

By Mark J. Phillips

Packard v. Packard (2025)

By Expanding the Definition of Construction of Trusts, the Court of Appeal Reduces the Risk of Contest

The California Supreme Court expands the power of the trial court to admit extrinsic evidence to correct mistakes in wills, while reducing the consequences of a no-contest clause.

IN ESTATE OF DUKE (2015) 61

Cal.4th 871, the California Supreme Court expanded the power of the trial court to admit extrinsic evidence to correct mistakes in wills, a power neither statute nor case law permitted, holding that such intervention was required to avoid unjust enrichment, and to reduce the potentially confiscatory consequences of a no-contest clause.

In this year's case of *Packard v. Packard* (2025) 108 Cal.App.5th 1284, the Fourth Appellate District has further limited the reach of no contest clauses, excluding their application where litigants seek the Court's assistance in construction of a trust's language even where that language is not ambiguous on its face.

There, a trustor, Newton Roy Packard, settled a trust in 2010. The original trust instrument called for Newton's trust estate to be distributed in equal shares to his children, Gregory Packard and Scott Packard. The Trust contained a no contest clause. Two years later, in 2012, Newton executed an amendment to the trust, which provided that Gregory would receive Newton's residence, and Scott would receive a "sum equal to the value of" Newton's residence. Two years after that, in 2014, Newton apparently added a handwritten interlineation of the word "one-half" into the first amendment, so that it called for Scott to receive "a sum equal to one-half the value of" Newton's residence.

After Newton's death in 2020, Scott filed a petition in the Superior Court of San Diego County asking the court to "construe and reform the first amendment so that it accurately reflected what he alleged to be Newton's intent." That is, Scott asserted that the "one-half" interlineation was not an insertion into the sentence so that the amount distributable to Scott was changed, but a confirmation that Gregory and Scott would each receive "equal distributions from the trust."

Gregory filed a motion for judgment on the pleadings arguing that the petition for construction or reformation was really

a contest because Scott sought to invalidate the handwritten changes. Gregory argued, essentially, that Scott's petition sought to undermine Newton's intent by disputing the clear language in the trust—that Gregory should receive the entire residence but that Scott should receive only "one-half" the value of Newton's residence. The probate court agreed with Gregory, finding that there was no ambiguity and the court "may not consider extrinsic evidence regarding the circumstances under which a trust was made in order to interpret the trust instrument."

The Appellate court disagreed. The court reasoned that "[h]istorically, disputes over the interpretation of instruments have not usually been treated as violating a no contest clause," in part because California courts have the equitable power to modify the terms of the trust to serve the trustor's original intent. The court focused on the fact that Scott's petition did "not seek to Nullify his father's trust." In the Court's terms, Scott was merely attempting to establish the trustor's true intent, not thwart it.

In reaching its decision, the Court looked to the precedent of *Duke*. In that case the decedent, Irving Duke, handwrote his own will in October of 1984. He left his estate to his wife, Beatrice, and provided that should he and his wife "die at the same moment" the estate was to be equally distributed to charities important to him.

Beatrice died in 2002. After her death, Irving told representatives of one of the charities that he was leaving his estate entirely to both charities and, in fact, made lifetime gifts against that ultimate distribution. On his death in 2007, his intestate heirs, two nephews, claimed that the estate went to them by intestacy since Irving and Beatrice did not die *at the same moment*. Although Irving made it clear during his lifetime that he intended his estate to pass to the two

“**PACKARD CONTINUES THE TREND OF LIBERALIZING THE RULES REGARDING USE OF EXTRINSIC EVIDENCE TO CONSTRUE AN INSTRUMENT THAT IS NOT, ON ITS FACE, AMBIGUOUS.**”

charities if his wife did not survive him, his will provided only for the contingency of simultaneous death; it was silent on what happened if he survived his wife. The charities sought to admit the extrinsic evidence of his statements, based on the theory of mistake, to demonstrate his intent.

For centuries, testamentary instruments have been interpreted in a way that excludes all content, written or oral, outside the four corners of their pages. This is because testamentary disposition requires a time-tested formality to assure reliability. Codified in Probate Code Section 6110, that formality requires a writing and attestation. Extrinsic oral statements lack the quality of a writing, and extrinsic writings generally lack attestation. This doctrine, known as the Plain Meaning Rule, permitted extrinsic evidence to be considered by a court only when an ambiguity was obvious, or "patent," on the face of the will, such as a misdescribed asset. Words or phrases



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that were not susceptible to more than one meaning were not ambiguous.

In the seminal case of *Estate of Russell* (1968) 69 Cal.2d 200, the California Supreme Court reconsidered the admission of extrinsic evidence in the face of all ambiguities. In *Russell*, decedent Thelma Russell left her estate in equal shares to Chester H. Quinn and Roxy Russell. Quinn was a friend and tenant of the decedent, but Roxy was an Airedale dog. Unambiguous on its face, the testamentary problem arose only if extrinsic evidence was admitted to show that Roxy was an impermissible beneficiary under California law. The court in *Russell* set out a new rule for extrinsic evidence, ruling that extrinsic evidence can be offered to demonstrate that an ambiguity, latent or patent, exists in a will. If the court finds such an ambiguity the extrinsic evidence remains to help clarify the intention of the decedent. If the court finds that no ambiguity exists, the extrinsic evidence is excluded.

Unlike ambiguities, however, mistakes of a testator in the drafting of a will historically were not corrected nor extrinsic evidence admitted to demonstrate or correct such an error.

In deciding *Duke*, the Supreme Court rejected this limitation. Because the will was not ambiguous, merely incomplete, there was no issue of construction under *Russell* to permit admission of extrinsic evidence. Rather, the Supreme Court ruled that extrinsic evidence was admissible to permit a court to reform mistakes in wills, holding:

“If a mistake in expression and the testator’s actual and specific intent at the time the will was drafted are established by clear and convincing evidence, no policy underlying the statute of wills supports a rule that would ignore the testator’s intent and unjustly enrich those who would inherit as a result of a mistake.”

In reaching this conclusion, the *Duke* court drew on what it perceived as an existing trend of liberalizing the statute of wills, including *Russell*’s decision on the admission of extrinsic evidence in cases involving ambiguity, and codification of the substantial compliance rule of Probate

Code Section 6110(c)(2), which permits the admission of wills that nearly, but not entirely, satisfy the requirements of a validly attested will.

When *Duke* was decided, there was concern that the Court had increased the likelihood of litigation in probate matters, opening the floodgates to spurious challenges to wills that were otherwise unambiguous. In *Wilkin v. Nelson* (2020) 45 Cal.App.5th 802, the Court of Appeal demonstrated that the expanded *Duke* approach could be exercised in a manner both sensible and judicious.

In *Wilkin*, Hanako Nelson hired an attorney to prepare a trust to pass her separate property to her sons when she died, and the evidence presented at trial was clear that she had no intention of disposing of her share of her community property. Nonetheless, along with a trust to hold the separate property and a deed of conveyance, the attorney prepared a will that poured over all of the residue of her property, separate and community alike, to that trust. On challenge, the trial court found that clear and convincing evidence supported equitable reformation of the will to provide for testamentary disposition of Hanako’s separate property only.

The court of appeal affirmed, stating:

“Applying *Duke*’s two-prong standard [clear and convincing evidence both of a mistake and the testator’s actual intent], we conclude substantial evidence supports the probate’s court’s decision to equitably reform the pour-over will...Given the probate court’s finding that Hanako intended at the time the trust and pour-over will were drafted to provide for testamentary control and disposition of only her separate property, the decision to reform the pour-over will to conform to that actual and specific intent was well within the court’s discretion.”

Since *Russell*, litigants have been entitled to present clear and convincing extrinsic evidence to establish that a will is ambiguous and courts already have experience in dealing with these issues. By setting a similar standard, *Duke*

reversed more than a century of black letter law in establishing a procedure to do the same in cases of mistake. In so doing, it brushed aside concerns that such a rule would result in increased probate litigation and expense.

Now, *Packard* continues the trend of liberalizing the rules regarding use of extrinsic evidence to construe an instrument that is not, on its face, ambiguous. In doing so, however, *Packard* goes even one step further: *Packard* concludes that a petition that seeks on its face to make use of extrinsic evidence to clarify the intention of a trustor should not necessarily be considered a contest, even where the construction advanced by the petition is contravened by the plain language of the instrument. The *Packard* court recognized that some cases defined a “contest” as a proceeding intended to frustrate the trustor’s intent as expressed in the donative instrument. Nonetheless, it found that:

To the extent this language might be read to suggest that any petition for reformation of unambiguous language necessarily constitutes a trust contest, we do not believe it can survive the Supreme Court’s 2015 elimination of “the historical rule that extrinsic evidence is inadmissible to reform an unambiguous will.

Undoubtedly, the *Packard* decision will open the courthouse doors to those litigants that would otherwise be concerned about the consequences of being on the wrong side of a no contest clause. While application of a no contest clause would not, even before *Packard*, turn on the titling of a petition as a “contest,” *Packard* now establishes that a petition can—after *Duke*—avoid triggering a no contest clause by framing its relief as establishing the trustor’s true intent, even where that intent is found nowhere in the four corners of the document. 

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