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When Axioms Collide

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WHEN AXIOMS COLLIDE

INTRODUCTION

Recently, American courts have begun to adopt an increasingly liberal approach to will construction and reformation. This trend reflects the continuing battle between two elemental axioms of wills law: (i) observing the formalities imposed by the Wills Act,[1] and (ii) admitting extrinsic evidence to effectuate the intent of the testator.[2] As recent case law suggests,[3] the former axiom has been steadily losing ground to the latter.[4] This assault on the previously inviolate stronghold of wills formalities has come in two waves: remedies given for execution errors, and remedies for content errors. This Note establishes that a third wave should follow—remedies given for mistake of fact.

The first wave in the trend of liberalism was the courts' gradual willingness to overlook "harmless errors" made in the execution of a will.[5] An example of a "harmless" error in execution is in *Estate of*

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[1] Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 9 (Eng.). The Wills Act provides in pertinent part:

> [N]o Will shall be valid unless it shall be in Writing and . . . signed . . . by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

Id.

[2] *See, e.g.*, Estate of Kajut, 22 Pa. D. & C.3d 123, 136 (1981) (excusing a harmless error in execution because testator "substantially complied" with the requisite formalities); *see also* Farmers & Merchants Bank v. Farmers & Merchants Bank, 216 S.E.2d 769, 772 (W. Va. 1975) ("The paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy.").

[3] *See infra* text accompanying notes 42-61.

[4] *See* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 4.1 (1988) ("Many today believe that the requirements for wills are too strict. The trend to impose more formal requirements, which culminated in the Wills Act of 1837, has recently begun to flow in the other direction."); 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, 53 (1987) ("In the law of wills, both the traditional refusal to excuse innocuous execution errors and the traditional refusal to correct obvious mistakes in content, result from the same theoretical excess—*overvaluing the requirements of Wills Act formality*.") (emphasis added).

[5] To execute a valid will, the Wills Act calls for the testator's compliance with two basic conditions: (i) the testator must adhere to all requisite formalities (for example, signing the will, attestation, publication), and (ii) the testator must have testamentary intent at the time he executes the instrument. Testamentary intent is simply the testator's subjective desire to provide for the disposition of property at her death. *See* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*,

Kajut.[6] In *Kajut*, a blind Pennsylvania resident signed his will by marking it with an "X."[7] At the execution of a will signed by a mark, Pennsylvania law calls for a third party to subscribe the testator's name next to the mark while in the testator's presence.[8] In *Kajut*, the lawyer typed in his client's name prior to the execution, failing to subscribe the will in the testator's presence. However, the court concluded that the will was executed in a manner which was in substantial compliance with the Wills Act.[9]

The second wave in the liberal construction of wills is the courts acceptance of wills that are executed with all due formalities, but contain an error in their terms. This occurs where the draftsman or scrivener transposes a digit, mangles an address, or inserts the wrong name. In *In re Gibbs' Estate*,[10] the probated will contained a bequest to "Robert J. Krause" at a given address. A Robert J. Krause did indeed reside at that address, but the testator had never had any contact with him. Meanwhile, Robert *W*. Krause, a personal friend and employee of testators' for over thirty years, was discounted because he resided at another address. Robert W. Krause, the petitioner, asserted that the testator intended to leave the property to him, and not the stranger actually mentioned in the will.[11]

The court's solution to this dilemma was rather unusual because it admitted extrinsic evidence "unofficially," enabling it to take action that in turn required "official" admission of the same extrinsic evidence.[12] First, the court admitted extrinsic evidence and, not wanting

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130 U. PA. L. REV. 521, 541 (1982) (outlining the recent movement of American courts toward excusing obvious errors in execution and mistaken terms).

6 22 Pa. D. & C.3d 123 (1981).

7 *Id.* at 134.

8 20 PA. CONS. STAT. ANN. § 2502(2) (1977).

9 *Kajut*, 22 Pa. D. & C.3d at 136. Generally, the legislatures and courts have reduced execution formalities by upholding the validity of instruments that are testamentary in character, but lack comprehensive formalities. *See infra* note 10. For example, life insurance policies, revocable trusts, Totten trusts, and joint bank accounts are "the functional equivalents of wills because the property owner retains enjoyment of and control over the property during life and provides for its disposition upon death." Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 615 (1988). A Totten trust is a bank account established by a depositor who describes himself as a trustee for another; despite its revocability, it is generally valid. Estate of Agioritis, 383 N.Y.S.2d 304 (App. Div.), *aff'd*, 357 N.E.2d 979 (N.Y. 1976). Because they are so easy to establish and maintain, they are sometimes referred to as "the poor man's will." *Id.* at 310.

10 111 N.W.2d 413 (Wis. 1961). *See also* Farrell v. Sullivan, 144 A. 155 (R.I. 1929) (erroneous parts of will ignored because court able to infer testator's probable intent by admitting extrinsic evidence); Moseley v. Goodman, 195 S.W. 590 (Tenn. 1917) (admitting extrinsic evidence to show that the testator habitually referred to a Mrs. Trimble as "Mrs. Moseley" where will bequeathed $20,000 to "Mrs. Moseley").

11 *Gibbs' Estate*, 111 N.W.2d at 415.

12 *Cf. id.*

to supply missing terms, deleted the middle initial and address from the will.[13] The effect of this judicial surgery was to create a latent ambiguity because the will now read "Robert Krause," and there were *two* claimants named Robert Krause. Last, the court admitted extrinsic evidence[14] to establish that the petitioner was the Robert Krause referred to in the will.[15]

In *In re Kremlick*,[16] the will provided that the residue of the estate be shared by the Salvation Army and the Michigan Cancer Society. The present controversy arose because there were two organizations commonly referred to as the "Michigan Cancer Society": the Michigan Cancer Society and the American Cancer Society, Michigan Division. The American Cancer Society presented substantial evidence tending to prove that it was the intended beneficiary.[17] In effect, the court held that this extrinsic evidence should be admitted to both *create* a latent ambiguity and to help *resolve* it.[18] Courts, as in *Kremlick*, frequently avoid express reformation of wills by finding an ambiguity in the terms.[19] A finding of ambiguity allows the courts to hang reformation on the peg of construction, a process tend-

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13 A court loathes to admit that it is reforming a will; adding words or altering text abrogates the demand for strict compliance with formalities. The "objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act." Langbein & Waggoner, *supra* note 5, at 528. Part of this feeling stems from the belief that one chief purpose of formalities is to shield the testator from fraudulent claims by ensuring authenticity. *See* Swackhamer v. Forman, 269 N.E.2d 48, 51 (Ohio Ct. App. 1971).

The Uniform Probate Code ("U.P.C.") requires that every will be in writing and signed by the testator. UNIF. PROBATE CODE § 2-502 (1987). However, the U.P.C. does not require every writing by the testator to be probated as a will. A writing made under fraud, duress, undue influence, without capacity, or by mistake may be denied probate. By extension, particular *words* or phrases which were accidentally included may be denied probate. *See* MCGOVERN ET AL., *supra* note 4, § 6.1.

14 *See infra* notes 33-37 and accompanying text for a discussion of the parol evidence rule.

15 *Gibbs' Estate*, 111 N.W.2d at 417-18.

16 331 N.W.2d 228 (Mich. 1983).

17 The executor asserted that she had discussed the provisions of the will with the testator many times, and he had explicitly mentioned to her that the American Cancer Society was to be a beneficiary. Furthermore, the American Cancer Society had provided support for the testator's wife when she was dying of cancer, and at the time of her death, the testator had requested memorials to the American Cancer Society. *Id.* at 229.

18 *Id.* at 230. "[N]ot only may extrinsic evidence be used to clarify the meaning of a latent ambiguity, but it may be used to demonstrate that an ambiguity exists in the first place and to establish intent." *Id. See also* Siegley v. Simpson, 131 P. 479 (Wash. 1913) (holding that extrinsic evidence is admissible to show that Hamilton Ross Simpson was the intended beneficiary of a bequest made to "Richard H. Simpson," even though testator had an acquaintance named Richard H. Simpson).

19 *See generally* Langbein & Waggoner, *supra* note 5. Very few courts will expressly reform a will, and should they do so, they usually apply limiting language. *See, e.g.*, *In re* Snide, 418 N.E.2d 656 (N.Y. 1981); *In re* Ikuta, 639 P.2d 400 (Haw. 1981).

ing toward remedy that courts feel more comfortable applying.[20]

The third area in need of more liberal construction in wills law is mistake of fact cases. A mistake of fact occurs when a will is executed with all the necessary formalities and free from any draftsman's error, but flawed because the testator was subjectively unaware of a true prejudicial fact at execution. This scenario stages the arena for the clash between two entrenched axioms: compliance with formalities versus admission of extrinsic evidence to show a testator's true intent. In fact, as this Note will show, the former axiom may be viewed as a means of accomplishing the ends of the latter axiom.

Each axiom undeniably serves a crucial role in public policy. On the one hand, formalities (i) inform the testator of the gravity of his actions, discouraging hasty bequests; (ii) assure the authenticity of a will; and (iii) protect the testator from fraud, undue influence, and duress. On the other hand, a major theme of the Wills Act is to give effect to the testator's intention, because society, with few exceptions, allows a property owner to dispose of property as he sees fit.[21]

Common sense suggests that the ultimate goal of formalities is to assure that the intentions carried out are truly the testator's. This Note proposes that intent should take priority over formalities when a court can infer the testator's probable intent[22] with a high degree of certainty. Part I discusses the recent cases that lead the vanguard in liberal construction and reformation of flawed wills. Despite these cases, courts feel powerless to reform flawed wills because of the formalities imposed by the Wills Act.[23] Part II proposes a model statute to codify a solution to the vexing problems discussed in Part I. In support of the model statute, Part III draws analogies between the model statute and existing reformation doctrines.

I. THE VANGUARD OF REFORM

Given that the testator's wishes should control, *which* intent should be followed: (i) the intent the testator had when she executed

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[20] Because reformation entails inserting terms in a will after the death of the testator, the added terms are not part of the document originally executed by the testator in accord with the necessary formalities. Thus, reformation is viewed skeptically because it bypasses formality, the legislative machinery designed to protect the interest of the decedent. Naturally, courts are eager to avoid reformation because they can accomplish the same goals by merely interpreting the will as it currently exists.

[21] *See supra* note 1; *see also* Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 3 (Eng.) (stating that all property may be disposed of in a will).

[22] *See infra* text accompanying notes 84-86.

[23] *See, e.g.*, Connecticut Junior Republic v. Sharon Hosp., 448 A.2d 190 (Conn. 1982) (holding that absent an ambiguity, extrinsic evidence was not admissible to show that scrivener mistakenly inserted wrong list of charitable beneficiaries in second codicil to will).

the will as evidenced by the will itself, or (ii) the "probable intent" the testator would have had, but for the mistake of fact, as evidenced by both the will and extrinsic evidence? Trying to divine the answer is like trying to see which side of a rapidly twirling "yin-yang" paddle[24] is facing the mediator at a given moment. To the mediator, black and white blur into gray. Similarly, trying to discern which intention should be followed—the one recorded at execution or the one that may be reasonably inferred from extrinsic evidence—blurs into confusion.

The closest a court has come to recognizing a viable reformation for mistake of fact doctrine was in *Gifford v. Dyer*.[25] The testator devised her estate to her grandchildren and friends but left nothing for her only son. The testator's son had disappeared ten years before his mother's death and extrinsic evidence indicated that the testator would have left nothing for her son even if he proved to be alive. Chief Justice Greene suggested by way of dicta that a will drafted under a mistake of fact is subject to reformation if it meets two criteria: (i) the mistake must appear on the face of the will, and (ii) the will must disclose what would have been the desire of the testator but for the mistake.[26] By extension, where a testator revoked a bequest under a mistaken supposition of fact which appeared on the face of the instrument of revocation, such revocation would be invalidated.[27] Unfortunately, "[v]ery few cases meet these rigorous requirements. Testators with mistaken beliefs do not often recite them in the will, or say what they would do if the facts were otherwise than they suppose them to be."[28]

Indeed, since the will is a formal legal document, common sense suggests that the body of a will is not the place for a testator to wistfully speculate how she would have left her estate if, for example, her brother had not disappeared in the Amazon Jungle five years ago. Although a testator may explain the motivation behind a bequest,[29] it would seem far more likely for the testator to provide for alternative

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24 "Yin-yang" paddles are black on one side and white on the other with a rubber ball on a short string attached to one of the paddle's edges. The mediator flips the paddle back and forth, bouncing the ball against the sides in a steady cadence. The (black) "yin" side represents the passive, female cosmic principle and the (white) "yang" side the masculine cosmic principle in Chinese dualistic philosophy. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2067, 2071 (3d ed. 1992).

25 2 R.I. 99 (1852).

26 *Id.*

27 *Id.* (citing Campbell v. French, 3 Eng. Rep. 1033 (1797)).

28 MCGOVERN ET AL., *supra* note 4, § 6.1, at 245.

29 For example, "I devise Blackacre to Susan on account of her great devotion to me in my declining years."

dispositions of property, if at all, in binding instruments, letters, journal entries, or other documents.[30] For example, suppose Mr. Jones suspects his wife of having an adulterous affair because every second Friday she enters a nearby hotel at 3:00 p.m. and departs an hour later. Mr. Jones hires a private detective to discover the truth, but unable to wait for a report, covertly changes his will leaving Mrs. Jones the minimum[31] share. Mr. Jones writes his friend Sam a dated and signed letter revealing his worst convictions. In the letter, Mr. Jones writes: "If she hadn't cheated on me, I'd have left her everything. Too bad I can't cut her out of the will entirely!" The next morning, Mr. Jones is killed in a car accident and his newly executed will is admitted to probate.

Assume that Mrs. Jones can irrefutably establish that her visits to the hotel were nothing more than attendance of bi-monthly meetings sponsored by the "Citizens For A Cleaner Metropolis Association." If Mrs. Jones applied to the court for reformation of the will, she would face several obstacles; namely the "plain meaning" rule which would operate to exclude extrinsic evidence that varied or contradicted the terms of the will, and the judiciary's virtually "axiomatic" rejection of suits for will reformation.[32]

Courts dislike admitting extrinsic evidence because the testator is no longer able to rebut false claims.[33] Therefore, statutory law imposes more stringent requirements for admitting extrinsic evidence to clarify a will than for construing a contract or other inter vivos instrument. The "plain meaning" rule operates to exclude extrinsic evidence when the will is unambiguous on its face,[34] and the "four

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30 Although there is a scarcity of mistake of fact cases on record, such mistakes must certainly occur. This scarcity of cases probably exists because until ten or fifteen years ago, the very idea of petitioning a court to excuse an error in execution or to reform a mistaken term was unheard of. *See infra* text accompanying notes 34-35, 59.

As mentioned above, however, certain recent cases "presage the abandonment of the ancient 'no-reformation' rule." Langbein & Waggoner, *supra* note 5, at 521. The trend toward reformation and relaxation of the parol evidence rule has just barely cracked open the window of possibility for the next assault on will formalities—reforming wills flawed by mistake of fact.

31 The testator may not completely disinherit his spouse. Under UNIF. PROBATE CODE § 2-201 (1987), the spouse is entitled to a minimum one-third share of the estate. In some states, the fraction increases if the decedent leave no surviving issue, or decreases if the testator left surviving issue by a prior marriage. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(c) (Consol. 1981).

32 Langbein & Waggoner, *supra* note 5, at 521.

33 "The testimony will typically involve [evidence] . . . which [the testator] can now neither corroborate nor deny. The testator's main protection against fabricated or mistaken evidence is the will itself." Langbein & Waggoner, *supra* note 5, at 525; *see also* MCGOVERN ET AL., *supra* note 4, § 6.1.

34 The traditional view is to exclude evidence when the will contains no latent or patent ambiguities. However, it is well resolved that a court will admit parol evidence to resolve a

corners" rule limits the court's search for the testator's intent to the executed (but flawed) will.[35]

However, if the complainant alleges fraud, undue influence,[36] or duress, the court is obligated to admit parol evidence.[37] It is counter-intuitive to admit extrinsic evidence when the complainant alleges these charges, but to exclude it when the testator created a mistake of fact. Indeed, a resourceful lawyer can create a false allegation of fraud to pry open the floodgates of extrinsic evidence, when in fact the testator made a self-induced mistake of fact.

For example, suppose in the above hypothetical Mr. Jones had a cousin, Mr. Smith. Like Mrs. Jones, Mrs. Smith visits a hotel every other week for club meetings. Suspecting his wife of having an extra-marital affair, Mr. Smith takes the same measures as Mr. Jones, and then dies leaving an altered will. Unlike Mrs. Jones, who argued that her husband was under a self-induced mistake of fact, Mrs. Smith's lawyer uses another tactic. Counsel for Mrs. Smith falsely alleges that Tom, Mr. Smith's son by a prior marriage, used undue influence to delude his father into believing that Mrs. Smith committed adultery. Because undue influence is alleged, the court will consider extrinsic evidence, and discover that testator's probable intent diverged from the intent expressed in the will. Assume that the court will go so far as construing the will in Mrs. Smith's favor.[38] It is patently unfair for

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latent ambiguity. *See In re* Frost's Will, 89 N.W.2d 216, 218 (Wis. 1958); R.T. Kimbrough, Annotation, *Admissibility of Extrinsic Evidence to Aid Interpretation of Will*, 94 A.L.R. 26, 47-51 (1935). A latent ambiguity occurs when the will seems clear on its face, but unclear in light of extrinsic evidence. For example, a will might devise "My house in Beverly Hills to my niece, Jane." This statement seems clear, but what if the testator has *two* houses in Beverly Hills, or more than one niece named Jane?

Patent ambiguities are immediately apparent because they are inconsistent with other provisions in the same document. Courts are split on whether to admit parol evidence to resolve a patent ambiguity. If the testator devised his house to Jane, but subsequently devised the same property to another relative, there would be a patent ambiguity since the inconsistency appears in the document. *See* Jacobsen v. Farnham, 53 N.W.2d 917 (Neb. 1952) (prohibiting admission of extrinsic evidence to discern testator's intent as expressed in his will because of a patent ambiguity); Kimbrough, *supra*, at 55 (citing decisions rejecting parol evidence to clear a patent ambiguity). *But see* Payne v. Todd, 43 P.2d 1004, 1006-07 (Ariz. 1935) (demonstrating the modern trend of admitting parol evidence to clear a patent ambiguity).

35 *See* Langbein & Waggoner, *supra* note 5, at 521.

36 Undue influence is mental coercion that destroys the free will of the testator, forcing him to substitute the intentions of another for his own. *See* MCGOVERN ET AL., *supra* note 4, § 7.3.

37 *Cf.* MCGOVERN ET AL., *supra* note 4, § 6.1, at 246 (Courts are open to claims of fraud "in order to prevent any possible profit from wrongdoing . . . . It is hard to see why [courts] distinguish between someone who innocently profits from another's fraud, and someone who innocently profits from a mistake.").

38 *Cf.* MCGOVERN ET AL., *supra* note 4, § 6.1. To determine whether extrinsic evidence

Mrs. Smith to benefit from this quirk of wills law and for Mrs. Jones to suffer from lack of judicial intervention.

Although the evidentiary problem is significant, it "does not in fact explain or justify the no-reformation rule in matters of testamentary mistake."[39] If parol evidence tends to reveal a conflict between a will and the probable intent of the testator, a court should grant reformation.[40] Knowing that the Wills Act is built on the directive of implementing the testator's true intent, can a court probate a will that fails to comply with this basic tenet?[41]

A few visionary decisions have departed from the "plain meaning" rule and have admitted extrinsic evidence to show that the testator meant something other than would be indicated by the words' ordinary meaning. In *In re Estate of Russell*,[42] the testator left the residue of his estate to his dog (Roxy Russell) and a close friend. The gift would normally be deemed void since a dog lacks capacity at law.[43] The trial court found that the testator wanted her friend to inherit the entire estate (excepting certain specific bequests) contingent on caring for the dog.[44] Although the court found against the friend on the constructional issue, it endorsed the admission of extrinsic evidence, regardless of how unambiguous the will appears on its face.[45] However, this method only allows courts to admit extrinsic evidence when they interpret the terms of the will. If the terms of the will are contradictory, parol evidence would be deemed inadmissible.[46] Thus, the method employed by the court in *Russell* is inadequate; while in the example above it enables Mrs. Jones to prove her late husband's probable intent, it blocks the court from furnishing a remedy because the probable intent will necessarily contradict the terms of the flawed will!

Continuing the transition to a more liberal approach for the admission of parol evidence, *In re Estate of Taff*[47] significantly broadened the method used in *Russell*. The testator devised her property to

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should be admitted, the court must actually hear the evidence. "[I]f this evidence turns out to be compelling, the court is likely to follow it." *Id.*

39 *See* Langbein & Waggoner, *supra* note 5, at 528.

40 *See id.* at 521.

41 *Cf.* Engle v. Siegel, 377 A.2d 892, 897 (N.J. 1977) (hearing extrinsic evidence in search of probable intent).

42 444 P.2d 353 (Cal. 1968).

43 *See* WILLIAM J. BOVE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS 851 (1901).

44 *Estate of Russel*, 444 P.2d at 356.

45 *Id.* at 359.

46 *See* Langbein & Waggoner, *supra* note 5, at 557.

47 133 Cal. Rptr. 737 (Ct. App. 1976).

her "heirs in accordance with the laws of intestate succession, in effect at my death in the State of California."[48] The testator wanted the property to go to her natural (blood) relatives, but, because she died in a community property state, the wording of her will would have caused half of the community property to pass to the natural heirs of her deceased spouse. The court admitted extrinsic evidence to discern the testator's purported intent and reformed the will so as to exclude the deceased spouse's intestate heirs.[49] In effect, the court *created* an ambiguity in the word "heirs" and subsequently resolved the ambiguity by reference to extrinsic evidence.[50]

As far reaching as the *Taff* and *Russell* decisions are, they are distinguishable from the adultery hypothetical posed above. Because the *Taff* court did not actually reform the will, they confined themselves to effectively creating an ambiguity rooted in a preexisting term. In the adultery hypothetical, a court would have to *add* and delete terms, not merely interpret preexisting ones, to give the widow anything more than her minimal share.

In *Engle v. Siegel*,[51] another remarkably liberal decision, the New Jersey Court came even closer to outright reformation. The testators, Albert and Judith Engle, perished with their children in a hotel fire. Upon drafting their wills, the testators advised their lawyer that they wanted to split the estates between their families. The lawyer interpreted the word "families" too generally and substituted the names of the testators' mothers and mothers-in-law (the mothers were deemed representatives of the two families). As a result, the wills contained a common "disaster clause" providing that in the event of the death of their spouse and children, their respective estates would be divided equally between their mothers and mothers-in-law.

Rose Siegel, the husband's mother, predeceased her son. However, Rose was survived by two children who submitted that they should take in her place by representation.[52] Mrs. Engle, the wife's mother, contended that since she was listed as a residuary legatee she should absorb Rose Siegel's shares to the exclusion of the Siegel chil-

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[48] *Id.* at 739.

[49] *Id.* at 740-42.

[50] "The effect of the decision in *Taff* was to substitute a phrase such as 'my natural heirs' for the inapt phrase that the will had employed . . . in order to carry out what the court conceived to be the actual or subjective intent of the testatrix." Langbein & Waggoner, *supra* note 5, at 558.

[51] 377 A.2d 892 (N.J. 1977).

[52] In property law, representation allows children or more remote lineal descendants of a predeceased relative of the decedent to stand in their ancestor's place for purposes of inheritance. MCGOVERN ET AL., *supra* note 4, § 1.3.

dren.[53] Under New Jersey state law, the antilapse statute did not operate in favor of the Siegel family because the scope of the statute did not extend its coverage to a parent of the testator.[54] Nevertheless, the court divided the estates equally between the Siegel and Engle families.[55] The court inferred from extrinsic evidence that a term had been mistakenly omitted and "supplied this term because the court was able to infer with a *high degree of probability* what content the testators would have given to the term had they expressed it."[56] From *Engle* it is not too far a stretch to argue that if the testator meant what he said when he executed the will—but was unaware of the true state of affairs—a court should admit parol evidence, even if the terms of the instrument are unambiguous and were not induced by fraud, undue influence, or duress.[57] In both *Taff* and *Engle*, the

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[53] *Engle*, 377 A.2d at 893.

[54] *Id.* Antilapse statutes function to prevent a failed gift from passing through intestacy. This is viewed favorably, partially because of a strong presumption against intestacy. *See In re* Estate of Ikuta, 639 P.2d 400 (Haw. 1981); MCGOVERN ET AL., *supra* note 4, § 11.1. Most antilapse statutes only extend their scope to testator's siblings or lineal descendants—not to parents.

[55] *Engle*, 377 A.2d at 896-97.

[56] Langbein & Waggoner, *supra* note 5, at 561 (emphasis added). The *Engle* court further noted the movement away from slavish obedience of formalities to a more liberal approach:

> "It is elementary principle in the construction of wills that the controlling consideration is the effect of the words as actually written rather than the actual intention of the testator independently of the written words. The question is not what the testator actually intended, or what he was minded to say, but rather the meaning of the terms chosen to state the testamentary purpose . . . ." *In re* Armor, 11 N.J. 257, 271, 94 A.2d 286, 292 (1953). *This statement can no longer be said accurately to express the law of our State.*
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> . . . .
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> In applying the new rule a court not only examines "the entire will" but also studies "competent extrinsic evidence"; it attributes to the testator "common human impulses" and seeks to find what he would *subjectively* have desired had he in fact actually addressed the contingency which has arisen.

Engle, 377 A.2d at 893-94 (first emphasis added).

[57] Admitting extrinsic evidence in this context may require convincing the court that the testator was oblivious to the true state of affairs, which may point to incapacity and result in intestate distribution. However, this danger is not as grave as it appears because the standard for testamentary capacity is lower than that necessary to enter into a binding contract. For a testator to have testamentary capacity, she must (i) know that she is leaving a will, (ii) know the natural objects of her bounty, (iii) have the potential to understand the nature and extent of her property, and (iv) understand the disposition she is making. MCGOVERN ET AL., *supra* note 4, § 7.2. Drunkenness, eccentricity, or low intelligence will not necessarily void a will. York v. Smith, 385 So. 2d 1110 (Fla. Dist. Ct. App. 1980) (holding that, in the absence of evidence that mistaken belief was an insane delusion, the will remains valid). Furthermore, there is a presumption against intestacy which operates to preserve a validly executed will. *See In re* Estate of Ikuta, 639 P.2d 400 (Haw. 1981); MCGOVERN ET AL., *supra* note 4, § 11.1, at 442.

Conversely, a unique Georgia statute provides that "a mistake of fact as to the existence or conduct of an heir" renders a will inoperative. GA. CODE ANN. § 53-2-8 (Michie 1982).

courts gave priority to unattested extrinsic evidence over the "contrary but mistaken language in the will."[58]

Courts previously were constrained to ignore a testator's true intent because they felt "enslaved by the Wills Act."[59] The liberal or conservative character of a court varies with its judges; thus identical issues facing several jurisdictions commonly produce different results. As demonstrated by liberal courts in *Estate of Russell*, *Estate of Taff*, and *Engle v. Siegel*, unduly restrictive or unfair laws will not deter progressive judges from finding more palatable solutions. Although these courts avoided using the word "reformation," more recent cases have not been as reluctant.[60]

In a New York Court of Appeals case, *In re Snide*,[61] Harvey and Rose Snide arranged to have mutual identical wills[62] executed contemporaneously, but at the execution each testator was given the wrong will to sign: Harvey signed Rose's will and vice versa. The executor applied to the court for reformation of the will asking that the words "Harvey," "Rose," and "wife" be substituted for "Rose," "Harvey," and "husband" respectively. Technically, the papers signed by the Snides were not wills because the testators lacked testamentary intent.[63] Furthermore, neither Harvey's nor Rose's will, taken individually, disclosed what would have been the testator's de-

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Yet the Georgia courts have contrived to construe the statute narrowly. Verner F. Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297, 362-64 (1977).

58 Langbein & Waggoner, *supra* note 5, at 525. Unlike the United States' steadfast resistance to the admission of extrinsic evidence, continental legal tradition embraces such evidence to discover the testator's true intent. "The testator's subjective intent predominates over literal meaning; extrinsic evidence is freely admissible, and techniques of supplementary interpretation . . . allow[] courts to fashion remedies on the imputed intent principle (what would the testator have desired had he known?)." *Id.* at 527.

59 *In re* Reynette-James, [1976] 1 W.L.R. 161, 166 (Ch. D. 1975). *See also* Fellows, *supra* note 9, at 631.

> [W]e believe that the primary impediment to the adoption of a general reformation doctrine for wills has been the seeming need for technical adherence to the Wills Act, rather than any judgment that it would offend the underlying purpose of the Wills Act to remedy well-proven mistakes. . . . In countless cases of palpable mistake, the courts have felt obliged to enforce the Wills Act literally *even though it is manifest that to do so defeats the basic goal of the Wills Act, which is to implement the testator's intent.*

Langbein & Waggoner, *supra* note 5, at 529 (emphasis added).

60 "On the spurious authority of *Russell*, *Taff* reformed the will without admitting, hence without justifying, this departure from traditional law." Langbein & Waggoner, *supra* note 5, at 558.

61 418 N.E.2d 656 (N.Y. 1981).

62 In other words, they contained identical dispositions of property and were executed simultaneously.

63 *Snide*, 418 N.E.2d at 657. By definition, Harvey and Rose Snide could only have had testamentary intent to execute their own—not each others'—wills.

sire but for the mistake. To determine the probable intent of one spouse, it is necessary to look at *both* wills at one time. This procedure may seem trivial, but it entails admitting *extrinsic evidence* that fails to comply with necessary will formalities.[64] The *Snide* court reformed the wills, daring to speak of "reformation" instead of "construction."[65]

The factors the court mentioned to justify this departure from the traditional rule are: "(1) the high quality of the evidence of mistake, and (2) the importance of serving the underlying principle policy of the Wills Act, which is to implement the testator's true intent."[66] The only drawback to the *Snide* decision is that the court limited its reasoning to the facts of the case at hand.

The Supreme Court of Hawaii is another bold court that spoke of reformation. In *In re Estate of Ikuta*,[67] the testator's will read: "[t]his trust shall terminate and the estate distributed, upon the death of the last survivor of Masa Muraoka or May I. Ikuta, *or when the oldest [sic] of my sons attains the age of 30 years*, whichever event occurs first."[68] However, at the time the will was drafted, the oldest son was already thirty years old. Evidence of the testator's intent was admitted, and the court inferred that the testator meant to indicate his "youngest" son rather than his "oldest" son.[69] If the clause were permitted to stand uncorrected, the testator's testamentary trust would have failed at its inception. With this in mind, the court substituted the appropriate language to realize the testator's true intent.[70]

II. THE SOLUTION

With limitations, documents written by the testator should be admitted to reform a will. For example, the letter like the one Mr. Jones signed, dated, and sent to his friend Sam in the hypothetical[71] should be admitted to reform the flawed will. The collision of axioms finally resolves into two conflicting desires: wanting to ensure justice for wronged legatees versus squelching potentially fraudulent claims. Immediately, this proposal raises fears of those who foresee abuse of the proposed rule: admission of unattested evidence to corrupt probated terms and a court system overwhelmed with a multiplicity of

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64 *See supra* note 1 and accompanying text.

65 *Snide*, 418 N.E.2d at 658.

66 Langbein & Waggoner, *supra* note 5, at 565 (citation omitted).

67 639 P.2d 400 (Haw. 1981).

68 *Id.* at 405.

69 *Id.* at 406.

70 *Id.*

71 *See supra* text accompanying note 31.

false claims. These are valid fears—but if a workable remedy compensates for these dangers, they should be cast aside.

Formalities were never invented for their own sake—a truth courts have often forgotten—they are merely devices that channel a testator's intent,[72] ensure the intent is free from compulsion, and establish authenticity. The operative word, however, is *intent*. The judiciary should strive to preserve these worthy functions, but without sacrificing *intent*, the controlling element that clothes formality with purpose. In formulating a remedy, administrative efficiency, uniformity, fairness, discretion, and evidentiary concerns must be addressed.

A. *Elements of a Model Statute*

Although a statute is desirable because it imparts uniformity and clarity, the flexibility and discretion associated with case law is also necessary. The compromise this Note proposes represents a statute that equips the trier of fact with standards to evaluate a given claim, but leaves room for discretion on a case-by-case basis.

As mentioned above, a legitimate concern is the potential burden that may be placed on the court system by a statute allowing for the admission of extrinsic evidence. However, a provision that demands a high standard of certainty that such evidence is genuine and produced free of compulsion will thin out potential claims. Providing the finder of fact with a standard to evaluate the quality of evidence, and directing that the weight assigned to such evidence depend on its quality, reduces potential claims even further. "The nature of evidence offered to show the testator's intent, rather than the type of mistake or ambiguity, seems to be determinative . . . the *strength* of the evidence may determine *the weight it receives*."[73]

Finally, the statute should contain a provision discouraging friv-

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[72] In other words, the ceremonial nature of execution tends to make the testator appreciate the instrument's importance.

[73] MCGOVERN ET AL., *supra* note 4, § 6.1 (emphasis added). In *In re* Estate of Taff, 133 Cal. Rptr. 737 (Ct. App. 1976), the court admitted a letter written by the testator to a legatee to show the testator's intent. *Id.* at 740. Although the letter was unattested and lacking in testamentary intent, the letter was considered in the court's analysis because they were satisfied with its authenticity. *Id.* at 741-42; *see* Langbein & Waggoner, *supra* note 5, at 556 (the authors suggest that this was a factor the court had in mind in reaching its decision). "We have said that a modern reformation doctrine for wills must follow the law of non-probate transfers by placing upon the proponent of a mistake claim the burden of proving it by evidence of exceptional quality." Langbein & Waggoner, *supra* note 5, at 579. Langbein and Waggoner advocate a standard of proof above that of most civil litigation, but below the "beyond-reasonable-doubt rule of the criminal law." *Id.* However, Langbein, in a more recent article, advances the "beyond a reasonable doubt" standard of proof for excusing errors in execution; the court may only probate a defective will if persuaded beyond a reasonable doubt that the decedent intended it to be his will. Langbein, *supra* note 4, at 34. Since reforming a

olous claims. The provision should set a minimum and maximum penalty range[74] against the attorney and fine the petitioner for the cost incurred by the estate in defense of the action, including attorney's fees. This "double-barreled" fine should eliminate most of the false claimants not deterred by the high standard of proof necessary for reformation.

B. *The Model Statute*

§ 1.0. REFORMATION OF WILLS FLAWED BY A MISTAKEN SUPPOSITION OF FACT

(1) Defining Provisions:
  (a) "*Extrinsic evidence*" means written documents composed by the testator, with or without testamentary intent;
  (b) "*Flawed*" means the testator drafts and executes a will on the mistaken assumption of a prejudicial fact;
  (c) "*Mistaken assumption*" means the testator is wrong about the true state of affairs at the time the will is executed;
  (d) "*Prejudicial*" means the court is presented with clear and convincing evidence that, but for the mistaken supposition, testator would have devised property differently than as done in the will;
  (e) "*Probable intent*" includes the alternative disposition of property the testator would have made, but for the mistaken assumption of a prejudicial fact;
  (f) "*Reformation*" means correcting a flawed will in such a way as to effectuate testator's probable intent;
  (g) "*Written*" includes handwritten or typed documents.

(2) When a court finds that a will has been flawed by a mistaken assumption of prejudicial fact, the will shall be reformed to reflect testator's probable intent.
  (a) When a legacy is revoked due to a mistaken assumption of fact, the court shall restore the legacy.

(3) Probable intent shall be established by admission of extrinsic evidence.

(4) Extrinsic evidence, regardless of whether the flaw is apparent

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will flawed by a mistaken supposition of fact may appear more extreme than probating a defectively executed will, a higher standard of proof should apply in the proposed Model Statute.

[74] The potential risk of failure increases with the size of the claim. For example, if the claim represents less than $100,000, a $10,000 fine should be sufficient. However, if the claim represents more than $500,000, a $50,000 fine may be more appropriate.

on the face of the will, shall be admissible to discern testator's probable intent.

(a) In evaluating extrinsic evidence, the fact finder shall weigh the persuasiveness of the extrinsic evidence by virtue of the *quality* of the evidence presented. The quality of the evidence shall be evaluated by considering, but not being limited to, the following:[75]

(i) Whether the instrument was one that legally bound the testator;

(ii) Whether the instrument was in the testator's handwriting;

(iii) Whether the instrument was dated and/or signed; and

(iv) Whether the testator's state of mind was serious or frivolous at the time the document was written.

(A) The testator's state of mind shall be determined by analyzing the context in which the document was written.

(B) In evaluating the testator's state of mind, non-written evidence shall be deemed admissible.

(5) Subsequent to analyzing the quality of evidence presented, a court will only grant reform if the finder of fact is presented with clear and convincing evidence that said evidence:

(a) Is authentic and genuine;

(b) Was created by testator free from duress, undue influence, or fraud;

(c) Reflects the probable intent of testator; and

(d) Determines the reasonably quantifiable amount testator would have devised, but for the mistake.

(i) In determining a reasonably quantifiable amount, extrinsic evidence that discloses testator would have left "more" but for the mistake, is not sufficient to support reform.

(ii) Extrinsic evidence that discloses a fraction will be deemed a reasonably quantifiable amount.

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[75] As mentioned above, one function of formality is ensuring that the testator realizes the gravity of his action. Along this vein, the more qualitative evidence there is, the more a court may infer the decedent took his actions seriously. The finder of fact must consider the context in which the document was created. For example, since a contract is a binding instrument, it is reasonable to assume that the testator signed the document earnestly. Alternatively, a diary entry may have been an amusing way for the testator to let off the day's tension, so it may be viewed more skeptically.

(6) In order to satisfy petitioner's claim, the estate will abate[76] in the following order:
   (a) Failed residuary gifts passing by intestacy;
   (b) Residuary gifts;
   (c) General legacies;
   (d) Demonstrative legacies; and
   (e) Specific legacies.
(7) Should the court determine that petitioner has brought a frivolous claim
   (a) The attorney representing the petitioner shall be fined no less than $10,000 and no more than $50,000; and
   (b) The petitioner shall compensate the estate for the costs incurred in defense of the claim.

III. PRECEDENT FOR REFORM

While this proposal may seem to depart significantly from traditional law, in reality the foundation for reform is so strong[77] it is astonishing that so many years have passed for it to finally materialize. Whereas reform is available for instruments of a testamentary or non-testamentary character,[78] there is a disturbing void where reformation of wills flawed by a mistaken assumption of fact should be. Furthermore, when the procedures and case law which tend to support the proposal are critically examined, it becomes obvious that some are less rational—and ironically, *more radical*—than the proposal.

Several New York decisions have firmly supported reforming charitable trusts in wills flawed by a draftsman's error. In *Last Will and Testament of Kander*,[79] the testator's will placed the residuary estate in a single trust with ninety percent of the residue to benefit six named local charities, the income of ten percent to benefit a close friend, and the remainder to an Israeli charity. Due to careless draftsmanship, the trust failed to qualify as a charitable deduction since it combined a charitable and an ordinary bequest in the same clause.

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[76] "Abatement" is the process of reducing testamentary gifts in cases where the estate assets are not sufficient to pay all claims against the estate and satisfy all bequests and devises. The order of abatement stipulated in the Model Statute is derived from Uniform Probate Code § 3-902.

[77] *See supra* notes 42-70 and accompanying text.

[78] *See supra* notes 6-8 and accompanying text. "Reformation lies routinely to correct mistakes . . . in deeds of gift, inter-vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death." Langbein & Waggoner, *supra* note 5, at 524.

[79] 454 N.Y.S.2d 229 (Sur. Ct. 1982).

However, because the testator's primary intent was charitable,[80] the court reformed the will by splitting the provision into charitable (tax exempt) and noncharitable (taxable) trusts. "It has long been recognized that where errors of draftsmanship have occurred, courts may save trusts which are contrary to technical requirements of law and *it is immaterial if the 'mistake' in the instrument is a mistake of fact or law.*"[81]

In re Will of Stalp,[82] a strikingly similar case, involved a charitable remainder annuity trust of one-half the residuary estate, the income to an elderly relative for life, and the balance of the income to a hospital as a charitable deduction. Unfortunately, at the testator's death, the annuity trust failed to qualify for charitable deduction due to a draftsman's error. Like the *Kander* court, the court in *Stalp* reformed the will to qualify the trust for charitable deduction in accordance with the testator's charitable intentions. The court found that "[testator's] honest and straightforward charitable motive . . . has been frustrated by an unintended 'mistake' in will draftsmanship, justifying the court in allowing reformation of [the defective clause] by minor judicial surgery."[83] Although these cases involve mistakes in terms rather than mistakes of fact, both courts presumed to know the alternative wording testator would have used in the wills but for the mistake, and implemented that intent by reforming the wills.

Although a testator's probable intent may be easy to establish, as above, a court should be equally willing to implement the testator's probable intent in mistake of fact cases, provided the testator's probable intent is comparably evident. Indeed, at least one authority suggests that when a court is faced with a drafting error, "the state ought to provide a remedy, *even if it must speculate about the alternative disposition the property owner intended*."[84] Considering that section 5(c) of the Model Statute denies reform unless the petitioner can establish the testator's probable intent based on clear and convincing evidence, the Model Statute has eliminated the need for crude speculation.

Consequently, the arbitrary fractions awarded by pretermitted

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[80] The court stated that it:

> will reform or modify a trust where it is clear that the creator's primary concern was to favor charities and obtain a charitable deduction and where because of the draftsman's apparent unfamiliarity with the complex rules which have evolved since the adoption of the Tax Reform Act, such obvious intent may be frustrated.

Id. at 230.

[81] *Id.* (emphasis added).

[82] 359 N.Y.S.2d 749 (Sur. Ct. 1974).

[83] *Id.* at 754.

[84] Fellows, *supra* note 9, at 637 (emphasis added).

heir statutes[85] ("PHS") are precluded in the Model Statute. The share awarded by PHS is arbitrary, because who can say with certainty what the testator wanted his child to get: a third, a half, three-quarters of his estate, or nothing at all? These statutes are predicated on the presumption that failure to mention a child in a will is accidental, so the omitted child should receive a share of the estate. The Uniform Probate Code ("U.P.C.") and most states only grant relief to children born or adopted after the will's execution.[86] A pretermitted child usually receives an intestate share,[87] and the ordinary rules of abatement apply in making up the pretermitted child's share.[88]

Under the U.P.C., if a testator fails to provide for his child in his will because he believes the child to be dead, the child will receive an intestate share.[89] The operation of PHS are very closely related to the proposed Model Statute, but are arguably less consistent. The PHS operate on the basis of a mere presumption that failure to mention a child in a will is an oversight.[90]

Conversely, the Model Statute will only operate when the petitioner can present concrete evidence of the testator's probable intent. As mentioned above, PHS award pretermitted children an arbitrary fraction of the estate.[91] Again, the Model Statute is more rational because it will only function if the petitioner can prove the "reasonably quantifiable" amount testator would have wanted her to have. According to Model Statute section 5(d)(i), merely establishing that testator would have wanted petitioner to have "more" than she actually received is not sufficient.

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[85] A pretermitted heir is:

> A child or other descendant omitted by a testator. Where a testator unintentionally fails to mention in his will, or make provision for, a child, either living at the date of the execution of the will or born thereafter, a statute may provide that such child, or the issue of a deceased child, shall share in the estate as though the testator had died intestate.

BLACK'S LAW DICTIONARY 1187 (6th ed. 1990).

[86] UNIF. PROBATE CODE § 2-302(a) (1991). There is no pretermission if (i) it appears from the "four corners" of the will that the omission was intentional (ii) the testator had one or several children when the will was executed and devised the bulk of his estate to the other parent of the omitted child or (iii) the testator provided for the omitted child by transfer outside the will. *Id.* at § 2-302(b)(1)-(2).

[87] MCGOVERN ET AL., *supra* note 4, § 3.6. The U.P.C. gives the surviving spouse the first $150,000, plus one-half of the intestate estate, the balance to be divided equally by decedent's descendants by representation. UNIF. PROBATE CODE §§ 2-102(3), 2-102A(a)(3), 2-103(1) (1991). Several states give the spouse one-third or one-half of the estate, with the issue sharing the balance. MCGOVERN ET AL., *supra* note 4, § 1.2.

[88] UNIF. PROBATE CODE §§ 2-302(d), 3-902 (1991).

[89] UNIF. PROBATE CODE § 2-302(c) (1991).

[90] MCGOVERN ET AL., *supra* note 4, § 3.6.

[91] *See supra* notes 85-89 and accompanying text.

Another related procedure is dependent relative revocation ("DRR"), an equitable remedy under which a court may ignore a revocation if it decides that the revocation was predicated on a mistake of law.[92] In this situation, Mr. Jones executes Will A, then changes his mind and executes Will B, thinking that Will B will cancel Will A. Changing his mind one last time, Mr. Jones destroys Will B, thinking that Will A will be thereby revived.[93] Although most jurisdictions will not revive Will A, they *will* revive Will B by operation of DRR.[94] DRR operates on the presumption that the testator would probably have preferred the most recently destroyed will over intestacy.[95] "A DRR case obliges a court to . . . make a determination of imputed intent about the question of whether, *had the testator known of his mistake, he would have preferred the will that he seemingly revoked over intestacy or a former will.*"[96]

Although the last thing the testator did was intentionally destroy Will B, the court will presume to know what testator *would have done* if he had known that Will A would not be revived.[97] This procedure is closely analogous to the *Gifford v. Dyer* conditions for reformation.[98] The alternative dispositions of property are derived from a formally executed and attested will stipulating testator's intentions in precise detail, as opposed to the PHS, which presume that testator

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92 *See* Langbein & Waggoner, *supra* note 5, at 543-45.

93 The minority rule is that no part of a will is effective until the death of the testator—the will is "ambulatory" until testator's death. Under this rule, Will B "snaps" into existence at testator's death if Will A was revoked before that time. *See* Percy Bordwell, *Testamentary Dispositions*, 19 KY. L.J. 283, 285 (1931); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1110 (1984).

However, the majority holds that a will, once revoked, is not revived unless reexecuted or revived by a subsequent codicil. Therefore, even if Will B is destroyed, Will B will *not* "snap" into operation at testator's death; if not for the DRR doctrine, testator would die intestate. *See* MCGOVERN ET AL., *supra* note 4, § 5.3.

Under UNIF. PROBATE CODE § 2-509(a) (1991), destruction of Will B and its language of revocation may revive Will A in a few situations if the testator so intended.

94 DRR is only available when a subsequent document is destroyed under the mistaken assumption that doing so will revive an earlier will. If the destruction of a later will is not done in reliance upon thereby reviving an earlier will, DRR will not function. Langbein & Waggoner, *supra* note 5, at 544.

95 This may be partially attributed to the presumption against intestacy. *See supra* note 57 and accompanying text. However, the court will examine the wills to decide whether DRR should be applied if it would clearly violate testator's wishes. For example, if Mr. Jones left Sam $10 in Will A, then changed his mind and left him $10,000 in Will B—then destroyed Will B, expecting Sam to only receive $10 by revival of Will A—the court will *not* revive Will B by operation of DRR to give Sam $10,000. *See* MCGOVERN ET AL., *supra* note 4, § 5.3.

96 Langbein & Waggoner, *supra* note 5, at 544-45 (emphasis added).

97 "The [DRR] rule operates by implying a condition that defeats the testator's unequivocal revocation." *Id.* at 543.

98 *See supra* text accompanying notes 25-26.

would have wanted his child to get an intestate share in the absence of concrete supporting evidence. The DRR doctrine is similar to the proposed Model Statute because it will only be applied when the court, *relying on extrinsic evidence* (both wills), infers the decedent's *probable intent* by noting the changes in disposition from the first will to the second. Unlike DRR, however, the proposed Model Statute will not operate unless the fact finder is confronted with clear and convincing evidence of testator's probable intent.

IV. CONCLUSION

To conclude, the proposed Model Statute represents a compromise between two often conflicting directives: observing necessary formalities imposed by the Wills Act and effectuating the intent of the testator. Formality is designed to *protect* the testator's intent, ensuring that it is free from compulsion and safeguarded against fraudulent claims; however, as discussed above, formalities were never invented for their own sake.[99] This compromise is reached by accepting the notion that in certain cases it is counterproductive to be constrained by formality, when doing so clearly and convincingly conflicts with testator's intent. The Model Statute attempts to provide justice for wronged legatees on the one hand, and minimize the danger of opening the floodgates to fraudulent claims on the other.

Jeffrey Daniel Haskell

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[99] *See supra* text accompanying note 72.