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Lawrence W. Waggoner

University of Michigan Law School

John H. Langbein

University of Chicago Law School

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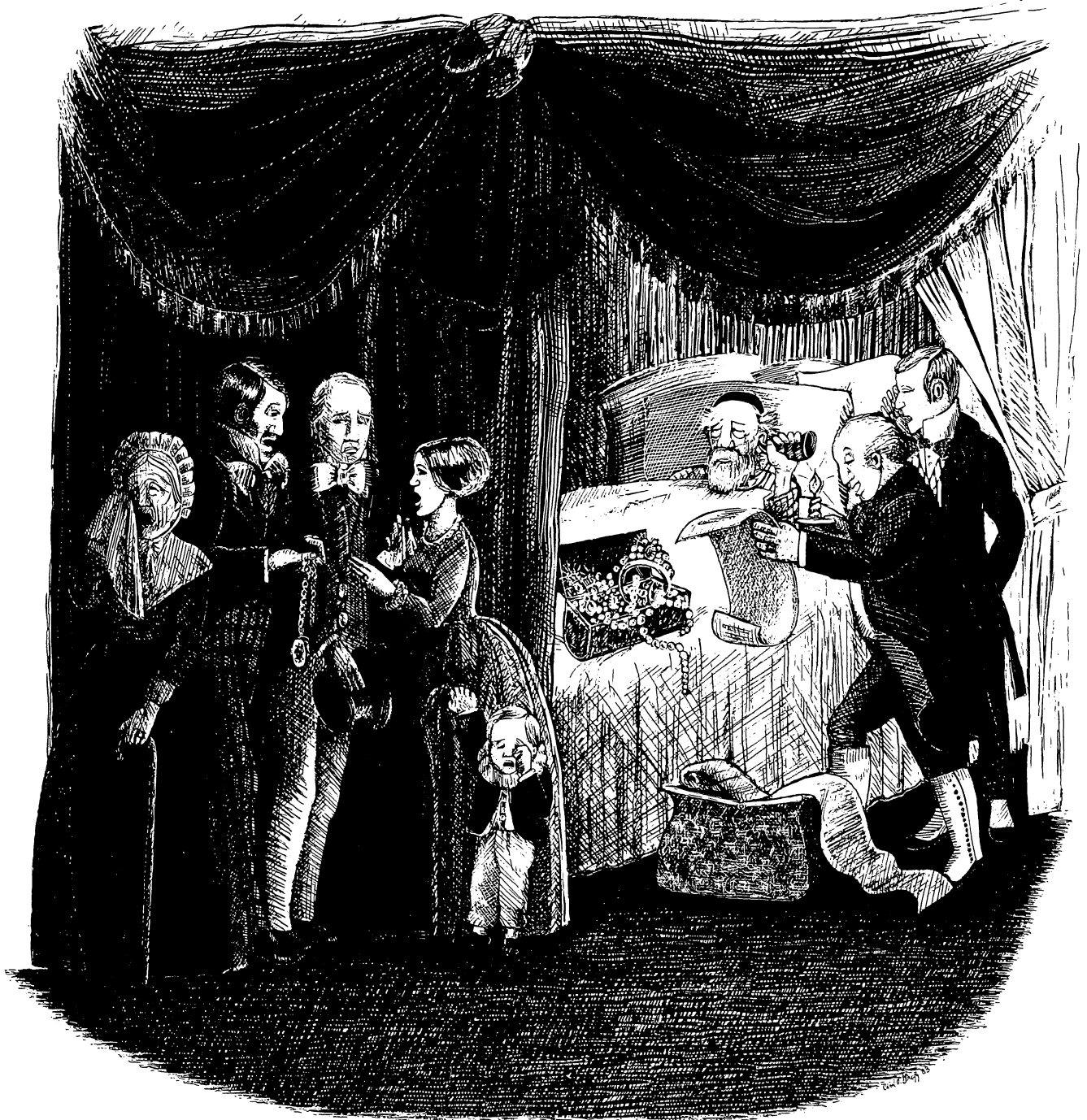
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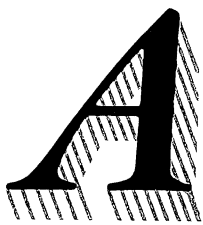
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The Emergence of a General Reformation Doctrine for Wills

by Lawrence W. Waggoner and John H. Langbein



Discrepancies in the Will



Although it has been axiomatic that our courts do not entertain suits to reform wills on the ground of mistake, appellate courts in New York, Michigan, New Jersey, and California have decided cases within the last several years that may presage the abandonment of the ancient "no-reformation" rule. (*In re Snide*, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981); *Estate of Kremlick*, 331 N.W.2d 228 (Mich. 1983); *Engle v. Siegel*, 74 N.J. 287, 377 A.2d 892 (1977); and *Estate of Taff*, 63 Cal. App. 3d 319, 133 Cal.Rptr. 737 (1976).)

The new cases do not purport to make this fundamental doctrinal change, although the New York court did announce an explicit exception to the no-reformation rule and the other three courts did disclaim a related rule, sometimes called the "plain meaning" rule. That rule, which we will be calling the "no-extrinsic-evidence rule," prescribes that courts not receive evidence about the testator's intent apart from, or in opposition to, the legal effect of the language he uses in the will itself. The three courts said that they were consulting extrinsic evidence (in the California and New Jersey cases, primarily the testimony of the lawyers whose poor draftsmanship had led to the litigation) in order to engage in "construction" of supposedly ambiguous instruments.

In this article, which both summarizes and updates an extensively footnoted article published last year ("Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?" 130 *University of Pennsylvania Law Review* 521 (1982)), we report on this new case law and discuss the analytic framework that we think it suggests and requires.

The Recent Developments



We shall discuss the three purported construction cases first and then turn to the more candid New York precedent.

The will in the *Kremlick* case devised half the testator's residuary estate "to the Michigan Cancer Society." Although there was an organization of that name, the Michigan Supreme Court, in a brief opinion, allowed another organization (the American Cancer Society, Michigan Division) to have a trial on the question of which was actually the intended beneficiary. The issue on remand, therefore, will be whether to prefer extrinsic evidence of the testator's intent over the explicit language of his will.

In *Engle v. Siegel* the two testators, spouses, named their children as their residuary devisees; in the

event the children predeceased them, each estate was to pass equally to the spouses' mothers. The spouses and children died in a hotel fire, predeceased, however, by one of the two spouses' mothers. Under the routine constructional law of the jurisdiction, the surviving mother would have taken the entirety of the two estates, since she was the sole surviving residuary devisee. The heirs of the predeceased mother contested and won. Extrinsic evidence of the spouses' deliberations with their lawyer at the time of the drafting of their wills showed that they had inclined to name their respective families as contingent residuary devisees, and that they had chosen to name the two mothers only after the lawyer had pointed out that the word "family" was imprecise. The New Jersey Supreme Court said:

We have no difficulty in reaching the conclusion that the primary wish of each decedent, given the contingency that occurred, would have been to divide the property included in their residuary estates between the [families of the two mothers]. The designation of their respective mothers resulted solely from the scrivener's rejection of the word "family" as a term to describe the recipient of a testamentary benefaction. Each mother was obviously thought of as an appropriate representative of a "family."

Extrinsic evidence was thereby used to contradict the language of the wills.

The testatrix in *Taff* devised the residue of her estate to her sister Margaret, or if Margaret predeceased her (which was the contingency that in fact occurred), "to my heirs in accordance with the laws of intestate succession. . . ." Her residuary estate consisted of community property to which she had succeeded by virtue of its community character on the death of her husband. The California probate code provided that in the event such property passed by intestacy, it should descend in equal halves to the heirs of the predeceased spouse and of the decedent. Accordingly, the effect of the language in the will adopting the heirship definition of the intestacy statute would have been—if applied—to pass half of her property to the heirs of her late husband, and half to her natural heirs (who were at her death some nieces and a nephew). In the trial court, the testatrix's natural heirs claimed the entire estate, on the ground that she meant to designate only them. In order to prove her actual intent, her natural heirs offered the testimony of her lawyer, who testified that she had instructed him to draft her will so that the residue went "to her own family, her own blood relatives." The intermediate court of appeals followed the trial court and sustained the claim of the testatrix's natural heirs to take the entire estate.

As in the Michigan and New Jersey cases, the key departure in *Taff* was the court's expansive treatment of the purpose for which it would consider evidence contradicting the terms of the will. In a statement that significantly breaks from prior law while seeming to invoke it, the court declared: "Extrinsic

evidence was properly received both to create the ambiguity in the word 'heirs' and to resolve the ambiguity." This way of stating the matter obliterates the fundamental distinction between ambiguity and mistake. The disputed term in *Taff* that had been mistakenly employed was quite unambiguous. 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 ("my heirs in accordance with the laws of intestate succession") in order to carry out what the court conceived to be the actual or subjective intent of the testatrix.

In each of these cases—*Kremlick*, *Engle v. Siegel* and *Taff*—the wills were utterly unambiguous. What each court actually did was to allow extrinsic evidence of the testator's intent to be preferred over the contrary but mistaken language in the will.

In the New York case, *In re Snide*, the New York Court of Appeals had to face one of the recurrent mistake situations: Husband and wife each signed a will prepared for the other, and only after the death of the husband was it discovered that he signed the wrong will. Harvey Snide signed the will prepared for his wife Rose, on account of the error of the lawyer-draftsman who supervised the joint execution ceremony. The first-instance court brushed aside the argument that strict compliance with the Wills Act prevented remedy for "a mistake so obvious." The court granted an application to reform the will, ordering that the words "Harvey," "Rose," and "wife" be substituted for "Rose," "Harvey," and "husband," respectively.

The first-instance court in *Snide* reached its result on general equitable principles, apparently without having understood that in the law of wills reformation has been refused even for "a mistake so obvious." The intermediate appellate court reversed in a memorandum opinion limited to pointing out that the judgment below ignored contrary New York appellate authority. In 1981, the New York Court of Appeals in turn reversed the appellate division and sustained the power of the first-instance court to reform the will. Unlike the courts in *Kremlick*, *Engle v. Siegel*, and *Taff*, the New York court admitted that it was granting reformation of a will, and it recognized how strongly that step contravened the former law. Nevertheless, the court advanced no significant justification for its departure. Its main concern was to limit its decision to this "very unusual case." The factors that the court mentioned in order to justify making the exception are factors that could (and in the view we develop below, should) be decisive in other cases of supposed mistake: (1) the high quality of the evidence of the mistake, and (2) the importance of serving the underlying policy of the Wills Act, which is to implement the testator's true intent.

We think that the "mere exception" rubric of *Snide* is ultimately no more defensible than the "mere construction" theory in *Kremlick*, *Engle v. Siegel*, and *Taff*. The *Snide* case is, however, a milestone on the

path toward a general reformation doctrine, because an Anglo-American court has now expressly acted to grant reformation of a will on the ground of mistake.

The inclination of modern courts to prevent injustice despite a long tradition of refusing to remedy mistakes in wills is, in our view, laudable. We do not, however, believe that courts should continue to reach such results by doctrinal sleight-of-hand. Rather, we take the position that the time has come for forthright judicial reconsideration of the no-reformation rule. We believe that a reformation doctrine shaped and limited according to criteria that we identify below has the capacity to prevent much of the hardship associated with the former rule, while effectively dealing with the concerns that motivated the rule.

The Contrast with Nonprobate Transfers: The Evidentiary Policy

The no-reformation rule is peculiar to the law of wills. It does not apply to other modes of gratuitous transfer—the so-called nonprobate transfers—even though many are virtually indistinguishable from the will in function. Reformation lies routinely to correct mistakes, both of expression and of omission, 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.

Courts have been willing to use their equity powers in these nonprobate situations, because a case of well-proven mistake necessarily invokes the fundamental principle of the law of restitution: preventing unjust enrichment. If the mistake is not corrected, the mistaken beneficiary is unjustly enriched at the expense of the intended beneficiary.

Judicial intervention to prevent unjust enrichment has such a manifestly compelling doctrinal basis that the puzzle is to explain why the courts have not been willing to act similarly when the document affected by the mistake is a will. Unjust enrichment is equally wrong whether the resulting error occurs in an inter vivos transfer or in a will. Both transfers are gratuitous, both unilateral. Accordingly, we emphasize as a starting point that the no-reformation rule for wills cannot rest on the notion that there is no wrong to remedy. Why, then, does equity refuse to remedy unjust enrichment in the case of a mistaken will?

The customary justification has to do with the nature of the evidence in cases of testation. Evidence suggesting that the document is affected by mistake—that the will is at variance with the testator's actual intent—must necessarily be presented when death has placed the testator beyond reply. The

testimony will typically involve statements allegedly made by the testator, so-called direct declarations of intent, which he can now neither corroborate nor deny. The testator's main protection against fabricated or mistaken evidence is the will itself.


Therefore, it has been argued, evidence extrinsic to the will should be excluded; and if the extrinsic evidence is excluded, the court can not learn of the ground upon which the reformation claim rests.

The law of nonprobate transfers supplies two persuasive answers. First, although the living donor under an inter vivos instrument can take the stand and testify about his true intent, this testimony does not have automatic reliability. The donor's testimony doubtless reflects his current intent, but the matter in issue is his intent at the time the instrument was executed. The instrument may have stated this intent accurately; he may since have changed his mind and now be lying or deceiving himself, or he may be mistaken about what he originally intended. Consequently, even the donor's own testimony is properly regarded as inherently suspect, which is why even such testimony is put to the clear-and-convincing-evidence test.

Second, and still more telling, reformation of documents effecting gratuitous inter vivos transfers is routinely granted even after the death of the donor. In these cases the extrinsic evidence is inherently suspect for exactly the reason that evidence of a testator's intent is suspect when offered against a will. Nevertheless, in nonprobate transfers when the clear-and-convincing-evidence standard has been satisfied, clauses omitted by mistake have been inserted. The courts have corrected mistaken designations of the beneficiaries, of the property intended to have been the subject matter of the gift, and of the extent of the interest intended to have been granted to the beneficiary. Documents drafted by lawyers (or others) have not been distinguished from self-drawn documents; enrichment of an unintended donee at the expense of the intended donee is unjust whether the mistake has been made by the donor or by his lawyer. The essential safeguard in these cases has been the clear-and-convincing-evidence standard, which appellate courts have policed rigorously.

Accordingly, we believe that the evidentiary problem, although important, does not in fact explain or justify the no-reformation rule in matters of testamentary mistake. If the courts had not been deeply worried about another policy, namely, compliance with Wills Act formality, we think that they would long ago have followed the evidentiary practice of nonprobate transfers for dealing with claims of mistake regarding wills. Instead of excluding the evidence, and thereby foreclosing any chance of proving the mistake, the courts would have dealt with the potential unreliability of the evidence by admitting it and testing it against the higher-than-ordinary standard of proof that has worked so well in the law of nonprobate transfers.

Understanding the No-Reformation Rule: The Unattested Language Problem



The great obstacle to reformation in the law of wills has been remedial rather than evidentiary. The real problem has not been proving the mistake with adequate certainty, but remedying it in a fashion consistent with the requirements of Wills Act formality. When the particular mistake that has affected a will is one that would require a court to supply an omitted term or to substitute language outside the will in place of a mistaken term, the objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act. Reformation would appear to have the courts interpolating unattested language into will.

In our article in the *University of Pennsylvania Law Review*, we have pointed to a variety of settings where practice in the traditional law of testamentary mistake shows that the courts are less serious about the evidentiary problem than they are about the problem of technical Wills Act compliance. When a mistake can be corrected by means of a theory that does not appear to conflict with the Wills Act, existing doctrines permit the extrinsic evidence to be admitted in order to prove the mistake. The courts purport to fear the potential unreliability of extrinsic evidence when they exclude it, yet they admit extrinsic evidence in the contexts in which it is equally unreliable. Where the courts have been able to remedy mistakes, they have manipulated notions of construction in two ways: primarily by refusing effect to mistaken but attested language, but occasionally by conferring the imprimatur of attestation upon unattested language, that is, language not contained in the will.

It is essential to understand that the unattested language problem raises a technical or formal rather than a purposive question. The purpose of having all the terms of a will attested is evidentiary, which is why it is so important that the courts have shown themselves able to deal effectively with the concern about the quality of the proofs in the fraction of mistake cases that are now remediable. Accordingly, we 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. That, in turn, throws light on why the no-reformation rule has produced results so harsh. 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.

As indicated above, the primary way that courts manipulate notions of construction to correct a mis-

take without appearing to conflict with the Wills Act is by refusing effect to mistaken but attested language. This maneuver is possible in cases of ambiguity. Situations involving ambiguous expression constitute a significant fraction of the mistakes that occur in wills, and even under traditional law, mistakes of this type are remediable in will construction suits. Ironically, therefore, the availability of remedy for this kind of mistake has played a role in keeping the no-reformation rule in force by reducing the pressure to reexamine it.

The ambiguity doctrine has two basic elements: (1) where the will contains an ambiguity, extrinsic evidence is admissible to clarify it; and (2) if necessary, mistaken parts of a will may be disregarded in order to give effect to intention proved by extrinsic evidence. The leading American decision enunciating these principles is *Patch v. White*, 117 U.S. 210 (1886), decided by a sharply divided United States Supreme Court in 1886. The testator's will devised to his brother a parcel of land described as "lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this my will." Extrinsic evidence revealed a latent ambiguity: There was a conflict between the description contained in the will and the subject matter of the gift. Although there was a square 403, and it contained a lot number 6, the testator did not (and never did) own that lot and there were no improvements on it. The Court then repeated a maxim that still appears in the decisions. "It is settled doctrine," the Court said, "that as a latent ambiguity is only disclosed by extrinsic evidence it may be removed by extrinsic evidence." The extrinsic evidence showed that the testator did own lot number 3, in square 406, and that this lot had not been specifically devised and was improved with a dwelling house. The Court found that the testator intended to devise this lot 3 to his brother, and that his intent could be given effect by "striking out the false description." In effect, the Court treated the testator's will as though it devised "lot number [blank], in square four hundred and [blank]. . . ." The Court then found that other evidence sufficed to establish the correct lot and square numbers: Lot 3 in square 406 was the only one the testator owned in a square whose number commenced with four hundred and that was not otherwise specifically disposed of in his will. The Court analogized this process of construction to the construction of words "blurred by accident so as to be illegible"; cases in which words have been judicially stricken or disregarded because of mistake, the Court concluded, should be resolved in the same way.

The process employed in *Patch v. White* has been routinely applied to descriptions of devisees as well as property. At present, therefore, if an ambiguity is found to exist, courts are prepared to admit just that sort of extrinsic evidence of the testator's intent

(including his direct declarations) that would have to be admitted if a general reformation doctrine for wills were to be adopted.

Why is it that the admissibility of such evidence is conditioned on the appearance of a so-called ambiguity? We infer that it is not the quality of the evidence but the availability of a theory of remedy that explains the courts' willingness to correct mistakes that can be characterized as resulting in ambiguity. The great attraction of the ambiguity label is that it virtually assures that a court can effect a remedy within the confines of the Wills Act. Ambiguity invokes the theory of construction rather than of reformation. When a court "construes" attested language, it "discovers" what the "ambiguous" words of the will "really" mean, whereas when a court reforms an instrument, it forthrightly supplies language from without. Although in truth the court in *Patch v. White* supplied omitted lot and section numbers, the ambiguity rubric permitted it to say that it was construing words within the will.

Courts do not openly discuss why the Wills Act is seen as allowing attested language to be stricken while not allowing unattested language to be inserted. We suspect that the underlying notion is that attested but mistaken language lacks testamentary intent. It is well accepted that a will executed wholly by mistake is invalid, on the ground that it lacks testamentary intent. In *Patch v. White*, when "lot 6 of square 403" was effectively rendered as "lot [blank] of square [blank]," the court was determining that the misdescriptions lacked testamentary intent and could be disregarded. In effect, *Patch v. White* involved partial denial of probate for want of testamentary intent. If the courts were not so frightened of the Wills Act, they would not meander in cases like *Patch v. White*. The device of striking out and then construing the resulting blanks is sufficiently awkward (by comparison with reformation) that it leaves little room for doubt about why it is done: It gives the appearance of Wills Act compliance. There are a variety of other doctrines in which reformation-like results are achieved by construction tricks. These include the dependent relative revocation rule, which corrects mistakes by implying remedies as conditions, and the personal usage doctrine, which saves some instruments containing seeming misnomers.

In addition to the ambiguity-striking out cases, courts have found other ways to correct mistakes without appearing to conflict with the Wills Act. Occasionally, the courts confer the imprimatur of attestation upon unattested language, for example, by the technique of implying future interests. Among the recurrent situations that have given rise to an implied future interest is the dispositive plan "To A for life, then to B if A dies without issue." If A dies with issue, a remainder in favor of such issue has been implied on the ground that the import of the condition attached to B's remainder makes it highly probable that the testator's primary objective was

to benefit A's issue if A left any. In this and other appropriate situations, courts "construct" omitted provisions out of the so-called general dispositive plan of the testator; the idea that words can be inserted into a will in this way is widely accepted. The Wills Act is not seen as posing an obstacle to this process because the inserted words are deemed to be constructed out of, or implied from, the attested words. The inserted words are thus seen as having the imprimatur of attestation.

Finally, we may point out that there are special types of mistakes that some courts have been willing to correct by openly reforming wills. An early decision of the Supreme Court of New Hampshire adopted a reformation doctrine for perpetuity violations, and this has been followed by the Supreme Courts of Hawaii, Mississippi, and West Virginia. See generally, Waggoner, "Perpetuity Reform," 81 Mich. L.Rev. 1718, 1755-1759 (1983). These courts were preoccupied with the problems of perpetuity law, and did not explain how their results could be squared with the no-reformation rule in the law of wills. Courts have also openly reformed wills in one type of tax case, a recent example of which is *Estate of Burdon-Miller*, 456 A.2d 1266 (Me. 1983). The Internal Revenue Code, section 2055(e)(3), grants an estate tax charitable deduction for certain charitable remainder trusts, if they have been created by wills that were executed prior to a certain date and if, after the testator's death, they were "amended or conformed" to the charitable remainder trust requirements as a result of judicial proceedings begun prior to a certain date. The state courts seem to have taken this federal statutory provision as somehow overriding the state Wills Act, so as to authorize the insertion of unattested language into wills. Elsewhere in the tax cases we find instances in which courts, mainly through doctrinal sleight-of-hand, have in effect reformed wills—without conceding that they were doing so—in order to conform testamentary provisions with such tax requirements as those applicable to the marital deduction.

Overcoming the Problem of Unattested Language



The no-reformation rule rests on the view that the courts cannot supply missing language, because the language to be supplied has not been written down, signed, and attested as required by the Wills Act. Reformation would require the validation of unattested language. The recent cases, described earlier, sidestepped the unattested language problem by manipulating the construction process or, in the case of *Snide*, by establishing an "exception" deemed by

the court to be too narrow to call the underlying no-reformation rule into question.

We propose to dispute the argument that the Wills Act attestation requirements dictate the no-reformation rule. In the following section we point the way to a theory that would allow reformation to confer the imprimatur of compliance upon language that must be supplied in order to remedy a mistaken omission or to correct a mistaken term in a will that has been otherwise executed in compliance with the formal requirements of the Wills Act. This compliance-type theory is derived from the practice of the courts in the most analogous area of private law, namely, cases in which language has been mistakenly omitted from or mistakenly rendered in an instrument that must comply with the formal requirements of the Statute of Frauds.

We then discuss a second theory, also with an ample common law pedigree, that could be employed in many mistake cases in order to overcome the unattested language problem. We call this theory "remedying wrongdoing"; we derive it from the quite similar notion that has been developed in constructive trust cases. Where the mistake that has affected the will has been the product of a wrong, for example the negligence of the lawyer-draftsman, the constructive trust cases provide by way of analogy an independent basis for reformation: preventing harm to the innocent victim of third-party wrongdoing.

Compliance Theory: Analogizing from Practice under the Statute of Frauds

The no-reformation rule has been justified on the ground that a contrary practice would allow oral wills in violation of the Wills Act attestation requirements. So also the so-called "oral contract" argument has been made respecting the Statute of Frauds. The statute is argued to be violated when oral evidence is adduced to show that an instrument subject to the Statute contains a mistaken term or lacks a term that was intended.

In his notable article, "Reformation and the Statute of Frauds," 65 Mich. L.Rev. 421 (1967), George Palmer showed why the "oral contract" argument was fallacious and not a barrier to reforming the instrument. The parties' attempt to express their transaction in writing is also an attempt to express in writing the deficient or omitted term. From the standpoint of the purposes of the formal requirements of the Statute of Frauds, there is a considerable difference between noncompliance and defective compliance. The cautionary and evidentiary purposes of the Statute of Frauds are largely achieved in the attempt at due execution. The object of reformation in these cases is not to enforce an oral transaction but to make a written transaction conform to the true understanding of the parties. "To say that reformation amounts to enforcement of the oral agreement,"

Palmer argued, "overlooks the significance of . . . the act of the parties by which they sought to turn the oral understanding into a legally enforceable agreement through expression in the writing. In the view of most judges, equity performs a proper role when it corrects the consequences of mistake so as to make the situation correspond, not merely to what the parties intended, but to what they also attempted to effectuate."

The safeguard that prevents reformation from being abused, for example, by being employed to interpolate a spurious term, is the ancient requirement of an exceptionally high standard of proof in reformation cases. Palmer's conclusion, for which he adduces considerable support in the case law, is that the Statute of Frauds "should not prevent reformation in any case in which it is found by clear and convincing evidence that through mistake a writing fails to express the terms [that] the parties to an agreement intended to express in the writing."

In a companion article, "Reformation and the Parol Evidence Rule," 65 Mich. L.Rev. 833 (1967), Palmer demonstrated that the parol evidence rule, properly understood, does not hinder the trier from consulting extrinsic evidence in these cases. Following Wigmore, Corbin, and much modern authority, Palmer showed that the so-called integration doctrine limits application of the parol evidence rule to cases in which "the writing was intended to be a complete and accurate embodiment of the agreement." Hence, "[t]he parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration." Once again, it is the heavy burden of proof according to a clear-and-convincing-evidence requirement that is the real safeguard against fraud and other abuse, rather than the categorical denial of relief.

We think that Palmer's analysis applies with full cogency to the Wills Act. Transposed to the setting of the Wills Act, Palmer's analysis highlights the difference between an oral will and the use of oral or other extrinsic evidence in order to correct or to supply a term in a duly executed will. Whereas an oral will instances total noncompliance with the Wills Act formalities, a duly executed will with a mistakenly rendered term involves high levels of compliance with both the letter and the purpose of the Wills Act formalities. To the extent that a mistake case risks impairing any policy of the Wills Act, it is the evidentiary policy that is in question. But, as Palmer points out, the decisive feature of the law of reformation in the inter vivos transfer cases has been its alternative evidentiary safeguard, the requirement of an exceptionally high standard of proof. A modern reformation doctrine for the law of wills will certainly adhere to this clear-and-convincing-evidence standard.

A substantially identical analysis appeared in 1973 in a report to the Lord Chancellor by England's official Law Reform Committee. The Committee found

itself unable to identify tenable reasons "why the equitable doctrine of rectification [the English term for reformation] does not apply to wills." It dismissed the unattested language argument on the ground that "in the case of other documents the doctrine of rectification applies even though statute requires them to be in a particular form, for example, under seal; and evidence of what words a will was intended to contain may fall far short of general evidence of the testator's dispositive intention." In other words, relief against mistake does not augur the enforcement of oral wills. Courts do and should distinguish between noncompliance with formal requirements and the extensive compliance characteristic of mistake cases. The Committee also echoed Palmer in trusting for safeguard to the higher standard of proof already developed in the law of rectification for inter vivos instruments.

Remedying Wrongdoing: Enforcing Unattested Intention in Open Disregard of the Wills Act.

In mistake cases, the testator has typically sought out, paid for, and relied upon the work of counsel. 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.

It is well established that when a devisee or an heir commits a wrong—by fraud, undue influence, or duress—in procuring his devise or in preventing disinheritance, a court of equity will prevent the wrongdoer from benefiting. Further, when the act of wrongdoing deprives an intended beneficiary of a devise or an inheritance, the court can impose a constructive trust in his favor.

The willingness of the courts to intervene in these cases invites comparison with the two policies on which the general no-reformation rule rests: the potential unreliability of the extrinsic evidence and the need for adherence to Wills Act formality.

When a will is alleged to have been affected by wrongdoing, both the fact of the wrongful act and the identity of the wrongfully deprived beneficiary must be proved by extrinsic evidence. This evidence is of the same character and inherent untrustworthiness as the evidence that would be required under a general reformation doctrine of the sort we advocate.

When a constructive trust is imposed on a wrongdoer, and when it is imposed in favor of the intended and wrongfully deprived beneficiary, the courts are ordering that the decedent's property be

transferred to a person who was not designated to take it in a validly executed will. In order to appreciate the significance of this, it is important to observe that the policy against preventing a wrongdoer from profiting by his own wrong could be served in a more limited way that would be much more faithful to the supposed virtue of Wills Act obeisance. Rather than impose the constructive trust for the benefit of the intended beneficiary who was not named in the will, the courts could impose the constructive trust for the benefit of the testator's estate, coupled with the direction that the estate pass as though the wrongdoer had predeceased the testator and the wrongdoer's interest in the estate had lapsed. Under such a decree, the estate would pass entirely to the remaining beneficiaries (the innocent devisees named in the will, or in the event of partial or total intestacy, the innocent heirs). The court's only tampering with the attested instrument would be by way of deletion, on the familiar ground that a nominal devise tainted by wrongdoer's conduct lacks testamentary intent.


Why have the courts not followed this less adventurous path, which we might call the "mere deletion" approach? The answer, which is well understood in the case law and the literature, is that mere deletion would still leave unjust enrichment unremedied. Although it would effectively deny the wrongdoer his spoils, it would allow his wrongful act to result in a benefit for the remaining innocent beneficiaries at the expense of the intended beneficiary. The courts have preferred the rule that a constructive trust action lies even against innocent beneficiaries, in order that they not be unjustly enriched at the expense of the intended beneficiary on account of the wrongdoer's conduct.

Accordingly, it is safe to say that in the constructive trust cases the courts have determined that the policy of correcting unjust enrichment resulting from wrongdoing prevails against the policy of literal adherence to Wills Act formality. If this principle were extended from the cases of intentional wrongdoing, where it is now entrenched, to cases of negligent wrongdoing, it could supply the theory for relief in many of the most egregious mistake cases that under traditional law go unremedied.

We think that the "remedying-wrongdoing" rationale in the constructive trust cases should apply to those mistake cases in which the mistake results from the poor draftsmanship of a lawyer (or other scrivener), as in cases like *Taff* and *Engle v. Siegel*; or from negligent supervision of clerical work, or of the execution process as in cases like *Snide*. The courts have shown themselves able to overcome the evidentiary difficulties in the constructive trust cases. If the lawyer's wrong in a mistake case is not corrected, an unintended beneficiary is unjustly enriched at the expense of the intended taker. To be sure, the constructive trust cases that arise in circumstances of fraud and force can be distinguished, because the

lawyer's wrongful conduct in the mistake case is negligent rather than intentional; but the distinction between intentional and negligent wrongdoing seems misplaced as a ground for denying relief in these mistake cases. A wrong is a wrong; and in the mistake cases the testator's claim is more worthy of relief than in most of the cases where remedy is now granted, because the testator sought out and followed the advice of counsel.

The Reformation Doctrine



The impulse to relieve against mistake is strongly felt in modern courts, as the *Kremlick*, *Taff*, *Engle v. Siegel*, and *Snide* cases illustrate. Yet because the black letter law has seemed so hostile, courts have often given remedy in specious or unreasoned theories of decision. We think that, with the no-extrinsic-evidence rule now undergoing abrogation and with the Wills Act formal requirements understood to be not an obstacle, a principled reformation doctrine can be formulated that will strike the proper balance between the concerns that underlie the old no-reformation rule and the factors that have made that rule ever more unpalatable.

The reformation doctrine will exhibit considerable simplicity. The three elements of the doctrine, already to be observed in the reformation doctrine for non-probate transfers, we label the (1) materiality, (2) particularity, and (3) burden-of-proof requirements. Each is directly responsive to the evidentiary concerns that were so prominent in discussions of the old no-reformation rule.

The materiality and particularity elements will require that the error be shown to have affected specific terms in the will and that the mistake claim be sufficiently circumscribed to be susceptible of proof. The contention that "if only my aunt had understood how much I loved her, she'd have left me more," will not suffice to transform disappointment into mistake.

The essential safeguard for a reformation doctrine in the law of wills is a standard of proof effective to deal with the evidentiary concerns to which the former no-reformation rule was addressed. Although that rule has been found too harsh, it did respond to the danger of false contentions that a testator now dead made a mistake in his duly executed will. We have said that a modern reformation doctrine for wills must follow the law of nonprobate transfers by placing upon the proponent of a mistake claim the burden of proving it by evidence of exceptional quality. The clear-and-convincing-evidence standard is pitched above the ordinary preponderance-of-the-evidence test characteristic of most civil litigation, but

below the beyond-reasonable-doubt rule of the criminal law.

In *Kremlick*, *Taff*, and *Engle v. Siegel*, where the no-reformation rule was avoided by pretending that they were "mere construction" cases, the appropriate clear-and-convincing-evidence standard was not articulated. One of the advantages of recognizing an explicit reformation doctrine is that the pressure to conceal reformation as mere construction should largely vanish. When mistake cases can be admitted for what they are, they can be held to the higher standard of proof appropriate to them. Paradoxically, therefore, abandonment of the no-reformation rule will sometimes result in greater fidelity to those evidentiary concerns that prompted the no-reformation rule. Experience suggests that the evidentiary policies of the no-reformation rule would be better served under the opposite rule.

Testation is a field in which planning values are quite rightly viewed as paramount. Since the will comes into effect when the testator is powerless to change it, certainty and predictability are at least as important here as in any field of law. If the development of a mistake doctrine were to jeopardize well-drafted instruments, the gain would surely not be worth the cost.

Would a reformation doctrine open every estate to the deprecation of potential contestants claiming to take under a mistakenly rendered or mistakenly omitted term? There are many reasons for thinking not. As the recent cases discussed earlier illustrate, the real sphere for relief against mistake has been in cases of deficient lawyering. The *Taff* case could not have arisen if counsel had worded the will to speak of "my natural heirs." In *Engle v. Siegel*, routine good drafting would have provided a further disposition for the contingency that one of the testators' mothers predeceased them. In *Snide*, all that the lawyer had to do in order to prevent the mistake was to read the first line of the document that he gave his client to execute.

The existence of relief in these cases will not work as a magnet for groundless claims against well-drafted wills. Existing reformation practice in contract and conveyancing has disclosed no such problem, and the reason seems obvious. The clear-and-convincing-evidence standard would impose too onerous a burden of proof upon the proponent of a spurious claim. Indeed, as we argued, the recognition of a reformation doctrine would serve to increase the level of safeguard in cases like *Kremlick*, *Taff*, and *Engle v. Siegel* that are now treated as "mere construction" cases without attention to the clear-and-convincing-evidence standard. It is far better to operate an honest reformation doctrine that relieves the pressure for subterfuge and sets an appropriate test for relief.

We should emphasize that, not only will the reformation doctrine have negligible effect upon well-drafted instruments, it will also not encourage draftsmen to become slovenly. Precisely because the

reformation doctrine is a rule of litigation, no draftsman would plan to rely on it when proper drafting can spare the expense and hazard of litigation. Every incentive to good drafting would remain.

A special characteristic of the proofs in the typical mistake case is that the testimony of the scrivener who made the mistake is frequently the predominant piece of evidence. On first impression this is a disturbing factor. We can imagine a duplicitous draftsman conniving with an interested contestant after the testator's death and testifying to a supposed mistake of which the draftsman has sole knowledge.

Reflection will show why this danger is remote and why it has not figured in those areas of the law where analogous mistakes have been remedied—the "mere construction" cases in testation and the reformation cases in contract and conveyance that involve instruments uttered by persons now deceased. A lawyer-draftsman has strong disincentives to plead his own slovenliness: It is not exactly a business-getter, it is costly in professional esteem, it may give rise to malpractice liability, and in extreme cases it can lead to professional discipline. Normally, therefore, the opposite danger is the serious one—that the lawyer will conceal his blunder.

Malpractice Liability



Because the error in many mistake cases is sufficiently egregious that a victim might be able to invoke the malpractice liability of the lawyer-draftsman if relief for mistake were denied, the argument can be made that the malpractice remedy makes relief for mistake unnecessary. We think that there are a variety of responses to this contention.

Initially, we note that there is a range of mistake cases that fall outside the scope of malpractice relief, including homedrawn wills and those lawyer-drafted wills where for whatever reason the mistake does not rise to the level of malpractice. Furthermore, in a considerable fraction of lawyer malpractice cases, the draftsman may be wholly or partially judgment-proof, as when he is long since deceased, or when he is uninsured or underinsured.

More fundamentally, the change in theory from devise to tort raises a serious problem of unjust enrichment. Whereas most forms of malpractice inflict deadweight loss that can only be put right by compensation, in these testamentary mistake cases a benefit is being transferred from the intended beneficiary to a mistaken devisee. That devisee is a volunteer lacking any claim of entitlement or justified reliance. The malpractice solution would leave the benefit where it fortuitously fell, thereby creating a

needless loss to be charged against the draftsman (or his insurer). So long as the draftsman's error was innocent (which is what distinguishes mistake from fraud), there is no reason to exaggerate his liability in this way. If, on the other hand, the lawyer were charged with the malpractice but subrogated to the tort plaintiff's mistake claim, the reformation doctrine would simply be recognized in a circular and more litigious fashion.

We do not mean to say that negligent draftsmen will be immune from malpractice liability in testamentary mistake cases. When the malpractice causes true loss, that loss should be compensable. One such item of compensable loss may be the reasonable litigation expenses of the parties to the reformation (or other) proceeding occasioned by the mistake. We can also imagine circumstances in which a mistake might come to light after distribution and dissipation of the mistakenly devised property; here the change of position of the mistaken devisee would constitute justified reliance and require that the intended beneficiary be remitted to his malpractice remedy.

Conclusion



So long as it is human to err, instances of mistaken terms in wills are inevitable. The impulse to remedy these errors in order to prevent unjust enrichment is also deeply rooted in our sense of justice, which is why the simplistic rule forbidding relief against mistake is dissolving. With the barriers to the receipt of extrinsic evidence coming down, and with theories now developed for overcoming the unattested language problem, courts will be presented with mistake cases ever more persistently.

To be sure, business as usual can continue. The courts can go on manipulating supposed rules of

construction, and they can make more exceptions. We think that a principled reformation doctrine has all the advantages over the patchwork of inconsistency and injustice that characterize the present law. The purposes of the discredited no-reformation rule will be better served under an explicit reformation doctrine that puts mistake cases to the test of an appropriate standard of proof.

Lawrence Waggoner is a Professor of Law in the Law School; John Langbein is Max Pam Professor of American and Foreign Law at the University of Chicago Law School.

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Lawrence Waggoner