Omissions Are [Still] Not Ambiguous

Problem: Clients seeking to pass assets to friends and family often desire to condition the gifts they are making. For instance, a testator may want a friend to receive an asset, but does not want that friend's children to receive the asset if the friend passes away before the testator. Drafters facing this situation often use conditionals, or "if… then…" language to express the testator's wishes. In the simple situation mentioned above, such language might be "I give all of my estate to John. If John and I die at the same time, then I give my estate to Charity." The idea embodied in this language is twofold. First, the testator does not want her children to receive her estate; she would like the estate to go to either John or Charity. Second, if John dies at the same time as the testator, she will not have time to revise her **will** to ensure the Charity receives her estate.

Problems arise when the condition never comes to pass. In the above example, if John dies well before the testator dies, then the condition upon which the Charity would receive the estate fails. Testator's estate, then, would pass to her children via intestacy, even though it is clear that the testator did not want her children to receive her estate.

The Case: The California Court of Appeal for the Second District lays out the law in this situation in ***Robert B. Radin v Jewish National Fund*** **Case No. B227954**, December 4, 2011. In *Radin*, the testator, Irving, created a **will** which essentially read "I give my estate to my wife, Beatrice. Should my wife and I die at the same moment, my estate is to be divided equally. One half is to be donated to City of Hope. One half is to be donated to the Jewish National Fund." Beatrice, however, predeceased Irving by over five years. When Irving died, the charities petitioned for and received letters of administration with **will** annexed. Irving's nephews, his heirs at law, filed a petition to determine who was entitled to the Irving's estate. Opposing the nephews' motion for summary judgment, the charities tried to submit **extrinsic** evidence that Irving's testamentary intent was to give his estate to the charities. This proposed evidence included testimony that Irving had made substantial gifts to the charities after Beatrice had died, and had given the charities the impression that he had already drafted a **will** that left his estate to the charities.

The trial court granted the nephews' motion for summary judgment, holding the proposed evidence inadmissible because it was **extrinsic** evidence, and it is well-settled that **extrinsic** evidence is only admissible to resolve **ambiguities** or uncertainties contained in a **will**. Because the **will** was not **ambiguous**, the evidence about Irving's gifts to the charities during the period between Beatrice death and his own, as well as his statements about already having drafted a **will** that gives his estate to the charities, could not be used to show his testamentary intent was to give his estate to the charities.

This rule seemed to strike the Court of Appeal as harsh. Clearly Irving was trying to give his estate to the charities. But the Court found Irving's situation to be almost identical to a situation faced by the California Supreme Court in ***Estate of Barnes***, a 1965 case that stands for the proposition that trial courts may not avoid intestacy based on a guess as to what the testator had intended but not expressed. That is, the question is not actually one of testator's intent, but rather one of ***expressed*** **intent**. The Court of Appeal seems to believe that this puts too fine a point on things. In a not-so-

subtle hint that the time may be ripe to overturn *Barnes*, the Court of Appeal headlines a section of its opinion with "a Finding of Intestacy is Inescapable." Finally, in concluding the opinion, the Court suggests "[p]erhaps 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."

The Takeaway: Irving's nephews were able to successfully thwart Irving's **will** because **extrinsic** evidence is not admissible to alter the dispositive provisions of a **will** unless the will is **ambiguous**. As *Radin* makes clear, *Barnes* is still controlling law in this area. There are lessons for both drafters and litigators in this case. First, drafters need to ensure that if a testator wishes to dispose of property through a **will** no matter what, any conditionals they use must account for every possible situation. Otherwise, as in *Radin*, intestacy results if a condition does not come to pass. Second, for litigators looking to invalidate a dispositive provision or suppress **extrinsic** evidence, pay careful attention to whether an argument can be made that a condition contained in a **will** has not occurred. Even overwhelming **extrinsic** evidence of testamentary intent will not save a dispositive provision of the condition on which it is based fails.

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