

## DRAFT OF APPELATE BRIEF (STATEMENT OF FACTS AND ARGUMENT ONLY)

### Statement of Facts

In 1976, Robert Small (“Robert”) validly executed his will. On July 5, 1981, Robert and Patricia Sanchez (“Patricia”) entered into a premarital contract. Agreeing contrarily to default Columbia law, this premarital contract provided that all property acquired during their marriage would remain separate property, unless there was an express written agreement to treat an item as community property. Robert and Patricia expressly agreed to treat some property as community property, including the family home and a surrounding vineyard, amounting to about \$13.6 million. Exhibits attached to the premarital contract indicate the properties owned by each spouse. Robert owned substantially more property than Patricia. For example, Robert owned multiple cars, multiple buildings, and cash and financial instruments amounting to about \$6.3 million. Patricia owned a condominium, a sedan, and about \$1,500 in cash. Soon thereafter, on July 8 of the same year, Robert and Patricia married.

Commented [BH1]: Good statement of facts.

In 2004, Robert validly executed a codicil based on “boilerplate” language copied from the Internet. In this codicil, Robert appointed Patricia as executor of his will, to execute the will in compliance with the laws of Columbia according to his wishes dictated in his will. The reason behind this codicil was that Robert no longer wanted his sister Frances as executor because they had become estranged. About one month later, Robert passed away, and Patricia seeks to determine her share in Robert’s estate as an omitted spouse.

### Argument

(1) The superior court erred because Patricia is an omitted spouse because the doctrine of republication did not cause Robert’s will to be treated as though executed during their marriage

The issue in this case is whether Patricia is indeed an omitted spouse and, as such, is entitled to share in Robert’s estate according to Colum. Prob. Code § 610.

#### The facts of Riddell are distinguishable from the present case

In Riddell, the surviving spouse sought his share in the estate of his deceased wife. The wife made no provision for the surviving husband in her codicil, and the surviving husband argued that he was an omitted spouse. However, the court in Riddell held that under the doctrine of republication, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. In addition, the wife’s purpose was express; she wanted to leave all her estate to her daughter. Thus, the court denied his petition to determine his entitlement to share in her estate.

The facts of the present case can be distinguished from Riddell. In Riddell, the wife executed a will leaving all her estate to her daughter. The wife executed a codicil having the *same provision* of leaving all her estate to her daughter, in effect reaffirming her original will and expressly stating her purpose of leaving out her spouse. In our case, however, unlike in Riddell, Robert’s codicil contained *different provisions*: Robert created his codicil to replace the executor. Although the superior court found that under the plain meaning of the codicil, Robert’s intent was to exclude Patricia from taking under the will, there is no express purpose contained to exclude Patricia.

Commented [BH2]: Good job distinguishing Riddell. But none of the law you have discussed so far indicates that the testator’s intent is relevant.

Therefore, Robert did not intend to exclude Patricia through his codicil.

Riddell's addition of "codicils" to Colum. Prob. Code § 601(a) is contrary to legislative intent and thus is inapplicable to Robert's codicil

Colum. Prob. Code § 601(a) states that "decendent's testamentary instruments" means two things: the decedent's *will* and any revocable *trust*. Even if the facts of Riddell are applicable in this case, the court in Challman held that Riddell's effective addition of "codicils" to section 601(a) through the doctrine of republication is *contrary* to the intent of the legislature, and they are not to be treated as an instrument that can republish a will.

In this case, the lower court found that Robert's intent in the codicil was to exclude Patricia from taking under his will. The lower court has erred because under Challman, codicils cannot be used to republish the prior will. If Robert's codicil did not republish his original will, then the original will is treated as though executed *before* his marriage to Patricia, not during marriage.

Therefore, Patricia is an omitted spouse.

**Commented [BH3]:** What's an omitted spouse? Make sure you always state the rules you are applying.

Patricia remains an omitted spouse because the codicil cannot override Robert's intent to provide for Patricia

Riddell itself states that "republication may not be applied to defeat the purpose of the testator as indicated in the codicil." Challman agrees that there is no basis to disturb the testator's intent. The court Challman went on to say that to do so would "deprive the surviving spouse of her entitlement to share in the estate and thereby leave her unprovided for—a result that would be contrary to the intent of the codicil." In Challman, the decedent wrote a codicil that acknowledge his debt to his wife. The lower court in Challman concluded that notwithstanding his codicil, the wife was an omitted spouse because "republication may not be applied to defeat the purpose of the testator as indicated in the codicil." Based on this reasoning, the court in Challman affirmed the lower judgment wherein the omitted spouse was entitled to receive her share of the decedent's estate because

Similar to the decedent's intent in Challman, Robert's intent in the codicil was to provide for Patricia, in spite of any interpretation based on the plain meaning of the language. His intent can be seen in several instances, among them include their express agreement to treat many items are community property, including the family home and a surrounding vineyard, amounting to about \$13.6 million. Robert also drafted the codicil by copying the "boilerplate" language from an Internet source in Patricia's presence, further shedding doubt on his supposed intent to omit Patricia. Furthermore, Exhibits A and B show that Patricia owns much less property than Robert. For example, Patricia has about \$1,500 in cash, while Robert has about \$6.3 million. Patricia worked as a chef at Robert's restaurant, which is work that is likely to become difficult as Patricia ages. Based on this evidence, Robert likely wanted to provide for Patricia through his estate. Since republication cannot defeat the testator's purpose, even if a codicil would be a testamentary instrument, it cannot override Robert's intent to provide for Patricia.

Therefore, since the codicil has no effect on Robert's intent to provide for Patricia, she remains an omitted spouse.

(2) The superior court erred because conditions that might defeat Patricia's entitlement to Robert's estate as an omitted spouse are not satisfied under Colum. Prob. Code § 611

The issue is whether Patricia is prevented from receiving a share of Robert's estate through the conditions under Colum. Prob. Code § 611.

Under Colum. Prob. Code § 611, an omitted spouse shall not receive a share of the decedent's estate (CP or SP) if (a) decedent's failure to provide was intentional, (b) decedent provided for the omitted spouse outside the estate, or (c) omitted spouse waived the right to share.

(a) Decedent's failure to provide was intentional?

If the decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments, then the omitted spouse may not receive a share of the estate.

In this case, Robert's codicil cannot be considered in determining his intent to omit because a codicil is not a testamentary instrument under Challman. Robert's original will does not show an intent to omit Patricia from the will because this will is from before he married Patricia. Even if the codicil is to be considered in determining his intent to omit under the plain meaning of the language contained, Robert's intent in the codicil was to provide for Patricia. Robert drafted the codicil by copying the "boilerplate" language from an Internet source *in Patricia's presence*, shedding doubt on his supposed intent to omit Patricia.

Therefore, Robert's failure to provide is not shown to be intentional under the law and the evidence.

(b) Decedent provided for the omitted spouse outside the estate?

If the decedent provided for the omitted spouse by transfer outside the estate and there is the intention that the transfer be in lieu of a provision in the instruments, then the omitted spouse may not receive a share of the estate.

Here, there is no outside transfer to Patricia intending to replace the will or codicil.

Therefore, Robert's providing for Patricia outside the estate cannot be shown under the law and the evidence.

(c) Omitted spouse waived the right to share?

If the omitted spouse waived the right to share in both the CP portion and the SP portion of the decedent's estate, then the omitted spouse may not receive a share of the estate. Under footnote 1 in Challman, a waiver of a right requires the knowing and intentional relinquishment of the right.

Here, there is no waiver of any right to the estate indicated. Patricia signed a premarital contract voluntarily and without duress. The contract contained a provision where all property acquired would be SP unless agreed in writing for particular properties. However, that does not waive Patricia's right to receive any CP upon Robert's death.

Therefore, a waiver by Patricia cannot be shown under the law and the evidence.

#### ADDITIONAL GRADER COMMENTARY

Hi Brian, Your essay could have been a little bit more detailed, but you still did well enough to pass on this essay. The bar examiners absolutely will prefer succinct answers with clear headlines over a lengthy but poorly organized essay, but you have to make sure that you include enough factual information to support each of your conclusions, and that you also state the rules that you are applying. Particularly in the first portion of your response, I noticed that you did not adequately state the rules that you were applying in order to reach your conclusions. –Justin

### Kaplan model answer (CBX answer 1) retyped

#### CBX answer 2 retyped

##### Statement of Facts

As you know, Robert Small executed a will which was dated, signed and witnessed on June 29, 2006. In his will, Mr. Small expressly stated that he was not married, and that his estate was to be devised into equal shares to his children who survive him...

##### Argument

- A. Because Patricia was not provided for in Mr. Small's will and because the subsequent codicil did not republish the will, the superior court erred in denying her petition for entitlement under § 610 of the CPC.

CPC 610 provides that if a decedent fails to provide in a testamentary instrument for decedent's surviving spouse who married the decedent after execution of all of decedent's testamentary instruments, the surviving spouse is entitled to a share of the estate as an omitted spouse. Thus, if it is found that Mr. Small did not provide for Patricia in any testamentary instrument and that she married him after execution of all testamentary instruments, then the court erred in finding she was not an omitted spouse.

- i. Because Patricia was not provided for in any testamentary instrument executed by Mr. Small prior to their marriage, she is an omitted spouse.

Mr. Small executed his will on June 29, 1976. This was almost five years prior to his marriage to Patricia. The will makes no mention of her, but rather devises all of the estate to his surviving children, or if none of them survived him, to the University of Columbia.

Under § 601 of CPC, only a "will" and a revocable trust are "testamentary instruments" within the meaning of 610. There is no evidence showing that Mr. Small executed any other testamentary instrument after they were married on July 8, 1981. Thus, because Patricia was not provided for in the will, executed prior to the marriage, she is an omitted spouse under 610.

- ii. Because the intent of the codicil was merely to appoint Patricia as the executor and not to republish under the will, the court erred in finding that the doctrine of republication applies.

Riddell. However, Challman...

In Challman [X years after Riddell?]...

Here, similar to Challman, Mr. Small's intent in making the codicil was merely to make Patricia the executor of his estate and nothing more. As Patricia attested, Mr. Small copied the language of the codicil from the Internet, drafted the document by himself, and referred to the language as "boilerplate."

As she explained, he had a falling out with his sister, and he didn't want to have her be the executor anymore. This codicil was drafted a month before his death, some 28 years after he executed his will and some 23 years after his marriage to Patricia, and contained only one, sparse provision regarding Patricia's appointment as executor. These surrounding circumstances, which the superior court failed to give weight to despite controlling precedent, shows that Mr. Small did not intend for this codicil to leave Patricia unprovided for, and therefore prevents application of the republication doctrine.

Furthermore, the superior court erred in finding that the language of the codicil was "clear" in referring to his "wishes dictated in [his] will." While the court's citation was correct, it is not clear when taken in context that the language evinces an intent to republish the old will and exclude Patricia from his estate. As discussed above, the codicil was merely meant to make Patricia his executor to the estate. The final sentence begins with "she is to comply with the laws of State of Columbia..." which thus suggests that he was merely describing the duties she would have as executor. The fact that he referred to this as "boilerplate" language supports this interpretation, rather than the superior court's interpretation that this sentence somehow manifested an intent to exclude Patricia. At the very least, the intent of the language is ambiguous. Combined with the surrounding circumstances, there is strong evidence to suggest that applying the republication doctrine would defeat Mr. Small's purpose of the codicil, and thus it should not be applied.

Finally Riddell [which the superior court relies on] is distinguishable from this case. In Riddell... Here, the opposite is true.

In summary, the superior court erred in holding that Patricia was not an omitted spouse, because she was not provided for in his will and because the doctrine of republication does not apply to the codicil he drafted shortly before his death. As such, she will likely be found to be an omitted spouse entitled to a share of the estate

- B. Because none of the 611 exceptions of the probate code applies to Patricia, her entitlement to a share of Mr. Small's estate will not be defeated.
- i. Because Mr. Small's failure to provide for Patricia was not intentional and no intention appeared from the will, exception (a) will not apply.

- ii. Because the amount of the transfer mentioned in the PMA was for a mere 10k, a tiny fraction of the estate, it is not evidence of a transfer in lieu of a provision in the will under (b).

611(b) says that where the decedent spouse provides for a transfer outside of the estate and intended for the transfer to be in lieu of a provision in the will, then that serves as a bar to entitlement under 610. Here, Patricia concedes that the premarital agreement provided 10k for her if she survived Robert.

However, as 611(b) expressly provides, the intent that the transfer be in lieu is evinced by "the amount of the transfer or other evidence." The transfer was only for 10k, which is a tiny fraction of the estate, which is worth millions. Clearly, given the miniscule amount, a court will not find this a sufficient transfer.

- iii. Because the waiver in the PMA was not knowing and intentional, or at the very least was only knowing and intentional with respect to Mr. Small's separate property, it does not preclude Patricia from entitlement under 611(c).

Conclusion to this section?

70 score (BarEssays) retyped

### STATEMENT OF FACTS

3 big paragraphs wtf

### ARGUMENT

The superior court erred in denying Patricia entitlement to share in Robert's estate as an omitted spouse because republication may not be applied to defeat the purpose of Robert's intent of executing the codicil which was to replace his sister Frances as the executor of the will and name Patricia as the executor of the will.

### Riddell

In applying Riddell, superior court erred by not looking at the purpose of Robert's...

The codicil executed by Robert should not be treated as a republication of will and have P not take in R's estate because in Challman, the court found the doctrine of repub may not be applied to treat Eugene's will as though it had been executed during the marriage.

Likewise, the codicil to change name of executors should not be made to apply retroactively as to the time the will was executed and penalize P.

Thus, the court erred in denying Patricia entitlement to share in Robert's estate because an express intent of the codicil was to change executors and not to exclude her from the will.

The children's argument that P may not be entitled to R's estate because the codicil republished the will, which would deem the marriage valid and mean to exclude P from the will has no merit because it would defeat the codicil's intent.

...Because this was a form change as to who executed will, it cannot be attributed to because change in the actual content of the will and who would receive R's bounty.

However, this argument would be defeated because R's intent was clear and that was to change the executor. As mentioned in Challman, the court did not apply the doctrine of repub to treat T's will as though it had been done during the marriage because to do so would be contrary to R's intent...

P should be awarded 1/2 interest in CP and his SP because P is an omitted spouse as R did not include her when he made his will.

610 states, "If a decedent fails to provide ... the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate, consisting of..."

In this case, R executed his will before married to P...

611(a) would allow P to take under the will because R did not intentionally fail to provide for her because he executed the will before they were married.

611(b)

611(b)

611(c)

Conclusion

THIS IS STILL A 70!

- Inconsistent designation of parties (Robert, Robert Small, R)
- Nonsensical phrases (see bold, capital headings)
- Nonsensical arguments (arguing against our position)
- Inappropriate tone for argumentative brief (children will argue...)
- Misspellings
- BUT the issues and sub-issues are there, and rules are correctly pulled out