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How to Beat the Pretermitted Heir Statute

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How To Beat the Pretermitted Heir Statute

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THE decedent, aged sixty-one, committed suicide on May 7, 1963,[1] leaving a formal witnessed will executed forty days earlier.[2] The will was admitted to probate. Various individual legatees were listed, and the American Heart Association, Inc., was named residuary legatee.[3] The will did not mention decedent's daughter by name, or even indicate that she had a daughter, but declared:

> FIFTH. Except as otherwise provided in this Will, I have intentionally and with full knowledge omitted to provide for my heirs, including my son GARETH DESMOND WINTON.[4]

The omitted daughter filed a petition to determine heirship.[5] At the trial, the attorney who drew the will testified that testatrix had indicated to him that she was greatly disappointed in her family[6] and that she had been quite reluctant to mention her son in the will.[7] He further stated that when testatrix was asked at length whether she had other children, she was very equivocal and reticent to the point of not speaking in response to the question for a minute or two.[8] She finally denied having other children.[9]

A qualified psychiatrist testified that "Repression is the uncon-

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[1] Clerk's Transcript, p. 13, Estate of Lipovsky, 238 Cal. App. 2d 604, 48 Cal. Rptr. 41 (1965), *petition for hearing denied*, 64 A.C. Feb. 2 minutes at 9 (1966). [Hereinafter cited as Clerk's Transcript.]

[2] *Id.* at 2.

[3] *Id.* at 1-2.

[4] Estate of Lipovsky, 238 Cal. App. 2d 604, 606, 48 Cal. Rptr. 41, 42 (1965).

[5] The petition was filed to institute a proceeding to determine heirship under Cal. Prob. Code §§ 1080-82. The petition was in the usual form and notice was given as required by law. Clerk's Transcript, pp. 5-6.

[6] Reporter's Transcript, p. 12, Estate of Lipovsky, *supra* note 4.

[7] *Id.* at 14.

[8] *Id.* at 15.

[9] *Ibid.*

scious, unintentional covering or hiding, the putting back into the unknown layers of the mind a desire, an urge, a feeling or a memory"[10] He stated that successful repression is a frequent phenomenon,[11] and that it is not unusual for a parent to successfully repress memory of a child in whom the parent is disappointed.[12] Further, the psychiatrist testified, in substance, and in response to a hypothetical question, that in his opinion it was medically probable that testatrix had successfully repressed the knowledge of the existence of her daughter, and that such repression would have the effect of eliminating from her mind the knowledge that she had a daughter.[13]

The residuary legatee appeared alone in opposition to the petition,[14] presented no evidence, and objected to all the evidence presented by petitioner.

Petitioner's theory was that she came within the terms of Probate Code section 90, the California pretermitted heir statute which provides:

> When a testator omits to provide in his will for any of his children, or for the issue of any deceased child . unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

The only reference in the will from which it could possibly appear that the omission to provide for petitioner was intentional, as is required by the explicit language of the statute, is the reference in paragraph FIFTH, quoted *supra*, to intentional omission of provision for "heirs." Petitioner was neither named in the will nor described by the more specific words "daughter," "children," or "issue", only the word "heirs" was used.[15]

The trial court, after considering the extrinsic evidence outlined

[10] *Id.* at 22.

[11] *Id.* at 25.

[12] *Id.* at 26-27.

[13] *Id.* at 30-31.

[14] Clerk's Transcript, p. 15.

[15] The clause used was adapted from a form clause recommended in pamphlets on wills widely distributed by two California banks. BANK OF AMERICA, SUGGESTED PROVISIONS FOR WILLS AND TRUSTS 21 (5th ed. 1964); SECURITY FIRST NATIONAL BANK, FORMS OF WILLS AND TRUSTS 15 (7th ed. 1962). The Bank of America form clause is more specific, stating that testator has intentionally omitted to provide for his heirs "including my children and the issue of any deceased child." BANK OF AMERICA, *op. cit. supra* at 21. A nearly identical clause is set forth in CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING §§ 7.28-.30, 19.16 (1965), but its use is not recommended and naming children and issue of deceased children is said to be a better method of complying with § 90.

above, found as facts that petitioner was the daughter of decedent[16] and that the omission of provision for petitioner in decedent's will was unintentional.[17] Judgment was entered for petitioner entitling her to distribution of one-half of the estate.[18]

The district court of appeal reversed the judgment, concluding that "as a matter of law" the language found in paragraph FIFTH of the will indicated an intent on the part of the testatrix to omit provision for her daughter.[19] The court held that extrinsic evidence was *not* admissible to prove testatrix's lack of intent to omit her daughter. A petition for a hearing in the California Supreme Court was denied.[20]

Thus, to the extent that the opinion of a district court of appeal, reinforced by a denial of a hearing in the supreme court, can be relied upon as a correct statement of California law,[21] the way to beat the pretermitted heir statute is to insert after the dispositive clauses the clause: "Except as otherwise provided in this will, I have intentionally and with full knowledge omitted to provide for my heirs." This will signify an intent to omit provision for any child or grandchild not named in the will.[22] No evidence to the contrary may be received.[23] It is probably the safer course not to attempt an enumeration of the intentionally omitted "heirs," lest the enumeration be incomplete, as

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[16] Clerk's Transcript, p. 45.

[17] *Ibid.*

[18] *Id.* at 45-46.

[19] 238 Cal. App. 2d at 610, 48 Cal. Rptr. at 45.

[20] 64 A.C. Feb. 2 minutes at 9.

[21] More petitions for hearings in the supreme court after decision by a district court of appeal are denied than are granted, and the effect of a denial as settling the law is difficult to determine. For an interesting attempt at analysis of the factors considered by the court in granting or denying a hearing, see generally Note, *To Hear or Not to Hear: A Question for the California Supreme Court* (pts. 1-2), 3 STAN. L. REV. 243 (1951), 4 STAN. L. REV. 392 (1952). The grounds on which a disappointed litigant may petition for a hearing in the supreme court after decision in the district court of appeal are set forth in CALIFORNIA RULES OF COURT rule 29. The most important ground is where a hearing in the supreme court appears necessary to secure uniformity of decision or the settlement of important questions of law. CALIFORNIA RULES OF COURT rule 29(a)(1).

[22] Estate of Lipovsky, 238 Cal. App. 2d 604, 606-10, 48 Cal. Rptr. 41, 44-45 (1965).

[23] Note that the exclusion of all extrinsic evidence would bar every claimant, no matter how certain it was that his omission was unintentional or due to a mistaken belief in the mind of the testator about his death. To use a familiar classroom case, the loved son presumed dead in the war would now return from the prison camp to find that his claim to a share in his deceased father's estate was absolutely barred by the presence of a *Lipovsky* type clause in his father's will. A similar situation existed in Estate of Torregano, 54 Cal. 2d 234, 5 Cal. Rptr. 137, 352 P.2d 505 (1960).

in *Estate of Lipovsky*,[24] and raise some doubt as to the testator's intent.[25] Perhaps it is safest for the attorney not to even talk to the testator about children or grandchildren, lest, if *Lipovsky* is overruled, he is required to give testimony similar to that given by the draftsman there.[26]

While this appears to be the way to beat Probate Code section 90, there is some doubt that the legislature intended it to be so, and some hope that it will not remain so forever.

Lipovsky and Torregano

The district court of appeal in *Lipovsky* reached its holding by this chain of reasoning. A testator can disinherit a child, although his intention to do so must appear on the face of the will.[27] It is not necessary that the child be named in the will.[28] It is enough that a class be intentionally omitted that can include a child.[29] It is settled that the

[24] 238 Cal. App. 2d 604, 48 Cal. Rptr. 41 (1965). See text accompanying note 4 *supra*.

[25] The doubt raised by an incomplete enumeration is expressed by the question: if testator named some of the disinherited children, why did he not name the others? It appears that an incomplete list of children, together with the fact of existence of unnamed children, gives rise to a latent ambiguity. And it is well settled law that extrinsic evidence is admissible to resolve a latent ambiguity, Estate of Torregano, 54 Cal. 2d 234, 246, 352 P.2d 505, 512, 5 Cal. Rptr. 137, 144 (1960). This argument was advanced by petitioner in *Lipovsky*, but the district court of appeal dismissed the argument by stating that the clause was not internally inconsistent, which, if true, disposes only of the *patent* ambiguity question. The court stated further that the failure to mention petitioner by name did not dictate the conclusion that testatrix did not have her in mind, which is irrelevant, as it is not necessary that the facts which give rise to a latent ambiguity dictate the resolution of that ambiguity. Estate of Lipovsky, 238 Cal. App. 2d 604, 610-11, 48 Cal. Rptr. 41, 45 (1965). Of course where there is a danger that the enumeration might become partial due to the potential birth of children after the execution of the will, the inclusion of a phrase indicating an intent to disinherit afterborn children as a specifically described class would make it practically impossible to claim or prove any ambiguity or any lack of intent to omit. This would be true even if extrinsic evidence were admissible, as the presumption of intent to omit from such a combined list and general clause would be very strong.

[26] 238 Cal. App. 2d at 608, 48 Cal. Rptr. at 43.

[27] Estate of Hassell, 168 Cal. 287, 142 Pac. 838 (1914); Estate of Stevens, 83 Cal. 322, 23 Pac. 379 (1890).

[28] Van Strien v. Jones, 46 Cal. 2d 705, 299 P.2d 1 (1956); Estate of Kurtz, 190 Cal. 146, 210 Pac. 959 (1922). It should be noted that *Van Strien v. Jones, supra*, as well as other cases were said to have come before the courts under circumstances where proof of lack of intent to omit was not offered. Estate of Torregano, 54 Cal. 2d 234, 254 n.9, 5 Cal. Rptr. 137, 149 n.9, 352 P.2d 505, 517 n.9 (1960). Justice Spence, in his dissent joined by Justices Schauer and McComb, was of the opinion that *Torregano* could not be reconciled with *Van Strien*. *Id.* at 254, 5 Cal. Rptr. at 149, 352 P.2d at 517 (dissenting opinion).

[29] Van Strien v. Jones, *supra* note 28; Estate of Lindsay, 176 Cal. 238, 168 Pac. 113 (1917); Estate of Hassell, 168 Cal. 287, 142 Pac. 838 (1914).

term "heirs" precisely describes children and issue of deceased children.[30] Therefore, the clause used is sufficient as a matter of law to indicate an intent to exclude petitioner.

But in 1960, subsequent to all but one[31] of the cases cited in support of this reasoning, the California Supreme Court decided *Estate of Torregano*.[32] In 1915 Torregano had been told under convincing circumstances that his daughter was dead.[33] His 1947 will stated, "I am a widower and have no children, issue of my marriage ."[34] and further stated

> THIRTEENTH. I give, devise and bequeath to any person or persons who may contest this my Last Will and Testament, or assert any claim to share my estate by virtue of relationship or otherwise the sum of One Dollar ($1.00) each in settlement of their said claim or claims.[35]

The supreme court held that extrinsic evidence, in this case evidence that showed testator mistakenly believed his daughter was dead, was admissible to prove testator's lack of intent to omit from his will any provision for a presumptive heir.[36] The court determined that this exact question had never been decided,[37] although there were several cases where such evidence had been allowed,[38] and numerous cases with dicta that such evidence would not be allowed.[39] Furthermore, it was found that the mistake which caused testator to omit provision for his child could not possibly appear from the will, and therefore extrinsic evidence must be contemplated by the statute.[40] The court distinguished cases cited by respondent for the proposition that appellant was excluded from the estate as a matter of law by paragraph Thirteenth on the grounds that the will, as a whole, indicated that testator did not intend that the daughter be barred by the no contest clause,[41] and also that the case involved something more than a no contest clause.[42] The court concluded that more than the general lan-

[30] Estate of Cochems, 112 Cal. App. 2d 634, 247 P.2d 131 (1952).

[31] The one later case cited was Estate of McClure, 214 Cal. App. 2d 590, 29 Cal. Rptr. 569 (1963), and the holding of that case was misstated. See note 66 *infra* and accompanying text.

[32] 54 Cal. 2d 234, 5 Cal. Rptr. 137, 352 P.2d 505 (1960).

[33] *Id.* at 241-42, 5 Cal. Rptr. at 141, 352 P.2d at 509.

[34] *Id.* at 239, 5 Cal. Rptr. at 139, 352 P.2d at 507.

[35] *Ibid.*

[36] *Id.* at 243, 5 Cal. Rptr. at 142, 352 P.2d at 510.

[37] *Id.* at 243-45, 5 Cal. Rptr. at 142-43, 352 P.2d at 510-11.

[38] *Id.* at 244, 5 Cal. Rptr. at 142, 352 P.2d at 510.

[39] *Id.* at 244-45, 5 Cal. Rptr. at 143, 352 P.2d at 511.

[40] *Id.* at 246, 5 Cal. Rptr. at 144, 352 P.2d at 512.

[41] *Id.* at 251-52, 5 Cal. Rptr. at 147-48, 352 P.2d at 515-16.

[42] *Id.* at 253-54, 5 Cal. Rptr. at 149, 352 P.2d at 517.

guage found in paragraph Thirteenth should be required to exclude a claim of pretermission by a daughter of whose existence the testator was unaware and further, that the issue of pretermission was a question of fact.[43]

The *Lipovsky* court distinguished *Torregano* on the ground that that case involved a no contest clause rather than a disinheritance clause.[44] This distinction furnished some support to the court in *Lipovsky*, which, however, took no note of the fact that the *Torregano* opinion also pointed out that some of the older cases were decided under circumstances where proof of lack of intent was not offered.[45]

It should indeed require more than general language to conclusively exclude a child from attempting to prove that he comes within the operation of section 90. And it should require more than general language whether such language appears in the form of a general disinheritance clause, as in *Lipovsky*, or in the form of a general no contest clause, as in *Torregano*.

Torregano Should Be Extended

The *Torregano* decision, if it means anything, must mean that extrinsic evidence is admissible to show unintentional omission where there is *some* indication of intent to omit on the face of the will. This is so because the court there must have recognized that there had been some indication of intent to omit the daughter in the no contest clause since, if there were none, it would not have appeared "from the face of the will that such omission was intentional," and the pretermitted heir statute would have applied automatically, without any extrinsic evidence of intention.[46] Proof of relationship alone would have established petitioner's status as a pretermitted heir[47] and it would not have been necessary to hold that extrinsic evidence of intention was admissible.

Further, although the *Torregano* decision indicated that it could not be determined as a matter of law that the no contest clause was

[43] *Id.* at 254, 5 Cal. Rptr. at 149, 352 P.2d at 517.

[44] Estate of Lipovsky, 238 Cal. App. 2d 604, 611, 48 Cal. Rptr. 41, 45 (1965).

[45] Estate of Torregano, 54 Cal. 2d 234, 254 n.9, 5 Cal. Rptr. 137, 149 n.9, 352 P.2d 505, 517 n.9 (1960).

[46] Plaintiff in *Torregano* introduced much evidence at the trial over the objection of defendant to show that testator had not intended to omit her. The evidence is summarized in 54 Cal. 2d at 241-42, 5 Cal. Rptr. at 141, 352 P.2d at 509.

[47] CAL. PROB. CODE § 90 provides that a child, or issue of a deceased child, omitted from a will (who has not received a settlement or an equal proportion by way of advancement) will succeed to its intestate share unless it appears from the will that the omission was intentional. Thus a child *will take* unless there is some indication of intentional omission on the face of the will.

intended to apply to the daughter,[48] it is clear from the plain words of the clause, "I give . to any person who may assert any claim to share in my estate by virtue of relationship the sum of One Dollar,"[49] that in the absence of the extrinsic evidence which was admitted, the clause could have been meant to apply to the daughter. The words exactly described a class of which petitioner, as soon as she claimed a share of the estate as a pretermitted heir, was a member. The question, then, is no longer to be decided by reading the will and saying either, yes, there is sufficient indication of intention to omit, or no, there is not sufficient indication of intent to omit. In all but the clearest cases—those in which it clearly and convincingly appears on the face of the will that testator had the child in mind at the time of executing the will and, having the child in mind, omitted to provide,[50] or those where there is no indication of intentional omission on the face of the will—extrinsic evidence is admissible to show lack of intent to omit in order to overcome any indication of intent to omit which does appear on the face of the will.[51]

Thus *Torregano* should not be dismissed as a holding that a no contest clause is no indication of intent to omit. Rather, the logical extension of the rule of the case, though the opinion was cautiously limited to the facts at hand, is that extrinsic evidence is admissible to show lack of intent to omit whenever there is some general phraseology on the face of the will which shows intent to omit in a manner not sufficiently strong and convincing.[52] The statements in *Torregano* differentiating the general disinheritance clause cases from no contest clause cases do not appear to have been determinative when one recognizes that the evidence was held admissible against a clause which did show some intent to omit. It is submitted that the presence of either type of general phraseology, in light of *Torregano*, should give rise only to an inference of intent to omit which is rebuttable by extrinsic evidence to show lack of intent to omit.[53]

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[48] 54 Cal. 2d at 252, 5 Cal. Rptr. at 148, 352 P.2d at 516.

[49] *Id.* at 239, 5 Cal. Rptr. at 139, 352 P.2d at 507.

[50] That this is the requirement for intentional omission, see the cases cited in paragraph "(10)" of the *Torregano* opinion, 54 Cal. 2d at 249, 5 Cal. Rptr. at 146, 352 P.2d at 514.

[51] Extrinsic evidence of intent to omit is not admissible by the terms of the statute. 54 Cal. 2d at 247, 5 Cal. Rptr. at 146, 352 P.2d at 513.

[52] The *Torregano* decision quoted Estate of Hassell, 168 Cal. 287, 288, 142 Pac. 838, 839 (1914), to the effect that a strong and convincing showing of intent to exclude children must appear on the face of the will before their "natural rights" to share in the inheritance of their immediate ancestors shall be taken away. 54 Cal. 2d at 249, 5 Cal. Rptr. at 146, 352 P.2d at 514.

[53] In a note on *Torregano*, it was concluded: "A more plausible explanation is that

The true issue in a pretermitted heir case is whether it appears on the face of the will that testator had the child in mind at the time of executing the will.[54] The purpose of the statute is to guard "against the omission of lineal descendants by reason of oversight, accident, mistake, or unexpected change of condition."[55] The court should thus scrutinize the will to see how clearly and strongly the testator indicated that he had his children in mind, *not* how clearly and strongly he indicated an intent to disinherit a general class which could include his children. In this connection one may note that a child named in a will and not provided for cannot take as a pretermitted heir, even if the will contains no disinheritance clause whatsoever.[56]

The importance of this observation is that it focuses attention on the fact that the strength of a clause which is argued to show some intent to omit a child is determined by the clarity and lack of ambiguity with which the clause refers to the child, and not by the form of the clause, whether it is a disinheritance clause, a no contest clause, or even a list of children. As a matter of common sense, the use of the word "heirs" in a general disinheritance clause is no more an indication that a testator had a particular child in mind than is the use of the word "relations" in a general no contest clause. As pointed out above, *Torregano* was a case of first impression. Many of the prior decisions had been rendered without attempted proof of extrinsic circumstances showing lack of intent to omit, and many of those decisions must be reevaluated in light of *Torregano*. It is not to be supposed that the use of a general clause of disinheritance is no longer some evidence of intent to omit children,[57] but, where only a general class description

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the court has overruled *Fernstrom* to the extent that general language such as 'heirs' will no longer be sufficient as a matter of law to exclude a presumptive heir of whom testator is unaware. A jury may still find that the testator would have disinherited the child even if he had known of her existence; however, to disinherit such an omitted child without allowing the admission of any extrinsic evidence, the language of the will must show affirmatively that such a sweeping omission was actually the intent of the testator. Language falling short of this, but which would have been sufficient to show an intent to omit in the past, now would give rise to 'an inference of intent to omit provision for a presumptive heir,' rebuttable by extrinsic evidence." Note, 8 U.C.L.A.L. REV. 476, 479 (1961). (Footnotes omitted.)

[54] See Estate of Torregano, 54 Cal. 2d 234, 249, 5 Cal. Rptr. 137, 146, 352 P.2d 505, 514 (1960). Whether claimant has been provided for by way of settlement or advancement can of course be an issue under the California statute, but this is a separate question.

[55] *Id.* at 248, 5 Cal. Rptr. at 145, 352 P.2d at 513.

[56] Estate of Fanning, 8 Cal. 2d 229, 64 P.2d 951 (1937); Estate of Sawyer, 193 Cal. App. 2d 471, 14 Cal. Rptr. 450 (1961); Estate of LaBrie, 130 Cal. App. 2d 235, 278 P.2d 760 (1955).

[57] Indeed if this were true, the result would be that a man desiring to disinherit

is relied upon to show intent to omit a particular child, logic and the policy of the statute support the admission of extrinsic evidence of the circumstances and the state of testator's mind to show lack of intent to omit.[58] The class description would create a presumption of an intent to omit, the strength of which might logically vary with the degree of specificity of the class description,[59] and the evidence of unintentional omission should be required to be strong enough to overcome the presumption.

Torregano stated with reference to the general description situation there:

> Such general language, referring as it does to a large class of persons, cannot be deemed, as a matter of law, necessarily to include a close relative who the testator mistakenly thought dead.[60]

And the court continued with reference to general phraseology:

> [T]he statement made in the Wilson opinion to the effect that specific words of kinship must be interpreted in light of circumstances of each individual case, and not by slavish adherence to the interpretation placed upon the same words under a different state of facts, is a correct statement of law
>
> Mere general phraseology, standing alone, cannot be construed to indicate an intent to omit provision for a presumptive heir, under every possible circumstance, even if such phraseology includes the word "heirs."[61]

In other words, general phraseology should not exclude as a matter of law, under all circumstances, competent evidence which might prove that testator was in fact unaware of the existence of a child.

Cases Since Torregano

Two cases decided since *Torregano* are helpful in determining the extent of the rule of that case.

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his children and grandchildren would have to name each one, as they were born, in a codicil to his will, and specifically disinherit them. This result is neither likely nor desirable.

[58] Otherwise, the statute becomes a dead letter in the presence of the form clause used in *Lipovsky*. The mistake or oversight which caused testator to omit the claimant can never be proved from the face of the will. Estate of Torregano, 54 Cal. 2d 234, 246, 5 Cal. Rptr. 137, 144, 352 P.2d 505, 512 (1960).

[59] For example a clause disinheriting "my children A and B, and any children hereafter born to the marriage of my wife and myself, and any issue of any of my children who predecease me" would create a stronger presumption of intent to omit those covered by the pretermitted heir statute than a clause disinheriting "my heirs."

[60] 54 Cal. 2d at 248, 5 Cal. Rptr. at 145, 352 P.2d 513.

[61] *Id.* at 250-51, 5 Cal. Rptr. at 147, 352 P.2d at 515.

In *Estate of McClure*[62] the will did not mention testatrix's granddaughter, but provided that if any person contested the will, claimed to be an heir to any part of the estate, and successfully established the fact, such person would receive one dollar.[63] The trial court allowed extrinsic evidence to be introduced by the granddaughter in support of her claim of pretermission.[64] The trial court found that the will expressed an intent to disinherit the claimant, and found against her. On appeal, the court rejected claimant's contention that the finding of intent to omit was erroneous as a matter of law [65] But the district court of appeal did not hold or suggest that the admission of extrinsic evidence to show lack of intent to omit was error. The conclusion was that "absent any factors indicating a contrary conclusion," the language of the will was a sufficient indication of intent to omit the granddaughter to comply with the requirement of section 90.[66] In addition, the court pointed out that the intent expressed by a class designation may not be the same in all instances and that the use of general language designating a class might or might not indicate the intent of a testator to omit a particular individual, depending on the circumstances of each individual case.[67] It seems clear that the factors and circumstances in an individual case can only be shown by extrinsic evidence.

A second case, *Estate of Groscup*,[68] also involved a grandchild, the son of a child who predeceased the testator. Neither the grandchild nor his mother was mentioned in the will. The will did declare that except as otherwise provided, the testator had intentionally omitted to provide for his heirs living at the time of his death.[69] A summary judgment against the grandchild petitioner was affirmed on appeal. However, the district court of appeal pointed out that the trial court had correctly considered the facts alleged in petitioner's counter-affidavit in opposition to the motion for summary judgment before determining that

[62] 214 Cal. App. 2d 590, 29 Cal. Rptr. 569 (1963).

[63] *Id.* at 592, 29 Cal. Rptr. at 570.

[64] The evidence consisted of proof that petitioner had frequently visited testatrix in the three years preceeding the execution of the will, which arguably was as much in derogation of petitioner's contentions as in support thereof. *Id.* at 595, 29 Cal. Rptr. at 572.

[65] *Id.* at 592, 29 Cal. Rptr. at 570.

[66] *Id.* at 593-94, 29 Cal. Rptr. at 571. In *Lipovsky*, the district court of appeal stated that *McClure* held the clause there involved referred to a child of the testator not otherwise provided for and thus satisfied § 90. This ignores the fact that this entire "holding" was preceded and modified in the *McClure* holding by the phrase, "absent any factors indicating a contrary result."

[67] *Id.* at 593, 29 Cal. Rptr. at 571.

[68] 231 Cal. App. 2d 535, 42 Cal. Rptr. 21 (1964).

[69] *Id.* at 536, 42 Cal. Rptr. at 21.

there were no fact issues which required trial.[70] The general language of disinheritance in the will did not bar consideration of extrinsic evidence to show lack of intent to omit. The court stated that *Torregano* made it clear that extrinsic evidence was admissible at the instance of the omitted heir to show that the omission was unintentional, and that the trial court correctly followed this rule in considering all the facts alleged in petitioner's counter-affidavit.[71] If the affidavits raised any fact issue, trial was required.[72]

Thus, while the *Groscup* court did not find sufficient facts presented to raise a triable issue of fact, it did state that facts could be shown by extrinsic evidence to rebut the inference of intentional omission raised by a general disinheritance clause, a clause almost identical with the one in *Lipovsky*. The summary judgment against petitioner affirmed in *Groscup* indicates one answer to those who oppose the extension of *Torregano* with the argument that evidence can be adduced in every case to show that omission to provide was unintentional.[73]

The Legislative Intent

There is a legislative purpose behind section 90 which deserves to be sustained. The *Torregano* decision stated it well: California, since its origin as a state, has protected the spouse, children and grandchildren against unintentional omission from a testator's will. The legislature's continuing policy of guarding against omission of lineal descendants by oversight, accident, mistake or unexpected change of condition is reflected in the statute designed to protect children against omission which not infrequently arises from the peculiar circumstances under which the will is executed.[74] These peculiar circumstances include the fact that many wills are executed by aged persons, persons who have often been long separated from their children or grandchildren, persons who, in some instances, through lapse of memory or

[70] *Id.* at 537, 42 Cal. Rptr. at 22.

[71] The facts alleged were that testator regarded his daughter, petitioner's mother, very highly, knew of her death, was on friendly terms with petitioner, and that testator's sight and hearing were failing at the time of execution of the will. *Id.* at 536, 42 Cal. Rptr. at 21-22.

[72] *Id.* at 537, 42 Cal. Rptr. at 22.

[73] In most cases the proof by petitioner, to be convincing, would probably have to be along the lines that testator was unaware of petitioner's existence at the time of execution of the will, and it is likely that such proof will seldom be available. Summary judgments against petitioner can quickly dispose of those claims obviously without merit.

[74] Estate of Torregano, 54 Cal. 2d 234, 248, 5 Cal. Rptr. 137, 145, 352 P.2d 505, 513 (1960); Estate of Kretschmer, 232 Cal. App. 2d 789, 794, 43 Cal. Rptr. 121, 125 (1965).

mental conditions contributed to by age or otherwise, are not aware of, or have temporarily forgotten, the existence of members of their own family It seems that the policy of the statute is at least arguably meritorious, and it is certainly not so clearly a bad law that it deserves judicial repeal.

A Reasonable Rule

In conclusion, it appears that there is a sure way to beat the California pretermitted heir statute if *Lipovsky* can be taken at full value. But the general phrase of disinheritance which is held there to be conclusive, as a matter of law, as a showing of intent to omit a pretermitted heir, does not, as a matter of common sense, indicate specifically that the testator had any particular individual in mind when executing the will. It is true that in a will drafted by a lawyer, technical words should be considered in a technical sense,[75] but to follow this to the extreme of *Lipovsky* will result in the emasculation of section 90 by the standardized use of the uninformative boiler plate language found there. The situation will be precisely as it was described before *Torregano* by Mr. Witkin:

> [T]he pretermitted heir statute no longer fulfills its purpose. Its effect is nullified by the standard form of disinheritance clause which every careful attorney uses. The court, in *Estate of Cochems* recognizes this defeat of the statutory policy in the following language: "[T]hese general clauses do not in fact constitute evidence that omitted children or grandchildren were intentionally omitted quite the contrary is true, for had they not been forgotten, they would generally have been referred to at least by a class."[76]

The main argument in favor of the *Lipovsky* result is that it promotes certainty While certainty is a goal perhaps more to be sought in wills than in any other area of the law, it is achieved at considerable cost when a statute is effectively nullified. The California legislature has sought to protect the members of the pretermitted heir class from unintentional omission, and this goal deserves judicial support.

It remains certain that mention by description as a part of a class is some indication of intent to omit. *Torregano* recognized this,[77] but also set forth the reasonable rule that extrinsic evidence to show lack

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[75] CAL. PROB. CODE § 105. But also "Strict adherence to the technical meaning of words and phrases must give way, if inconsistent with the testator's intent as shown by the will as a whole " Estate of Torregano, 54 Cal. 2d 234, 251, 5 Cal. Rptr. 137, 147, 352 P.2d 505, 515 (1960).

[76] 4 WITKIN, SUMMARY OF CALIFORNIA LAW 3028 (1960).

[77] See text accompanying note 47 *supra.*

of intent to omit is admissible in the face of general words of omission which name a class that includes the claimant. This seems a proper result. All of the ordinary safeguards of the judicial process are available to detect false claims based on such extrinsic evidence, but if *Lipovsky*, rather than *Torregano*, is followed, section 90 will become practically unavailable regardless of the merit of claimant's case.

If there is a necessity for a clause which will absolutely disinherit persons within the pretermitted heir class, it is an easy matter to put the question beyond a doubt by naming the persons in the will with a nominal legacy or none at all, from which it will clearly appear that these persons were in the mind of the testator.[78] Requiring this much to be certain before excluding extrinsic evidence has the advantage of enforcing the policy of the statute by encouraging the scrivener to get testator to reveal the names of all the potential pretermission claimants, ensuring that testator does in fact knowingly omit them.

Where the claimant is only described by reference to a class in a clause of omission, the door should be open to factual proof that the claimant was unintentionally omitted, with the clause creating a presumption of intentional omission. If a general disinheritance clause or a general no contest clause covering "children and children of deceased children," "heirs," "issue," or "persons claiming my estate by virtue of relationship," were placed in the will, under the reasonable rule there would exist a presumption of intent to omit. This presumption might logically be considered stronger the more closely the description in the general omission clause matched the class of those who might take under the pretermitted heir statute. And, as in *Groscup*,[79] unless the affidavits indicated that extrinsic evidence of lack of intent to omit raised a triable issue of fact against the presumption, the general clause would support a denial of claims of pretermission by summary judgment. Where the extrinsic evidence indicates a lack of intent to omit, it should be admissible against any type of general clause of omission, and the issue of pretermission should become a question of fact.

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[78] Estate of Torregano, 54 Cal. 2d 234, 252, 5 Cal. Rptr. 137, 148, 352 P.2d 505, 516 (1960); Estate of Stevens, 83 Cal. 322, 330, 23 Pac. 379, 382 (1890).

[79] See note 73 *supra* and accompanying text.