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My Will Be Done: Accommodating the Erring and the Atypical Testator

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I. INTRODUCTION

Repeal of federal estate taxes,1 elimination of the rule against perpetuities,2 changes in definitions of principal and income,3 and a host of revisions to established doctrine in the Uniform Probate Code4 have changed the terrain of estate planning so dramatically that it is almost unrecognizable from that of a decade ago. Some of these mod-
ernizations reflect changes in societal preferences and values, but many simply replace fixed rules that produce predictable results with a more flexible approach designed to effectuate the presumed intent of the donor where the language of the dispositive instrument fails to achieve that result due to lawyer error or other reason.

The movement away from fixed rules in the law of wills, though not entirely free of controversy, has enjoyed widespread support.\(^5\) In an area of law that heavily values the certainty produced by fixed rules,\(^6\) such support might not have been expected. An important factor reducing the basis for objection to these modernizations, no doubt, is the retention of “safe harbors,” which provide assurance that actual intent, if expressed in a particular manner (albeit not the historic manner) will be respected.\(^7\) These safe harbors permit careful testators to preclude litigation over intent and protect against the possibility that intent will be discerned inaccurately based on extrinsic evidence that is outside their control.

The most fundamental of all changes in the law of wills is the reinterpretation of the Statue of Wills to accommodate reformation of wills on the grounds of mistake which does not incorporate such a safe harbor. The historic approach provided a safe harbor by demanding absolute deference to the testator’s wishes as written, foreclosing any opportunity to reform a will based on an alleged mistake.\(^8\) The liberalized approach to reformation, adopted by the Third Restatement of the Law of Property (Donative Transfers),\(^9\) the Third Restatement of Trusts,\(^10\) the Uniform Trust Code\(^11\) and at least one state legislature,\(^12\) provides none. Instead, it permits re-writing of wills whenever

5. See infra note 28.
7. See, e.g., infra notes 233, 272 and accompanying text.
9. Restatement (Third) of Prop.: Donative Transfers (Tentative Draft No. 1, 1995) [hereinafter Third Restatement]. This material is not yet published in a hardbound volume of the Restatement, but it has been approved by the full membership of the American Law Institute and thus is an approved part of the Restatement.
10. Restatement (Third) of Trusts § 62 (Tentative Draft No. 3, 2001). This was approved by the full membership of the American Law Institute at its 2001 Annual Meeting, subject to discussion at that meeting and final editorial revisions. The official text for this material is expected to be published in 2002.
12. In Iowa, a reformation statute patterned on the Uniform Trust Code was adopted effective July 1, 2000. Iowa Code Ann. § 633.2206 (West Supp. 2001). In New York, the Association of the Bar of the City of New York has proposed legislation based on the Third Restatement. See Proposed N.Y. Est. Powers & Trusts Law § 2-1.18 (on file with the author). There has been some indication that courts may be receptive to the Third Restatement’s position as well. See Putnam v. Put-
the fact finder concludes there is clear and convincing evidence that the will does not embody the testator's actual dispositive wishes.

To date, commentators have hailed the change without analyzing the impact of the loss of the safe harbor.13 This Article seeks to provide that analysis by exploring the value of reformation relief, considering the policy impact of abandoning the safe harbor, and questioning the desirability of the trade-off reflected in the modernization adopted by the Third Restatement and the Uniform Trust Code.

Part II begins by comparing the historic approach to will reformation with two alternatives:14 the approach adopted by the Third Restatement and an approach advocated by Professor Fellows.15 The discussion of these approaches identifies shortcomings of any single approach to divining donative intent and the consequent desirability of a system that incorporates elements of multiple approaches. Examination of a sampling of mistake cases highlights the overbreadth of the historic approach's safe harbor as well as the safe harbor's indispensability in shielding individuals from perversion of their testamentary wishes.

Part III evaluates the policy implications of liberalizing relief for mistake by examining the impact of such a change on individuals' ability to control their estate plans, lawyers' incentives to exercise care in the planning process, and the legal system's tolerance to bear the administrative cost involved.16 Using an unmarried same sex couple as an example, section A of Part III argues that elimination of

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13. See Clifton B. Kruse, Jr., Reformation of Wills: The Implications of Restatement (Third) of Property (Donative Transfers) on Flawed but Unambiguous Testaments, 25 ACTEC NOTES 299 (2000); see also Clark Shores, Reforming the Doctrine of No Reformation, 26 Gonz. L. Rev. 475 (1990/91) (advocating that courts should be able to reform mistakes in a will and should be able to admit extrinsic evidence without finding any ambiguity).


16. See infra notes 169-217 and accompanying text.
the safe harbor, though it may benefit a majority of testators, produces a discriminatory impact on those whom other provisions of the law of wills protect least. Section B argues that the specter of malpractice liability, largely or entirely eliminated by liberalized reformation relief, motivates lawyers and testators to avoid errors in the planning process while recognizing that malpractice as a remedy is a flawed means of effectuating intent. Finally, section C argues that the cost of reformation should be avoided where the inquiry is likely to be unproductive.

Part IV advocates an alternative approach to reformation that is designed to advance the competing policy considerations by offering many of the benefits of the liberalized approaches while preserving the safe harbor that is the cornerstone of the historic prohibition on reformation. Specifically, this Article suggests a privately adaptable rule which would preclude reformation of unambiguous wills unless either the testator affirmatively elected to confer upon the court a power of reformation or the will failed to satisfy specific pre-established criteria designed to protect against ill-advised decisions to preclude reformation. This proposal would permit reformation but at the same time grant testators the ability to preclude courts from “correcting” unambiguous dispositions in contravention of the testator’s actual and accurately expressed intent. While the proposal imposes an additional burden in the planning process and only unifies the reformation standards for wills and will substitutes imperfectly, it does balance the interests of those who err against the interests of those who do not in a manner that offers important protections for both groups.

II. DISCERNING TESTAMENTARY INTENT

Testamentary freedom promises individuals the ability to control devolution of their property at death, but realization of the promise occurs only if the wishes are ascertained accurately in a court proceeding that occurs after death. To facilitate realization of testamentary freedom, the law historically has required individuals to set forth dis-
positive desires in a written statement\textsuperscript{20} executed with formalities\textsuperscript{21} sufficient to identify to the individual executing the instrument and the world at large that the writing is intended to be a will.\textsuperscript{22}

The requirement to set forth testamentary wishes in a will creates two potential problems for testators. First, the formalities required for wills may be complied with imperfectly, resulting in refusal to probate the document containing the testamentary wishes. Second, a properly executed will may fail to communicate testamentary wishes accurately.

To minimize the situations in which imposition of formalities will preclude probate of instruments intended to constitute wills, several reforms have been enacted. One such reform is the modification of will execution statutes to streamline the required formalities. The Uniform Probate Code (UPC), for example, dispenses with formalities found in older statutes such as the requirement for the testator to publish the will (i.e., signify that the document is his will) to the attesting witnesses, the requirement for the testator to sign the will at the end (as opposed to some other place on the will), and the requirement for the witnesses to sign "in the presence of" the testator or in the presence of each other.\textsuperscript{23} Another legislative reform, also embodied in the UPC, denominated the "harmless error" rule, allows courts

\textsuperscript{20} Oral (nuncupative) wills generally are not permitted although they may be permissible to govern disposition of personal property of modest value or to govern disposition of estates of soldiers in active military service or mariners at sea. \textit{Restatement (Third) of Prop.: Donative Transfers} § 3.2 cmt. h (1999).

\textsuperscript{21} Formalities vary from jurisdiction to jurisdiction but they generally track one of three models: the highly formalistic Wills Act, 1837, 7 Wm. 4 & 1 Vict. c. 26. § 9; the less formalistic Statute of Frauds, 1677, 29 Car. 2, c. 3, § 5; or the streamlined \textit{Uniform Probate Code} § 2-502. In several jurisdictions, unwitnessed instruments may be admitted to probate as holographs if written in the testator's handwriting, signed by the testator, and in some jurisdictions, dated in the testator's handwriting. \textit{Id.} §§ 3.1, 3.2 (listing, as of October, 1998, the following jurisdictions recognizing holographs: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Oklahoma, Maine, Maryland (persons in the armed services only), Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York (persons in the armed services only), North Carolina, North Dakota, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming).

\textsuperscript{22} The Statute of Wills serves four functions: a ritual function, which identifies the instrument as a will in the decedent's eyes; a channeling function, which identifies the instrument as a will in the eyes of the world at large; a protective function, which increases the difficulty of deception or coercion of the testator; and an evidentiary function which provides the court with substantial evidence of testamentary intent and the terms of the will. Ashbel G. Guliver & Catherine J. Tilson, \textit{Classification of Gratuitous Transfers}, 51 Yale L.J. 1 (1941); see also John H. Langbein, \textit{Substantial Compliance with the Wills Act}, 88 Harv. L. Rev. 489, 491-498 (1975) (introducing the channeling function).

\textsuperscript{23} \textit{Restatement (Third) of Prop.: Donative Transfers}, supra note 20, § 3.1 cmts. h, k, l, p.
to excuse execution defects, however serious, upon a showing by clear
and convincing evidence that the testator intended the document to be
his will.24 In the many jurisdictions where the harmless error rule
has not been enacted, some courts have adopted a relaxed approach to
execution requirements, excusing defects so long as the execution sub-
stantially complies with the statutory requirements.25

Reduction of formalities limits the possibility that defective execu-
tion will preclude probate without reducing the certainty about which
writings will and will not qualify as testamentary writings. In con-
trast, the harmless error rule and, to a lesser degree, the substantial
compliance doctrine, do reduce the ability to predict in advance which
writings will qualify as wills because they rely on extrinsic evidence of
the testator's intent rather than formalities alone to establish the tes-
tamentary character of an instrument. In effect, the more liberal re-
forms eliminate the safe harbor that exists under an approach that
requires strict compliance with the formalities prescribed by the Stat-
ute of Wills and thus create the possibility that an instrument will be
admitted to probate which the testator did not intend to constitute his
will. This concern is minimized, however, by the reliance on the objec-
tive requirements of the Statute of Wills as a frame of reference for
evaluating the subjective question whether a particular document was
intended to constitute a will.26 Thus, refraining from execution of in-
struments with formalities similar to those of the applicable Statute of
Wills will all but preclude the possibility that an instrument other

24. The UPC's harmless error rule provides:

Although a document or writing added upon a document was not exe-
cuted in compliance with [the Statute of Wills], the document or writing
is treated as if it had been executed in compliance with that [statute] if
the proponent of the document or writing establishes by clear and con-
vincing evidence that the decedent intended the document or writing to
constitute (i) the decedent's will, (ii) a partial or complete revocation of
the will, (iii) an addition to or an alteration of the will, or (iv) a partial or
complete revival of his [or her] formerly revoked will or of a formerly
revoked portion of the will.


25. See, e.g., In re Estate of Ranney, 589 A.2d 1339 (N.J. 1991) (adopting substantial
compliance doctrine); Langbein, supra note 22 (explicating and advocating adop-
tion of the substantial compliance doctrine).

26. The substantial compliance doctrine expressly requires consideration of the for-
malities of the particular wills statute. The dispensing power, though framed as
purely a test of intent, nevertheless relies on the Statute of Wills as a measure-
ment of testamentary intent. See John H. Langbein, Excusing Harmless Errors
in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate
Law, 87 COLUM. L. REV. 1, 22 (1987) (ranking wills act formalities in terms of
persuasiveness in establishing testamentary intent). After evaluating results
achieved under the substantial compliance doctrine and the harmless error rule,
Langbein expressed preference for the latter. Id.
than one intended to constitute a will may be admitted to probate. This perhaps explains the substantial support for this reform in the scholarly commentary.

The second problem occasioned by the Statute of Wills, failure to articulate testamentary wishes accurately, is more intractable than the problem of improper execution because execution formalities are merely a means to the end of identifying the character of an instrument as testamentary or not, whereas the communication of dispositive wishes is the ultimate purpose of the will. This problem of discerning actual intent arises whenever the will is alleged to be inaccurate, either because it conveys wishes ambiguously or because it conveys wishes unambiguously but incorrectly.

General principles of construction, which provide that instruments ought to be read in the context of the surrounding circumstances in which they were prepared, allow for remedy in the case of ambiguous

27. There is a risk that a non-testamentary instrument may be admitted to probate pursuant to the dispensing power, but a similar, and broader, risk has always existed in jurisdictions that recognize holographic wills. In the case of a holograph, the court must determine whether the handwritten instrument is intended to constitute a will, and in those cases there is not, of course, a set of formalities to serve as an objective reference for analyzing the issue. Consequently, there is wider latitude to admit to probate instruments that may not have been intended to constitute wills. See, e.g., In re Estate of Kuralt, 15 P.3d 931 (Mont. 2000) (admitting letter in which decedent stated “I’ll have the lawyer visit the hospital to be sure you inherit the [Montana property] if it comes to that” as valid holographic codicil).

instruments.\(^\text{29}\) Circumstantial and other extrinsic evidence shed light on the meaning of the document and the ambiguity is resolved in accordance with that evidence.\(^\text{30}\) In the case of unambiguous wills, on the other hand, general principles of construction will not allow for remedy because, by definition, the meaning of the will is clear when read in light of surrounding circumstances.\(^\text{31}\) If, nevertheless, error is alleged or apparent, the remedy of reformation would be required to change the document so that it conforms to the actual intent of the testator.\(^\text{32}\)

Unambiguous wills alleged to contain a mistake present a difficult dilemma. If the will does in fact contain a mistake, then failure to correct it will defeat realization of testamentary wishes. On the other hand, permitting extrinsic evidence to override the terms of an unambiguous will reduces the testator's control over the presentation of his dispositive wishes and therefore creates the possibility that his attempt to exercise testamentary freedom will fail through no fault of his own. Whether reformation of unambiguous wills is appropriate depends upon the extent to which there is confidence in the ability to convey wishes accurately in written form and the extent to which there is fear of undermining a will through the use of possibly unreliable extrinsic evidence.


\(^{30}\) The law of construction was not always so accommodating of extrinsic evidence. For example, the plain meaning rule, now "largely discredited," was applied to preclude introduction of extrinsic evidence where the will seemingly was clear on its face. *Third Restatement* § 12.1 cmt. d; *see also* 9 *Wigmore on Evidence* § 2641 (3d ed. 1940); *Restatement of Prop.* § 242 cmt. c (1940) (discussing the reading of the instrument as a whole); *Page on Wills*, supra note 29, § 32.10; Andrea W. Cornelison, Note, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 *Real Prop. Prob. & Tr. J.* 811 (2001). Another means of limiting the introduction of extrinsic evidence in construction proceedings was to distinguish between patent ambiguities, those discernable from the face of the will, and latent ambiguities, which could be uncovered only by reference to extrinsic evidence. Historically, extrinsic evidence was allowed only to resolve latent ambiguities, *see, e.g.*, Patch v. White, 117 U.S. 210 (1886), but this restriction was heavily criticized. *See* James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 422 (Boston, Little Brown & Co. 1898); *Wigmore*, *supra*, § 2472; *Restatement of Prop.*, *supra*, § 241 cmt. a; Comment, *Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence*, 22 *Hastings L.J.* 1349 (1971). Some courts, however, continue to preclude extrinsic evidence in the case of ambiguities characterized as patent. *See, e.g.*, Breckner v. Prestwood, 600 S.W.2d 52 (Mo. Ct. App. 1980) (precluding direct evidence of intent due to characterization of ambiguity as patent but expressing dissatisfaction with the restriction); Bob Jones Univ. v. Strandell, 543 S.E.2d 251 (S.C. Ct. App. 2001); *In re Estate of Burchfiel v. First United Methodist Church*, 933 S.W.2d 481 (Tenn. Ct. App. 1996).

\(^{31}\) *See Third Restatement* § 12.1 cmt. d.

\(^{32}\) *See, e.g.*, Hoover v. Roberts, 59 P.2d 83 (Kan. 1936) (distinguishing reformation from construction).
A. Alternative Approaches to Reformation

Conceivable approaches to discerning testamentary intent range from establishment of irrebuttable presumptions about dispositive wishes for all decedents to a process of individualized determination based on comprehensive review of any and all evidence of intent regardless of the existence or absence of a will. Neither has been suggested because the first effectively dispenses with testamentary freedom by imposing an intestacy scheme on all decedents while the second would impose an enormous administrative burden that would be unjustified for those decedents who in fact formulated no testamentary wishes. Several possibilities between these endpoints exist which balance the benefits of correcting apparent errors against the costs of doing so. The three approaches considered here, the historic approach, the approach adopted by the Third Restatement, and the approach advocated by Professor Fellows are representative of the advantages and disadvantages of seeking testamentary intent through alternative means.

1. Historic Approach

The historic approach to reformation couples a rigid deference to the testator’s unambiguously expressed written wishes with an elaborate system of default rules that supplement or supersede provisions of the will that appear to be the product of mistake stemming from the testator’s failure to anticipate circumstances as they exist at his death. Examples of situations covered by such statutes include


34. See supra note 15.

35. Deference to the will as written, though rigid, is not absolute. Obligations to pay taxes, satisfy creditors and provide for a surviving spouse all limit testamentary freedom. See Lewis M. Simes, Public Policy and the Dead Hand, Thomas Coo-ley Lectures, Sixth Series 4-5 (1955). Additional mandates to provide for family members other than the surviving spouse have been suggested. See, e.g., Deborah A. Batts, I Didn’t Ask to Be Born, 41 Hastings L.J. 1197 (1980) (advocating protection for children); Ralph C. Brashier, Disinheritance and the Modern Family, 45 Case W. Rs. L. Rev. 83, 121-133 (1994) (arguing in favor of recognition of posthumous support obligation for minor children); Ronald Chester, Should American Children Be Protected Against Disinheritance?, 32 Real Prop. Prob. & Tr. J. 405 (1997) (arguing in favor of a family maintenance scheme patterned on that of British Columbia); see also Edwin M. Epstein, Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform, 35 Temp. L.Q. 231 (1962) (arguing that a family maintenance scheme would bring coherence to the doctrine of testamentary capacity).

36. The no-reformation rule was a fixture in English as well as American law until 1982 when England, by statute, adopted a reform similar to that adopted by the
the death of a beneficiary prior to the testator,\textsuperscript{38} ineffective disposition of all or a portion of the residuary estate,\textsuperscript{39} and inadequacy of the estate to fund all of the dispositions provided in the will.\textsuperscript{40} These statutes presume that wills containing specified provisions or executed in specified circumstances include a particular mistake and provide a pre-established remedy. In all cases, however, the testator may avoid application of the default rule by expressly addressing the contingency contemplated by the corrective statute.

For example, anti-lapse statutes designate substitute beneficiaries to receive bequests given to specified relatives of the testator who predecease him.\textsuperscript{41} Without these statutes, such bequests would be ineffective, and the property given to the predeceased relative would fall...
into the residuary estate unless the will directed a different disposition. These statutes are based on the assumption that the testator would have provided an alternative bequest to the substitute takers identified in the statute, typically the issue of the deceased beneficiary, if he had considered the possibility that he would survive the relative-beneficiary. If the testator does contemplate this possibility and desires a disposition other than the one provided by the anti-lapse statute, he may effectuate his intent by expressly identifying alternative takers or otherwise indicating an intent to avoid application of the anti-lapse statute.

Statutes designed to address ineffective disposition of a portion of the residuary estate operate similarly. At common law, an ineffective disposition of the residuary estate would pass to intestate takers under the “no residue of a residue rule,” which held that ineffective residuary dispositions do not pass to other residuary beneficiaries on the grounds that the property has passed to the residue once and cannot pass through it again. Thus, if the will provided one-third of the residue to each of three friends, and one predeceased the testator, the portion of the residue designated for the predeceased beneficiary would pass in intestacy. Based on the assumption that most testators would prefer the named residuary beneficiaries to intestate takers not designated in the will, most jurisdictions reverse the no residue of a residue rule, either by statute or by judicial decision, and hold that the ineffectively disposed of portion passes to the remaining residuary beneficiaries pro rata. As with anti-lapse statutes, the testator may avoid this result by expressly providing an alternative disposition in the event a residuary beneficiary predeceases.

As a final example, abatement statutes address the situation in which the estate is inadequate to fund all of the dispositions provided in the will. These statutes prioritize bequests by type, typically residuary, general, demonstrative, and specific, and provide that

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42. French, supra note 41, at 337-40.
43. Id.
44. See Page on Wills, supra note 29, § 33.56.
45. A residuary devise, usually the last provision in the will incorporating language like “residuum,” “remainder,” or “residue,” disposes of all property remaining after payment of debts, expenses, and specific, demonstrative and general devises. Id. § 48.10.
46. A general devise is “one which, in accordance with the terms of the will, may be satisfied out of the testator's estate generally, by delivering all of his estate or part of it which corresponds with the... devise in general description, and which is not charged upon any specific property.” Id. § 48.2.
47. A demonstrative devise is a hybrid of the specific devise and the general devise. It is a money gift, payable out of the estate generally but charged on a specific fund. Id. § 48.7.
they abate in that or a similar order, with bequests within a single class abating pro rata.49 Like the preceding corrective statutes discussed, the statutory abatement scheme may be avoided by dictating an alternative prioritization.

This approach to mistake provides protection against the most common mistakes without depriving the testator of the ability to distribute his property in a manner inconsistent with the presumptions underlying the corrective statutes. More liberalized relief from mistake based on analysis of extrinsic evidence of intent is generally unavailable under the historic approach.50 Occasionally, this result is expressed as a necessary corollary of the writing requirement of the Statute of Wills as if there were no independent policy justifying this interpretation of the statute.51 In reality, the preclusion against reformation is a purposive interpretation of the statute that reflects the difficulty of discerning testamentary intent accurately from evidence other than the will itself and thus advances the statute's evidentiary function52 to assure the testator that his unambiguously expressed dispositive wishes will be respected.53

48. A specific devise is a gift of property which is in existence when the will is made and which is described so that it can be distinguished from any other item of property. Id. § 48.4. A devise of a dollar amount typically would not constitute a specific devise but a devise of a particular stock or account may constitute a specific devise. Id. § 48.5.


50. See, e.g., Burnett v. First Commercial Trust Co., 939 S.W.2d 827 (Ark. 1997) (refusing to reform will to avoid intestate distribution); In re Estate of Smith, 599 N.E.2d 184 (Ill. App. Ct. 1992) (stating that reformation should not be granted under the guise of construction); Scarlett v. Hopper, 823 P.2d 435 (Or. Ct. App. 1992) (holding that will cannot be reformed based on allegation of scrivener's error); In re Estate of Patrick, 728 N.Y.S.2d 354 (Sur. Ct. 2001) (refusing to reform will based on alleged mistake in the inducement).

51. See, e.g., Goode v. Goode, 22 Mo. 518, 522 (1856) ("[W]e hesitate not to declare that [a proceeding to correct a mistake in a will] cannot be allowed or sustained . . . . Admit this doctrine, and you may as well repeal the statute requiring wills to be in writing at once. Witnesses will then make the wills and not testators.").

52. See supra note 22.

53. See, e.g., In re Will of Gluckman, 101 A. 295, 296 (N.J. Prerog. Ct. 1917) ("It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless."). See also Langbein & Waggoner, supra note 33, at 528 (arguing that courts are less serious about the evidentiary problem than about the problem of technical Wills Act compliance). The potentially enormous cost of reforming unambiguous wills alleged to contain errors also is offered as a justification for the historic approach. See, e.g., Flannery v McNamara, 738 N.E.2d 739 (Mass. 2000). Arguments historically justifying the prohibition on reformation but no longer relied upon include: (1) the view that reformation would constitute a collateral attack on the decree of the probate court, and (2) the view that reformation is in the nature of specific performance and requires consideration for its support which is lacking in the relationship...
While the vast majority of courts ostensibly adhere to the traditional proscription against reformation, many have deviated from it in cases where the rationale of the rule appears to be inapplicable. The deviation occurs both for categories of cases and for individual cases that seemingly are outside the realm of relief. This liberalized interpretation of the historic approach is beneficial in the sense that it is purposive rather than formalistic, but it also is problematic in the sense that the deviations from it are not explicable by any generally accepted theory.

On the spectrum of rules and standards, the historic approach to reformation may be characterized as quite rule-oriented, meaning that a predetermined directive, in this case effectuating intent in accordance with unambiguously expressed written wishes, will govern disposition of the case regardless of particular facts and circumstances demonstrable through extrinsic evidence tending to show that the written words do not accurately reflect intent. As is typical of rules, between a testator and beneficiary. G. Thompson, The Law of Wills § 137 (3d ed. 1947).

54. On a systemic basis, relief from unambiguous mistakes is provided for several classes of cases where the decedent's intent is thought to be unquestionable. These include cases within the gifts by implication doctrine, see infra note 229; violations of the rule against perpetuities, see infra notes 99-106; and tax-related mistakes, see infra notes 109-113.

55. On an ad hoc basis, relief from the unambiguous mistake may be provided by characterizing the error in question as an ambiguity, thus skirting the prohibition on reformation and justifying the remedy of construction. For example, the cases on which illustrations 3, 5, 6 and 7 are based were characterized, either by one or more of the parties or by the court itself, as matters of construction. See also Langbein & Waggoner, supra note 33, at 553 (arguing that courts mis-characterize unambiguous wills as ambiguous in order to afford a remedy for clear mistakes); Page on Wills, supra note 29, § 32.1.


57. Rule-oriented approaches have been summarized as follows:

A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. . . . A rule necessarily captures the background principle or policy incompletely and so produces errors of over or underinclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

Sullivan, supra note 56, at 58.
the no-reformation rule sometimes fails to achieve correct results because the rule is predicated on a generalization (the unambiguous written will of the testator is the best indicator of testamentary intent) that does not hold true in every case. Consequently, the rule, if faithfully applied, will produce intent-defeating results in some cases. Despite this quite obvious and important flaw, the no-reformation rule, like any other rule, nevertheless may be supported due to other advantages rules arguably enjoy over standards-oriented approaches.

One of the most important advantages of a rule in the context of will reformation is that it limits the opportunity to exercise bias by finding evidence of "mistake" more readily in cases involving testators whose dispositive plans are unusual or unpalatable. By limiting courts to the unambiguous language of the will, these testators receive assurance that their wishes will not be overturned because they are unpopular. More generally, the rule-oriented approach offers predictability to all testators, assuring them that their wishes, if expressed unambiguously, will be respected. Furthermore, the no-reformation rule reduces the cost of decision-making by effectively eliminating litigation over all wills deemed to be unambiguous.

For all of these reasons, the historic approach has more to commend it than mere unthinking adherence to tradition. Nevertheless, the steady stream of wills containing unremediable mistakes compels

58. SCHAUER, supra note 56, at 47-52.
59. Occasionally, corrective statutes, which are intended to remedy mistake, are the cause of intent-defeating results. See, e.g., Erickson v. Erickson, 716 A.2d 92 (Conn. 1998); Engle v. Siegel, 377 A.2d 892 (N.J. 1977).
60. Sunstein, supra note 18, at 974-75. In the context of donative transfers, this discrimination takes the form of application of a "family preference" pursuant to which "closer" relatives of the testator receive de facto advantage over the more distant relatives or non-relatives. For development of this point, see infra notes 138-142, 146-48, 162-68, 173-180, and accompanying text.
61. Sunstein, supra note 18, at 976. For development of this point, see infra notes 196-203 and accompanying text.
62. Id. at 972-74. For development of this point, see infra notes 216-17 and accompanying text. In addition to the virtues of rules discussed in the text, rule advocates identify the following virtues: (1) rules make it easier for adjudicators to enforce determinations because they can claim that enforcement is dictated by those who have laid down the rule; (2) rules increase accountability by clearly identifying the body responsible (the creator of the rule—e.g., the legislature) if rules produce undesirable results; (3) rules avoid the humiliation of subjecting people to exercises of official discretion in their particular case which may be important where the determination would have a stigmatizing effect; and (4) rules promote equal application of the law by treating the wealthy, who have the resources to litigate disputes, similarly to those of modest means who would not have the ability to seek an individualized circumstanced adjudication. See id. at 969-978. Professor Sunstein, himself not an advocate of rules, describes how the attributes of rules characterized as advantages by rules proponents may be seen differently by proponents of discretion-conferring approaches. See id. at 980-1003.
consideration of alternative approaches that might better effectuate intent.

2. Fellows Approach

The approach to reformation advocated by Professor Fellows seeks to broaden the availability of the reformation remedy to eliminate the cases in which the historic approach produces an outcome at odds with common sense. This approach to reformation relaxes, indeed rejects, the premise that the written will is an effective means by which a typical testator can convey his testamentary wishes. The basis for rejecting the written word as an accurate expression of intent is the assertion that "the level of detail and the economic constraints of the planning process make it impossible for the property owner to understand, let alone make an informed choice about, all the issues that arise." The terms of a will drafted by a lawyer thus "do not reflect the property owner's understanding of the plan" but rather, at best, "implement a plan that represents the client's probable intent." This premise compels the conclusion that no will, however clear, should be insulated from the possibility of revision based on judicial determination of the testator's true intent.

At the same time, the premise precludes the conclusion that actual intent of a particular testator is discernible; indeed, the premise would suggest that it often is non-existent. Consequently, Fellows rejects the goal of ascertaining actual intent as an unattainable ideal, whether through extrinsic evidence or otherwise, and instead advocates an approach in which determination of the meaning of a will is acknowledged as a process of imputing intent to the testator based upon evidence relating to the individual situation ("individualized imputed intent") or based upon general preferences that most testators are deemed to have ("generalized imputed intent"). Generalized imputed intent would reflect the inclination of most testators to favor family members and to engage in tax-efficient and otherwise sound estate planning.

Under this approach, alleged mistakes as well as ambiguities would be resolved by presuming that the testator intended to benefit his family and that he intended to minimize estate taxes. In other

63. Fellows, supra note 15, at 634.
64. Id.
65. Id.
66. Id. Accord James L. Robertson, supra note 14, at 1052 ("We need to accept the reality that the donor's subjective individuated intent may not be known with sufficient certainty and completeness and frequency that we may successfully ground it in our jurisprudence of donative documents."). Robertson's "circumstanced external approach" to interpretation of donative documents bears important similarities to Fellows' approach but differs in significant respects. Id.
words, reformation would be permitted based upon a court's view of the merits of an estate plan even in the absence of specific evidence of mistake. This approach, Fellows argues, better effectuates intent for testators as a whole.

This approach represents a move away from the rule-oriented determination embodied by the historic approach toward a standard-oriented determination that permits consideration of the particulars of individual cases. The approach is not, however, entirely devoid of rule-like aspects. Generalized imputed intent, and to a lesser degree individualized imputed intent, reflect presumptions (rebuttable rules) about the dispositive choices of individuals. With sufficient evidence, the presumptions can be overcome, but in the absence of such evidence the rebuttable rules govern. Ultimately, this approach produces the theoretical possibility of effectuating intent in all cases, but the price of that benefit is introduction of prejudice produced by application of presumptions derived from majoritarian norms.

3. Third Restatement Approach

The assumptions underlying the Third Restatement approach bear some similarity to each of the approaches discussed thus far. Like the historic approach, the Third Restatement is premised on the supposition that it is possible for testators to express themselves unambiguously and the belief that testators who manage to do so should not bear an undue risk that their wishes will be violated. At the same time, the Third Restatement, like the Fellows approach, contemplates the possibility of mistake and considers extrinsic evidence a useful source of guidance about intent though, unlike the Fellows approach, the Third Restatement seeks the actual (as opposed to imputed) intent of the testator. The Third Restatement treats tax-related errors under a special, more lenient provision that affords the remedy of "modification" rather than "reformation" the chief benefit of which is that evidentiary restrictions are loosened.

Under the general reformation provision of the Third Restatement:

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67. A legal-like approach has been summarized as follows:
A legal directive is "standard-like" when it tends to collapse decision-making back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under and over inclusiveness by giving the decisionmaker more discretion than do rules. . . . Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.
Sullivan, supra note 56, at 58-59 (internal citations omitted).

68. Fellows acknowledges the adverse impact generalized imputed intent may have on testators with preferences outside majoritarian norms. Fellows, supra note 15, at 613 ("Imputing intent . . . rais[es] barriers to donative freedom, while only rarely prohibiting its exercise").
A donative document, though unambiguous, may be reformed to conform the
text to the donor's intention if the following are established by clear and con-
vincing evidence:

(1) that a mistake of fact or law, whether in expression or inducement,
affected specific terms of the document; and

(2) what the donor's intention was.

Direct evidence of intention contradicting the plain meaning of the text as
well as other evidence of intention may be considered in determining whether
elements (1) and (2) have been established by clear and convincing

evidence.69

This provision allows for correction of a wide range of mistakes
that traditionally would be irremediable but imposes prerequisites to
the invocation of the remedy of reformation. One such threshold is
that the testator must execute a document conforming to the applica-
ble execution requirements. If the testator fails to execute a document
on the mistaken assumption that no will is required, for example, the
remedy of reformation is unavailable to correct this mistake.70 Additionally, the mistake must exist at the time of the execution. A failure
to change a will to reflect an unanticipated change in circumstances
cannot be remedied under this provision.71

The proof requirements of the Third Restatement approach also im-
pose limitations on the situations in which a remedy may be available.
Under the general provision cited above, much importance is placed
on the requirement that evidence of intent must be "clear and convinc-
ing" to justify departure from the testator's unambiguously expressed
wishes.72 The rationale is that the above-normal standard of proof
will guard against giving effect to fraudulent or mistaken evidence
and yet allow remedy in cases where the evidence is genuine and per-
suasive.73 The higher standard of proof also is intended to impose a
heightened sense of responsibility upon the trial judge and to free ap-
pellate courts to scrutinize the trial court's work more closely than in
the typical preponderance of the evidence review.74 Finally, it is
thought that the higher standard of proof will deter a potential plain-
tiff from bringing a reformation suit on the basis of insubstantial
evidence.75

Another restriction on the use of extrinsic evidence to support ref-
formation is that the alleged mistake, as well as the proof of the testa-

69. THIRD RESTATEMENT, supra note 9, § 12.1. This provision, phrased in terms of the
"donative document" and the "donor's intent," applies to inter vivos instruments
as well as wills. Adoption of a single standard to govern reformation of both types
of instruments is an important, though not indispensable, virtue of a reformation
doctrine for donative transfers. See infra notes 260-272 and accompanying text.
70. THIRD RESTATEMENT, supra note 9, § 12.1 cmt. h.
71. Id.
72. Id. § 12.1 cmt. e.
73. Id. § 12.1 cmt. b.
74. Id. § 12.1 cmt. e.
75. Id.
tor's actual intent, must be established by particularized proof.\textsuperscript{76} This requirement of particularity is designed to preclude reformation based on generalized claims such as, "if only my aunt had known how much I loved her, she would have left me more."\textsuperscript{77} Similarly, an assertion that the testator sought an estate plan to minimize taxes would lack the particularity required to justify a reformation under this standard.\textsuperscript{78} This focus on proof with particularity constitutes a rejection of Fellows' generalized imputed intent approach and instead requires specific evidence about the dispositive desires of the testator.

Discerning how these evidentiary standards will apply to actual cases is difficult because the \textit{Third Restatement} illustrations indicate only the nature of the mistakes that are within the ambit of the provision and not the combinations of evidence that will satisfy the proof requirements.\textsuperscript{79} To a degree, the nature of the proof required will depend upon the particular facts of the case, the credibility of witnesses, and other matters that are situation specific. There are, however, general evidentiary questions that arise under such a broad provision.

For example, should circumstantial evidence alone ever support reformation? The \textit{Third Restatement} does not directly preclude this,\textsuperscript{80} but on the other hand, circumstantial evidence alone would seem to fall short of the requirement to establish mistake with particularized proof because circumstantial evidence establishes no more than that the testator's dispositive plan fails to comport with the wishes the finder of fact would expect of someone similarly situated. Another general question is whether the drafter's testimony alone may satisfy the clear and convincing standard. Professors Langbein and Waggoner, on whose work the \textit{Third Restatement} position is premised, opine that it should not in the usual case,\textsuperscript{81} but nothing in the \textit{Third Restatement} suggests either support for or rejection of that position.

These evidentiary questions do not arise in the case of tax mistakes that fall within the \textit{Third Restatement}'s special modification provision. Under this provision, a will that fails to qualify for a tax benefit the testator intended to take advantage of may be re-written "in a manner that does not violate the donor's probable intention, to achieve

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. In this type of case, the remedy of modification might be available. See infra notes 82-86 and accompanying text.
\textsuperscript{79} \textit{Third Restatement}, supra note 9, § 12.1 cmt. i, illus. 4-8 (indicating that mistakes will be remediable if the evidence satisfies the clear and convincing standard of proof but failing to illustrate what such evidence might be).
\textsuperscript{80} \textit{Third Restatement}, supra note 9, § 12.1. \textit{But see infra note 95 (Third Restatement's definition of ambiguity suggests that where circumstantial evidence alone suggests mistake the case may be classified as one meriting construction rather than justifying reformation).}
\textsuperscript{81} Langbein & Waggoner, supra note 33, at 588 (noting that burden of proof in reformation is too high for the lawyer to carry unaided in most cases).
the donor’s tax objectives.”

This does not require a showing that the testator’s original, particularized intention was not expressed but rather merely a showing, based on a preponderance of the evidence, that the testator’s tax objectives were not achieved. Satisfying this standard requires a determination of the testator’s non-tax as well as tax objectives. Where a tax savings can be achieved with no disposi-
tive alteration, for example by dividing a single trust into multiple trusts in order to maximize the value of tax exemptions or deductions, the test is satisfied. On the other hand, if the tax savings requires an alteration of the beneficial interests, a factual inquiry into the testator’s intent is necessary. Such inquiry includes consideration of the testator’s dispositive plan as well as the consent of detrimentally affected beneficiaries.

This standard embodies elements of Fellows’ concept of generalized imputed intent with respect to tax-related planning. Unlike Fellows’ approach, the Third Restatement does not begin with the presumption that the testator intended to avail himself of all advantageous estate planning techniques and instead requires a finding that the testator in fact intended to achieve tax benefits. Once this intent is demonstrated, however, the Third Restatement approach parallels the Fellows approach to the extent that changes necessary to accomplish the tax objective are authorized even without additional affirmative proof they advance the testator’s desires so long as the changes are not inconsistent with those desires.

The Third Restatement approach to tax mistakes will be less accommodating than the Fellows approach for testators who did not consider tax objectives during the planning process. On the other hand, it has the potential to be more accommodating than the historic approach to the extent that the will itself fails to manifest the testator’s objectives.

82. Third Restatement, supra note 9, § 12.2.
83. Id. § 12.2 cmt. c.
84. Simple division of a single trust into multiple trusts increases the tax efficiency of a plan where only a portion of the assets will be subject to transfer tax at a later time. Segregating the assets into one trust that is fully taxable and one that is fully exempt from later tax allows the beneficiaries to consume the taxable assets while preserving the tax exempt assets. For examples of cases involving this type of reformation, see In re Estate of Reese, 622 So. 2d 157 (Fla. Dist. Ct. App. 1993); In re Case, 585 N.Y.S.2d 1004 (Surr. Ct. 1992); In re Nossiter, 552 N.Y.S.2d 834 (Surr. Ct. 1990); In re Kaskel, 549 N.Y.S.2d 587 (Surr. Ct. 1989). Some states now permit such reformations by statute. See, e.g., N.Y. Est. Powers & Trusts Law § 7-1.13 (McKinney 1992 & Supp. 2001).
85. Third Restatement, supra note 9, § 12.2 cmt. f.
86. Id.
87. See, e.g., Conn. Bank and Trust Co. v. Ajello, 468 A.2d 942 (Conn. Super. Ct. 1983) (refusing to reform trust to qualify it as tax exempt despite absence of objection by any interested party); In re Branigan, 609 A.2d 431 (N.J. 1992) (declin-
On the spectrum of rules and standards, the Third Restatement is rule-like in the sense that it imposes thresholds to qualify for reformation relief. Its core, however, is a standard that affords wider discretion than does the Fellows approach. Rather than anchoring presumptions about dispositive choices to imputed intent as Fellows does, the Third Restatement authorizes an unconstrained individualized inquiry into actual intent. The modification provision applicable to tax errors does contain some element of imputed intent to the extent that it shifts the burden of proof to those who support adherence to the terms of the document once a general desire to secure a tax benefit has been proven. However, the modification provision does not adopt the presumption of Fellows that all testators intend to minimize taxes.

The Third Restatement's focus on actual, rather than imputed, intent ostensibly frees the inquiry from the inherent bias toward majoritarian norms that the Fellows approach incorporates. To the extent the bias is absent, the results produced by the Third Restatement will be more likely to effectuate actual intent of testators who deviate from those norms. Whether it is possible to free the intent inquiry from those biases is another question. Evaluation of evidence, both direct and circumstantial, may be influenced indirectly or unconsciously by the fact finder's sense of what a similarly situated individual would wish. At bottom, the Third Restatement's rejection of imputed intent will increase the unpredictability of results without necessarily eliminating the bias that makes its use so troublesome.

B. Seven Classic Mistake Cases

The preceding description of alternative approaches to reformation identifies abstractly the relative strengths and weaknesses of each, which is a useful preliminary step in the process of evaluating possible alternatives. This section illustrates the meaning and import of the abstractions by applying the alternative approaches to seven classic mistake cases.

These cases, organized in order of seeming clarity of intent, highlight three important points. First, there are cases (e.g., Cases 1 and 2) in which the will itself establishes with certainty that adherence to its terms defeats the intent expressed within it. Second, in cases

88. See supra notes 70-72 and 76-78.
89. See infra notes 138-142, 146-48, 162-68 and accompanying text for illustrations of this problem.
where the will itself does not manifest mistake (e.g., Cases 3, 4 and 5), consideration of extrinsic evidence risks defeating testamentary intent, and this risk varies depending upon the type of evidence involved. Finally, evidentiary restrictions cannot preclude the implicit role of the family preference in the process of discerning intent (e.g., Cases 5, 6 and 7).

1. **Case 1: The Crossed Will Execution**\(^9\)—An Unequivocal Error

Husband and wife wish to execute mutual (mirror image) wills. The wills are prepared properly, and husband and wife sign the wills in execution ceremonies conducted simultaneously. Inadvertently, husband signs the will prepared for his wife, and wife signs the will prepared for her husband.

Query: May the will signed by the husband be admitted to probate and then reformed so that the document reads as if it were the instrument prepared for the husband?

In the case of a crossed will execution where each spouse signs the will prepared for the other, strict application of the Statute of Wills would preclude relief. The will execution requirements, if strictly applied, foreclose probate of the will containing the testamentary provisions the decedent intended to express; reformation of the erroneously signed instrument is impermissible on the grounds that Case 1 is indistinguishable, in principle, from other cases involving less compelling proof.\(^9\)

Strict adherence to the no-reformation rule in this case is "ironic—if not perverse."\(^9\) The will signed by the decedent itself manifests the existence of the mistake—the testator named in the will is different from the individual who signed it. Compelling evidence of the decedent’s dispositive intent is provided by the wills of the couple, considered together. The wills reveal a joint plan of disposition under which each spouse leaves his or her own estate to the other, and at the death of the survivor, leaves the estate to the same ultimate beneficiaries. The documents, executed simultaneously, with all of the formalities required for wills, are nearly as free of concerns about fraud and perjury as one properly executed will would be. Neither the testimony of the drafter (or others) nor evaluation of the dispositive choices embodied in the instruments is necessary to the conclusion that mistake occurred. The will offered for probate itself establishes mistake with absolute certainty unless the possibility that the couple purposefully endeavored to achieve a nullity in their estate planning activities must be considered.

In *In re Snide*, the New York Court of Appeals adopted this view, granting relief in a crossed will execution case, while purporting to

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90. This illustration is based on *In re Snide*, 418 N.E.2d 656 (N.Y. 1981).
92. 418 N.E.2d at 657.
adhere to the historic approach to reformation.93 This decision may be understood as an unprincipled deviation from the no-reformation rule, indistinguishable from any other situation in which the proof is compelling. Alternatively, it may represent a limit in the scope of the no-reformation rule. The rule, so conceived, requires adherence to the unambiguous terms of a document only if the terms effectuate a disposition. If the terms of the will fail to effectuate a disposition, they cannot be any, much less the best, source of the testator’s dispositive intent, and deference to the instrument is not required if extrinsic evidence establishes dispositive intent with requisite certainty.94

Similarly, relief should be available under the Third Restatement approach for the crossed will execution. Whether the appropriate remedy would be reformation or construction, however, is unclear. Arguably, an uncertainty in meaning is apparent from the will itself in light of the discrepancy between the testator named in the will and the signature of a different individual.95 On the other hand, the absence of any conflict in the dispositive terms themselves might suggest that reformation is the appropriate remedy. If characterized as an ambiguity, then the proof of dispositive wishes must be established by a mere preponderance of the evidence.96 If characterized as an unambiguous mistake, then the proof must meet the higher clear and convincing standard and the particularity requirements.97 The

93. Id.

94. The Snide decision expressly refutes the argument that it creates a general exception to the no-reformation rule, but this may simply reflect the reality that cases involving both certain mistake and high quality extrinsic evidence establishing testamentary intent will be exceedingly rare. See id.

95. The following illustration, categorized by the Third Restatement as ambiguous, supports this contention:

G’s will devised property to “my friend Richard H. Simpson.” Extrinsic evidence shows that “Richard H. Simpson,” though a remote acquaintance, was not G’s “friend,” but another person with that surname, one Hamilton Ross Simpson, also known as “Bill” or “Rotary Bill,” was G’s friend.

Third Restatement, supra note 9, § 11.2 cmt. j, illus. 7. To categorize this disposition as ambiguous, one must ascribe an artificially narrow meaning to the elastic descriptor “friend.” See American Heritage Dictionary of the English Language 527 (William Morris ed. 1976) (defining “friend” to include any associate or acquaintance). The only reason to do so is to facilitate the opportunity to change an otherwise unambiguous disposition on the grounds that the motivation for the disposition is not readily apparent. If this justifies a finding of ambiguity, then the facts of Case 1, where the motivation for the disposition could only be mischief or mistake, should easily merit construction relief. But see infra note 107.

96. Third Restatement, supra note 9, § 11.2 (stating that preponderance standard of evidence applies to ambiguities).

97. Third Restatement, supra note 9, § 12.1 (stating that clear and convincing standard of evidence applies to unambiguous mistakes).
compelling nature of the proof here easily satisfies either standard so categorization makes little difference.

This, the clearest of all cases considered, is trouble-free from a purposive perspective only because the error is one of execution rather than one of substantive meaning. As such, the case is different from true reformation cases which involve a failure to articulate intent accurately in the will. Consequently, Case 1 is more appropriately characterized as an execution error to be remedied by one of the approaches under which signing formalities are relaxed.98

2. Case 2: The Bequest Void at Execution99—Another Unequivocal Error

Testator's will establishes two trusts, one for the benefit of his son and one for the benefit of his daughter, which were to terminate upon the later of (i) the death of the child for whose life benefit the trust was created, and (ii) the attainment of age 35 by all of the testator's grandchildren. The remainder interests in the trusts violate the rule against perpetuities,100 requiring the court to declare the future interests void in the absence of reformation.

Query: May the will be reformed to save the future interests in the trust by modifying the provisions of the will to conform to the rule against perpetuities?

The level of certainty about the existence of mistake is identical in the case of a perpetuities violation and a crossed will execution. In both, the conclusion may be erroneous only if the testator engaged in the estate planning exercise intending to achieve a nullity. In the crossed will execution case, the error obviates the will in its entirety while the perpetuities error obviates the provisions of the will running afoul of the perpetuities restrictions.

As with the crossed will execution cases, courts adhering to the no-reformation rule have produced conflicting results in the perpetuities cases. In some cases, courts have applied the rule strictly, refusing to reform the will so that the provisions offending the rule against perpetuities are simply struck from the will.101 To the extent that the no-reformation rule is premised on a distrust for extrinsic evidence, refusing to reform perpetuities violations conforms to the purpose of the

98. See supra notes 24-25.
99. This illustration is based on In re Ghiglia, 116 Cal. Rptr. 827 (Ct. App. 1974).
100. The common law rule against perpetuities voids certain future interests that neither vest nor fail to vest within a period measured by a life in being plus 21 years. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (Roland Gray ed., 4th ed. 1942). Because of its extraordinary complexity, the rule has been described as "a modern labyrinth in need of a golden thread." Jesse Dukeminier, A Modern Guide to Perpetuities, 74 CAL. L. REV. 1867 (1986).
rule. This distrust, however, extends only to unambiguous instruments and not to ambiguous ones where, as noted earlier, extrinsic evidence is freely considered. Once mistake is unequivocally established, however, ambiguous and unambiguous mistakes are indistinguishable. In either situation, the testator's true intent is not discernable from the will alone. Consequently, there is little justification for restricting use of extrinsic evidence, for whatever it may be worth, to ascertain intent.103

Recognizing the validity of this argument, some courts have reformed wills to comply with the perpetuities requirements while otherwise adhering to the no-reformation rule.104 In In re Ghiglia, for example, upon which Case 2 is based, the court reduced the age contingency for the grandchildren's remainder interests to 21 to conform to the rule against perpetuities.105 In so holding, the court was able to preserve the "dominant testamentary plan."106

The Third Restatement approach would deny relief, either construction or reformation, for this unequivocal error. The certainty that the testator's expressed wishes cannot be effectuated is insufficient to merit remedy because the will, when written, accurately stated the testator's actual, albeit unattainable, intent.107 The exis-

102. See supra note 30.
103. The Uniform Statutory Rule Against Perpetuities (USRAP), embodied in Unif. Probate Code §§ 2-901 to 2-907, 8 U.L.A. 223 (1998 & Supp. 2001), is premised on this conclusion. Under USRAP, an instrument violating the rule against perpetuities may be reformed "in the manner that most closely approximates the testator's manifested plan of distribution" subject to the requirement for the interest to vest or fail within 90 years. Unif. Probate Code, supra, § 2-903. There is little concern about the ability to discern the testator's intent in these cases because the error is not a failure to express wishes accurately but rather a failure to alter actual wishes to conform to legal constrains on dispositions. See Unif. Probate Code, official cmt., 8 U.L.A. 234, 235 (1998 & Supp. 2001); William M. McGovern, Facts and Rules in the Construction of Wills, 26 UCLA L. Rev. 285, 310-25 (1978). The widespread popularity of this statute evidences the common sense appeal of the reasoning underlying it. Unif. Stat. Rule Against Perpetuities, 8B U.L.A. 223 (West 2001) (listing, as of 1993, 25 jurisdictions that have enacted the statute).
105. 116 Cal. Rptr. at 833.
106. Id.
107. In response to a query from the Association of the Bar of the City of New York's Committee on Trusts, Estates and Surrogate's Courts, Professors Langbein and Waggoner expressed the view that perpetuities violations would be outside the purview of the Third Restatement's reformation provisions in the absence of proof that a "savings clause" (providing for termination of trusts no later than the maximum period permitted by the rule against perpetuities) was intended to be inserted but was omitted by drafting mistake. Letter from Langbein and Waggoner to Donald A. Goldsmith and Professor Robert Parella (Feb. 26, 2000) (on file with author). Upon further inquiry Professor Waggoner opined that the perpetuities
tence of other statutory authority\textsuperscript{108} to remedy perpetuities violations reduces concern about perpetuities problems in particular, but it is unclear why any provision that is certain to fail to effectuate intent is outside the purview of reformation.

3. Case 3: Tax Mistakes\textsuperscript{109}—Red Apples, Green Apples, and Oranges

Testator's will establishes a single trust for the benefit of his spouse and issue of his siblings. Distributions from the trust to siblings' issue will incur generation-skipping tax (GSTT) to the extent the decedent's exemption from GSTT is not applied to the trust. If, however, the trust is divided into two identical trusts, the testator's GSTT exemption may be allocated to fully insulate one trust from GSTT which will minimize total transfer taxes payable without affecting the dispositive provisions of the will.\textsuperscript{110} All interested parties consent to the proposed reformation.

Query: May the will be reformed?

The confluence of several factors has created a special niche for tax-related testamentary mistakes in some jurisdictions. First, the ever increasing complexity of federal transfer tax law magnifies the potential for drafting error.\textsuperscript{111} Second, the concern about distrust of violation should not qualify for relief either. Letter from Waggoner to the author (Dec. 10, 2001) (on file with author).

\textsuperscript{108} See supra note 103.

\textsuperscript{109} This illustration is based on In re Dunlop, 617 N.Y.S. 2d 119 (Surr. Ct. 1994). The disposition in Dunlop was somewhat more complex than that of Case 3 due to the interplay of the unified credit applicable to transfer tax, the estate tax marital deduction and the generation skipping transfer tax, but the more simplistic facts of Case 3 accurately illustrate the issue involved.

\textsuperscript{110} For a description of the benefits of trust-splitting, see supra note 84.

extrinsic evidence is of marginal relevance because often it is uniquely unequivocal. All interested parties will support the reformation if it increases the benefits for all at the sole expense of the taxing authorities; the taxing authorities very often acquiesce in the result; and all but the most unusual of testators would agree with the reformation. Moreover, the document itself often will manifest an intent to qualify for the particular tax benefit at issue, so the remedy, though properly characterized as reformation in the sense that an actual re-writing of the instrument is required to qualify for the tax benefit, is really more akin to construction in the sense that extrinsic evidence is relied upon to clarify intent that is expressly set forth in the document itself.\(^\text{112}\) Finally, given that the Internal Revenue Code is not the native tongue of the testator, there is no expectation that the testator has considered the choice of language in light of the Code's requirements, and therefore, there is little hesitation in modifying the language to facilitate the testator's apparent general purpose.

In Case 3, strict application of the historic approach would preclude relief. In \textit{In re Dunlop}, on which Case 3 is based, the court held that reformation was unjustified because the will itself did not manifest an intent to maximize the benefit of the generation-skipping transfer tax exemption.\(^\text{113}\) Although the failure to mention generation-skipping transfer taxes in the will supports the conclusion that the testator did not contemplate minimizing them, it is almost unthinkable that he would object to a ministerial change increasing the net estate while leaving the dispositive provisions entirely in tact. For this reason, more progressive courts applying the historic approach


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would grant relief in similar cases as would the Third Restatement.

Where achievement of the tax benefit requires modification of the dispositive provisions as opposed to mere administrative change, conclusions about the testator's intent are less certain. These cases may be divided into three categories: those in which the will indicates an intent to qualify for the tax benefit it fails to achieve (red apples); those in which the will does not indicate an intent to qualify for a particular tax benefit, but extrinsic evidence demonstrates that the testator intended to utilize that tax benefit (green apples); and those in which the testator did not intend to utilize a tax benefit which someone argues he would have wanted if he had been properly advised (oranges).

Cases within the first category ought to fall within the ambit of construction rather than reformation because the conflict between the stated intent to qualify for a tax benefit and the failure of the will to so qualify creates an ambiguity. Some cases applying the historic approach follow this analysis while others treat the issue as one of reformation on the grounds that qualification for the tax benefit requires actual re-writing of the will. Under the Third Restatement's modification standard, the will's statement of the intent to achieve the tax benefit in issue suffices so that a remedy is available regardless of whether the will is characterized as ambiguous, thus meriting construction relief, or not.

114. See supra note 84.
115. See supra note 82.
116. See, e.g., In re Martin, 549 N.Y.S.2d 592 (Surr. Ct. 1989) (involving a testator's will that expressly contemplated that a trust would qualify for the estate tax marital deduction but permitted the trustee to sell trust assets at less than fair market value which would preclude allowance of that deduction).
117. See, e.g., In re Quigan, N.Y.L.J., Nov. 17, 1994, at 84 col. 3 (Surr. Ct.) (involving a will that established a trust insulated from further transfer tax by reason of the unified credit ("credit shelter trust") over which testator's daughter was given general power of appointment thereby subjecting the assets to tax in the daughter's estate; inclusion of credit shelter trust would not necessarily be inconsistent with estate tax planning but drafter testified to error).
118. See, e.g., In re Choate, 533 N.Y.S.2d 272 (Surr. Ct. 1988) (involving provisions of testamentary trust that required modification in order to minimize consequences of generation-skipping transfer tax which was not in effect at the time will was executed).
119. Compare In re Martin, 549 N.Y.S.2d 592 (Surr. Ct. 1989) (holding that will's indication of intent to qualify trust for estate tax marital deduction resulted in categorizing will as ambiguous), with In re Bickel, 598 N.Y.S.2d 128 (Surr. Ct. 1993) (holding that presumed intent to qualify trust for estate tax charitable deduction did not result in categorizing will as ambiguous). See also In re Estate of Reese, 622 So. 2d 157 (Fla. Dist. Ct. App. 1993); Edmisten v. Sands, 300 S.E.2d 387 (N.C. 1983) (holding that where realization of tax objectives requires change in administrative provisions only, proper relief is construction).
120. See Third Restatement, supra note 9.
Cases in which the utilization of a tax benefit requires dispositive modification and the will contains no clear indication of the desire to achieve a particular tax benefit are more difficult to reconcile with the historic approach. Whether the testator desired the benefit but failed to express it in the will (green apples) or the testator failed to consider the tax benefit but may have wanted it if he had considered it (oranges), there is no testamentary indication of this intent. Nevertheless, some courts applying the historic approach have entertained applications of this sort on the grounds that the tax benefit may be great in comparison to the disruption of the estate plan. In these cases, some courts have tended to focus on what the testator would have wanted in light of the tax laws existing at his death rather than on what the testator actually desired at the time of will execution so that "green apples" and "oranges" are treated like "red apples." 121 The Third Restatement adopts this approach, 122 falling short of Fellows' concept of generalized imputed intent which affords all testators the benefits of sound estate planning regardless of whether they considered tax issues in the development of their estate plans. 123 Unlike Cases 1 and 2, the universe of possible motivations for executing wills failing to qualify for tax benefits is not limited to mischief or mistake. Even where no dispositive change is required to realize a tax benefit, it is possible, albeit unlikely, that the testator intended the results produced by the will as written. Where dispositive change is required, the possibility that the testator desired the plan as written becomes more realistic. Thus, in every case of alleged tax mistake, the safe harbor may be important, and in those tax cases that involve changes to the will's dispositive provisions, the safe harbor is as important as it is in any other situation where reformation affords the opportunity to re-write dispositions.

4. Case 4: The Scrivener's Error 124—Over-Reliance on Drafters' Testimony

Testator executes a will establishing a charitable trust, and nine years later executes a codicil to change the charitable beneficiaries. Six years after executing the first codicil, testator executes a second codicil in order to qualify the trust for the estate tax charitable deduction pursuant to newly enacted changes in the Internal Revenue Code. In the preparation of the second codicil, the lawyer inadvertently reinstates the charities named in the original

121. Compare In re Choate, 533 N.Y.S.2d at 272 (involving testator who did not actually intend to achieve a particular tax benefit), with In re Quigan, N.Y.L.J., Nov. 17, 1994, at 34, col. 3 (Surr. Ct.) (involving testator who alleged to desire tax benefit at the time of the will execution).
122. See Third Restatement, supra note 9.
123. See Fellows, supra note 15.
124. This illustration is based on Connecticut Junior Republic v. Sharon Hospital, 448 A.2d 190 (Conn. 1982), overruled by Erickson v. Erickson, 716 A.2d 92 (Conn. 1998).
will in place of the charities named in the first codicil thus dramatically changing the decedent's estate plan. The decedent executed the second codicil, and at his death it, together with the will and first codicil, is offered for probate.

Query: May the will (second codicil) be reformed to provide that the charities named in the first codicil take?

Case 4 differs from all of the preceding cases in that the alleged error could not be suspected in the absence of the testimony of the drafter. The will and codicils together establish a valid charitable trust that qualifies for favorable tax treatment. The testamentary documents disclose a change from one set of charitable beneficiaries to another and back again, but this raises no suspicion of error; instead, it simply appears that the testator vacillated about the charitable beneficiaries. The testamentary plan can be carried out as written, and nothing about the plan is at odds with expectations about what a testator in this position would do.

In such a case, application of the historic approach would preclude relief which is the result reached in Connecticut Junior v. Sharon Hospital,\textsuperscript{125} on which Case 4 is patterned. Even as it adhered to the no-reformation rule, the Supreme Court of Connecticut, quoting the lower court, hinted at possible justifications for excepting scriveners' errors from the general reformation prohibition:

Substantial and convincing evidence was offered to establish that the testator had directed that the second codicil to his will be prepared only for the purpose of qualifying the charitable bequests under Paragraphs Seventh and Eighth of the will and first codicil as charitable remainder annuity trusts eligible for an estate tax charitable deduction in the decedent's estate; and that by scrivener's error the [charities named in the will] were substituted for the [charities named in the first codicil] in the [second] codicil; and that the proposed [second] codicil was presented to the testator in the context of innocent misrepresentation of its contents resulting in mistake in the instrument as executed with respect as to which charitable beneficiaries the testator intended to benefit.\textsuperscript{126}

Under the approach of the Third Restatement the case would rise or fall on the testimony of the drafter.\textsuperscript{127} With or without supporting direct proof, such as the testimony of the secretary or contemporaneous notes, the drafter's testimony seems compelling. Not only does he forthrightly confess to the error, the circumstances support the explanation that the testator executed the second codicil for the sole pur-

\textsuperscript{125} Id. Similar cases arise recurringy. See, e.g., In re Estate of Frietze, 966 P.2d 183 (N.M. 1998) (declining to correct alleged scrivener's error to replace one beneficiary with another); Scarlett v. Hopper, 823 P.2d 435 (Or. Ct. App. 1992) (declining to correct alleged scrivener's error where the effect would be to change beneficiaries that the will unambiguously identified). See also V. Woerner, Annotation, Effect of Mistake of Draftsman (Other Than Testator) in Drawing Will, 90 A.L.R.2d 924 (1963 & Supp. 1993).

\textsuperscript{126} 448 A.2d at 192 n.5 (emphasis added).

\textsuperscript{127} Third Restatement, supra note 9, § 12.1 cmt. i, illustr. 4, 5, 6.
pose of securing a tax advantage and not to effect any dispositive change. There is no evidence contradicting the drafter's recollection and no reason to doubt his veracity. To the contrary, it would seem highly unlikely that the drafter would testify to an error he did not commit. For those reasons, the testimony of the drafter alone, at least in this case, arguably should satisfy the clear and convincing standard.

The epilogue to Connecticut Junior proves this conclusion wrong. Following the Connecticut Supreme Court's refusal to permit reformation of the will,128 the disappointed beneficiaries brought a malpractice action against the drafter.129 In Connecticut Junior, other evidence surfaced that contradicted the conclusion of mistake. Specifically, the decedent did not, as one might have surmised from the Connecticut Junior case, sign the second codicil without reviewing its contents. The second codicil was read aloud to him and he asked questions about it. Furthermore, decedent later told a long time friend that he had "reverted or returned or gone back to his original list of charities."130 These facts compelled the finding that the change in charitable beneficiaries, though not initially requested by the decedent, was ratified by him. Consequently, the disappointed charities lost the malpractice case.131

The risk of interest-defeating reformation illustrated by this case stems from the assumption that a drafter who confesses to error is an authoritative source of the testator's true intent. The discrepancy between the drafter's view of the testator's intent as expressed in the Connecticut Junior case and the evidence of testamentary intent the drafter presented in the subsequent malpractice action raises the question of the validity of that assumption. The assumption may be invalid not only in the unusual case of drafting error ratification presented by Connecticut Junior but in any case where the drafter may have misunderstood the client's wishes or failed to recollect them accurately at the time of the reformation application. In all such cases, complete evidence of testamentary intent may fail to come before the court hearing the reformation application if undue deference is accorded to the drafter.

5. Case 5: Uniquely Compelling Circumstantial Evidence132—The Impotence of a Broad Standard to Assure Relief

Testator and his fiancé execute mutual (mirror image) wills. The wills provide that the estate of each will pass to the other, and that on the death of the

128. 448 A.2d at 199.
130. Id. at 738.
131. Id. at 739
132. See Erickson v. Erickson, 716 A.2d 92 (Conn. 1998).
survivor, the estate will be divided into two shares, one for the children of the testator and one for the children of testator's fiancé. The will fully and accurately expresses the testator's desires. However, state law provides that a will executed prior to marriage is deemed revoked unless the will expresses the intent that it continue in force after marriage.\footnote{133} The will, as executed, does not state expressly that the testator wishes it to remain valid after marriage. Testator marries his fiancé two days after executing the will, and he dies without revising the will.

Query: May the will be reformed to state expressly testator's intent for the will to remain valid after the marriage?

Case 5 is hardly classic in the sense that it is unlikely to arise repeatedly, but it is an extreme example of a large class of cases involving apparently compelling circumstantial evidence.\footnote{134} If this case is susceptible to a singular analysis, then the safe harbor would be unnecessary for at least some portion of the cases within the class it represents, and the Third Restatement approach would assure relief. Conversely, if multiple interpretations of the evidence are possible on these extreme facts, then the retention of the safe harbor is important for the entire class of such cases, and the Third Restatement approach will not necessarily effectuate intent.

In Case 5, the dispositive plan of the testator and his fiancé, each leaving his or her estate to the other and on the death of the survivor to identical residuary beneficiaries, is a plan typical for married couples. The execution of the will two days before the planned wedding date strongly suggests that the testator intended the will to remain in effect after the marriage. Difficulty arises notwithstanding the will’s absolute clarity regarding the testator's intent as a result of a corrective statute revoking the will that is premised on a generalization which, in all likelihood, does not apply to this testator.

\footnote{133} Id. at 93. The statute involved in the Erickson case provided:

If, after the making of a will, the testator marries or is divorced or his marriage is annulled or dissolved or a child is born to the testator or a minor child is legally adopted by him, ... and no provision has been made in such will for such contingency, such marriage, divorce, annulment, dissolution, birth or adoption of a minor child shall operate as a revocation of such will, provided such divorce, annulment or dissolution shall not operate as a revocation of such will if the spouse of the testator was not a beneficiary under such will ... .

\footnote{Conn. Gen. Stat. § 45a-257(A) (rev. to 1995). The statute was repealed in 1996, the same year the testator in Erickson died, but the repeal was effective January 1, 1997. 1996 Conn. Acts 95, § 4 (Reg. Sess.).}

\footnote{134} See, e.g., In re Estate of Tuthill, 754 A.2d 272 (D.C. 2000) (involving omission of spouse as beneficiary of family trust under instrument that established both the family trust and a marital trust where the assets were insufficient to fund the marital trust); Crisp Area Y.M.C.A. v. Nationsbank, N.A., 526 S.E.2d 63 (Ga. 2000) (involving designation of organization as beneficiary that ceased operations six days prior to execution of the will); Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000) (involving close relationship with claimants versus remote relationship with individuals who would take in the absence of reformation).
If characterized as an unambiguous mistake, no remedy would be available under the historic approach, and the surviving spouse would be relegated to a recovery in malpractice. There would, however, be a tendency to characterize the will as ambiguous in order to justify relief by construction based on the compelling circumstantial evidence. In a system that offers relief for unambiguous mistakes as well as ambiguities, however, defining ambiguity to exclude dispositions like those in Case 5 that are clear but puzzling is justifiable because reformation provides a potential remedy. In *Erickson v. Erickson*, on which Case 5 is based, the Supreme Court of Connecticut adopted this approach, holding that the will was unambiguous but that it could be reformed if there was clear and convincing evidence of mistake.

Interestingly, on remand the Superior Court held that the evidence did not meet this standard. The court approached the issue by looking for affirmative evidence that the testator desired the will to remain operative beyond the two day window between the will execution ceremony and the marriage ceremony rather than focusing on the senselessness of the plan as written (and re-written by applicable statute). The court found no such evidence existed because both the drafter and the surviving spouse, who testified to this effect, were incredible. The drafter’s testimony was discredited because it varied slightly in the course of the proceedings; the surviving spouse’s testimony was discredited based on, among other things, evidence that she had failed to check the box on the probate petition indicating that the decedent had married after executing the proffered will. Other witnesses testified on behalf of the surviving spouse as well, including a neighbor, a brother and a son-in-law, but the testimony, colored by


137. *Id.*


139. *Id.*

140. *Id.*
indirect interest, was insufficient to establish mistake with the requisite certainty. This counter-intuitive result is equally possible under the Third Restatement approach which sanctions denial of relief whenever the finder of fact is unconvinced that the will, as written, incorporates a mistake.

One explanation for the odd outcome in *Erickson* is that the court implicitly applied a family preference, requiring protection of the children of the first marriage. The decedent’s estate plan provided no such protection because the provisions for them under the reciprocal will executed by their step-mother could be revoked at will. Express mention of this fact, the substantial inheritance received by the decedent from his first wife, and the short duration of his marriage to the surviving spouse at the time of the will execution, suggest that the family preference played a pivotal role in the court’s analysis.141

The family preference also, however, would have supported the opposite result because leaving the estate to the soon-to-be wife, is consistent with general norms and sound estate planning.142 Consequently, if the family preference explicitly, as in the Fellows approach, or implicitly, as is possible in the Third Restatement approach, determines the availability of reformation, the results will be highly unpredictable, depending more on the fact finder’s sense of equity than the likelihood of the testator having erred. While *Erickson* itself represents a risk of under-correction, the same issue could produce cases of over-correction as well.

An alternative explanation for *Erickson* is that the court understood the clear and convincing evidence standard to require direct evidence in addition to the circumstantial evidence presented to the Connecticut Supreme Court. This interpretation would preclude reformation where the only evidence of mistake was failure to dispose of the estate in a manner consistent with the fact finder’s expectations for a similarly situated testator. The value of this protection, readily apparent in most cases, is less apparent in the *Erickson* case but still potentially important. If, for example, the testator’s assets included interests in employee benefit plans that provided for surviving spouses but not fiancés, testamentary provisions would be important for the fiancé prior to marriage while their continuation after marriage could defeat intent if the testator desired to provide for his children after assuring that his spouse received a certain amount. The

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141. *Id.*
142. See Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 319, 367 (reporting empirical data establishing that 23 percent of decedents would leave 100 percent of the estate to the surviving spouse if survived by a minor child living with a former spouse, and a majority of decedents would give the spouse more than half of the estate in this situation). Assets passing to the surviving spouse qualify for the estate tax marital deduction. *See* I.R.C. § 2056.
inclusion to dismiss this possibility, in light of the likelihood that the
non-testamentary assets would be revealed in the reformation pro-
ceeding, assumes that the beneficiaries' lawyers will ascertain intent
more competently than the will will express it. Case 4 aptly demon-
strated the vulnerability of that assumption.143

6. Case 6: Undisposed of Property144—The Power of the Family
Preference to Preclude Apparently Justified Relief
(and the Inefficacy of the Safe Harbor to Preclude It)

Testator's will devises $5 each to two children and the residuary estate to a
third child. The will specifically states: "I make no disposition of real estate as
that is devised by the will of my late husband." In fact the testator owned an
interest in real property as tenants in common with her husband which will
pass by intestacy to all three children in equal shares if it does not pass under
the residuary clause.

Query: May the will be reformed to provide that the real estate
passes to the residuary beneficiary?

Case 6, like Case 5, is one in which the will could be categorized as
ambiguous in order to create the possibility of relief in a system that
would deny relief for unambiguous mistakes. Yet the will is unambig-
uous in the sense that the testator clearly had no intention to dispose
of real property under her will. Where the error is evident from a pro-
vision of the will itself, adherence to the terms of the will will not ad-
vance the testator's intent except by happenstance, and consideration
of extrinsic evidence may advance intent.145 Nevertheless, in In re
Estate of Dobrovolny, on which Case 6 is based, relief was denied.146

In the more typical case, where failure to dispose of a portion of the
estate is unexplained in the will, relief from strict application of the
historic approach is arguably unjustifiable because the will itself is
effective, and the property not disposed of pursuant to express provi-
sions might have been intended to pass to intestate heirs. Accord-
ingly, courts typically, though not unfailingly, deny reformation in
such cases.147

143. See supra notes 129-131 and accompanying text.
144. This illustration is based on In re Estate of Dobrovolny, 318 P.2d 1053 (Kan.
1958).
145. But see Boone County Nat'l Bank v. Edson, 760 S.W.2d 108 (Mo. 1988) (holding
that court cannot correct mistake of drafter unless mistake as well as what the
testator would have done in the absence of mistake appears on the face of the
will); Gifford v. Dyer, 2 R.I. 99 (1850) (stating that relief for mistake could be
available only if the instrument indicated the disposition the testator would
have made but for the mistake).
146. 318 P.2d at 1058.
147. See, e.g., Knupp v. D.C., 578 A.2d 702 (D.C. 1990) (holding that failure to desig-
nate residuary beneficiary not correctable resulting in escheat); In re Estate of
Smith, 599 N.E.2d 184 (Ill. App. Ct. 1992) (holding that omission of residuary
Under the *Third Restatement* approach, an individualized analysis would suggest that the real estate should pass to the residuary beneficiary. As in Case 5, however, the flexibility of the approach would accommodate the opposite result, which the finder of fact would be inclined to reach if he was concerned about the testator's decision to disinherit two of her three children. The family preference itself would not constitute an overt part of the analysis, but it could, consciously or unconsciously, color the interpretation of and weight accorded to evidence of intent.

If relief is justified in Case 6 and other cases where the will fails to dispose of a portion of the testator's property, it should extend to all cases in which the testator fails to dispose of some portion of his property under the will. This would alert drafters and testators to the need to dispose of all property in the will even if the testator wishes for some portion or items of property to pass to intestate heirs. Additionally, this would afford at least an opportunity to seek relief to claimants, such as the child in Case 6, whose position may be at odds with the fact finder's sense of the family preference.148

7. **Case 7: Unanticipated Circumstances**—*The Power of the Family Preference to Create the Perception of Mistake (and the Inefficacy of the Safe Harbor to Preclude It)*

Testator and his wife execute mutual (mirror image) wills providing that the estate of each passes to the other, and upon death of the survivor, to the children. If neither the spouse nor the children survive, the residue of the estate is to be distributed in equal shares to the husband's mother, Rose, and

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148. If protection of the family, as determined in the eyes of the judge, is desirable, then a family maintenance system similar to that in place in England and elsewhere would be a more direct means of achieving this result. Under such a system, the court has discretion to allocate a portion of the decedent's estate to his survivors if the decedent has not made reasonable provisions for them. For a brief overview of these statutes, see Brashier, supra note 35.

149. This illustration is based on *Engle v. Siegel*, 377 A.2d 892 (N.J. 1977).
the wife's mother, Ida. Rose dies, and several years pass after which the couple and their children die in a common disaster survived by Ida. By statute, when one residuary beneficiary predeceases the testator, the other residuary beneficiaries share the estate pro rata.150

Query: May the will be reformed to provide that the portion of the estate designated for Rose shall pass to Rose's children (testator's siblings) on the theory that the couple intended to benefit the two families equally?

In Case 7, the testator may not have contemplated seriously, or at all, the possibility his wife, children and mother would predecease him while his wife's mother survived. The probable failure to contemplate the particular contingencies that in fact arose could justify either the decision to disregard the will that does not address disposition in the event of these contingencies or, alternatively, the refusal to attempt to discern an intent that probably never was formulated. The historic approach adopts the latter position.151

Under New Jersey's construction doctrine of probable intent, which allows the court to attempt to effectuate the testator's probable intent in order "to accomplish what he would have done had 'he envisioned [the actual circumstances that would exist at death],'" however, relief may be available.152 In Engle v. Siegel,153 for example, upon which Case 7 is based, the New Jersey Supreme Court disregarded the corrective statute, effectively re-instating the common law result of partial intestacy154 based on extrinsic evidence that "obviously"

150. Id. at 895. The statute involved in the Engle case provided as follows:
   When a residuary devise or bequest shall be made to 2 or more persons by the will of any testator ... unless a contrary intention shall appear by the will, the share of any such residuary devises or legatees dying before the testator and not saved from lapse [by anti-lapse statute which provides that dispositions to certain relatives who predecease the testator pass to the issue of the predeceased relative, or not capable of taking effect because of any other circumstance or cause, shall go to and be vested in the remaining residuary devisee or legatee, if any there be, and if more than 1, then to the remaining residuary devises or legatees in proportion to their respective shares in said residue.


151. See, e.g., In re Estate of Connolly, 222 N.W.2d 885 (Wis. 1974).


153. 377 A.2d 892.

154. Id. at 895-96. The will of the decedent's wife presented the identical issue and the result in the Engle case applied to her will as well. In the wife's case, the entire estate would pass to the wife's mother in the absence of judicial interven-
established an intent to divide the estate equally between the two families if the couple was not survived by issue. Support for this conclusion rested heavily on evidence supplied by the drafter of the will. Testifying from notes written several years before the decedents' deaths, the drafter stated that the couple had initially indicated that they would like their property to be divided equally between their two families in the event of a common disaster and that designation of the mothers as beneficiaries resulted from the drafter's advice that designation of the "families" as beneficiaries was too imprecise. Accordingly, the court held that the share of the estate designated for the predeceased mother, Rose, would not pass to the surviving residuary beneficiary, the mother-in-law, Ida, as the applicable statute would require, and instead, the court determined Rose's share of the estate should pass to Rose's issue.

Under the Third Restatement approach, reformation should be unavailable in Case 7. If the (alleged) mistake is characterized as a failure to anticipate family members' order of death as opposed to a failure to articulate accurately dispositive directives, it is outside the scope of the reformation remedy altogether. Even if the mistake is characterized as one within the scope of reformation, the proof should be insufficient to meet the Third Restatement standard. The testimony of the drafter does not establish that the testators desired to provide the share of a predeceased mother to the issue of that mother. The testators and the drafter never discussed the possibility that the testators would be survived by only one of the mothers, rendering his view of the testators' actual dispositive wishes of little value. The drafter testified only that the testators expressed the desire to divide their estates between their families and that they identified their mothers as the ultimate contingent beneficiaries only after the drafter advised them that they needed to be more precise in their identification of beneficiaries.

It is certainly possible that, as the court concluded, the testators used "mothers" as a shorthand expression for "family." It is equally possible, however, that the testators used "family" as an imprecise description for their mothers, which they ultimately refined when the

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155. Id. at 896.
156. Id.
157. Id. at 896-97.
158. THIRD RESTATEMENT, supra note 9, § 12.1 cmt. h, illus. 3.
drafter informed them that "family" was too imprecise a descriptor. Apart from the drafter's testimony, nothing beyond general assumptions about providing for family over in-laws, or dividing estates equally between relatives of spouses, would support the court's conclusion. These general assumptions are improper sources of reliance in the Third Restatement scheme and therefore would provide no support for the grant of a remedy. Langbein and Waggoner, on whose work the Third Restatement position heavily relies, approve of the inquiry into intent in Engle v. Siegel but do not opine as to its outcome under the standard they proposed. This leaves open the question whether, as Fellows asserts, the family preference would seep unnoticed into the determination of actual intent.

In this Case, as in Case 5, application of the family preference does not provide a singular interpretation of intent. Fellows herself offers two alternative explanations for the Engle decision. One is that the court applied the family preference from the husband's perspective. The will, as construed in light of the corrective statute, would disinherit his family entirely for the benefit of his mother-in-law. Under this view of the family preference, the mother-in-law is a non-family member beneficiary who may share in the estate to the extent the testator expressly manifested a desire to provide for her but may not deprive his family of their rightful share in the absence of a clear intent for this result. The alternative explanation is that the court imputed intent for the couple together rather than for the testators individually. As a unit, the couple intended "a fair distribution in which their respective families would share equally." Under this view of the family preference, the mother-in-law is a family member but her entitlement does not supersede that of collateral blood relatives.

Yet another interpretation of the family preference would produce a conclusion that relief was unjustified in the Engle case. Under this view, family includes relatives by marriage and the family preference embodies a preference for closer family members over more distant relatives, and specifically, for parents over siblings just as intestacy statutes do. A decision to provide for one's mother and mother-in-

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160. See Langbein & Waggoner, supra note 33.
161. Id.
162. Fellows, supra note 15.
163. Id. at 646.
164. Id. at 645.
165. Id. at 645-646.
166. Parents receive preferential treatment as compared to siblings in most intestacy statutes, not only because they often qualify as heirs before and to the exclusion of siblings and their issue but also because parents often will share with the surviving spouse. See, e.g., Unif. Probate Code § 2-103, 8 U.L.A. 83 (1998) (providing that parents share with the surviving spouse if decedent is not survived by
law to the exclusion of one's siblings is explicable either as a desire to provide for the needs of aging family members or (or in conjunction with) a desire to reciprocate for past support provided to one or one's spouse. If the testators in Engel v. Siegel adopted this view of family, then interpretation of the will adopted by the court would defeat the testators' intent.

If relief is available in Case 7, there must be a basis upon which to conclude that the otherwise applicable corrective statute (providing for the estate to pass to the surviving residuary beneficiary) should be disregarded. This basis must consist of more than the fact finder's personal interpretation of the family preference because that, as shown in the preceding discussion, is as likely to defeat intent as it is to effectuate it.

III. POLICY IMPLICATIONS

The criteria to be used to evaluate alternative approaches to reformation are not self-evident. The abstract attributes of rules or standards adjudication are insufficient because both approaches offer important benefits while lacking critical protections. Standards provide flexibility, eliminating the possibility of results certain to defeat intent that a rule might require as occurred in Case 5. Rules, in contrast, provide certainty, assuring testators that they retain control over their dispositive wishes, but fail to effectuate intent in cases of clear error.

Empirical evidence would be an important source of guidance, but such evidence is unavailable and much of it would be impossible to obtain. Quantifying the percentage of cases in which particular types of errors (or alleged errors) occur, for example, would indicate that some of the illustrative cases would be more important than others in designing a reformation approach. Sampling reformation cases de-
decided under a standard-oriented approach to ascertain how often court decisions accorded with the true intent of the testator would identify the degree of accuracy such a standard would provide. Most fundamentally, quantifying the percentage of unambiguous wills in which errors actually existed would demonstrate the extent of the need for liberalization of the strict approach to reformation of wills as well as the extent of the risk imposed by a standard that would afford the possibility of a remedy to unambiguous testamentary instruments.

Without that extrinsic evidence, evaluation of the relative merits of each approach should be grounded the policy implications for testators, the estate planning profession, and the legal system generally. The optimal reformation doctrine should provide an opportunity to correct mistakes without permitting explicitly, as Fellows does, or implicitly, as the Third Restatement does, discrimination based on the family preference which may serve as an after the fact justification rather than a pre-determination guide for reaching a particular conclusion. Additionally, the optimal reformation doctrine should coordinate with malpractice liability and other aspects of professional responsibility in a manner that maximizes the incentive to produce error-free wills without imposing unnecessary cost. Finally, the optimal reformation doctrine should limit the opportunity to reform wills to preclude inquiries that are likely to be unproductive.

A. Impact on Testators

Cases 5170 and 7171 illustrate the risk of incorporating a family preference into reformation doctrine for an individual who appears to fit a typical profile: Case 5 involved a married man who provided for his spouse and relied on her reciprocal will to provide for his children from a prior marriage; Case 7 involved a married man who provided for his spouse, or if she predeceased, for his children equally, or if they predeceased, for his mother and mother-in-law. In each case, an interpretation of the family preference that produces a result inconsistent with the terms of the will, as written (and re-written by applicable statute), will defeat intent if the testator meant what he said.

For atypical testators, the family preference creates a greater risk because the bias against their wishes and values will be stronger. If the class of atypical testators were limited to social outcasts, concern for legal protection of their testamentary freedom would be minimal. The increasing diversity in the composition of families, however,

170. See Erickson v. Erickson, 716 A.2d 92 (Conn. 1998).
172. The 2000 Census reports that family households, defined as a household that includes at least two members related by blood marriage or adoption, comprise only 69 percent of all households, down from 81 percent in 1970. The most significant trend within this group is the decline in the proportion of married-couple
suggests that an explicit or implicit "family preference" jeopardizes the testamentary plans of a far larger group.

1. **Discrimination—The Unmarried Couple**

The illustrations discussed in Part I (all based on actual cases) may be dismissed by skeptics as outside the mainstream or obviously wrongly decided. If truth is stranger than fiction, a hypothetical may illuminate more persuasively the threat that the family preference poses. For this purpose, consider the hypothetical case of Ted, a successful gay man who has accumulated an estate of $500,000. He consults a lawyer for estate planning in order to provide for his partner, Paul, with whom he has maintained a 20 year relationship. The lawyer asks the usual questions, including whether Ted has living relatives for whom he might wish to provide. Ted advises the lawyer that he has a close relationship with his father but that his father is financially secure. The lawyer then drafts the will as requested which is admitted to probate after Ted's death.

Ted's father brings a reformation proceeding based on the allegation that the will was executed on the mistaken assumption that he was financially secure when in fact he is not. He is about to enter a nursing home, and Ted's $500,000 would allow him to enjoy better accommodations than Medicaid otherwise would provide, at least for some period of time. The lawyer testifies to his conversation with Ted. Circumstantial evidence shows that Ted enjoyed a close relationship with his father, that Paul is an independent professional who earns a substantial salary, that friends considered Paul and Ted "a couple," and that Paul and Ted neither lived together nor combined their finances.

Based on this evidence, it is certainly possible, and possibly likely, that Ted's will will be reformed. Ted's father could put the money to good use, Paul apparently does not need it, and the relationship of Ted and Paul does not parallel a traditional spousal relationship that would explain the bequest. Although Ted did not tell the lawyer that he would have left his estate to his father if his father had a financial need, the lawyer might have inferred this and testify accordingly in a reformation proceeding. Even if the lawyer recounted his conversation with Ted verbatim, a court might itself infer that Ted would have provided for his father if he had been aware of his father's need.

If Ted in fact erred, of course this effectuates his intent. But there is a strong possibility he did not. The absence of traditional indicia of households with their own children, from 40 percent in 1970 to 24 percent in 2000. The same census reports that more 3.7 percent of all households in the United States, representing 3.8 million households, include unmarried partners. Jason Fields, America's Families and Living Arrangements, CURRENT POPULATION REPORTS P20-537 (June 2001).
a spousal-type relationship says little about the feelings the couple had for each other. The apparent discrepancy in need between father and Paul may reflect a differential in willingness to disclose circumstances rather than the true state of affairs. Suppose, for example, that Paul is infected with the AIDS virus and requires extremely expensive treatments that his insurance does not cover. If Paul is unwilling to make his health situation a matter of public record, he decreases the likelihood of defeating the reformation application. Even if he does disclose, there is no guarantee that Ted’s wishes will prevail.

The serious jeopardy that Ted will face in realizing his testamentary wishes is abundantly established by studies revealing the significant role of the family preference in the analogous area of will contests,173 and in particular, the impact this has on same sex couples.174 Like questions of capacity and undue influence in will contests, the issue of mistake in a reformation proceeding involves a highly subjective evidentiary interpretation that is incapable of filtering out insidious influences. Distressingly, reformation presents a greater temptation to act on those insidious influences because it offers the opportunity to re-write selective portions of the will as opposed to probate contests where the will generally is either admitted or denied probate in total.175


175. Partial probate, though infrequently used, is available where only a portion of a will is infected by undue influence or other invalidity. See, e.g., In re Estate of Webster, 110 P.2d 81 (Cal. Ct. App. 1941); In re Estate of Smelser, 818 P.2d 322 (Kan. Ct. App. 1991); In re Wharton, 453 N.Y.S.2d 308 (Surr. Ct. 1982) (and cases cited therein); In re Estate of Herrly, 276 P.2d 247 (Okla. 1954).
In addition to the temptation to discriminate intentionally, the possibility of unintentional bias also must be considered. A conscientious judge, respectful of the relationship of Ted and Paul, may be inclined to analogize their relationship to that of a married couple. Even if the family preference would produce predictable results for the married couple, its extension to Ted and Paul would be imperfect because underlying legal protections, societal expectations and other factors differentiate the married from the unmarried couple. This observation is buttressed by an empirical study conducted by Fellows and colleagues designed to assess public attitudes about the inclusion of surviving committed partners as intestate heirs. The study, which asked respondents to divide the property of an intestate decedent involved in a non-marital committed relationship that terminated as a result of death among the decedent's survivors in eight different scenarios, revealed that respondents with same sex partners were consistently more generous to surviving partners, whether same sex or opposite sex, than were the respondents from the general pub-

176. The probability of discrimination probably would be lower in reformation cases where facts are determined by the court than in will contests where facts often are decided by juries. Schoenblum, supra note 173; Note, Will Contests on Trial, 6 STAN. L. REV. 91 (1953). To the extent courts recognize a same sex partner as a natural object of the testator's bounty, as the Third Restatement suggests, intentional discrimination would be absent. Restatement (Third) of Prop.: Donative Transfers § 3.1 cmt. c, § 18.3 cmt. f (Tentative Draft No. 3, 2001). For debate on the question whether juries' tendency to overturn wills satisfying the legal requirements for validity is appropriate, compare Ronald Chester, Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests, 37 Duq. L. Rev. 173 (1999) (arguing that, despite the common law focus on the mind of the testator, the proper inquiry in will contests should address the fairness of the resulting distribution), with Josef Athanas, The Pros and Cons of Jury Trials in Will Contests, 1990 U. CHI. LEGAL F. 529 (1990) (arguing that the "equitable fairness" juries may provide in resolution of wills disputes should be supplied by legislative changes to laws that are "equitably unfair").

177. Unmarried partners generally qualify neither as intestate heirs nor as surviving spouses entitled to a minimum share of the estate notwithstanding decedent's will. See, e.g., In re Cooper, 592 N.Y.S.2d 797 (App. Div. 1993) (holding that unmarried partner does not qualify as surviving spouse for purposes of the elective share); Peffley-Warner v. Bowen, 778 P.2d 1022 (Wash. 1989) (finding no intestacy right for unmarried partner in decedent's partner's estate and therefore no social security benefits either). See also Raum v. Rest. Assoc., Inc. 675 N.Y.S.2d 343 (App. Div. 1998) (holding that same sex partner is not entitled to assert a wrongful death claim in connection with deceased partner's death). But see Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (declining to adopt a bright line test precluding wrongful death claim of decedent's fiancé). There are, however, a few exceptions to this generalization. See Haw. Rev. Stat. § 560:2-202 (1998) (permitting unmarried partners, like any other individuals, to designate each other as reciprocal beneficiaries); Vt. Stat. Ann. tit. 15 §§ 1202, 1204 (1999) (recognizing civil unions between same sex couples and granting them "all the same benefits, protections and responsibilities under law... as are granted to spouses in a marriage").

178. Fellows, supra note 168.
While the different preferences of same sex versus opposite sex partners would not necessarily carry over into individual testamentary plans, they might. An empirical study of testamentary preferences of same sex partners would provide generic information that is currently unavailable, but it would be of marginal value in facilitating their exercise of testamentary freedom. Any family preference, however refined, mutes the individuality that our recognition of testamentary freedom is designed to allow individuals to express.

2. Should the Atypical Bear the Risk of Intent-Defeating Reformation for the Benefit of Those Who Err?

The most important policy question involved in will reformation doctrine is whether the occasional incorrect results produced by the implicit application of the family preference is a tolerable price to pay for the promise of liberal availability of relief a standard like the Third Restatement approach would afford. In the absence of extrinsic evidence quantifying the frequency of incorrect results and the scope of the risk imposed by implicit application of the family preference, assumptions about these factors must suffice. Granting the benefit of the doubt to the drafters of the Third Restatement, it shall be assumed that intent-effectuating reformation would occur more frequently than would intent-defeating reformation, and that the malleability of the family preference will not impose significant risk to testators whose estate plans, as written, reflect traditional values. Under these assumptions, the brunt of the family preference, and the risk of intent-defeating reformation generally, would fall most heavily on "abhorrent testators" whose estate plans deviate from traditional norms and who suffer disproportionate risk of intent-defeating resulting in other types of wills disputes. The abhorrent testators, by definition, constitute a minority, and the Third Restatement therefore could be regarded as inuring to the benefit of the majority and thus enhancing the realization of testamentary wishes for testators in the aggregate.

179. Id.
180. See supra notes 167 and 168 (noting that considerations involved in intestacy statutes are not limited to what decedent would do if he executed a will).
181. The term "abhorrent testator" was coined by Professor Spitko to describe the testator who disinherits a legal spouse or close blood relations in favor of a non-mainstream religion, a radical political organization, a same sex romantic partner or other beneficiary that represents a choice outside the mainstream. E. Gary Spitko, Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. Rev. 275 (1999) (proposing a system of testator-compelled arbitration to insulate against the bias in favor of family).
182. See supra notes 173 and 174.
There is an immediately apparent irony about evaluating an exercise of freedom by reference to majoritarian norms. On the other hand, sacrificing the interests of the majority for the benefit of a minority group defined by its desire to dispose of property unusually is not an intuitively compelled result.

An appropriate basis for determining the relative weight of the competing claims of minority testators who accurately express their testamentary wishes and majoritarian testators who would benefit from a liberal reformation doctrine is the underlying rationale for recognizing testamentary freedom which may suggest a reason to prefer the majority, a reason to protect the minority, or a reason to protect those who express themselves accurately, regardless of whether their wishes conform to majoritarian norms or not.

The most prevalent justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior. Adopting this view of testamentary freedom,

183. There are, of course, other justifications for testamentary freedom. Professor Epstein, for example, states:

There is no principled distinction between the right of property and the right of succession. The conception of property includes the exclusive rights of possession, use and disposition. The right of disposition includes dispositions during life, by gift or by sale, and it includes dispositions at death, which are limited only by the status claims of family members protected, for example, by rules relating to dower and forced shares.


184. Stanley N. Katz, Republicanism and the Law of Inheritance in the American Revolutionary Era, 76 Mich. L. Rev. 1, 8 (1977-1978) ("American state and federal courts since the foundation of the new nation have been equally committed to the positivist argument."); see also Ronald Chester, Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving, 24 Sw. U. L. Rev. 1195, 1196 (1995); Adam J. Hirsch, The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587, 636-637 (1989); Daniel J. Kornstein, Inheritance: A Constitutional Right?, 36 Rutgers L. Rev. 741, 751 (1984); Jeffrey G. Sherman, Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices, 1999 U. Ill. L. Rev. 1273, 1285 (1999). Apart from the utilitarian justification, there are other positivist theories of testamentary freedom as well. See PAGE ON WILLS, supra note 29, § 1.7 (citing Eric H. Kaden, The Peasant Inheritance Law in Germany, 20 Iowa L. Rev. 350 (1935)); Charmont, Changes in Family Law in Progress of Continental Law in the 19th Century, in 11 CONTINENTAL LEGAL HISTORY SERIES 147, 160 (1918) (arguing that a scheme of forced distribution based on equality of children or other close relatives within the same degree of consanguinity would cause the breaking up of tracts of land into small portions so that eventually they would become so small as to be uneconomical). Of course, any positivist approach to testamentary freedom leaves open the possibility that testamentary freedom should be severely curtailed or eliminated altogether. For contemporary competing views on the value of testamentary freedom, compare Barbara R. Hauser, Death Duties and Immortality: Why Civilization Needs Inheritances, 34 Real Prop. Prob. & Tr. J. 363 (1999) (arguing that the right to bequeath is fundamental to the existence of
the Supreme Court, in 1942, declared: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." 185 Under this view, expressed by Blackstone among others, the right to transmit property at death is merely a privilege conferred by the state for its own purposes and not an inherent element of property ownership:

[N]aturally speaking, the instant a man ceases to be, he ceases to have any dominion: else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. 186

The initial reason for conferring a right to dispose of property after death was, in Blackstone's view, a fortuity driven by practicality. He believed that inheritance rights originally developed because:

A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir." 187

a thriving market economy, and thus to civilization, and that the right to devise supports a "deep human need" to live on and provide for future generations), with Mark L. Ascher, Curtailing Inherited Wealth, 89 Mich. L. Rev. 69 (1990) (proposing severe restrictions on testamentary freedom in order to increase equality of opportunity and raise revenue).

185. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). Subsequently, the U.S. Supreme Court declared that the right to transfer property at death, a part of the Anglo-American legal system since feudal times, is a Constitutionally protected property right in Hodel v. Irving, 481 U.S. 704, 716 (1987). Irving held that the Indian Land Consolidation Act of 1983, which directed that interests in land falling below specified size and dollar thresholds would escheat at the death of the owner to the tribe to which the land initially was allotted by prior Act of Congress without any provision for compensation to the owner, violated the Takings Clause of the Fifth Amendment. Id. Read broadly, Irving would reverse the historic understanding of the source of testamentary freedom. Read more restrictively, Irving does not guarantee the opportunity to transmit property at death in all cases but rather only in those situations where there is no viable opportunity to transfer property by other means (i.e., by will substitute). Chester, supra note 184. The view expressed in Irving was re-iterated in Babbitt v. Youpee, 519 U.S. 234 (1997), but the scope of the holding was not clarified.

186. 2 Sir William Blackstone, Esq., Commentaries on the Laws of England 10 (Oxford 1766). Thomas Jefferson, the American with whom the positivist view is most prominently associated, stated: "[E]arth belongs in usufruct to the living; that the dead have neither powers nor rights over it. . . . [T]he portion occupied by an individual ceases [to be] and reverts to the society." Ronald Chester, Inheritance, Wealth, and Society 35 (1982) (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 The Works of Thomas Jefferson 116 (P. L. Ford ed., 1895)).

At the same time, he recognized the motivational impact inheritance would have on individuals.\textsuperscript{188} The ability to control devolution of property after death encourages individuals to accumulate wealth, engaging in economically productive activity and saving rather than consuming.\textsuperscript{189} Without the ability to control disposition of property at death, individuals would have less incentive to continue economically productive activity and more incentive to consume because there would be no means of enjoying their property after death. Testamentary freedom is thought to encourage socially desirable behavior on the part of hopeful beneficiaries as well, promoting loyalty and responsiveness to family members and others who may be expected to reward this behavior with tokens of appreciation at death.\textsuperscript{190}

This explanation for testamentary freedom suggests that the paramount consideration in the development of a will reformation doctrine is not effectuation of actual dispositive wishes after death because no societal benefit is derived from effectuating actual wishes that were unexpressed.\textsuperscript{191} Neither does it support, however, the argument that actual intent is irrelevant because a reformation rule that creates significant obstacles to realization of testamentary wishes will blunt the motivational impact of testamentary freedom. Instead, the utilitarian view supports the argument that reformation doctrine ought to be structured in the manner that will provide the fairest possible opportunity to realize testamentary freedom for those who seek to exercise it.

Fairness arguments may be asserted by both advocates of the traditional rule-oriented approach as well as advocates of the Third

\textsuperscript{188} Id. ("It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections.")

\textsuperscript{189} Jeremy Bentham, Principles of the Civil Code, in I The Works of Jeremy Bentham 308, 337 (John Bowring ed., 1962); Blackstone, supra note 186, at 11; Edmond N. Cahn, Restraints on Disinheritance, 85 U. Pa. L. Rev. 139, 145 (1936); Joseph Gold, Freedom of Testation, 1 Mod. L. Rev. 296, 296-297 (1938); Gordon Tullock, Inheritance Justified, 14 J.L. & Econ. 465 (1971). The incentive effects of testamentary freedom are an important justification for the libertarian opposition to inheritance reform, see Chester, supra note 186, at 81-88 (discussing views of Friedman, Hayek, and Nozick), but as critics note, there is no empirical evidence to support the supposition that testamentary freedom inspires accumulation of wealth. Id. at 86-87 (noting the absence of such evidence).


\textsuperscript{191} Hirsch, supra note 184, at 636-637.
Restatement liberalization. The traditionalist argument, as articulated by Professor Alexander asserts:

Certainty of result is a significant, if not the primary feature of the law of inheritance. . . . Although insistence on correct form appears at first to thwart the accomplishment of a property owner's wishes, the purpose of that insistence may actually be the opposite. By providing for a certain result, such rules enable those willing to take the trouble to adopt the proper form to be certain about the outcome of their actions. The formality prevents competing claims of unfairness from becoming issues. If form were not so important, courts would continuously be confronted with the invitation to balance counterveiling interests against the precision of the property owner's statement of intent. But instead a court can reject a document when improperly expressed—however "unfair" that rejection may be—and accept a property owner's statement made in proper the form—however "unfair" its disposition of property may be. In that light, one can understand [decisions apparently thwarting intent] even if the "unfairness" in [the particular case] is extreme.

This philosophical analysis of fairness is inseparable from value judgements about the relative merits of rules versus standards. Advocates of standards-oriented approaches can rebut this analysis, as Langbein and Waggoner have done, by asserting that the strictures of a rule are unnecessary to effectuate intent in many, albeit not all, cases. Framed in this way, the argument fails to address the question: should the testators who express themselves accurately receive protection at the expense of those whose actual wishes, inaccurately stated, could be effectuated with a liberal reformation doctrine?

If, however, fairness is analyzed based on practical consequences rather than philosophical outcomes, evaluation of the alternative approaches to reformation may be segregated, at least in part, from general views about the relative merits of rules and standards. The practical consequences to be considered include the extent to which the reformation approach comports with testators' expectations, the burden that the reformation approach imposes on the planning process, and the burden that the reformation approach imposes after death.

Empirical evidence is unavailable, but it seems appropriate to assume that testators expect their wishes to be respected as written. Whether the will is formal or holographic, the testator understands that he executes the document for the purpose of expressing his wishes. There is no reason he would expect an inquiry to occur after death that could change the dispositive scheme he adopted. In the Ted and Paul hypothetical, for example, Ted has no reason to believe that his will, which clearly provides for Paul, may be re-written to

192. See Sunstein, supra note 18, at 995.
194. See Langbein & Waggoner, supra note 33, at 566-571.
substitute his father. Nor does he have any reason to know that de-
tailed explanation of his reasons for dispositive choices, either set
forth in the will or provided orally to the lawyer or others, may be
required in order for his plan to be respected. Similarly, in Case 4,195
which involved a typical estate plan, the testator has no inking that
the change in the charitable beneficiaries may be disregarded because
he did not orally confirm to the lawyer wishes that were unambigu-
ously set forth in that document. A liberalized approach to reforma-
tion, such as the Third Restatement’s, imposes these obligations
without any provision for notifying the testator of them, which un-
fairly creates the possibility of defeating intent.

Advocates of liberal relief could counter that testators would expect
clear errors in wills to be corrected. The validity of the argument,
however, depends entirely on the definition of "clear error." Testators
who agree with this proposition would include, within the definition of
clear error, unequivocal mistakes such as those involved in Cases 1196
and 2.197 Many might conceive of clear error more expansively, but
their conception would not parallel the highly complex definition of
the Third Restatement complete with exclusions198 and evidentiary
restrictions.199 Instead, their conception of clear error would embrace
situations in which error, in fact, occurred. Put differently, testators
who expect errors other than unequivocal errors to be corrected also
expect accurate wills to be respected. From each individual testator’s
perspective, the Third Restatement fulfills this dual expectation no
better than the historic approach because an attempt to correct an er-
ror that is less than unequivocal risks violating accurately expressed
intent just as the historic approach’s refusal to correct errors presents
the opposite risk. From the perspective of testators in the aggregate,
neither approach can be proven superior to the other because that
would require empirical evidence about which better effectuates ac-
tual intent, a difficult to impossible undertaking not attempted to
date.200 Consequently, this counter-argument does little to under-
mine the proposition that testators expect their wishes to be followed
as written.

A second criterion by which to judge the fairness of the reformation
doctrine is comparison of the burdens imposed by the reformation al-
ternatives at the planning stage: the obligation to avoid unambiguous
error imposed by a strict approach to reformation versus the obliga-
tion to assure, during life, that a challenge to an accurate will after

195. See supra note 124.
196. See supra note 90.
197. See supra note 99.
198. See supra notes 70, 71.
199. See supra notes 72-78.
200. See supra text accompanying notes 181-82.
death will be unsuccessful. If the burden to avoid unambiguous error is heavier than the burden of precluding an unmeritorious challenge, then the liberalizations incorporated into the Third Restatement are appropriate. Conversely, if the burden to avoid unambiguous error is less demanding than the alternative, then the safe harbor protection of the historic approach is justified. Consideration of the relative burdens compel the conclusion that safe harbor protection is critical.

The burden of assuring that a challenge to an accurate will is unsuccessful requires the testator to control any and all extrinsic evidence of intent that may come before the court after his death. To attempt to satisfy this burden, the testator who is concerned about an intent-defeating reformation might feel compelled to explain his reasons for dispositive choices that he would prefer to keep private; to limit conversations with family and friends about estate planning in order to limit the possibility of misunderstandings that could create a belief reformation was appropriate; and to generate additional supporting documentation reinforcing his clearly stated wishes. These steps are not only undesirable but also insufficient to achieve the purpose of insulating a will from an intent-defeating reformation. The testator can control neither the evidence litigants choose to place before the court after his death nor the manner in which the court perceives it, and therefore he cedes some of his authority to express testamentary wishes to those who are interested in disposition of his estate.

In comparison to the burden of controlling extrinsic evidence that will be presented to a court after death, the burden of avoiding unambiguous error in the will is markedly lighter. With respect to potential errors that originate with the testator, the testator has almost full control, and therefore, the burden to avoid these mistakes is quite manageable. In these cases, the testator has access to the true facts but fails either to uncover them (so that he conveys to the drafter wishes that would be different if he had understood the factual situation) or to convey them (so that he incorrectly describes relevant information to the drafter resulting in an error in the will). The only situation in which the testator does not have access to the true facts, which are later available to a court considering a reformation application, is the rare case in which there is a change in the availability of information after the death of the testator, allowing disappointed beneficiaries to uncover information the testator could not have uncovered. Even in these cases, a remedy should rarely be granted under the Third Restatement approach because the testator, in all likelihood, would not formulate a dispositive plan for a situation of which he was unaware.

In cases of errors that originate with the drafter, the burden of avoidance is more significant, particularly in cases of tax and other
substantive (as opposed to ministerial) mistakes that a testator has no reasonable opportunity to discover. As Langbein and Waggoner put it:

To frustrate the wishes of a testator who had the prudence to follow counsel’s direction seems especially offensive if it is avoidable. Since testators cannot be expected to discover their lawyers’ mistakes, the question is whether to charge them with such mistakes when the evidence clearly establishes what was really wanted. We think it palpable that in these circumstances the testator’s intent should be implemented if it can be proved with appropriate certainty.201

Even in these cases, however, the existence of liberal reformation relief is not indispensable to the provision of a fair opportunity to exercise testamentary freedom. By exercising responsibility in the selection of a careful and competent drafter, the testator reduces the risk of legal or scrivener’s error. Moreover, in the vast majority of jurisdictions, the testator’s wishes could be effectuated through a malpractice action.202 Consequently, reformation would be unnecessary in most cases to effectuate the wishes of testators who erred; it would serve only to insulate erring lawyers from loss.

Finally, a fairness analysis requires comparison of the burdens imposed after death of a strict versus a liberal approach to reformation. Under a strict approach, the burden imposed by reformation falls on the erring testator himself in that his actual wishes will not be carried out. Under a liberal approach, the burden of reformation falls on all to the extent that every estate is subject to the possibility of nuisance litigation. Imposition of this burden transfers wealth from named beneficiaries to lawyers and others involved in litigation for the sake of a group (indeterminate in size) that errs under circumstances which will allow a court to discern intent accurately. This burden is arguably unfair and definitely inconsistent with maximizing productivity of societal resources.

All of this suggests that an approach to reformation requiring testators to avoid unambiguous mistake would facilitate fair opportunity to realize testamentary wishes more effectively than would a reformation doctrine that ascertained intent based on evidence outside testators’ control. Judged by this criterion, preservation of a safe harbor is essential to a will reformation doctrine, but correction of true errors is undeniably important.

201. Langbein & Waggoner, supra note 33, at 571.
202. As Langbein and Waggoner note, malpractice liability does not redress mistakes in every situation. Where fault for the mistake lies with the testator, the lawyer’s error falls below the threshold of liability, the lawyer is judgment proof, the jurisdiction does not recognize malpractice liability, or the property at issue has a sentimental value that cannot be captured by a damages remedy, malpractice relief will be incomplete. Id. at 589.
B. Impact on the Estate Planning Profession

The impact of will reformation doctrine on the estate planning profession is an important policy consideration because consequences for the profession have consequences for clients which stem from the direct relationship between reformation and malpractice liability. If reformation is available to rectify mistakes for which a negligent lawyer otherwise would be responsible, the risk of loss shifts from the lawyer to the competing beneficiaries. If reformation in fact reflects the testator's intent, the beneficiary's "loss" is merely elimination of an unwarranted windfall. If, on the other hand, an intent-effectuating reformation required to rectify a lawyer's error is denied, the negligent lawyer escapes liability at the expense of the intended beneficiary.

In addition to this basic shift of risk, there are indirect consequences of supplanting malpractice liability with a reformation remedy, including: (1) a reduction in the accuracy of planning, (2) a change in the nature of the financial stakes involved in the litigation over intent that in some cases may reduce the quality of proof presented, and (3) a potential implicit or explicit change in the standard of proof for malpractice or reformation claims in a regime where the standard of proof ostensibly differs in malpractice and reformation cases. In such a regime, the potential change occurs by either limiting the ability of disappointed beneficiaries to recover (if the standard of proof for malpractice is increased) or by increasing the risk that accurately expressed wishes will be defeated (if the standard of proof for reformation is decreased).

1. Accuracy in Planning

The premium that a strict approach to reformation places on accuracy should tend to motivate care on the part of the lawyer and the client in the planning process and thus reduce the likelihood that error will occur. To the extent a liberalized approach reduces that care, it will tend to increase the incidence of mistake and thus exacerbate the problem it seeks to alleviate.

Anticipating this argument, Langbein and Waggoner have asserted that, because reformation is a rule of litigation, no drafter would plan to rely on it when proper drafting can spare the expense and hazard of litigation. While it is illogical to assume that one would knowingly draft a problematic instrument in reliance on the availability of an opportunity to correct it later, that is quite different from believing that the level of care exercised by lawyers will be unaffected by the possibility of malpractice liability. Clearly, potential

203. Id. at 587.
malpractice liability does affect the overall quality of service. Without it, the deterrent of malpractice liability is eliminated from the cost-benefit analysis used to compute the minimum necessary work and replaced with the weaker deterrent of subsequent reformation litigation in which the lawyer has no direct self-interest.

To the extent this temptation attracts lawyers to the field of estate planning who otherwise would consider the field outside their expertise, it exacerbates the economic pressure faced by the experienced estate planning lawyers. Compelled to compete with less experienced lawyers that clients perceive as providing the same service at lower cost, the responsible professional will have an incentive greater than ever to reduce the time devoted to matters below that which he otherwise would feel was appropriate. Thus, the law's support for the inexperienced and incompetent increases the likelihood that a client will find his planning in the hands of one ill-equipped to handle it.

2. Lawyer's Testimony in Reformation Proceedings

The best witness in a reformation proceeding would seem to be the lawyer. He hears the testator's own articulation of testamentary wishes under circumstances in which the testator has every motivation to express them forthrightly; this occurs in near proximity to the time of will execution; and the lawyer will have no interest in the dis-


205. Johnston, supra note 204, at 528, 530 ("[T]he "loss leader" approach to will preparation, even in conjunction with the long run potential for lucrative probate fees, does not provide sufficient incentive for most practitioners to take the time and effort necessary to do a thorough, competent job of estate planning. Corners are often cut for cost savings, and the malpractice risk is increased significantly. . . . [However,] once malpractice exposure is appreciated, most practitioners are willing to do a competent job in order to minimize the risk of liability, even if the estate planning work itself is not fully compensatory."); Gerald P. Johnston, Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner, 67 Iowa L. Rev. 629, 710 (1982) ("While [legal] malpractice may not be greeted with a great deal of enthusiasm by the practicing bar, the potential of such liability serves as incentive for the improvement of attorneys' practices, and thus better service is provided to the community. Such a salutary effect can only prove beneficial in the area of estate planning, where minimal effort and modest charges have too long prevailed.").
position estate. Malpractice or reputational concerns create a self-interest that could tend to color the testimony in favor of the will as written, reducing the value of testimony to establish the will was accurate, but the same self-interest would seem to lend special credibility to the testimony of a lawyer who confesses to error.

To the extent reformation reduces or supplants malpractice liability, only reputational concerns engender this special credibility. In light of the importance of professional reputation, reliance on it to assure credibility appears viable. However, a review of recent decisions in New York, one of the few jurisdictions in which the absence of privilege bars malpractice recovery by disappointed beneficiaries, reveals an extraordinary willingness to confess to error. Simple honesty is one

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206. There is an ethical prohibition against drafting a will that includes provisions for the attorney-drafter or close relatives. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983).

207. For example, in Estate of Utterback, 521 A.2d 1184 (Me. 1987), the court, in adhering to the traditional rule excluding statements of intent made by the testator, stated:

Testimony concerning statements of intent made by a testator at or near the time he made his will is almost always self-serving and rarely objective. The residuary beneficiaries note that several states have relaxed the rule excluding oral statements of the testator's intent, particularly when the statements are made to the scrivener. The testimony of scriveners, however, concerning the oral declarations of the testator may be just as questionable as the testimony of non-attorneys.... [A]dmission of testimony concerning the oral declarations of the testator's intent would subvert the very purpose of the Statute of Wills: to provide a reliable source of the testator's intent expressed under circumstances where the testator fully understands the significance and permanence of the statements he has reduced to written form. *Id.* at 1188 (citation omitted). See also *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (Surr. Ct. 1997) (and cases cited therein) (expressing skepticism about the value of testimony of an otherwise honest practitioner who may be called upon to testify decades after the estate planning transaction, or who may fear damage to his reputation, loss of business or legal action because of a perceived error in the expression of the client's desires). *Cf. In re Estate of Pozarny*, 677 N.Y.S.2d 714 (Surr. Ct. 1998) (declining to consider testimony of drafter of poorly drafted instrument), *superseded by statute on other grounds, In re Estate of Wickwire*, 705 N.Y.S.2d 102 (App. Div. 2000). Where the will is ambiguous these concerns are less pressing than in the case of an alleged mistake in an unambiguous will. *See In Re Estate of Cole*, 621 N.W.2d 816 (Minn. Ct. App. 2001).

208. Langbein & Waggoner, *supra* note 33, at 588. For a fully developed argument in favor of such an approach, see deFuria, *supra* note 14.

209. *See In re Merns*, N.Y.L.J., Mar. 16, 2001, at 18, col. 6 (Surr. Ct.); *In re Florio*, N.Y.L.J., Oct. 12, 1999, at 27, col. 6 (Surr. Ct.) (involving drafter who testified that he failed to edit model will provisions to conform to testator's instructions); *In re Hall*, N.Y.L.J., Feb. 11, 1999, at 34, col. 1 (Surr. Ct.) (involving drafter who admitted that percentage shares of residuary estate totaling 110 percent resulted from scrivener's error); *In re Chiarenza*, N.Y.L.J., Nov. 6, 1998, at 25, col. 5 (Surr. Ct.) (involving drafter who submitted affidavit stating that reference in will to "wife" rather than "husband" and "dependents" rather than "descendants" was the result of drafting error); *In re Silkworth*, N.Y.L.J., Dec. 5, 1997, at 36, col. 5
explanation, but the discrepancy between testimony in reformation proceedings and malpractice proceedings in the few reported cases in which both reformation and malpractice suits were litigated suggests this explanation may be incomplete.²¹⁰

An important factor that may contribute to a difference in the lawyer's testimony in malpractice proceedings as opposed to reformation proceedings is the difference between the financial stakes in the two types of suits. In the malpractice case, the lawyer stands to lose assets already acquired. In the reformation case, in contrast, he will, at worst, suffer a reduction in future earnings. Moreover, if family members of the testator or others close to him who are interested in the reformation proceeding are, or may become, future clients, the lawyer may have a financial incentive to support reformation of the testator's will.

The interest of the named beneficiaries in defending an unwarranted reformation suit will not offset this problem because they, like the lawyer, may have disincentives to unearth proof. Their long run financial interest, like the lawyer's, may be better served by acquiescing in the reformation if, for example, they are natural objects of the bounty of those benefitted by the reformation. Additionally, their direct potential for loss, like the lawyer's, is, at worst, loss of an expectancy. This may be insufficient to merit expenditure of current assets

to defend the suit. Furthermore, there may be non-financial reasons to avoid litigation including faith that the system will produce the correct result without their participation and concerns about family or other inter-personal harmony. For these reasons, named beneficiaries cannot necessarily be relied upon to ensure that accurately expressed intent is defended with available extrinsic evidence.

For these reasons, reliance on reputational concerns alone to add special credibility to the lawyer’s testimony appears questionable. This does not suggest that malpractice liability is necessary to protect testators’ accurately expressed wishes, but it does highlight the importance of a substitute mechanism for assuring adequate protection of accurately expressed wishes.

3. Standard of Proof in Malpractice Cases

If the standard of proof for malpractice and reformation claims is identical, reformation may obviate malpractice liability entirely. If, however, reformation requires clear and convincing evidence, as the Third Restatement provides, there is a category of cases that would qualify for relief in malpractice but not reformation. Some argue that this is illogical and unfair. In theory, it may be justified on the grounds that the higher standard of proof provides a necessary measure of deference to the testator’s expression of wishes while the lower standard of proof is sufficient to support the imposition of liability on a lawyer that was, more likely than not, negligent. In reality, however, the differential creates a difficulty because courts will be loathe to deny reformation in a case where the proof appears sufficient to establish malpractice liability. In such situations, enforcing the differential standards means that the parties will pay to litigate a new case, the lawyer will be out of pocket, and a beneficiary will receive a benefit he more likely than not was never intended to have, all of which are undesirable. Whether courts raise the standard of proof for malpractice liability or lower the standard of proof for reformation, effectua-

211. William M. McGovern, Jr., The Increasing Malpractice Liability of Will Drafters, Tr. & Est., Dec. 1994, at 16 (arguing that it is illogical and unfair to apply different rules in malpractice cases than those applicable in reformation cases since the goal of both the law of wills and malpractice is to effectuate the testator’s intent); Robertson, supra note 14 (concluding higher clear and convincing standard is unnecessary in reformation cases).

212. The New Jersey Supreme Court has done just that. See Pivnick v. Beck, 762 A.2d 653 (N.J. 2000) (changing burden of proof requirements in malpractice cases to the clear and convincing standard).

213. Langbein’s study of cases decided under South Australia’s dispensing power revealed that courts admitted to probate instruments falling short of the statutorily required quantum of evidence, proof beyond a reasonable doubt, in order to facilitate correction of execution errors. Langbein, supra note 26. Langbein approved of this flexibility and urged that the statute be revised to authorize relief based on the lesser standard of clear and convincing evidence. Id. at 53. In accordance
tion of intent becomes secondary to protection of the negligent lawyer. Thus, unification of the standards of proof in these proceedings is desirable.

C. Impact on the System—Administrative Cost

Administrative cost, one of the justifications offered in support of the historic approach,\textsuperscript{214} merits brief mention. To the extent reformation opens avenues of litigation, the burden on courts and the cost to deflect nuisance suits will increase.\textsuperscript{215} One might question the desirability of incurring this cost on the grounds that society would bear the cost of providing judicial resources to discern intent while only those wealthy enough to litigate would enjoy the benefits. This is particularly true in the case of tax-motivated reformation which involve only the very wealthiest of citizens.\textsuperscript{216} If, however, the costs produce a greater ability to effectuate intent, then they arguably may be justified on the same grounds that the enormous costs of construction are justified.\textsuperscript{217}

with the recommendation, the statute was amended to lower the standard of proof. Wills (Misc.) Amendment Act (1994) (S.A.), \textit{reported in An Annual Survey of Australian Law} 1994 (Robert Baxt & Anthony P. Moore eds.) (reducing burden of proof from beyond a reasonable doubt to the balance of the probabilities). While Langbein himself would not approve of a similar reduction in the context of reformation from the clear and convincing standard to a preponderance standard, \textit{see supra} note 33, it would be difficult for appellate courts to enforce the standard in light of the deference given to trial courts' determinations about credibility of witnesses and fact findings generally.

\textsuperscript{214} Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000).

\textsuperscript{215} \textit{But cf} Mary Louise Fellows, \textit{Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)}, 77 Minn. L. Rev. 659 (1993) (disputing the argument that intent-driven reforms in the Uniform Probate Code will increase litigation). Langbein probably would argue that the opportunity to reform will not increase the overall level of litigation but rather will focus existing litigation squarely on the testator's intent rather than on the threshold question of whether an ambiguity exists to justify the remedy of construction. \textit{Cf.} Langbein, \textit{supra} note 22 (arguing that substantial compliance doctrine will not increase litigation but rather will focus litigation of the question of intent rather than technical compliance with wills act formalities). Others would disagree. \textit{See} Mark L. Ascher, \textit{The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?}, 77 Minn. L. Rev. 639 (1993); Bonfield, \textit{supra} note 28.


\textsuperscript{217} \textit{See} George E. Gardner, \textit{Handbook of the Law of Wills} (photo. reprint 1999) (1903) (devoting eight of 24 chapters to construction). More than a century ago, the reason for the "great and growing host" of construction cases was described as follows:

So long as the world lasts, those diversely interested will dispute the meaning of written phrases on which turn their several pecuniary rights; and no [writing] can be more fruitful of litigation [than a will] . . . . The law itself fosters uncertainty in such cases by refusing to sub-
Demanding empirical evidence of the benefit of the inquiry into intent in the case of unambiguous wills is too stringent a standard to satisfy. Any modification to the historic approach should be supportable, however, with cogent reasons for believing that the benefit afforded by the change will justify the cost.

IV. THE PROPOSAL

The policy arguments discussed in the preceding section do not support one of the three approaches discussed to the exclusion of the others. The utilitarian rationale for testamentary freedom favors deference to the testator's will but also supports correction of mistake in situations where the testator in fact erred. Professional responsibility considerations support adherence to the will as written, but the remedy of malpractice is problematic. Cost considerations support adherence to the will as written as well, but rejection of the remedy on the grounds of cost is inconsistent with the availability of construction relief.

As Part II illustrates, neither a rule nor a standard alone addresses these competing considerations well. The historic no-reformation rule relies exclusively (if strictly applied) or at least heavily (if progressively applied) on the testator and his lawyer to avoid error in the first instance, leaving a court with little or no capability to consider relevant information ferreted out by interested parties that the testator may have overlooked. The Third Restatement standard leans heavily in the opposite direction, providing relief for mistake when relevant information has been overlooked but leaving the testator with no means of definitively conveying that the will, as written, accurately expresses his intent.

To better accommodate both groups, Part IV proposes a bifurcated approach to reformation which includes both a flexible standard permitting broad relief for mistake and a rule that requires deference to the will as written. The crux of this proposal lies in the method of differentiating those wills that are subject to reformation from those that are not. Rather than requiring the testator (with or without counsel) to determine whether a mistake exists before the will is executed, as the historic approach does, or mandating deferral of the determination to the time the will becomes effective when the testator is unavailable to explicate his wishes, as the Third Restatement requires, the proposal permits the testator to elect the time at which the issue of mistake is addressed, subject to an indefeasible judicial au-

ject this class of instruments to rigid rules of construction, but making what it may of a testator's language, [being] slovenly and illiterate as it may; our policy being to give the greatest possible scope to each dying [testator's] wishes, provided he executed his will with due formalities.

JAMES SCHOULER, LAW OF WILLS § 461 (3d ed. 1900).
thority to reform wills after death that fail to satisfy specific pre-es-
tablished criteria designed to protect against ill-advised decisions to
preclude reformation. In effect, the proposal constitutes a privately
adaptable rule which allows the testator to select the approach to re-
formation that will best suit his needs as he perceives them.

The proposal enhances the opportunity to realize the promise of
testamentary freedom (disposition of property at death in accordance
with the testator’s actual wishes) by conferring on testators the oppor-
tunity to determine the means by which those dispositive wishes are
communicated: through the will alone (in cases where the testator
precludes reformation) or through the will coupled with extrinsic evi-
dence (in cases where the testator elects reformation). The direct con-
nection between effectuation of actual testamentary wishes and
control over the means of communicating them compels recognition of
reformation as a component of dispositive choice over which the testa-
tor ought to have absolute authority. If one choice or the other may be
unwise in particular cases, a conclusion difficult to reach without em-
pirical data, the law appropriately may discourage, but should not
foreclose, that option. Thus, if, as the Third Restatement drafters ap-
parently believe, courts generally are able to ascertain intent better
than testators are able to express it, will reformation doctrine should
courage testators to elect to subject their wills to reformation with-
out forcing the decision upon them.

Under the proposal, the standard of proof required to merit refor-
mation, pursuant to either the testator’s affirmative election or the
indefeasible judicial authority to reform, would be the preponderance
standard. There would be no particularity requirement, thus facilitat-
ing and validating reliance on imputed intent outcomes that comport
with common sense as well as eliminating the distinction between
probable and actual intent. The difficult task of policing evidentiary
determinations as the Third Restatement requires would be unneces-
sary because testators who perceive themselves to be the likely vic-
tims of inaccurate determinations would have the opportunity to
preclude the inquiry into intent. Consequently, the proof require-
ments for malpractice, reformation and construction could be unified
without reducing the ability to exercise effectively testamentary
freedom.

The precise parameters of the proposal, together with the justifica-
tions for the balancing of interests reflected by the parameters, are
discussed below. Section A addresses the optional prong of the bifur-
cated system while section B addresses the mandatory prong. In sec-
section C, anticipated criticisms of the proposal are evaluated.
A. Optional Reformation

Optional reformation would be available under the proposal for all errors in the expression of testamentary intent as well as those arising from misunderstanding of the factual circumstances or governing law if the testator elects to avail himself of the opportunity for this relief. A critical facet of this bifurcated approach to reformation is the imposition of the burden to opt into reformation relief rather than requiring testators who seek the benefit of the safe harbor to opt out of reformation relief. Also important is the manner of opting in and the extent to which the testator may define the parameters of any inquiry into intent if reformation is authorized.

1. Opting In Versus Opting Out

In order to maximize testamentary freedom in the aggregate, a bifurcated approach to reformation ought to incorporate as the default approach the one that would benefit the majority of testators and impose the burden of electing into the alternative approach on the minority group. Without empirical information about the frequency of mistakes in wills and the extent to which a liberalized reformation doctrine actually relieves them, it is impossible to know, with certainty, whether deference to the will as written or liberal relief would be the optimal default. In the absence of this information, the selection of one approach as the default should be balanced with the broadest possible safeguards to maximize the opportunity to select, intelligently, the opposite choice.

Two factors weigh in favor of requiring confident testators to opt out of reformation relief rather than requiring testators who contemplate the possibility of error to opt in. First, to the extent the need for the safe harbor arises from atypicality rather than an assumption about limitations on courts' ability to ascertain actual intent accurately, the majority would be benefited by an opt out approach. Second, many testators may assume relief is unnecessary without carefully considering the possibilities for error. For these reasons, it would be reasonable to assume that an opt out approach would maximize testamentary freedom in the aggregate. Counterveiling factors, however, outweigh the justifications for an opt out approach, which drive the proposal's adoption of an opt in approach coupled with liberal protections to minimize the possibility of ill-advised decisions about optional reformation.

First, an opt out approach is conceptually inconsistent with a pre-existing power to reform. If a will is, in the first instance, subject to reformation, then the inclusion of a provision expressing the desire to opt out of reformation relief itself could be found to be the product of mistake and thus subject to reformation. The protection offered by such language in an opt out system could reduce the likelihood of in-
tent-defeating reformation, but it could not preclude an inquiry into intent leading to reformation of an accurate will. A statute could mandate absolute deference to opt out language, but the force of such a statute would be questionable in light of the general rejection of the prohibition against reformation embodied in the opt out approach.

An opt in system, on the other hand, is conceptually consistent with courts' traditional, if not unfailing, deference to the language of unambiguous wills. If wills continue to be exempt from reformation, then they will be subject to re-writing only when a valid election is in place. A court may reform or disregard an opt in election, but this should preclude reformation in the absence of an election, indicating a desire to subject the will to re-writing.

Another important value an opt in approach provides that an opt out approach cannot is incentive to consider the possibility of mistake in the planning process. By requiring an opt in for reformation relief, lawyers seeking to obviate malpractice claims would have to persuade their clients to opt in. To do this, the subject of mistake would have to be discussed, and this itself would encourage lawyer and client to focus on the possibility of mistake, thereby avoiding some mistakes that otherwise would occur. In contrast, an opt out approach would create an incentive for lawyers to gloss over or omit entirely discussion of the possibility of mistake and potential remedies, reducing testators' ability to choose intelligently and creating the false impression that testators' wishes will be respected as written.

Finally, an opt in approach leaves in place as the default rule the current approach to reformation of testamentary instruments. This eliminates the possibility that introduction of the elective system embodied in the proposal itself will create errors in wills drafted by those who are unaware of this change in the law.

2. Manner of, and Parameters for, Opting In

The means by which a testator conveys the intent to permit reformation is an important part of a reformation doctrine premised on express consent. One possibility is to permit a simple statement in the will affirming a desire to permit reformation, but this approach risks the possibility that such a provision may be included as form language without specific consideration by the testator. To preclude that risk, as well as the risk of litigation over the question whether the provision was included as boilerplate or as the result of specific consideration by the testator, the indication of an intent to opt in should be set forth in a writing separate from the will itself.218 Formalities for this writing

218. The lawyer's personal interest in a testamentary decision of the client supports the imposition of a special disclosure in the context of fiduciary appointments for the drafting attorney. See N.Y. SURR. CT. PROC. ACT § 2307-a (McKinney 1997)
should parallel those required for will execution with an option to utilize alternative formalities that fulfill the same cautionary function.\textsuperscript{219}

Requiring a separate writing also presents the question whether a new writing must be executed when a new will or codicil is executed. There are sound reasons for requiring re-execution of the instrument granting the reformation power with each will execution. A change that prompts the re-execution of the will may cause a change of view about the desirability of the grant of the reformation authority. Further, a change in lawyers could impact the desirability of a reformation power. A testator might be comfortable granting the reformation power for instruments drafted by a trusted confidant whose testimony, if available, would likely correspond to the testator’s actual desires but less comfortable granting the power for instruments drafted by a lawyer with whom the testator was less familiar. Alternatively, the testator might be comfortable without the reformation power for instruments drafted by a lawyer in whom he had great confidence but less sanguine about the absence of the reformation power for an instrument drafted by a different lawyer. These concerns justify the requirement to execute a new reformation authorization with each new will.

While the concerns could apply when a codicil is executed as well, it is far less likely that they will because lawyers typically do not draft codicils to instruments they themselves did not prepare. Moreover, the advent of word processing has probably limited the use of codicils largely to those situations in which there is an affirmative reason to continue to rely on a previously executed will such as a change in the law that is tied to the date of execution of a will or an increased risk of challenge based on capacity at the time the changes to the will are

\textsuperscript{219} Cf. Unif. Probate Code § 2-503, 8 U.L.A. 146 (1998) (dispensing power allowing recognition of writings intended to constitute wills as wills so long as the intent is clear even if all formalities required are not observed).
desired. For these reasons, new reformation authorization would not be required for execution of a codicil, and the authority granted to reform a will would extend to codicils to it.

Granting the testator the power to determine whether or not to permit reformation of his will raises the question of the extent to which the testator can control reformation proceedings. For example, may he preclude specified types of evidence, change the standard of proof so that reformation is permitted only if a higher standard is met, or allow reformation of only certain types of errors or specified provisions in his will? A desire to permit reformation based only on a higher standard of proof such as clear and convincing evidence would be understandable, and the opportunity to preclude the testimony of particular individuals whom the testator believes would present a distorted picture of intent might be understandable as well. Certainly the desire to authorize tax reformations while precluding inquiry into wholly substantive dispositions is to be expected.

On the other hand, the enormous complications that could occur if the parameters of the reformations permitted were designed over-zealously, inartfully or unwisely are easy to imagine. Conceptualizing the choice to opt into reformation relief as the extension of communicative authority from the testator to other individuals who may present evidence of testamentary intent at his death would suggest that the testator should be able to tailor the parameters of reformation to his wishes. The basic goal of the proposed reformation approach does not, however, require this result. Sufficient communicative authority exists so long as a safe harbor is available to preclude consideration of communications over which the testator has no control; if he avails himself of the benefit of extrinsic evidence, he must accept it in its entirety with two exceptions.

First, the testator would be permitted to restrict the reformation authority to applications designed to achieve a tax benefit. The need for tax reformations, particularly in light of the possibility of retroactive tax changes, suggests that such a power would be desirable for many who would not necessarily wish to invite re-evaluation of their dispositive choices in general.

Second, the testator would be permitted, but not required, to designate a person who would serve as the testator's proxy for advising the court of intent. By allowing the testator to select a proxy, the testator

could identify for the court the individual whom the testator viewed as the best source of information about his intent and express himself through a living person in the reformation proceeding.221 This may, but need not, be the drafter. With the two roles segregated, the testimony of the drafter will receive extraordinary weight only in those situations where it is most appropriate, minimizing the possibility of over-correction as would otherwise be likely in Case 4.222

3. Sample Authorization Form

Disclosure of reformation authority as contemplated by the proposal would take the following form:

AUTHORIZATION TO CHANGE PROVISIONS OF MY WILL

I, ___________ have executed a will dated ______________.

1. I believe that the will accurately and clearly expresses my wishes.
2. I understand that if my will INACCURATELY expresses my wishes due to typographical error, legal error on the part of my lawyer, or misunderstanding of my factual situation, either on the part of my lawyer or myself, my intended beneficiaries may have NO opportunity to change the

221. This proposal bears some similarity to the following suggestion made several years ago by Professor Casner:

Flexibility in an estate plan to meet changing conditions can be achieved today to some extent by the use of discretionary powers in a trustee and by giving powers of appointment to various beneficiaries. It ought to be possible, however, for a donor of property to select a person in whom he or she has confidence, and in effect say to that person you develop an appropriate plan for the disposition of my accumulated wealth within six months after my death. I shall give you a general outline of the objectives I have in mind but your decision shall be binding on all concerned. This would be similar to a durable power of attorney that it is now possible to give another person to make gifts of such person's property during such person's lifetime, even though the owner of the property becomes mentally incompetent. I can see a possible future as permitting a durable power of attorney extending for a limited time into the post-death period under which the holder of the power may make appropriate donative arrangements of the decedent's accumulated wealth. These changes would relate back to the donor's death for all purposes, as though they had been made by the decedent before he in fact died.

A. James Casner, Estate Planning—Past, Present, and Possibly a Different Future (Mar. 9, 1989), reprinted in 15 PROB. LAW. (Summer 1989), at 18. The Casner approach is broader than the proposal because it contemplates an authority akin to a power of appointment that would vest the possessor of the authority with complete control to determine the testator's wishes rather than a mere advisory role in assisting the court in the discernment of the testator's intent. The more modest proposal set forth in the text would be preferable for those testators who prefer not to give one individual absolute control over the dispositive plan; those who may be concerned that the person or persons who they believe are most familiar with their dispositive plans may predecease; and those who would grant power to one who is beneficially interested in the estate.

222. See supra note 124 and accompanying text.
provisions of my will unless I agree to confer upon the court a power to reform my will.

3. I understand that if I do NOT confer upon the court a power to reform my will, and my will is INACCURATE, my intended beneficiaries may successfully sue my lawyer in a malpractice action if the inaccuracy results from his negligence. I understand that if the inaccuracy results from my own misinformation or other error, my intended beneficiaries will not be entitled to recover from my lawyer.

4. Based upon the information stated in this form, I choose the following:
   ___ I DO NOT authorize the court to reform my will (if this option is selected, form need not be completed)
   ___ I AUTHORIZE the court to reform my will ONLY for purposes of securing a tax benefit which I understand may decrease the share of the estate that one or more beneficiaries receive for the good of the estate as a whole
   ___ I AUTHORIZE the court to reform ANY PROVISION of my will in order to effectuate my intent as the court understands it based upon all of the evidence presented to it

5. I understand that I have the option to designate an individual (known as my proxy) who, in my view, is most likely to advise the court accurately as to my dispositive intentions in the event a proceeding is brought to reform my will. I understand that the designation of a proxy will express my wish for the court to give the proxy's testimony special weight, but that the court is not bound to reform (or refuse to reform) my will in accordance with my proxy's view about my actual intent. I understand that this individual may, but need not, be my lawyer.
   ___ I choose not to designate a proxy.
   ___ I designate ________ as my proxy.

6. I understand that the reformation authorization conferred by this form will extend to any codicils I execute to supplement this will.

__________________________  [signature]
__________________________  [witness]

This form sets forth the basic factors important in deciding whether reformation may be desirable without excessive detail. The form itself does not (and cannot) explain, much less analyze, all factors relevant in the decision whether to allow reformation, and it therefore requires elaboration by a competent lawyer. The form does, however, alert the testator to the basic choice and its potential consequences, thus giving the testator enough information to ask intelligent questions, or if appropriate, seek out a different lawyer who will explain the choice in a manner that he comprehends.

B. Mandatory Reformation: Mischief or Mistake

Offsetting the possibility of an ill-advised choice to preclude reformation (or a failure to elect resulting from ignorance of the option) is the inclusion of an indefeasible power to reform in cases where mischief may be presumed without infringing on dispositive choice. These would include all cases in which only mischief or mistake could ex-
plain the disposition as determined under pre-defined presumptions refutable by will. In these cases, there is no justification for adhering to the will, as written, because mistake ought to be remedied and mischief ought not to be sanctioned. Intentionally executing an instrument containing provisions that violate the rule against perpetuities, for example, may serve some fraudulent purpose or tickle an odd sense of humor, but indulgence of these desires is unnecessary to fulfill the promise of testamentary freedom. This is more liberal than the Third Restatement approach, which, ironically, permits reformation of wills not certain to correct mistake and yet may preclude reformation of wills where mistake unequivocally occurred.\footnote{223}{See supra note 107 and accompanying text.}

The presumption of mistake would extend to any case where the will failed, in whole or in part, to dispose of the estate, giving effect to all default rules embodied in the law of wills. Intestacy statutes, which currently govern disposition of property ineffectively disposed of by will, would be disregarded. The primary justification for differentiating the intestacy statute from other default rules is that other default rules are specifically designed for those who leave wills and reliance on them is both expected and efficient.\footnote{224}{Corrective statutes are efficient in that they obviate the necessity for a new will when the modification provided by statute is consistent with the testator's actual desires. A reformation system that precluded reliance on these statutes would require execution of a new will to confirm the statutorily presumed intent or alternatively a recitation that all corrective statutes in effect on the date of the will execution were intended to apply. To impose this burden is to assume that the remedies provided by the corrective statutes are too questionable to apply without further inquiry. Some courts appear to adopt this view, but if the view is sound, testators and their lawyers should not be misled by the existence of the corrective statutes. See Engle v. Siegel, 377 A.2d 892 (N.J. 1977) (declining to apply statutory reversal of "no residue of a residue" rule based on extrinsic evidence suggesting that testator would prefer a different approach); In re Estate of Tateo, 768 A.2d 243 (N.J. Super. Ct. App. Div. 2001) (declining to apply statutory default scheme for abatement based on extrinsic evidence suggesting that testator would prefer a different approach).}

Intestacy statutes, in contrast, are not tailored to the unique circumstances of those who leave wills, and it is presumed that they will be inapplicable to estates of testators who leave valid wills.\footnote{225}{See generally PAGE ON WILLS, supra note 29, § 30.14 (noting constructional preference against intestacy). This is incorporated into the Third Restatement's provisions relating to construction. Third Restatement, supra note 9, § 11.3(c)(2). In addition to this general construction preference, courts also avoid partial intestacy for decedents who leave wills by concluding that the failure to dispose of all property by will creates a latent ambiguity. See, e.g., In re Estate of Wood, 226 So. 2d 46 (Fla. Dist. Ct. App. 1969); In re Martin, 262 So. 2d 46 (La. Ct. App. 1972); Greer v. Anderson, 259 S.W.2d 550 (Tenn. Ct. App. 1953). These doctrines, of course, do not avoid application of intestacy in all cases of ineffective disposition. See supra note 147. See generally, Annotation, Proper Disposition Under Will Providing for Allocation of Express Percentages or Proportions.
Also within the scope of presumed mistake would be any devise, including a pre-residuary devise, subject to an unfulfilled condition stated in the will that is not otherwise expressly disposed of pursuant to the will or corrective statute. A situation involving an allegation that the testator intended to impose a condition unexpressed in the will would be outside the presumption of mistake as would a disposition that is initially effective but voided by corrective statute. An example of a will falling within the scope of presumed mistake would be one which establishes a trust, conditions the remainder interest on survivorship of the life beneficiary, and fails to dispose of the remainder interest in the event the named remainderman fails to satisfy the survivorship condition. Another example would be a devise to a beneficiary "if he survives me" with no express designation of an alternate beneficiary and to which no anti-lapse statute is applicable. In these cases, pre-residuary devises typically would pass under the residuary clause in the absence of reformation, a result that sometimes but not always effectuates actual intent.

Expanding the scope of presumed mistake beyond provisions that are nugatory at the time of execution, such as Cases 1 and 2, imposes a significant burden on testators who seek to avoid mandatory reformation. These testators will be unable to rely on the intestacy statute or the residuary clause to cover contingencies not expressly addressed in the will; instead they must expressly state that they intend all pre-residuary devises not otherwise effectively disposed of pass to the residuary beneficiaries, and any bequest not effectively disposed of by the residuary clause to pass in intestacy. This is especially significant because it effectively changes the meaning of a residuary disposition from one disposing of all property not otherwise devised under the will to one disposing of property only to the extent that the will expressly contemplates disposition of that property pursuant to the residuary clause. Imposing this burden on testators who seek to avoid reformation is justified, however, for several reasons.

First, the burden already exists under current law to the extent that failure to address a contingency may (but will not necessarily) be remedied by a sympathetic court that ostensibly is constrained to apply the historic approach. By expressly including these types of dis-

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227. *See supra* note 90.

228. *See supra* note 99.

229. *See supra* note 30 and accompanying text. The doctrine of gifts by implication, for example, allows the court to infer the disposition intended for the unaddressed contingency in cases where the terms of the will admit but one conclusion about the testator’s intent. *See,* e.g., *Bishop Trust Co., Ltd. v. Jacobs*, 36 Haw.
positions within the ambit of presumed mistake, drafters are alerted to the possibility that failing to expressly dispose of the entire estate may create an issue as to intent. An ancillary benefit is that differentiating unaddressed contingencies, incorporated into the definition of presumed mistake, from express use of legal or colloquial language, not so incorporated, may reduce the tendency to categorize clear but puzzling dispositive choices as ambiguous, strengthening the benefit of the safe harbor. This would be consistent with judicial decisions that have expressed a willingness to liberalize reformation relief.

Another justification for burdening the testator who seeks to preclude reformation with the obligation to draft in a manner that forecloses mandatory reformation is that his decision to opt out conveys a sense of confidence in the will’s articulation of his wishes. If this confidence is justified, he will be aware of the scope of the presumed mistake provision of reformation and able to secure a will that avoids it. If the drafter (whether the testator himself or a lawyer) is unable to draft in a manner that avoids the presumed mistake provision, the drafter is unlikely to have sufficient knowledge about other default rules to prepare a will that unambiguously expresses the testator’s actual intent. In this case, the testator’s confidence would be un-

314 (1942); Erwin v. Kruse, 161 N.E.2d 249 (Ill. 1959); In re Estate of Carpenter, 533 N.W.2d 497 (Iowa 1995); In re Abraham, 136 So. 2d 471 (La. Ct. App. 1962); First Portland Nat’l Bank v. Kaler-Vaill Mem’l Home, 151 A.2d 708 (Me. 1959); In re Bieley, 695 N.E.2d 1119 (N.Y. 1998); In re Will of Bruckheimer, 173 N.Y.S.2d 655 (Surr. Ct. 1958); In re Estate of Hunt, 842 P.2d 872 (Utah 1992). Just when the will admits of a single conclusion about intent is difficult to predict. See, e.g., In re Estate of Kronen, 496 N.E.2d 678 (N.Y. 1986). Including these cases within the category of presumed mistake obviates the difficulties inherent in the doctrine of gifts by implication.

230. See supra note 95 (discussing Third Restatement’s characterization as an ambiguity a devise to a named individual on the grounds that the descriptor “friend” might fit a similarly named individual better).

231. The Third Restatement itself does not provide that an alleged failure to understand a legally defined term constitutes an ambiguity, but logic would seem to require that it should because the decedent is more likely to know, and certainly more capable of ascertaining, the name of his intended beneficiary than he is the consequences of legal terms and phrases. Such an expansive definition of ambiguity is inconsistent with the proposal because it effectively would preclude the right to insulate a will from re-interpretation based on extrinsic evidence.

232. See Erickson v. Erickson, 716 A.2d 92 (Conn. 1998) (holding that alleged misunderstanding of failure to opt out of corrective statute did not create ambiguity); Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000) (holding that alleged misunderstanding of legal effect of failing to name contingent beneficiaries did not create an ambiguity; concurrence noted that, though Massachusetts had not yet adopted reformation doctrine, court would be amenable in an appropriate case).

233. This is similar to the obligation imposed by the 1990 revisions to the UPC anti-lapse statute. Under the prior statute, conditioning the bequest with the language “if he survives me” was thought by many to preclude application of the anti-lapse statute. See Edward C. Halbach, Jr. & Lawrence W. Waggoner, The
justified, and reformation, contrary to his own assessment, would be in his best interest.

1. Illustrative Cases Within the Scope of Mischief or Mistake

Of the illustrative cases discussed in Part I, Case 1,234 the crossed will execution, Case 2,235 the perpetuities violation, Case 3,236 the tax error, and Case 6,237 the failure to dispose of real property, would qualify for reformation automatically regardless of the testator's desire to limit the court to the provisions of the will because each case involves a will that is wholly or partially ineffective at the time of execution. In each of these cases, one or more of the will's provisions can never become fully operative, and inquiry into intent is likely to effectuate actual wishes.

Case 5,238 the situation in which the corrective statute designed to protect surviving spouses who married after the will execution deprived the spouse of more generous testamentary provisions, should not arise under the proposal because the corrective statute (now repealed)239 is inconsistent with it. The proposal presumes mistake in cases where the will results in an intestate distribution that is not expressly required, and the corrective statute, providing for intestate distribution, would place the will within the realm of presumed mis-

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234. See supra note 90 and accompanying text.
235. See supra note 99.
236. See supra note 109.
237. See supra note 144.
238. See supra note 132.
239. See supra note 133. The repeal of the then existing omitted spouse statute was accompanied by enactment of a new statute that follows the more typical approach. 21 CONN. GEN. STAT. ANN. § 45a-257a (West Supp. 2001) (following general parameters of the original UPC, see infra note 240).
take, a nonsensical result. A more typical omitted spouse statute would provide the spouse with a right to a fraction of the estate equal to the intestate share, and that type of statute would not disturb the estate plan in Case 5 which provided more generously for the surviving spouse.

Also within the mischief or mistake provision would be a disposition to a beneficiary deceased at the time of the will execution. Although such a disposition might be saved by an anti-lapse statute, the disposition itself, ineffective at the time of execution, would not be intentionally included for any legitimate purpose.243 Similarly, relief would be available in cases like In re Estate of Ikuta244 in which reformation was sought to substitute the word "youngest" for "oldest" in a clause providing for the termination of a testamentary trust upon the death of the last survivor of two named individuals or when the "oldest [sic] of my sons attains the age of 30 years, whichever event occurs first." At the time of the will execution, the decedent's oldest son was already 30 years old, thus rendering the trust nugatory from the moment of execution.245 Consequently, no legitimate purpose could be served by adhering to this language.

240. See, e.g., Unif. Probate Code § 2-301, 8 U.L.A. 317 (1998) (providing spouse who married testator after execution of his will with the same share of the estate she would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for her by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence). Later revisions to the UPC reduce the share of the spouse who married the testator after execution of the will by calculating the intestate share based on only that portion of the estate that does not pass to a child born before the testator married the spouse who is not a child of the spouse or descendants of such a child either directly or pursuant to anti-lapse or other corrective statutes. Unif. Probate Code § 2-214 (revised 1993), 8 U.L.A. 131 (1998).

241. Historically, the law distinguished between void devises, which were designated for beneficiaries who died prior to execution of the will, and lapsed devises, which were designated for beneficiaries alive at the time of the will execution but predeceased the testator. Generally no consequences attach to the distinction and the Third Restatement, therefore, advocates its elimination of the distinction itself. Restatement (Third) of Prop.: Donative Transfers § 5.5 cmt. a (1999). This distinction would retain importance under this mischief or mistake standard.

242. See supra note 38.

243. An exception to this generalization would be required for those anti-lapse statutes that apply to members included in a class disposition who are predeceased at the time of the will execution. See, e.g., Unif. Probate Code § 2-605, 8 U.L.A. 423 (1998). In such a case, the general provision allowing reliance on corrective statutes should apply so that the deceased class member's issue would take, and the will would not be deemed to include a mistake. Of course, the will could qualify for relief under the opt in provisions discussed in section A if the testator so elected.

244. 639 P.2d 400 (Haw. 1981).

245. Id. at 406.
Tax cases would be evaluated based on the same mischief or mistake standard with the express recognition that a will failing to qualify for beneficial tax treatment would be deemed partially ineffective to the extent that it passes a portion of the estate to the government that is unnecessary to fulfill the dispositions to the named beneficiaries in the will. This does not preclude testators’ ability to ensure that a plan intentionally foregoing a tax benefit is effective; it merely requires him to state this intention expressly in the will. This burden is justifiable on the grounds that, apart from tax reformation cases, current law requires testators to express unequivocally that the government is intended as a beneficiary in order to preclude inquiry into intent.246

If, however, securing the tax benefit would require any alteration of dispositive provisions, relief would be available under mandatory reformation only if the intent to secure the tax benefit was manifested directly or indirectly in the will, thus constituting a proper case for construction; all other changes to dispositive provisions sought to secure tax benefits would require an election for optional reformation as described in Section A.247 This is more restrictive than the current law of some jurisdictions248 or the Third Restatement approach.249 The justification is that the nearly universal desire to minimize tax burdens does not translate into the desire to utilize any particular planning technique. Weighing the benefits of the tax savings against the modifications to the dispositive plan involves some measure of objectivity, but there is no basis upon which to conclude the dispositive desires of the testator whose plan is at stake would conform to this quasi-objective assessment.250 The evaluation of the desirability of the dispositive modification could incorporate a normative aspect which could work to defeat the testator’s desires. Accordingly, relief


247. See supra text accompanying notes 218-222.

248. See supra note 87.

249. See supra note 82.

250. See, e.g., In re Estate of Burdon-Muller, 456 A.2d 1266 (Me. 1983) (regarding determination of percentage of partially charitable (“split interest”) testator intended for charity to receive could not be based solely on maximizing the estate tax charitable deduction). Cf., James W. Narron, Non-Charitable Inter Vivos Gifts—A Plan for Tax Relief, 34 Univ. of Miami Philip E. Heckler Inst. On Est. Plan. 15-1, 15-26 (2000) (noting that a “myriad of personal and family imponderables that defy any numerical analysis” enter into the determination whether to make taxable transfers during life); Richard W. Nenno, Delaware Law Offers Asset Protection and Estate Planning Benefits, 26 Est. Plan. 3, 7 (1999) (noting that many individuals understand that inter vivos gifts would generate substantial transfer tax savings but nevertheless are reluctant to make them).
for tax mistakes of this sort is better addressed by the optional reformation provision of which the testator may choose to avail himself.

2. Illustrative Cases Outside the Scope of Mischief or Mistake

Outside the scope of mandatory reformation are tax cases requiring alteration of dispositive provisions other than those qualifying for construction relief: Case 4, the scrivener’s error which, it was revealed later, in fact represented the testator’s true intent; and Case 7, the unanticipated circumstance addressed by corrective statute. These cases must be excluded from the presumption of mistake in order to provide a safe harbor for testators who accurately express their wishes because, unlike Cases 1, 2, 3 and 6, there is no drafting mechanism, other than a general statement of desire to preclude reformation, that could insulate an accurate will from these allegations of error.

If Case 7 raises a generalized concern, that speaks more to the validity of the presumption underlying the corrective statute than to a defect in the proposal. If exclusion of Case 4 from automatic relief seems harsh, it is only because we are willing to jeopardize realization of the testator’s wishes in order to save the negligent lawyer from the consequences of his own mistake. Moreover, in both of these cases, relief would be available under the optional reformation provisions for those testators choosing to avail themselves of it.

C. Potential Criticisms

No reformation doctrine can accommodate perfectly the dual desires to remedy apparent mistakes and protect those who do not err from erroneous realignment of their dispositive plans. A different view of the appropriate balance between these two competing goals will lead to a different conclusion about the desirability of the proposed approach. Even for those who agree with the basic balance, the proposal involves some drawbacks, the most apparent of which are addressed below.

251. *See supra* text accompanying note 30. Non-tax cases falling outside the realm of construction, of course, would be excluded as well if they did not fall within the definition of presumed mistake. While the presumed mistake definition is intended, among other things, to reduce the desire to categorize as ambiguous unequivocal statements, difficult cases nevertheless would arise. *See, e.g.*, Crisp Area Y.M.C.A. v. NationsBank, N.A, 526 S.E.2d 63 (Ga. 2000) (holding that charitable bequest to extant but inactive organization could not be reformed to benefit the organization that assumed the functions of the named charity).

252. *See supra* note 124.

253. *See supra* note 149.
1. Burdens on the Planning Process

The opt in approach burdens all testators at the planning stage because it treats reformation as, in effect, a dispositive choice that, like any other dispositive choice, requires consideration. The added time required to discuss the desirability of opting into reformation relief and the preparation of documentation effectuating the intent to opt in will add to the pressures lawyers already face in preparing estate plans at a competitive cost. The benefit of this burden, however, more than outweighs its cost. The opt in requirement for reformation encourages lawyers to discuss the possibility of error with clients because reformation will be available to obviate a malpractice claim only if the client chooses to opt into reformation relief. This, in turn, gives testators the ability to choose which approach to reformation better suits their situation rather than imposing a “one size fits all” rule or standard as the other approaches to reformation do. Additionally, the reformation discussion heightens awareness of the limitations on the estate planning process that may result in mistake and reduces the possibility that mistakes will be made to the extent testators respond to the heightened awareness by, for example, proofreading more carefully than they otherwise would. This provides similar, albeit lesser, protection than malpractice liability while avoiding truly unnecessary losses.

The brunt of the opt in burden will be borne most heavily by those who draft their own wills or rely on lawyers unfamiliar with the opt in requirement. In the case of self-drafted wills, the burden is offset to some degree by the reduction in possibility of ministerial scrivener’s error and, in the case of form wills, the likelihood that the opt in form would be included as part of the will drafting package. In the case of wills drafted by lawyers, the burden is offset to a large degree by the existence of malpractice liability to disappointed beneficiaries. In the case of all wills, it must be recognized that no reformation doctrine can substitute for careful planning by an experienced professional without compromising testamentary freedom significantly.

A related criticism is that the opt in choice will be largely incomprehensible to clients, creating confusion and complexity for no real benefit. Estate planning clients need not be educated or even intelligent, but they must possess the capacity to understand the property they own, the objects of their bounty and the nature of their dispositions. The vast majority of clients who meet the test for capacity (and arguably all) should be able to comprehend the possibility of mis-

254. See supra note 204-05.
255. See supra note 202 (arguing that malpractice liability is not a complete substitute for reformation).
256. PAGE ON WILLS, supra note 29, § 12.1 et seq.
take and the consequences of choosing or declining to authorize reformation. This concept is no more difficult to comprehend than stirpital distributions,\textsuperscript{257} lapse\textsuperscript{258} and many others incorporated directly or indirectly in the dispositive provisions of the will.

The lawyer's explanation of reformation will be important, and here it must be conceded that some will sign whatever the lawyer places in front of them. For these clients, the benefit of the choice will be lost. These clients are in no worse a position, however, than they would be under a reformation system that permitted no choice so long as the default rules and incentives are structured to channel these clients to the optimal choice. The existence of malpractice liability creates an incentive for lawyers to suggest opting into reformation,\textsuperscript{259} and this incentive should preserve the opportunity for relief for these acquiescent clients without forcing "relief" on those who determine that reformation would not be in their best interests.

2. Disparity Between Wills and Testamentary Substitutes

If the proposal applies only to wills and not to will substitutes, it will lessen, but not eliminate, the disparity between the two. Will substitutes would continue to qualify for reformation under contract principles\textsuperscript{260} while wills would be subject to the special opt in requirement before reformation would be available. Initially, this would appear to be inferior to the Third Restatement which places wills and testamentary substitutes on equal footing by equating reformation of wills to reformation of contracts.\textsuperscript{261}

If conformity of all facets of the law of wills and the law governing testamentary substitutes is desirable, the goal could be achieved by extending the approach to reformation proposed here to nontestamentary substitutes.
tary donative documents. Modifying the approach to reformation of testamentary substitutes rather than replacing will reformation principles with those of contract law would produce conformity without relegating protection of accurately expressed testamentary intent to post-death proceedings. This would create a disparity between contracts and will substitutes, but there is an obvious justification for the distinction: the party whose intent is at issue usually is deceased at the time the problem arises. That argument is not developed here, however, because the considerably less radical argument that differential treatment is justified may be made on several grounds.

First, unification of the law of wills and testamentary substitutes is desirable only because they are functional equivalents. Unification of requirements governing validity of instruments is desirable because policy considerations underlying these requirements are identical regardless of the mechanism used to effectuate the transfer. Unification of default laws governing interpretation of donative documents that an individual may avoid by use of sufficiently clear language should be unified as well because donative intent does not differ based on the type of instrument utilized. Reformation

262. See Guliver & Tilson, supra note 22, at 4 (stating that as a practical matter, the donor is almost always unavailable at the time the mistake is discovered). The Second Restatement of Trusts would place all testamentary substitutes on equal footing with wills by excluding the donor's testimony in cases where he is available. Restatement (Second) of Trusts § 332 cmts. c, e (1959).

263. The Second Restatement of Trusts would lend support to the proposition that testamentary substitutes should be differentiated from contracts for purposes of reformation. See Restatement (Second) of Trusts § 332 cmts. c, e (excluding testimony of the donor in reformation proceedings on the grounds that the donor's testimony is "inherently unreliable"). Contra Restatement (Second) of Prop. § 34.7 cmt. d (1992) (advocating, as the Third Restatement of Property does, reliance on testimony of lawyers and those whose have or allege beneficial interests under the instrument in applications for reformation of both testamentary and non-testamentary instruments). To make this argument persuasively, however, would require an exploration of the relationship between contracts and donative transfers that is beyond the scope of this Article. For a sampling of recent literature on the subject, see Leslie, Enforcing Family Promises, supra note 173; Jane B. Baron, Gifts, Bargains, and Form, 64 Ind. L.J. 155 (1988/1989); Melvin A. Eisenberg, The World of Contract and the World of Gift, 85 Cal. L. Rev. 821 (1997); E. Allan Farnsworth, Promises to Make Gifts, Am. J. Comp. Law 359 (1995); Mary Louise Fellows, His to Give; His to Receive; Hers to Trust: A Response to Carol M. Rose, 44 Fla. L. Rev. 329 (1992); Carol M. Rose, Giving Some Back—A Reprise, 44 Fla. L. Rev. 365 (1992); Carol M. Rose, Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Verso, 44 Fla. L. Rev. 295 (1992). See also John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625 (1995).


265. See Langbein, supra note 22.

differs from default law and validity requirements, however, because it permits re-writing of concededly valid instruments on an ad hoc basis. To extend contract reformation doctrine to testamentary instruments would eliminate the opportunity to insulate an estate plan from intent-defeating reformation. Consistency in the treatment of wills and will substitutes is insufficient to justify this constriction in testamentary freedom for those testators whose primary relationships enjoy few, if any, other legal protections.267

A second justification for different approaches to reformation for wills versus will substitutes is that general unification of the law of testamentary and non-testamentary transfers does not always require precise identity in governing requirements. The dispensing power is a prime example.268 The power exists to reduce formalities to more nearly equate the law of testamentary and non-testamentary transfers, yet it still retains as its touchstone the traditional requirements of the Statute of Wills.269 The reformation proposal is structured similarly: flexibility to achieve results paralleling those reached in cases involving non-testamentary transfers is provided, but the Statute of Wills remains the touchstone.

Finally, the enormity of the change itself can justify adherence to a traditional rule even where dispositive intent may be similar for wills and will substitutes. For example, an individual’s dispositive desires with respect to an interest created in a beneficiary who predeceases the testator will not differ based on whether the desire is reflected in a will or in a revocable trust. Under the doctrine of lapse, a testamentary disposition to a predeceased beneficiary will be ineffective while a disposition in a revocable trust to a beneficiary who predeceases the grantor will pass to the beneficiary’s personal representative unless the governing instrument expressly provides otherwise.270 This disunity was rectified by the drafters of the 1990 Uniform Probate Code to the chagrin of some.271 The dispute was less about the probable intent of the testator than it was about the extent of the burden that such a fundamental change in the law of future interests would cre-

As a matter of decisional law, courts often, but not always, reach a parallel conclusion. Compare In re Dean, 967 S.W.2d 219 (Mo. Ct. App. 1998) (determining capacity to revoke trust based on testamentary standard), with In re Edson, N.Y.L.J., July 14, 1997, at 31, col. 1 (Surr. Ct.) (requiring contractual capacity to execute revocable trust).

267. See supra note 177.
268. See supra note 24.
269. See supra note 26.
270. See supra notes 41-43 and accompanying text.
A similar argument can be made in the reformation context. Desire to permit correction of mistakes may not vary based on whether the estate plan is embodied in a will or a will substitute, but effecting a fundamental change in the law of wills to preclude safe harbor reliance changes the nature of the planning process in a manner that even the most diligent testator or most astute lawyer cannot with certainty manage.

V. CONCLUSION

The burden of exercising care in estate planning necessary to realize testamentary freedom cannot be alleviated but rather only deferred to litigation that occurs after the testator’s death when he is incapable of exercising the same degree of control over communication of his wishes. This simply shifts the premium on factual knowledge, effective expression and good lawyering from the testator and his estate planner to competing beneficiaries and their litigators. Refusing to permit this shift to occur in any circumstance, as strict application of the historic approach does, precludes realization of intent in cases where there is no offsetting benefit to the testator. Mandating the shift, as the Third Restatement does, eliminates the opportunity to assure that testamentary wishes may be realized through careful planning.

To maximize the possibility of realizing testamentary freedom, individuals must be permitted to control the means by which their unambiguously expressed wishes are understood after death. The proposed approach to reformation advocated here confers that control by allowing testators to elect whether to permit or preclude reformation, and thus to determine whether or not extrinsic evidence outside the individual testator’s control may supplement the court’s understanding of his wishes as expressed in the will itself. Consequently, the proposal provides a complete opportunity for relief from mistake while protecting those who otherwise could be harmed by a more “liberal” approach to reformation of testamentary instruments.

272. Compare David M. Becker, supra note 271 (arguing that the complexities of the statute will cause those familiar with it to draft around it), with Lawrence W. Waggoner, The Uniform Probate Code Extends Anti-lapse-Type Protection to Poorly Drafted Trusts, 94 Mich. L. Rev. 2309 (1996) (arguing that the statute reflects the dispositions a skilled planner would recommend). Other revisions to the Uniform Probate Code are subject to similar disagreements. Compare Ascher, supra note 215 (arguing changes to anti-lapse and ademption statutes impose unwarranted burdens on experienced planners), with Fellows, supra note 215 (arguing the opposite).