's closest living relatives.

The Radins moved for summary judgment. COH filed opposition to the motion, in which JNF and Bernstein joined. They asserted in opposition that the trial court should consider extrinsic evidence of Irving's testamentary intent. To wit, in August 2003, Irving invited a senior gift planning officer for City of Hope to his home. He executed a "City of Hope Gift Annuity Agreement" and gave the COH representative checks totaling $100,000. On January 7, 2004, he did the same thing. During this second meeting, he told the COH representative that he was "'leaving his estate to City of Hope and to

Jewish National Fund.'" It was the representative's impression from their conversation that Irving had already prepared a will that included gifts to COH and JNF, not that he intended to do so in the future. Later the same month, on January 30, 2004, Irving once again executed a charitable gift annuity agreement, and gave the COH representative checks totaling $100,000.

The Radins filed a reply, asserting that because the will was not ambiguous, the court was not permitted to consider extrinsic evidence.

The trial court initially denied the motion for summary judgment for reasons not relevant here. The Radins filed a motion for reconsideration. The trial court granted the motion for reconsideration, and thereafter ordered entry of judgment in favor of the Radins.

The court found that the will was not ambiguous or uncertain, and therefore the court could not resort to extrinsic evidence in order to ascertain the intent of the testator. In reaching its conclusions, the court relied on *Estate of Barnes* (1965) 63 Cal.2d 580 (*Barnes*). We shall discuss *Barnes* in some detail below because we conclude that it governs the outcome in this case.

This timely appeal followed.

DISCUSSION

I. Standard of Review

"Under summary judgment law, any party to an action, whether plaintiff or defendant, 'may move' the court 'for summary judgment' in his favor on a cause of action (i.e., claim) or defense (Code Civ. Proc., § 437c, subd. (a))—a plaintiff 'contend[ing] . . . that there is no defense to the action,' a defendant 'contend[ing] that the action has no merit' (*ibid.*). The court must 'grant[]' the 'motion' 'if all the papers submitted show' that 'there is no triable issue as to any material fact' (*id.*, § 437c, subd. (c))—that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations]—and that the 'moving party is entitled to a

judgment as a matter of law' (Code Civ. Proc., § 437c, subd. (c))." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

"In moving for summary judgment, a 'plaintiff . . . has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant . . . must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (*o*)(1).)" (*Aguilar, supra*, 25 Cal.4th at p. 849.)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact . . . , is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See Civ. Code, §§ 1635-1661; Code Civ. Proc., §§ 1856-1866.) Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. (Civ. Code, §§ 1638, 1639; Code Civ. Proc., § 1856.)" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) In interpreting the will at issue here, we must observe the paramount rule that the will is to be construed according to the intention of the testator as expressed therein. Our

"objective is to ascertain what the testator meant by the language he used." (*Estate of Russell* (1968) 69 Cal.2d 200, 205-206, 213 (*Russell*).)

II. No Ambiguity Exists in the Will, and a Finding of Intestacy Is Inescapable

The will under consideration here is very similar to the one construed by the Supreme Court in *Barnes*, *supra*, 63 Cal.2d 580. There, the testatrix prepared a will declaring she was married, had no children, and intended by the will to dispose of all of her property. The will provided that all of her property was to go to her husband, who was also named the executor. The will further provided that "'[i]n the event that the death of my husband and myself shall occur simultaneously or within two weeks of each other, or in the same common accident or calamity, or under any circumstances causing doubt as to which of us survives the other, then, and in such event, I hereby give, devise and bequeath all of my estate of whatsoever kind and character and wheresoever situated, to Robert Earl Henderson [petitioner].'" The will also included a no contest clause and a disinheritance clause. (*Id.* at pp. 581 & fn. 3, 582.)

The husband of the testatrix predeceased her by more than five years. Upon the death of the testatrix, she was survived by heirs at law that included her brothers and sisters, and a nephew and nieces (children of brothers and sisters who predeceased her). Petitioner was not an heir at law because his mother, the testatrix's sister, survived. (*Barnes*, *supra*, 63 Cal.2d at p. 582.) Petitioner contended that he was entitled to succeed to the entire estate. Over the objection of the heirs at law, the trial court admitted evidence offered by petitioner that a special relationship existed between him and the testatrix when she executed the will (about 13 years before her death) and thereafter. The trial court concluded that there was "some uncertainty on the face of the will," and found in favor of petitioner.

The Supreme Court reversed the judgment, finding that "the will ma[d]e no disposition whatever of the property of testatrix in the event she outlived her husband by several years, as she did." (*Barnes*, *supra*, 63 Cal.2d at pp. 583, 584.) The court observed "that a will is to be construed according to the intention of the testator, and so as

to avoid intestacy." (*Ibid*., citing former Prob. Code, §§ 101, 102.) "However, a court may not write a will which the testator did not write. 'To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the . . . property. "Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended although not expressed." [Citation.]' (*Estate of Beldon* (1938) 11 Cal.2d 108, 112.)" (*Barnes*, *supra*, at p. 583.)

The court noted that the will demonstrated an awareness by testatrix that she might have no further opportunity to designate an alternate if she and her husband died simultaneously, so she named petitioner. But she did not include a provision or any indication of her intent if, as occurred, she was afforded sufficient time to review the will following her husband's death. (*Barnes, supra*, 63 Cal.2d at pp. 583, 584.) If she had considered the lack of a disposition of her property after her husband's death, she might have chosen petitioner, or she might have relaxed her disinheritance of other relatives, or selected different beneficiaries. "Under such circumstances any selection by the courts now would be to indulge in forbidden conjecture. (See *Estate of Maxwell* (1958) 158 Cal.App.2d 544, 549-551.) The declared intention of testatrix . . . to dispose of all of her property does not authorize the courts under the guise of construction to supply dispositive clauses lacking from the will. [Citation.]" (*Barnes*, *supra*, at pp. 583-584.)

The existence of the disinheritance clause did not alter the court's conclusion. "It is settled that a disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate a claim of pretermission. Such a clause does not and cannot operate to prevent the heirs at law from taking under the statutory rules of inheritance when the decedent has died intestate as to any or all of his property. [Citations.]" (*Barnes, supra,* 63 Cal.2d at p. 583.)

The court further concluded that the extrinsic evidence offered by petitioner about his relationship with the testatrix "d[id] not assist in interpreting the will. It may serve to

explain why petitioner was named as alternate beneficiary in the particular situation envisaged by paragraph Sixth of the will . . . , but that situation did not arise. The 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." (*Barnes, supra,* 63 Cal.2d at pp. 582-583.) On the subject of extrinsic testimony, the court cited former Probate Code section 105, which provided 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 . . . oral declarations' of the testator as to his intentions." (*Id.* at p. 582, fn. 6.)

Just as the court concluded in *Barnes*, Irving's will is not ambiguous. The will set forth his intent only in the event he predeceased his wife, or if they died "at the same moment."[2] It simply made no disposition whatsoever of the property in the event Irving outlived his wife by several years, as eventually occurred. However, this omission does not render the will ambiguous. We 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.) Furthermore, the existence in Irving's will of a disinheritance clause does not prevent respondents from taking under the statutory rules of inheritance where, as here, the decedent must be considered as having died intestate. (*Id.* at p. 583.)

In summary, we conclude that the *Barnes* decision is directly on point and controls our decision here. 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.)

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[2] Although the will in *Barnes* included more extensive, redundant formulations of the notion of simultaneous or near-simultaneous death, we conclude the language "at the same moment" is the functional equivalent of the language used in *Barnes*.

III. No Dominant Dispositive Plan Exists to Warrant Finding an Implied Gift

Appellants argue that "the general scheme of Irving's will produces the unyielding conviction that Irving intended to divide his estate between COH and JNF, rather than have it pass by intestacy to his estranged nephews." They rely on the case of *Brock v. Hall* (1949) 33 Cal.2d 885 (*Brock*), which the *Barnes* court considered but distinguished, stating that "[n]o such 'dominant dispositive plan' as referred to and held to warrant a gift by implication in [*Brock*] . . . is demonstrated by the provisions of the will now before us." (*Barnes*, *supra*, 63 Cal.2d at p. 584.) We shall briefly discuss *Brock* in order to demonstrate that it is readily distinguishable from the situation here.

In *Brock*, *supra*, 33 Cal.2d 885, a father established an inter vivos trust for the benefit of his two daughters. The trust instrument provided that upon reaching the age of 18, each daughter would receive half of the net income from the trust property, until reaching the age of 35, when each would receive half of the trust property outright. The trust instrument contained various provisions indicating the trustor's desired disposition of the property if, for example, either daughter died without having married, or if they died having married and leaving issue (or were married but without issue), and so forth. Before reaching age 35, the younger daughter died a widow, without issue. This precise scenario was not addressed in the trust instrument. The trustor contended that, since there was no provision for an express gift to the older daughter under these circumstances, the younger daughter's share of the property should revert to him.

The Supreme Court found applicable the law governing implied gifts in wills. In that regard, the court observed: "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." (*Brock*, *supra*, 33 Cal.2d at pp. 887-888.) However, in order to imply a gift, "the intention to make a gift [must] clearly appear[] from the instrument taken by its four corners and read as a whole, considering its general scheme, the property involved, and

the persons named as beneficiaries . . . . (*Estate of Franck* [(1922)] 190 Cal. 28, 31.) *Although the 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*, a gift will be raised by necessary implication where a reading of the entire instrument produces a conviction that a gift was intended." (*Brock, supra*, at p. 889, italics added.) The court concluded that an implied gift to the surviving daughter was necessarily implied in the trust instrument. The instrument did not provide for a reversion to the trustor under any contingency, and the general plan showed the trustor intended a surviving daughter to have all the property in the event the other specified beneficiaries (surviving husbands or issue) were not in existence. The apparent purpose of the trust was "to provide first for each daughter and her issue, and second, in case of her death without issue, for those next entitled to her bounty, namely, her sister and a surviving husband, if any." (*Id.* at pp. 890-891.) The court concluded that "the probability that the trustor intended to make a gift in this contingency *is so strong as to nullify the existence of any other possible intent*." (*Id.* at p. 892, italics added.)

Irving's will cannot be said to necessarily entail a dominant dispositive plan to leave his property to JNF and COH under any possible scenario. Its similarity to the will involved in *Barnes, supra*, is evident, and the Supreme Court's finding *Brock* to be distinguishable is controlling here.

IV. Extrinsic Evidence Is Inadmissible Where the Meaning of a Will Is Clear

Appellants contend that the decision in *Barnes* is no longer controlling because the court relied on a section of the Probate Code regarding extrinsic evidence, which was repealed in 1985. The statute at issue was former Probate Code section 105, which provided 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 . . . oral declarations' of the testator as to his intentions." (*Barnes, supra,* 63 Cal.2d at p. 582, fn. 6.) Appellants assert that under current law (i.e., the general rules of evidence), they

were permitted to introduce extrinsic evidence to demonstrate what Irving meant by the words used in his will, including his statement that he was leaving his estate to COH and JNF.

In fact, the *Barnes* court did consider the existence of extrinsic evidence regarding the relationship between the testatrix and petitioner.[3] However, the court found that such evidence did not assist in interpreting the will. "The 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." (*Barnes, supra,* 63 Cal.2d at pp. 582-583.)

The admission of extrinsic evidence in matters involving wills is addressed in Probate Code section 6111.5, which provides as follows: "Extrinsic evidence is admissible . . . to determine the meaning of a will or a portion of a will *if the meaning is unclear*." (Italics added.) As we have previously stated, there was no ambiguity in Irving's will that would permit the introduction of extrinsic evidence to explain it.

Appellants point to cases which hold that extrinsic evidence is always admissible, at least provisionally, to establish a latent ambiguity in a testamentary instrument. For example, the court in *Russell, supra*, 69 Cal.2d 200, 207, stated as follows: "Extrinsic evidence always may be introduced initially in order to show that under the circumstances of a particular case the seemingly clear language of a will describing either the subject of or the object of the gift actually embodies a latent ambiguity for it is only by the introduction of extrinsic evidence that the existence of such an ambiguity can be shown. Once shown, such ambiguity may be resolved by extrinsic evidence. [Citations.]" In *Russell*, the holographic will stated, "'I leave everything I own Real & Personal to Chester H. Quinn and Roxy Russell.'" (*Id.* at p. 203.) Extrinsic evidence was found to be properly admitted to establish that Roxy Russell was a dog, with the result that the court found that portion of the testamentary gift was void. (*Id.* at p. 214.)

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3 The testatrix's oral declarations regarding her intentions were apparently not offered into evidence, in accordance with Probate Code section 105.

The extrinsic evidence offered here did not serve to establish the existence of a latent ambiguity in the will at issue. Rather, there was simply an unambiguous failure on the face of the will to include a testamentary provision for the circumstances that occurred. Irving's purported oral declaration of intent cannot be used to fill in *omitted* terms of the will. His statement cannot be used to prove that his dominant dispositive purpose was to leave everything to the charities, because the meaning of the will was not unclear.

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."

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." In reaching this conclusion, it found the proffered extrinsic evidence did not assist in interpreting the will. In this regard, the court stated, "The 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." (*Barnes, supra,* 63 Cal.2d at pp. 582-583.) However, that is not the case here, as there is evidence of Irving's intentions after the death of his wife. After she died, Irving gave substantial amounts of money to the COH and told its representative that he was "'leaving his estate to City of Hope and to Jewish National Fund.'" The representative believed Irving had already made such a provision in a testamentary instrument. A few weeks after making that statement, Irving again delivered checks to the COH's representative. Recognizing "that a will is to be construed according to the intention of the testator, and so as to avoid intestacy" (*id.* 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.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.