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Incomplete Dispositions

Naomi Cahn*

Abstract

In Irresolute Testators*, Professor Jane Baron provocatively suggests the existence of two distinct types of testators: the rational, autonomous testator who has made deliberate choices about the contents of her will and whose errors, if any, are minor; and the more vulnerable, less resolute testator who may not have actually made the final decisions enshrined in a formal will. To illustrate how these testators appear in wills law, she analyzes how courts apply the doctrines of harmless error and mistake reformation. While the two doctrines appear to be intended to help the resolute testator, courts instead, she suggests, also apply the doctrines to help the irresolute testator. In causing us to reflect on the distinctions between dispository intent and a formal writing recognizable as a final statement, on rational and boundedly rational testators, on final and almost-final declarations, her article focuses us on the art of line-drawing in wills law. In this commentary, I explore another context that similarly raises issues about testators whose final intent is not clearly expressed: when can a disappointed beneficiary sue the drafting attorney for malpractice? The doctrine of privity confronts the spectre of the irresolute or inconclusive testator, yet courts have developed some dividing lines that differ from those they have developed surrounding harmless error. Privity seems to offer another illustration of how bright-line rules do not necessarily achieve dispository intent, although the privity rules do achieve certainty on only allowing final dispository statements (that are incomplete or show a lack of resolution) to provide a basis for a malpractice action. This commentary applauds Professor Baron's achievement in focusing us on the limits of the wills reform doctrines and the significance of accounting for different types of testators.*

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In *Irresolute Testators*,[1] Professor Baron raises a series of fascinating issues about seemingly progressive developments in wills law. I am honored to have this opportunity to respond to her masterful, thoughtful, and thought-provoking article. Irresolute Testators adds a much-needed—and contrary—layer to the conventional story of wills reform doctrine, providing an analysis of relevant statutory interpretation and court decisions. In doing so, it tells numerous complex stories that explore the more fundamental constraints on potential changes to wills doctrine and builds on Professor Baron's extraordinary earlier works.[2] Reformers, scholars, and practitioners both within and outside of the trusts and estates field can learn much from this rich and detailed account of the possibilities and limits of reforming wills law.

First, she suggests that the movement of progress in wills doctrine—exemplified by the developments of substantial compliance, mistake, and harmless error—do not, theoretically, go quite as far as courts have taken the doctrines in practice. These reforms, codified in statutes and written in the Restatement, are designed to complement the goals of the Wills Act, that is, recognition of a reliable writing[3] that represents the decedent's "finalized testamentary intent"[4] created by the rational testator. They seek to assess whether the alleged writing sought to be probated is, in fact, a "will"[5] by excusing fairly

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1. Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 1 (2016).

2. *E.g.*, Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1055 (1987) (discussing the "insane delusion" principle in wills law); Jane B. Baron, *Gifts, Bargains, and Form,* 64 IND. LJ. 155, 202 (1989) (describing wills law as anachronistic); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 268 (1994) (noting the importance of storytelling in critiquing objectivity).

3. The definition of a writing is, actually, ambiguous. *See, e.g.*, NEV. REV. STAT. ANN. §§ 132.119, 136.185 (allowing for electronic wills) (2016); *In re* Estate of Javier Castro, No. 2013ES00140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013) (permitting probate of an electronic will pursuant to the Ohio version of the harmless error rule—OHIO REV. CODE ANN. § 2107.24 (2016)); Anthony R. La Ratta & Melissa B. Osorio, *What's in A Name? Writings Intended As Wills*, 28 PROB. & PROP. 47, 50 (2014) ("The type of writing necessary to create a valid will is evolving.").

4. Baron, *supra* note 1, at 8.

5. "[T]he will execution reform permits investigation of a testator's intent that a document serve as a will, not the testator's dispositive intent." Baron,

technical requirements. Accordingly, the article focuses on whether the heightened evidentiary standard of proving defects by clear and convincing evidence actually serves as the limit the drafters anticipated on use of the reform doctrines.[6]

This leads to a second, and related, point: she draws a distinction between whether a document is, indeed, a will rather than simply an expression of the decedent's intent for what should, eventually, be included in a will.[7] The reforms are designed to address the decedent's "fixed intent, and address only the problem of inadvertent errors in setting out those wishes."[8] In interpreting the reform doctrines, she argues, courts may "find it difficult to stay within the limits" contemplated by the reforms.[9] Instead, they inquire into whether the writing establishes the decedent's intent, even though the writings' noncompliance with conventional Wills Act rules goes far beyond the technical problems and—under appropriate interpretation of the savings doctrines—might not actually qualify as wills.

Finally, and most critically, she suggests that wills law faces an inherent contradiction: it posits a rational testator who is protected by the reform doctrines, but the law also recognizes the existence of a more emotionally vulnerable, less definitive testator who is not explicitly protected by the reforms, and whom

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supra note 1, at 39.

6. Baron's article notes that some courts do apply the clear and convincing standard in the manner seemingly intended by the reformers, but other courts have had various problems, such as uncertainty as to the precise meaning of the standard or whether clear and convincing evidence of the decedent's dispository intent—rather than that the decedent intended a particular document to be a will—is adequate to satisfy the doctrines. Baron, *supra* note 1, at 8–27. For an alternative critique of these doctrines, see Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 184 (2015) (noting the expense of establishing error). Interestingly, although there was concern that "a flood of litigation" might result from adoption of the harmless error standard, an empirical sample of California cases found none that involved the issue. Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 362 (2016).

7. Mark Glover argues that conventional Wills Act doctrine is risk-averse to probating an inauthentic will and results in false-negative outcomes that prevent genuine wills from being probated. *See* Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335–404 (2016) (concluding that "the conventional law heavily allocates risk in favor of false-negative outcomes, and does not minimize the overall risk of probate errors").

8. Baron, *supra* note 1, at 68.

9. *Id.* at 69.

courts often find sympathetic.[10] She argues that the reform doctrines do not adequately resolve the tensions between these two different testators.

In identifying different images of testators, Professor Baron has uncovered discords that are, as she suggests, fundamental to contemporary wills law. While traditional probate law would never validate a document that was everything-but-a-will in terms of formalities—or would not reform a document that mislabeled a beneficiary—the modern reform doctrines have, perhaps inadvertently, permitted courts to give effect to such a document or a bequest.

By causing us to reflect on the distinctions between dispository intent and a formal writing recognizable as a final statement—on rational and boundedly rational testators as well as on final and almost-final declarations—Baron's article brilliantly focuses us on the art and craft of line-drawing in wills law. She notes some of the other areas in which line-drawing proves to be a challenge, and I briefly want to comment on another context that provides an example of both safe harbors and individualized decision-making, yet similarly raises issues about testators whose final intent is not clearly expressed: When can a disappointed beneficiary sue the drafting attorney for malpractice?

The doctrine of privity confronts the spectre of the irresolute or inconclusive testator, yet courts have developed some dividing lines that differ from those they have developed surrounding harmless error. This area may exemplify the approach that Baron suggests the reform doctrines are designed to provide, and it shows the promises and limits of clear rules.[11] Privity seems to

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10. Professor Baron points out the gendered nature of this language and explicitly uses "the male pronoun throughout [her] article to avoid any suggestion that male testators are resolute and female testators irresolute." *Id.* at 5 n.1.

11. *See, e.g.*, Rydde v. Morris, 675 S.E.2d 431, 433 (2009) ("Having relaxed the traditional privity requirement in legal malpractice claims, [we] nevertheless draw the line and refuse for compelling policy reasons to permit a malpractice claim by a non-client for negligent failure to draft a will."). One major difference is that the reform doctrines apply regardless of whether an attorney is involved, while malpractice claims only involve attorney-drafted wills, so the policy of protecting lawyers is implicit in some of the limitations on malpractice claims. For example, there is a concern that lawyers liable to disappointed beneficiaries will experience a conflict of interest with divided

offer another illustration of how bright-line rules do not necessarily achieve dispository intent, although the privity rules do achieve certainty on only allowing final dispository statements (that are incomplete or show a lack of resolution) to provide a basis for a malpractice action.

A malpractice claim typically requires: (1) the existence of an attorney-client relationship (privity); (2) a duty to use such skill, prudence, and diligence as other attorneys commonly possess and exercise; (3) the attorney's breach of duty; and (4) damage to the client. The traditional rule was that attorneys owed duties only to their clients; third party potential beneficiaries could not bring suits against a drafting attorney. Strict privity began to crumble, however, during the second half of the twentieth century,[12] with most states willing to relax the privity bar at least in some circumstances so that the estate or a disappointed beneficiary can sue an attorney for malpractice.[13] Notwithstanding a lack of privity, courts have found a duty where the executed testamentary document itself reflects the testator's undisputed intent that the plaintiff receive a specific benefit and that intent is frustrated.[14] In deciding whether to excuse privity, courts often apply a balancing test that looks at the public interest.

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loyalties, an issue not presented in the harmless error context. And, of course, the issues concerning "Irresolute Testators" include cases both with and without attorney involvement. The role of the attorney as mediator between the testator's actual intent and the ultimate product results in additional uncertainty as to whether the error resulted from the testator's lack of decisiveness or the attorney's malpractice. Nonetheless, the question of how far to move beyond a traditional and confining law involving estate planning is clearly presented.

12. *See* Hall v. Kalfayan, 190 Cal. App. 4th 927, 933 (Ct. App. 2010) ("[T]his strict privity test was rejected in a trio of cases involving testamentary instruments."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000) ("Duty of Care to Certain Nonclients"); Daniel R. Nappier, Note, *Blurred Lines: Analyzing an Attorney's Duties to A Fiduciary-Client's Beneficiaries*, 71 WASH. & LEE L. REV. 2609, 2621 (2014) ("Many . . . cases have concluded that a fiduciary's attorney does owe duties to beneficiaries.").

13. *See* Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 281–82 (2003) (describing approaches taken by states regarding privity); Gerry W. Beyer, *Avoid Being A Defendant: Estate Planning Malpractice and Ethical Concerns*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 224, 232 (2015) (same); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 714 (2011) (same).

14. *See* Paul v. Patton, 185 Cal. Rptr. 3d 830, 837 (2015) (citing cases

By contrast, courts have resolutely refused to relax the privity bar when it comes to non-execution, holding that "an attorney owes no duty of care to an intended will beneficiary to have the will executed promptly" or even at all.[15] That is, in the absence of a valid will, courts find no duty. For example, in a 1995 California case, Mary Ann Borina's will provided for trust income to her husband and sister.[16] She met with an attorney to discuss a new will under which her husband would receive all of the trust income.[17] Once the attorney delivered a rough draft of the new will to Borina for review, she told him she needed to discuss the revised estate plan with her sister before finalizing the new will.[18] Borina died six months later, with the new will unexecuted.[19] The court found that there was no duty to the husband, the beneficiary of the new, but unexecuted, will.[20] These cases do seem to involve the irresolute testator of Baron's title. But, of course, they also illustrate that privity is more likely than not to be a bar when the testator "conform[s] to the paradigm"[21] and there actually is a will; this conformity, Baron suggests, "is more important to the outcome of these cases than the evidentiary standard."[22] Or, in *Sisson v. Jankowski*,[23] the decedent did not want to die intestate, and the court acknowledged that "the unexecuted will accurately expressed his intent to pass his entire estate to the plaintiff."[24] Nonetheless, the will remained unexecuted because of a minor change in contingent beneficiaries.[25]

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reflecting the view "that the testator's intent is central to the duty analysis").

15. Parks v. Fink, 293 P.3d 1275, 1281 (Wa. 2013); *see also Riso v. Dwyer*, No. 2015-0361, 2016 WL 1069068, at *3 (N.H. Mar. 18, 2016) (concluding that because there was still a "potential for conflict as to who [the testator's] beneficiary would be," the attorney defendants "did not owe a duty to the plaintiffs").

16. Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573, 574 (Ct. App. 1995).

17. *Id.*

18. *Id.* at 575.

19. *Id.*

20. *Id.* at 584.

21. Baron, *supra* note 1, at 55

22. *Id.*

23. 809 A.2d 1265 (N.H. 2002).

24. *Id.* at 1266.

25. *See id.* at 1266 (noting that, "rather than modifying the will

This stringent line in cases where a will has not actually been executed for malpractice purposes is not echoed in the existing harmless error cases that Baron discusses. In those reform cases in her article, courts are willing to admit to probate improperly executed wills or arguably not final statements of intention designed to constitute a will. And it is those cases which Baron suggests function to stretch the reform doctrines beyond where they may have been intended to go. Wills law reforms, as Baron's article argues, are designed to save the testator who has an undisputed intent. Thus, it is not surprising that courts reforming privity doctrine would draw a similar distinction between testators who clearly had reached a finalized intent, as evidenced by an executed will, and those who *might* in fact have reached a finalized intent, but did not have the executed will as evidence of their resoluteness.

In titling her article *Irresolute Testators*, Baron suggests that the decedents were not entirely certain of their dispository wishes. In some of the cases, that is undoubtedly true. Indeed, the problem is sometimes hesitancy about particular outcomes (the need to discuss a will change with a sister). Nonetheless, in others, there seems strong—sometimes beyond a reasonable doubt—evidence of the testator's intent. It often appears to be just plain old lawyer failure (leaving a residuary clause unfinished in *Herceg*). Yes, Charles Kuralt was sophisticated, but did he really understand that a typed will would supersede an earlier holographic will?[26] Similarly, in the unexecuted wills cases, where courts are unwilling to relax the privity bar to consider malpractice claims, there is sometimes quite reasonable doubt that the decedents intended the draft writings to become final testamentary statements or even uncertainty that the documents contained those wishes; yet there are also cases where

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immediately to include a hand-written contingent beneficiary clause . . . Attorney Jankowski left without obtaining the decedent's signature to the will").

26. Baron notes that *Kuralt* did not involve substantial compliance/harmless error. For further discussion of how nonlawyers understand the law, see generally Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325 (2015).

it was the lawyer's failure to translate wishes into written certainty (the *Sisson* decedent did not want to die intestate).

Consequently, rather than labeling the tension as one between differing testator selves who are "rational" and "irresolute,"[27] we might instead conceptualize the sometimes contradictory trends as tensions between whether to apply rules versus standards,[28] as well as between the complete versus the incomplete. That is, the cases often involve decedents who have made final choices, but have, at least arguably, not adequately documented their choices. They are not—or at least frequently are not—irresolute. They had specific goals. Louise Macool knew what she wanted, but her lawyer may have felt irresolute about whether he knew what she wanted; Kuralt apparently did not realize the nature of his illness, or he would have called in the lawyers before writing the document that (ultimately) qualified as a holographic will. Or, the post-will execution savings doctrines of ademption and antilapse protect against a failure to anticipate contingencies; the testator might well have intended to allow descendants of the original devisee to inherit something, but simply did not contemplate a sale of a specific item or the death of the original devisee. The intentions may be final and decisive, but not enough planning occurred, the wrong questions were asked, or the wrong legal formalities were followed. The two—resolute and irresolute testator—are, in fact, ends on a continuum of dispository wishes that is often defined by lawyer competence.[29]

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27. Irresolute means feeling hesitant, uncertain. Interestingly, women appear somewhat more likely than men to use precatory (non-directive) words in their wills. *See* Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills,* 22 WIS. WOMEN'S L.J. 1, 38–39 (2007) (discussing an empirical research showing that "sex explains roughly 1.7% of the variability in precatory language"); Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1567 (2015) ("Because precatory language and expressive language appear to be included more in the Wills of women than the Wills of men, the use may reflect the perpetuation of gender stereotypes about gender appropriate language or could be a legacy of testamentary access or a combination of both.").

28. *See* Baron, *supra* note 1, at 73; *see also* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 872 (2012) ("[R]ules entail more predictability and consistency than standards.").

29. As Baron states,

Whether the testators are actually irresolute or their final dispository wishes are definitive but—based on the requisite formalities—incompletely articulated, ultimately, Baron calls attention to the larger issues of the sometimes paradoxical manner in which the legal system approaches dispository intent. Wills law has, for centuries, attempted to establish two distinct categories, the intestate decedent and the rational testator. The irresolute, or (my preferred term) the incomplete, testator adds another significant dimension altogether that, moving forward, challenges existing wills doctrine.[30]

Bright-line rules and neat categories are appealing; they make decisions easy. And, when a will falls into the safe harbor that Baron identifies, the decision is easy. Or, when there is no writing, intestacy serves as a similar safe harbor.[31] Tantalizingly, the article does not suggest how the law might more appropriately balance these two "selves"—should we, for example, move towards recognizing final statements of intent, even if there is no clear and convincing evidence of compliance with the Wills Act?[32] In a world of increasingly common nonprobate transfers,

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> I do not wish to overdraw the comparison between the two testamentary selves. It is surely not the case that some people are entirely rational in the traditional, choosing sense, while others experience only the bounded rationality of the erring testator. Nor is it true that careful, self-reliant testators will never make mistakes, while less careful testators will always make them.

Baron, *supra* note 1, at 73.

30. *Id*.

31. That is not to say that a valid will may not be challenged, or that intestacy is easy. *See generally* SUSAN GARY, JEROME BORISON, NAOMI CAHN & PAULA MONOPOLI, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES (2d ed. 2014) (discussing challenges of intestacy and will contests); Carly McKeeman, *'I Never Meant to Cause You Any Sorrow'—Lessons from Prince on Intestacy*, ABA (May 9, 2016), http://abaforlawstudents.com/2016/05/09/never-meant-cause-sorrow-lessons-prince-intestacy/ (last visited June 30, 2016) (noting the potential heirs to Prince's fortune along with the estate tax consequences of the lack of planning) (on file with the Washington and Lee Law Review); Maria Puente, *"Heirs" to Prince's Millions are Multiplying*, USA TODAY (Jun 16, 2016), http://www.usatoday.com/story/life/music/2016/06/14/would--heirs-princes-millions-multiplying/85891872/ (last visited June 30, 2016) (detailing the complexities of determining heirs to the singer, Prince) (on file with the Washington and Lee Law Review).

32. *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.2 (AM. LAW INST. 2003).

what role, after all, does the safe harbor of wills, with its ritualized formalities, still serve? By suggesting the need to ask these questions that are fundamental to trusts and estates, Baron goes far in moving the law towards recognition, if not reconciliation, of the differing testamentary selves.