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## Irresolute Testators, Clear and Convincing Wills Law

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# Irresolute Testators, Clear and Convincing Wills Law

Jane B. Baron\*

## *Abstract*

*Controversial recent wills law reforms, embodied in new provisions of both the Uniform Probate Code and the Restatement of Property, excuse so-called harmless errors in will execution and permit judicial correction of erroneous terms in a will or trust. Both reforms pose evidentiary dangers, as proof of the error must come from outside the attested instrument and will be offered after the testator's death. To respond to this concern, both the error and the testator's true intent must be established by "clear and convincing" evidence.*

*This Article is the first to examine how courts have applied the clear and convincing evidence standard to these important reforms of wills law. In practice, the clear and convincing evidence standard provides less evidentiary protection than its proponents expected. More importantly, judicial struggles with the clear and convincing evidence standard expose a deep fissure in the very concept of testamentary freedom.*

*The reforms assume—as does the Wills Act itself—a fully formed, fixed set of choices that the testator has sought to express in his will, choices made by a conventionally rational choosing testamentary self for whom wills rules further self-determined ends. This conventionally rational testator makes only innocent, inconsequential errors. Many of the testators in the actual cases, however, display only bounded rationality. Their errors are not*

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*simple accidental snafus. While the reforms contemplate correction only of the technical, innocuous expression or execution errors made by self-reliant, choosing testamentary selves, at least some courts care also about the more complicated errors made by vulnerable, irresolute testamentary selves. These courts push against the reforms' boundaries. The clear and convincing evidence standard has not and will not function as a serious limit on mistake correction because it fails to reckon with both visions of testamentary freedom.*

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### *I. Introduction*

The musty law of wills has been substantially refurbished over the last half century to solve a recurring problem. It has long been clear that the formal requirements governing will execution have the capacity to defeat the very intent they were designed to further. Small, inconsequential errors in signing or witnessing a

will can lead to the invalidation of the document, even where the court is confident that the decedent intended the document to serve as his will.<sup>1</sup> The first wave of wills law reform sought to solve this problem by reducing the number of required formalities.<sup>2</sup> A second and more controversial wave of reform, embodied in new provisions added to both the Uniform Probate Code (UPC)<sup>3</sup> and the Restatement (Third) of Property: Wills and Donative Transfers (Restatement),<sup>4</sup> sought to solve the problem differently, by excusing “harmless errors” in will execution if “clear and convincing” evidence shows that the decedent intended the document to be a will.<sup>5</sup>

The will execution reform was quickly followed by another reform permitting judicial correction of erroneous terms in a will or trust. This mistake correction reform departed starkly from prior law that generally excluded extrinsic evidence of the testator’s intent if the words of the will or trust were

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1. I use the male pronoun throughout this Article to avoid any suggestion that male testators are resolute and female testators irresolute.

2. See UNIF. PROBATE CODE art. 2 pt. 5 gen. cmt. (UNIF. LAW COMM’N 1969) (“The basic intent of these sections is to validate the will whenever possible. To this end . . . formalities for a written and attested will are kept to a minimum.”).

3. UNIF. PROBATE CODE (amended 2010) (UNIF. LAW COMM’N 2013).

4. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS (AM. LAW INST. 2015).

5. See UNIF. PROBATE CODE § 2-503 (amended 2010) (UNIF. LAW COMM’N 2013) (validating an improperly executed document if clear and convincing evidence establishes that the decedent intended the document to be his will); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2015) (“A harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will.”). These reforms are explained *infra* Part II.A. On the importance of—and the controversy surrounding—these reforms, see Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REF. 855, 877 (2012) [hereinafter Kelly, *Toward Economic Analysis*] (describing the harmless error rule as a “significant development”); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 279 (1996) (describing UPC section 2-503 as a “revolutionary change”); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1009 (1992) (describing the UPC execution reforms as a “big step” in reconciling the law of wills and contracts); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 601 (1991) (describing UPC section 2-503 as a “major innovation”).

unambiguous.<sup>6</sup> Before allowing reformation of the text of donative documents, the revised UPC and Restatement require clear and convincing evidence both of the mistake in the document's existing terms and of the testator's true intent.<sup>7</sup>

This Article is the first to examine how courts are applying the clear and convincing evidence standard to these important reforms of wills law.<sup>8</sup> In practice, the clear and convincing

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6. On the prior law, see *infra* Part II.B (describing the historical practice of excluding extrinsic evidence because of the unavailability of the testator).

7. See UNIF. PROBATE CODE § 2-805 (amended 2010) (UNIF. LAW COMM'N 2013) ("The court may reform the terms of a governing instrument . . . if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law . . ."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2015) ("A donative document . . . may be reformed . . . if it is established by clear and convincing evidence[:] (1) that a mistake of fact or law . . . affected specific terms of the document; and (2) what the donor's intention was."). These reforms are explained *infra* Part II.A.

8. Prior commentary has focused mainly on the wisdom of excusing clear errors and on the experiences of the countries that adopted the will execution reform ahead of the United States, with particular attention paid to whether the reforms have created a slippery slope problem of habitual noncompliance with Wills Act requirements. See, e.g., Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills*, 64 S.C. L. REV. 403, 420 (2012) (suggesting that the reformation reform will add to estate litigation); Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 583 (2007) (examining how the harmless error rule and substantial compliance fared in Australia from 1987–2007); Miller, *supra* note 5, at 705 (arguing that the harmless error rule will compromise existing limits on the issues to be resolved after the testator's death); John V. Orth, *Wills Act Formalities: How Much Compliance Is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73, 80 (2008) (tracing how the slippery slope of relaxing formalities to determine testamentary intent, without more guidance than "do the right thing," creates a new avenue for judicial activism).

There is one exception to this line of commentary. In 2002, when both UPC section 2-503 and Restatement section 3.3 were relatively new, Emily Sherwin argued that "the true function of the clear and convincing evidence standard is to give the appearance of a compromise, when in fact a choice has been made in favor of fact-sensitive adjudication and against determinate formality rules." Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 474 (2002). Sherwin's direct concern, however, was not wills law particularly but legal formality generally, with the UPC harmless error rule serving merely as an example of the impossibility of a position intermediate between formalism and case-by-case evaluation of intent. *Id.* at 460. She considered the potential effectiveness of the will execution reform only as a logical and theoretical matter and did not purport to examine how the reform

evidence standard provides less evidentiary protection than its proponents expected. Nor has it functioned as apparently intended to cabin the reforms to a narrow range of technical mistakes in execution or expression.

The courts' struggles with the clear and convincing evidence standard expose a fissure in the concept of testamentary freedom. The reforms assume—as does the Wills Act<sup>9</sup> itself—a fully formed, fixed set of choices that the testator means to express in his will. For a testator with such intent, the will functions as a “safe harbor,”<sup>10</sup> in which his wishes are protected against the unreliable statements of others and his own potential ill-considered changes of mind. The safe harbor contemplates a coldly rational, choosing testamentary self for whom wills rules are a means for furthering self-determined ends. The reforms contemplate correction only of technical, innocuous errors in the expression or execution of that testator's intent.

But many of the testators in the cases do not seem to correspond to the model underlying the Wills Act and the reforms. These testators cannot bring themselves to make the final decisions about their property that the Wills Act rules are meant to effectuate or, if they do, they change their minds.<sup>11</sup> Their errors are not the simple technical snafus the reforms appear to contemplate. Nevertheless, courts work hard to fit them under the reform provisions. These efforts are consistent with other wills rules which envision and protect more emotional, ambivalent testators—testators who, for example, fail to take

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actually functions in the courts. *See generally id.*

9. The term “Wills Act” refers generically to the probate code provisions prescribing rules for making a valid will. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 147 (9th ed. 2013) (“The probate code of every state includes a provision . . . which prescribes rules for making a valid will.”).

10. *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 *COLUM. L. REV.* 1, 4 (1987) [hereinafter Langbein, *Excusing Harmless Errors*] (“The greatest blessing of the Wills Act formalities is the safe harbor that they create. . . . The testator who complies with Wills Act formalities assures his estate of routine probate in all but exceptional circumstances.”).

11. *See, e.g., In re Estate of Windham*, No. 287937, 2010 WL 293064, at \*1–2 (Mich. Ct. App. Jan. 26, 2010) (per curiam) (describing a testator who initially devised her estate to her son and then in weeks before her death, lined out her son's name on a copy of the will and wrote in her daughter's name).

care in expressing themselves or to update their wills. Both testators are a part of wills law. The clear and convincing evidence standard addresses only the technical errors of the self-reliant choosing testamentary self. But at least some courts care also about the more complicated errors of the vulnerable, irresolute testamentary self. These courts push against the reforms' boundaries. As a result, the clear and convincing evidence standard has not, and will not, function as a serious limit on mistake correction.

Part II examines the development of the will execution and mistake correction reforms in wills law. The trajectory of this history, from "substantial compliance" to "harmless error," is well-established. What has not been sufficiently appreciated is the role of a heightened evidentiary standard in the development of the reforms. The reforms were never meant to displace the view of will-making inherent in the Wills Act itself, which assumes a finalized testamentary intent of which unambiguous evidence can be found. Part III details the courts' application of the clear and convincing evidence standard, demonstrating how much less protection the standard offers than might be expected. This problem may have less to do with the courts than with the testators themselves, whose will-making practices reflect a much less determinate intent than the Wills Act and the reforms envision. Part IV explores whether and why it matters that the clear and convincing evidence standard does not function as its proponents anticipated. It argues that wills law recognizes two discordant versions of testamentary freedom, one envisioning a conventionally rational testator capable of once-and-for-all decision making and the other envisioning a testator whose rationality is noticeably bounded and whose choices are much more tentative. A true reform of wills law would encompass both of these visions.

## *II. Evidence and the Harmless Error/Mistake Correction Reforms*

This Part contextualizes the will execution and mistake correction reforms, explaining their place in the range of efforts to deal with execution and expression errors. The reforms address directly what makes wills errors so difficult to correct—the

potential unreliability of the evidence of mistake.<sup>12</sup> The clear and convincing evidence standard was built into the reforms in response to this evidentiary problem. However, the strategy of requiring clear and convincing evidence shares the assumption of earlier strategies that testators have a fixed and final intent that they mean to state once and for all in their wills.

#### A. *The Case for Excusing Harmless Errors*

The new execution and mistake correction reforms address an old problem. The formalities of the Wills Act have long been thought to perform intent-effectuating functions.<sup>13</sup> They are said to provide a ritual, cautioning testators that their acts should be taken seriously,<sup>14</sup> to produce reliable evidence of testators' wishes,<sup>15</sup> to protect testators (in the case of nonholographic wills) from fraud, undue influence or other forms of pressure,<sup>16</sup> and to channel testators into forms of expression easily recognized by courts as wills.<sup>17</sup> Similarly, the rules prohibiting correction of

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12. See DUKEMINIER & SITKOFF, *supra* note 9, at 147 (“The witness who is best able to authenticate the will . . . and to clarify the meaning if its terms is dead by the time the court considers such issues.”).

13. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3–4 (1941) (explaining the function of wills formalities in convincing the court of the testator’s deliberate and final intent to effectuate a transfer).

14. See *id.* at 4 (“The formalities of transfer generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements . . . . This purpose of the requirements of transfer may conveniently be termed their ritual function.”).

15. See *id.* (explaining that formalities may increase the reliability of proof, counteracting inaccurate oral testimony and the unavailability of the main actor).

16. See *id.* at 4–5 (“[T]he . . . prophylactic purpose of safeguarding the testator . . . [is] the protective function.”).

17. The first three functions derive from Gulliver & Tilson. *Id.* John H. Langbein added the fourth, channeling, function to this canonical listing in his article *Substantial Compliance with the Wills Act* [hereinafter Langbein, *Substantial Compliance*], 88 HARV. L. REV. 489 (1975). See *id.* at 493–94 (invoking the “channeling” function of contract law to explain the purpose of the Wills Act formalities).

I have argued elsewhere that these functions were not of primary concern in the adoption of the Wills Act, and that there is reason to question the understanding of human behavior that underlies the functional justification of



mistaken terms are thought to protect against the dangers of potentially unreliable extrinsic evidence.<sup>18</sup> Yet, however well those rules might work for the well-advised and well-represented testators who follow them, the reported cases show that at least some testators whose intentions are undisputed fail to comply with them in some respect or another.<sup>19</sup> These testators sign outside the presence or sight of the witnesses,<sup>20</sup> or they have their will witnessed by only one of two required witnesses,<sup>21</sup> or they place their signature somewhere other than at the “end” or “foot” of the will,<sup>22</sup> and so forth. For these testators, the rules are not intent-effectuating, but intent-defeating because “once a formal defect [in execution] is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.”<sup>23</sup>

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form. *See generally* Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1988–89).

18. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. c (AM. LAW INST. 2015) (explaining prior law barring reformation and explaining that “[r]eforming a will, it was feared, would often require inserting language that was not executed in accordance with the statutory formalities”). On the “plain meaning” or “no extrinsic evidence” rule, *see* DUKEMINIER & SITKOFF, *supra* note 9, at 328 (“[A] majority of states follow . . . two rules that, operating in tandem, bar admission of extrinsic evidence to vary the terms of a will. [T]he plain meaning of the words of a will cannot be disturbed by evidence that the testator intended another meaning . . . . [C]ourts may not reform a will to correct a mistaken term . . . .”). *See also* 1-5 Schoenblum, PAGE ON THE LAW OF WILLS § 5.16 (LexisNexis Matthew Bender 2015) (explaining the admissibility of extrinsic evidence to contradict the terms of a will). For a critique of the plain meaning rule, *see* Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 656–57 (1992) (advocating a storytelling approach to will interpretation).

19. *See, e.g., In re Groffman*, [1969] All E.R. 108 (Eng.) (declining probate to a document the court was “perfectly satisfied” was intended as the testator’s will because the two witnesses were not present at the same time at execution, as required by the statute).

20. *See e.g., In re Estate of Berg*, No. 268584, 2006 WL 2482895, at \*2–3 (Mich. Ct. App. Aug. 29, 2006) (describing how Berg signed out of sight of one of the two required witnesses).

21. *See, e.g., In re Estate of Hall*, 51 P.3d 1134, 1135–36 (Mont. 2002) (explaining that the will was signed by only one witness where the execution statute required two).

22. *See* DUKEMINIER & SITKOFF, *supra* note 9, at 149 (explaining how the original Wills Act of 1837 required the will to be signed “at the foot or end thereof,” known generally as subscription).

23. Langbein, *Substantial Compliance*, *supra* note 17, at 489; *see also id.* at 498 (“[W]hat is peculiar about the law of wills is not the prominence of the

One response to the problem of the rules' intent defeating potential is to ignore it. This is the approach of courts that require strict compliance with the Wills Act and that exclude extrinsic evidence in cases where unambiguous wills contain mistaken terms.<sup>24</sup> From an institutional perspective, this is a safe choice. Especially with respect to Wills Act formalities, it is not clear that courts have authority to deviate from legislatively specified will execution requirements.<sup>25</sup> On the other hand, the strict compliance approach does nothing to further wills law's objective of furthering freedom of disposition.<sup>26</sup> And it allows much unjust enrichment of unintended beneficiaries.<sup>27</sup>

A second way to address the problem is simply to reduce the number of formalities required for due execution. This was the strategy adopted in the 1969 UPC.<sup>28</sup> Gone, for example, was the

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formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.”). Note, however, that “there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities.” *Id.* Courts can reduce the impact of the automatic-invalidity rule and of the strict compliance approach simply by straining to find that the will's execution *did* in fact comply with the applicable requirements.

24. *But see generally* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597 (2014) (arguing that the formalities and the strict compliance rule have different purposes).

25. *See* Sherwin, *supra* note 8, at 458 (noting, with respect to the substantial compliance doctrine, that “the source of courts' authority to disregard the literal terms of the will statutes was left unclear”); *see also* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 6 (“The substantial compliance doctrine is the only avenue open to the courts without legislative intervention.”); *see also* Litevich v. Prob. Court, Dist. of W. Haven, No. NNHCV126031579S, 2013 WL 2945055, at \*16 (Conn. Super. Ct. May 17, 2013) (declining to adopt the harmless error rule as a “judicial gloss” to the Connecticut statute prescribing requirements for a valid will).

26. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2015) (“[T]he organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.”).

27. On the problem of unjust enrichment, *see infra* note 344 and accompanying text.

28. UNIF. PROBATE CODE art. II, intro. pt. 5 gen. cmt. (UNIF. LAW COMM'N 1969) (“If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple.”); *see also* Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 453 (1970) (describing the UPC's drafting process).

requirement that a will be signed “at the end,” or that the witnesses be “present at the same time” when the testator signed or acknowledged the will.<sup>29</sup> The fewer the formalities required, the lower the number of wills invalidated on purely technical grounds, where the testator’s intent will be defeated due to inadvertent, inconsequential execution errors. But for wills that failed to comply with the relaxed requirements of the 1969 UPC, the automatic invalidity rule held fast, raising the same issues as arose under the prior strict compliance approach.<sup>30</sup>

To solve this problem, John Langbein proposed, in a ground-breaking article published in 1975, an entirely different way to avoid unfortunate outcomes: the doctrine of “substantial compliance.”<sup>31</sup> Under this doctrine, the finding of a formal defect would not lead to automatic invalidity, but rather to a further inquiry: “[D]oes the noncomplying document express the decedent’s testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?”<sup>32</sup> If, in a case of improper execution, the functions of the relevant formalities were satisfied, Langbein argued that the will should be admitted to probate notwithstanding the technical error.<sup>33</sup>

However, in 1987, after studying experience with statutory reforms in Australia, Langbein moved in an altogether different

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29. See UNIF. PROBATE CODE § 2-502 (amended 2010) (UNIF. LAW COMM’N 2013) (requiring only the testator’s signature and the signature of two witnesses for a formal will execution); see also UNIF. PROBATE CODE § 2-502 cmt. (UNIF. LAW COMM’N 1969) (“The formalities for execution of a witnessed will have been reduced to a minimum . . . . The intent is to validate wills which meet the minimal formalities of the statute.”).

30. See Langbein, *Substantial Compliance*, *supra* note 17, at 510 (comparing a “rule of reduced formalism” to the UPC approach which “reduce[s] the number of required formalities,” but noting “although both techniques work generally in the same direction, they will produce different results in many cases if the UPC’s ‘minimal formalities’ are to be enforced with the same literalism as before”); see also Lindgren, *supra* note 5, at 1011 (“The approach of the Uniform Probate Code from 1969 to 1980 was to reduce will formalities, but to require strict compliance with those formalities.”).

31. See Langbein, *Substantial Compliance*, *supra* note 17, at 489 (insisting that the formalism of wills law is “mistaken and needless”).

32. *Id.*

33. See *id.* at 515–16 (“[T]he substantial compliance doctrine would admit to probate a noncomplying instrument that the court determined was meant as a will and whose form satisfied the purposes of the Wills Act.”).

direction.<sup>34</sup> Rather than seeking to ascertain whether the functions of form had been met on the facts, as was required under the substantial compliance doctrine, Langbein proposed instead that any and all compliance errors be excused entirely if the testator's intent that the document constitute his will is proven to a high degree of confidence. Under this new harmless error proposal, the extent to which an instrument's form "approximate[s]" Wills Act requirements is entirely immaterial as long as the evidence that the testator intended the document as his will is otherwise convincingly clear. UPC section 2-503 and Restatement section 3.3 alike adopt this approach. Section 2-503 of the 2010 UPC provides that a document *not* executed in compliance with the provisions of the Wills Act may nonetheless be treated as a will if it is established by clear and convincing evidence that the decedent intended the writing to constitute his or her will.<sup>35</sup> Restatement section 3.3, promulgated a few years later, provides that "a harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."<sup>36</sup>

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34. See generally Langbein, *Excusing Harmless Errors*, *supra* note 10.

35. UPC section 2-503's "dispensing power" extends to formally-flawed efforts to revoke, amend, or revive a will. See UNIF. PROBATE CODE § 2-503 (amended 2010) (UNIF. LAW COMM'N 2013)

Although a document or writing added upon a document was not executed in compliance with Section 2-502 [stating requirements for valid will execution], the document or writing is treated as if it had been executed with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (1) the decedent's will
- (2) a partial or complete revocation of the will,
- (3) an addition to or an alteration of the will, or
- (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

36. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2015). The reasons for preferring the harmless error approach to the substantial compliance approach have been frequently rehearsed. Langbein found that the courts purporting to apply the substantial compliance approach tended not to focus, as the doctrine intended, on whether the defect in question was "harmless to the statutory purpose." Langbein, *Substantial Compliance*, *supra* note 17, at 531. Instead, the courts asked whether the testator's compliance was "near perfect." See Langbein, *Excusing*

Toward the end of his article proposing the harmless error reform, Langbein noted that “the development of a statutory remedy to cure mistakes in complying with execution formalities invites consideration of the parallel . . . problem of mistakes in content,”<sup>37</sup> such as dropped paragraphs or misdescribed devisees. In accordance with an earlier proposal made in an article co-authored with Lawrence Waggoner,<sup>38</sup> Langbein argued that in the mistaken term context as in the execution context, the law should be prepared to correct the error if the error is proved to a high degree of certainty.<sup>39</sup> UPC section 2-805 and Restatement section 12.1, adopted in the 2008 and 2003 respectively, reflect this approach, permitting reformation to conform the testator’s document to reflect his intention if both the mistake and the intention are proved by “clear and convincing evidence.”<sup>40</sup> In

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*Harmless Errors*, *supra* note 10, at 53 (“[T]he courts read into their substantial compliance doctrine a near-miss standard, ignoring the central issue of whether the testator’s conduct evidenced testamentary intent.”). Meanwhile, the power to excuse harmless errors, which was applied far more often to attestation mistakes than those involving writing or signature, brought the formal law of wills into proper “alignment” with the law of will substitutes, where writing and signature are virtually indispensable, but attestation uncommon. *Id.* at 52–53. The reform also made sense in the context of wills law itself, making the presumption of invalidity applicable to defectively executed wills rebuttable rather than conclusive. *Id.* at 53. Finally, the Australian experience showed that there was no need to fear that open acknowledgment and correction of execution errors would somehow open a floodgate of litigation. *See id.* at 51 (“[T]he litigation levels have been astonishingly low.”).

37. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 53.

38. *See generally* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law*, 130 U. PA. L. REV. 521 (1982) [hereinafter Langbein & Waggoner, *Reformation of Wills*].

39. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 53 (“And the standard of proof should be pitched below that of criminal law but above that of ordinary civil litigation—in American parlance, clear and convincing evidence.”).

40. *See* UNIF. PROBATE CODE § 2-805 (amended 2010) (UNIF. LAW COMM’N 2013)

The court may reform the terms of a governing instrument, even if ambiguous, to conform the terms to the transferor’s intention if it is proved by clear and convincing evidence what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake or fact or law, whether in expression or inducement.

The Restatement provides:

A donative document, though unambiguous, may be reformed to

combination, the execution and mistake correction reforms reject the “relentless formalism” of the older law of wills.<sup>41</sup>

### *B. The Evidentiary Problem*

This history of reform is fairly well established. What has not been previously appreciated, however, is the extent to which a higher than normal standard of proof—the clear and convincing evidence standard—has been integral to the reforms from the start. As we have seen, prior law held that, even under the more relaxed rules of the 1969 UPC, mistakes in execution automatically invalidated a will and mistaken terms could not be corrected. The danger involved in correcting both kinds of mistakes is evidentiary. Proof of the error and of the testator’s intent must come from outside the attested will and will be offered when the testator is incapable of clarifying, correcting, or contradicting the unreliable statements of the living.<sup>42</sup> The reforms’ response is to require more and better evidence—evidence that is “clear and convincing.”

The evidentiary problem has long been clear. Gulliver and Tilson’s “classic”<sup>43</sup> explanation of why the requirements for will execution are formal begins by depicting an evidentiary dilemma:

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conform the text to the donor’s intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor’s intent was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2015). The concept of these reforms originated in section 415 of the Uniform Trust Code. UNIF. TRUST CODE § 415 (amended 2005) (UNIF. LAW COMM’N 2014); *see also* UNIF. PROBATE CODE § 2-805 cmt. (UNIF. LAW COMM’N 2010) (“Added in 2008, Section 2-805 is based on Section 415 of the Uniform Trust Code, which in turn was based on Section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (2003).”); *see* Gazur, *supra* note 8, at 409–10 (describing the development of the reforms).

41. Langbein, *Substantial Compliance*, *supra* note 17, at 489.

42. *See* DUKEMINIER & SITKOFF, *supra* note 9, at 147 (“The witness who is best able to authenticate the will . . . and to clarify the meaning of its terms is dead by the time the court considers such issues.”).

43. Langbein, *Substantial Compliance*, *supra* note 17, at 492.

“If all transfers were required to be made before the court determining their validity,” they wrote, “it is probable that no formalities except oral declarations in the presence of the court would be necessary” because the court “could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions.”<sup>44</sup> But transfers are not made before courts, and this is why the law imposes “requirements of transfer beyond evidence of oral statements of intent.”<sup>45</sup> Langbein made a similar point about evidence, observing that “the ‘chief justification’ for the Wills Act formalities . . . is that the testator must inevitably be unavailable at the time of litigation to authenticate or clarify his intention. This factor justifies the formalities.”<sup>46</sup>

As noted earlier, the formalities are potentially intent-effectuating, serving ritual, evidentiary, protective, and channeling functions.<sup>47</sup> While the functions of formality are intimately connected because “whatever tends to accomplish one of these purposes will also tend to accomplish the [others],”<sup>48</sup> some of these functions were considered more important than others from the start. For example, even as Gulliver and Tilson identified the protective function of attestation, they sharply criticized its necessity and effectiveness.<sup>49</sup> The 1969 UPC’s elimination of prior requirements that the testator publish the will, that the witnesses sign in the testator’s presence, that the will be signed at “the end,” and that the witnesses be disinterested,<sup>50</sup> all “markedly weakened the ceremonial value of

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44. Gulliver & Tilson, *supra* note 13, at 3.

45. *Id.*

46. Langbein, *Substantial Compliance*, *supra* note 17, at 501.

47. *Supra* notes 13–17 and accompanying text; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2015) (“Four discrete functions have been attributed to the formalities—the evidentiary, cautionary, protective, and channeling functions.”).

48. Langbein, *Substantial Compliance*, *supra* note 17, at 497 (quoting Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 803 (1941)).

49. *See* Gulliver & Tilson, *supra* note 13, at 9–10 (asserting that the protective function “is difficult to justify under modern conditions”).

50. *See* UNIF. PROBATE CODE § 2-502 cmt. (UNIF. LAW COMM’N 1969) (dispensing with the formalities of publishing, signing at the foot of the instrument, and signing in the presence of attesting witnesses).

attestation.”<sup>51</sup> From this, Langbein concluded that “the Code’s requirements for attested wills suggest that it is primarily the evidentiary and channeling purposes of the Wills Act which survive in modern times.”<sup>52</sup> Of these two, Langbein had no trouble concluding that the evidentiary function is “primary.”<sup>53</sup>

But if the evidentiary function of form matters, then any relaxation of formal requirements is potentially worrisome, as it reduces the certainty that the instrument in question reliably evidences the testator’s intent.<sup>54</sup> Langbein was attentive to this concern when he proposed the substantial compliance reform, assuring readers that the two most important evidentiary safeguards, a writing and a signature, would not be threatened under his new approach.<sup>55</sup> “A will with the testator’s signature omitted does not substantially comply with the Wills Act because it leaves in doubt . . . the formation of testamentary intent, deliberate and *evidenced*.”<sup>56</sup> Similarly, “the substantial compliance doctrine would have no practical effect on the requirement that wills be in writing. Written terms, written signature, and—where mandated—written attestation comprise a group of formalities whose omission could scarcely be insubstantial.”<sup>57</sup> Because writing and signature requirements were indispensable under the substantial compliance approach, the quality and quantity of evidence of the testator’s intent would necessarily be high.<sup>58</sup>

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51. Langbein, *Substantial Compliance*, *supra* note 17, at 511.

52. *Id.*

53. *See id.* at 492 (“The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent and of the terms of the will.”); *see also* Lindgren, *supra* note 5, at 1027 (“In the law of wills the overriding fear is that unattested language will be used to pass property at death.”).

54. *See* Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 579 (explaining that the no-reformation rule responded to “the difficulty and danger of proving that a testator now dead made a mistake in his duly executed will”).

55. *See* Langbein, *Substantial Compliance*, *supra* note 17, at 518 (“Our courts rely upon signatures as the most important evidence of finality of intention. . . . Signature is also the primary evidence of the will’s authenticity.”).

56. *Id.* (emphasis added).

57. *Id.* at 518–19.

58. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 37 (“The requirement that the testator must have substantially complied with the Wills Act . . . serves much the function of an afforded standard of proof. Complying



But the evidentiary problems arising under the will execution reform are potentially far more serious because, in theory, even documents that do not come close to following Wills Act requirements are still eligible to be probated.<sup>59</sup> Langbein first confronted this problem in the context of his and Waggoner's proposal to reform wills containing mistaken terms.<sup>60</sup> In that analogous context,<sup>61</sup> courts faced the same problem as arose with defectively executed wills: the evidence of mistake "must necessarily be presented when death has placed the testator beyond reply" and will involve statements "which he can now neither corroborate nor deny."<sup>62</sup> Just as the solution to the problem of faulty execution had traditionally been to invalidate the will, the solution to the problem of "inherently suspect"<sup>63</sup> extrinsic evidence in the reformation context had traditionally been to exclude it.<sup>64</sup> But there was an alternative, which courts had already used when asked to reform non-testamentary documents executed *inter vivos*, even when reformation was

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substantially necessarily involves conduct that evinces unmistakable testamentary intent.").

59. See Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 569 ("To the extent that a mistake case risks impairing any policy of the Wills Act, it is the evidentiary policy that is in question.").

60. *Id.* Proposed in 1982, the reformation reform fell between the time of the substantial compliance and harmless error proposals. Although introduced after the reformation reform, the harmless error execution reform was adopted by the UPC first, in 1990. The reformation reform did not appear in the UPC until later, in 2008. See John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 8–9 (2012) [hereinafter Langbein, *Major Reforms*] ("In 2008, the Uniform Law Commission amended the Uniform Probate Code to incorporate the Restatement's reformation rule, giving the rule a statutory basis in enacting jurisdictions.").

61. See Langbein, *Excusing Harmless Errors*, *supra* note 10, at 35–36 (asserting a "cogent analogy" between problems of mistaken terms and mistakes in execution).

62. Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 525; see also Gazur, *supra* note 8, at 406 (observing that a will is different from other instruments because it is the statement of the testator who "is always deceased and unable to testify when the instrument is interpreted, raising the possibility of fraud and unreliable, self-serving testimony by those hoping to change the outcome under the will").

63. Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 526.

64. See *id.* at 525 (identifying the testator's primary protection against mistaken or fabricated evidence as the exclusion of all evidence).

sought after the death of the donor. That alternative was to require the evidence of mistake to be “clear and convincing.” This higher standard of proof was described as “the essential safeguard” in the reformation cases.<sup>65</sup> “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.”<sup>66</sup>

The South Australian statute on which Langbein modeled the harmless error reform responded to the evidentiary danger inherent in mis-executed wills by requiring that there be “no reasonable doubt” that the decedent intended the document to serve as his will.<sup>67</sup> This standard, so resembling the “beyond reasonable doubt” standard applicable in criminal, but not civil, cases in the United States, struck Langbein as too demanding.<sup>68</sup> While the preponderance of the evidence standard ordinarily applicable to civil litigation might be appropriate in substantial compliance cases because “complying substantially necessarily involves conduct that evinces unmistakable testamentary

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65. *Id.* at 526, 578; *see also* UNIFORM TRUST CODE § 415 cmt. (UNIF. LAW COMM’N 2010) (“Because reformation may involve the addition [or deletion] of language to the instrument . . . reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required.”).

66. Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 568; *see also id.* (“It is the heavy burden of proof according to a clear-and-convincing-evidence requirement that is the real safeguard against fraud and abuse, rather than the categorical denial of relief.”); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. b (AM. LAW INST. 2015) (explaining that the new strategy to deal with “inherently suspect” extrinsic evidence is not to exclude it altogether, as had been the case in the past, but to “guard against giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof”).

67. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 9 (quoting *Wills Act Amendment Act (No. 2) 1975* (S. Aust.) s 9 (Aust.) (amending the *Wills Act of 1936*, §§–1975 (S. Aust.) s 12(2), 8 S. Aust. Stat. 665)) (instructing courts to deem a document a will if it is satisfied “that there can be no reasonable doubt that the deceased intended the document to constitute his will”).

68. *See id.* at 34 (“[I]n some [of the cases under the South Australian dispensing power statute] adherence to the BRD standard would have required courts to frustrate well-proven testator’s intent under a remedial statute that was designed to achieve the opposite.”).

intent,”<sup>69</sup> he argued that in harmless error cases the clear and convincing evidence standard struck “the appropriate balance.”<sup>70</sup>

The official comments to both the UPC and Restatement reform provisions link the use of the clear and convincing evidence standard for the mistake correction reforms in wills law to the traditional justifications for the use of the clear and convincing evidence standard in other legal contexts. In *Addington v. Texas*,<sup>71</sup> where the standard of proof for involuntary commitment was at issue, the United States Supreme Court described three functions served by elevated proof standards: 1) instructing the fact finder about the degree of confidence in the correctness of factual conclusions, 2) allocating the risk of error between litigants, and 3) indicating the relative importance attached to the ultimate decision.<sup>72</sup> The comment to UPC section 2-503 invokes the risk allocation and importance-signifying functions directly: “By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence . . . Section 2-503 imposes procedural safeguards appropriate to the seriousness of the issue.”<sup>73</sup> The comment to Restatement section 12.1 permitting reformation of mistaken terms refers to all three functions: “The higher standard of proof under this section imposes a heightened sense of responsibility on the trier of fact,” “imposes a greater risk of an erroneous factual determination on the party seeking reformation,” and, by inviting searching appellate court scrutiny, “pressures the trial judge to do an especially careful job.”<sup>74</sup> Thus the clear and convincing evidence standard marks the execution and term correction reforms of the Wills Act as high-stakes decisions in which it is

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69. *Id.* at 37.

70. *Id.*

71. 441 U.S. 418 (1979).

72. *Id.* at 423. The third factor is restated later in the opinion as “impress[ing] the factfinder with the importance of the decision.” *Id.* at 427.

73. UNIF. PROBATE CODE § 2-503 cmt. (amended 2010) (UNIF. LAW COMM’N 2013).

74. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2015). Comment e to Restatement section 12.1 cites *In re Winship*, 397 U.S. 358 (1970), an authority the U.S. Supreme Court relied on in *Addington*. 441 U.S. at 423–28.

especially important for courts to pay close attention and worry about accurate fact-finding.<sup>75</sup> This attention to accuracy is integral to the reform.

The higher degree of certainty required under and provided by the clear and convincing evidence standard responds to another potential problem posed by the relaxation of the formalism of older wills law, the threat of an explosion of previously foreclosed litigation over the validity and meaning of wills.<sup>76</sup> “Perhaps the most recurrent concern in discussions about the merits of a harmless error rule for Wills Act blunders,” Langbein wrote, “is the fear of a litigation imbroglio.”<sup>77</sup> Relatedly, permitting reform of mistakes in will drafting or execution might invite a different slippery slope problem of carelessness in will preparation.<sup>78</sup>

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75. There are many provisions of the UPC other than section 2-503 and section 2-805 providing that a certain fact will be deemed true or presumed under specified circumstances, but permitting the contrary to be shown *if* the facts offered to rebut the presumed state of affairs are established by clear and convincing evidence. *See generally, e.g.*, UNIF. PROBATE CODE §§ 2-104, 2-210, 2-702, 5-311 (amended 2010) (UNIF. LAW COMM’N 2013). The mistake correction reforms can be seen to fit this pattern in that, as explained *infra* text accompanying notes 60–63, they state a presumption that faulty execution bespeaks lack of testamentary intent, but permit the contrary to be shown if proven by clear and convincing evidence. The other UPC provisions relying on clear and convincing evidence are akin to the mistake correction reforms in that they involve facts of unusual importance, such as death, survival or parentage. As is the case with will execution errors and mistake correction, in these cases much also turns on the outcome, and thus the factfinder must both understand the importance of the issue before him and have a high degree of confidence in the factual conclusions reached.

76. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 36 (“[T]he drafters of the South Australian statute sought a higher-than-ordinary standard of proof . . . [because] [t]hey were inviting litigation about an issue . . . that due compliance . . . forecloses, namely, whether to treat an imperfect instrument as a will.”).

77. *Id.* at 37.

78. For recent commentary echoing this concern, see, e.g., Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 KAN. L. REV. 139, 173 (2012) [hereinafter Glover, *The Therapeutic Function*] (“[A] rule of relaxed formalism could encourage testators to execute wills informally and without the assistance of a lawyer.”); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 829 (2014) (“The harmless error power might tend to encourage carelessness and breed litigation, or open up avenues for fraud.”); Kelly, *Toward Economic Analysis*, *supra* note 5, at 878 (“In theory, adopting harmless error or reformation could affect the incentives of a testator or the testator’s attorney” to

The response to the concern about a litigation explosion had two parts. The first focused on the kind of litigation that arises under the automatic-invalidity rule that the reforms set out to change. If a court's only option with respect to an improperly executed will is to deny it probate, then in cases of technical noncompliance there is pressure to interpret the facts in a strained manner to reach the conclusion that despite what might look like evidence to the contrary the will *was* in fact properly executed.<sup>79</sup> This pressure produces a case law that the reformers described as “awkward”<sup>80</sup> and sometimes “dishonest.”<sup>81</sup> The reformers claimed that the new, purposive, analysis required under the reforms' approach would produce better litigation: “The choice is not between litigation and no litigation. In cases of defective compliance the important choice is between litigation resolved purposefully and honestly . . . or irrationally and sometimes dishonestly under the rule of literal compliance.”<sup>82</sup> Litigation that more honestly and directly addressed the real concerns would, in turn, render litigation more “predictable.”<sup>83</sup>

But the reformers' claim went further. Improving the quality of the litigation, they argued, would lead to a reduction in certain kinds of suits: “A harmless error rule actually decreases litigation about Wills Act formalities,” suppressing litigation about “technicalities of compliance.”<sup>84</sup> But what would really reduce the

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take care in executing or reviewing the terms of a will).

79. See Langbein, *Substantial Compliance*, *supra* note 17, at 525

“The rule of literal compliance can produce results so harsh that sympathetic courts incline to squirm,” asking questions such as, “Is a wave of a testator's hand a publication or an acknowledgement. Was the signature ‘at the end’? When the attesting witnesses were in the next room, were they in the testator's presence?” (citations omitted).

80. *Id.* at 526.

81. *Id.* at 525.

82. *Id.* at 526; see also Lindgren, *supra* note 5, at 1016 (“[U]nder the dispensing power the issues litigated will change for the better. Litigation about formalities will lessen; litigation about testamentary intent will increase.”).

83. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 51.

84. *Id.*; see also Langbein, *Substantial Compliance*, *supra* note 17, at 526 (“[T]he standard would be more predictable, and contestants would lose their present incentive to prove up harmless defects.”). Indeed, Langbein speculated that it was the older rule that might foster needless litigation: “[A]t least for execution defects of the near-miss type, the rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in

quantity of suits—the real preventative to the feared “litigation imbroglio”—was the heightened evidentiary standard built into the reforms. “The clear-and-convincing-evidence standard,” Langbein wrote, “would raise the threshold for directed verdict and summary judgment to a level that would deter . . . litigation.”<sup>85</sup> This thought is echoed in the Comment to Restatement section 12.1: “The higher standard of proof . . . imposes a greater risk of an erroneous factual determination on the party opposing reformation . . . . This tilt . . . deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence.”<sup>86</sup> Lest all this seem too hypothetical, the reformers had hard evidence to back it up. Litigation levels in Australia were “astonishingly low.”<sup>87</sup>

Neither, it was argued, would the reforms truly risk the other potential slippery slope problem of inviting careless execution or drafting. The reformed provisions, with their direct mention of evidence, mark the new statutes as rules of litigation. The reformers argued that professional estate planners never rely on litigation;<sup>88</sup> to the contrary, “they opt for maximum formality, in order to be in the best possible position to defend the will against any claim of imposition or want of finality.”<sup>89</sup> Nor would the reforms “attract the reliance of amateurs, nor increase the number of homemade wills.”<sup>90</sup> Those are the wills, of course, about which litigation is assumed to be most frequent,<sup>91</sup> but the

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ways that make the outcomes hard to predict.” Langbein, *Excusing Harmless Errors*, *supra* note 10, at 28.

85. Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 587.

86. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2015).

87. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 51; *see also* UNIF. PROBATE CODE § 2-503 cmt. (amended 2010) (UNIF. LAW COMM’N 2013) (“Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation.”).

88. *See* Langbein, *Substantial Compliance*, *supra* note 17, at 524 (“Precisely because the substantial compliance doctrine is a rule of litigation, it would have no place in professional estate planning.”); Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 587 (“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.”).

89. Langbein, *Substantial Compliance*, *supra* note 17, at 524.

90. *Id.*

91. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 8

reformers asserted that the standard of proof would reduce lawsuits over them.<sup>92</sup> If the proponent's burden of proof of a defective will is "onerous,"<sup>93</sup> as it would be under the clear and convincing evidence standard, then he will "forego the trouble and expense of hopeless litigation."<sup>94</sup>

### C. Reform, Not Revolution

In the end, the reformers conceptualized the harmless error rule as simply a variant on a presumption already implicitly present in the Wills Act.<sup>95</sup> When a will is proper in form, it is presumed to reflect serious, genuine, authentic testamentary intent.<sup>96</sup> But the presumption is rebuttable.<sup>97</sup> Contestants may challenge the presumption raised by due execution by showing *inter alia* that the testator lacked capacity or did not in the circumstances truly intend the executed instrument to serve as

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(explaining that "Wills Act execution blunders arise mostly in home-executed wills"). *But see infra* notes 346–350 and accompanying text (challenging the assertion that mistakes are made only by those who lack means or access to legal advice).

92. *See* Langbein, *Substantial Compliance*, *supra* note 17, at 566 ("By substituting a purposive analysis for a formal one, the substantial compliance doctrine would actually decrease litigation about the formalities. The standard would be more predictable, and contestants would lose their present incentive to prove up harmless defects.").

93. *Id.* at 525.

94. *Id.*

95. *See id.* at 513 ("Proponents . . . are now entitled to presume from due execution . . . the existence of testamentary intent and the fulfillment of the Wills Act purposes.").

96. *See* R.D. Hursh, Annotation, *Weight and Effect of Presumption or Inference of Due Execution*, 40 A.L.R.2d 1223, § 1 (originally published in 1955) ("It is a relatively well-established principle of the law of wills that when it is shown that a will has been attested . . . a presumption arises that the will was duly executed, that is, that it was executed with the formalities required by law."); Langbein, *Substantial Compliance*, *supra* note 17, at 513 (explaining that this presumption serves to "routinize probate" and "transform hard questions into easy ones").

97. *See* Hursh, *Weight and Effect of Presumption or Inference of Due Execution*, *supra* note 96, § 7(a) ("Both the courts which regard the presumption arising from proof of attestation of a will as one 'of fact' and those which regard it as one 'of law,' are in agreement that the presumption is a rebuttable one, and may be overcome by evidence to the contrary.").

his will.<sup>98</sup> The “central insight” underlying the harmless error rule is just the mirror image: “[T]he law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one.”<sup>99</sup> Thus, under the will execution reform, lack of due execution gives rise to the presumption that the document was not intended as the testator’s will, but proponents may challenge that presumption by showing that, despite the execution defect, the testator *did* seriously intend the document to serve as his will.<sup>100</sup> Like other important factual presumptions created by the UPC, the rebuttal must be clear and convincing.<sup>101</sup> The reforms were presented as a significant change in the law, but not a revolutionary one.

Before moving on to the cases applying the clear and convincing evidence standard, it is worth noting three other important limits on the reforms’ ambitions. First, the will execution reform was not intended to displace the Wills Act formalities, which continued to be seen as creating a safe harbor for the testator, who, by complying with the formal execution rules, “assures his estate of routine probate in all but exceptional circumstances.”<sup>102</sup> All the harmless error rule did was recognize that “when the testator has made a mistake in complying with the formalities, it does not follow that the purposes of the Wills Act have been disserved.”<sup>103</sup> Those purposes—ritual, evidence, etc.—remained unquestioned; it was only the automatic-invalidity rule that was to be altered.<sup>104</sup>

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98. See Langbein, *Substantial Compliance*, *supra* note 17, at 500 (“Such fundamental requisites as the testator’s capacity and testamentary intent are presumed from due execution, subject of course to disproof.”).

99. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 3.

100. See Langbein, *Substantial Compliance*, *supra* note 17, at 513 (explaining the function and methods under which the presumption operates).

101. See *supra* note 75 and accompanying text (discussing these presumptions).

102. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 4.

103. *Id.*

104. See *id.* at 6 (“[A] legal system should be able to preserve relatively high levels of formality, in order to enhance the safe harbor that is created for the careful testator who complies fully, without having to invalidate every will in which the testator does not reach the harbor.”).



Second, the reformers repeatedly described the mistakes subject to correction as “innocuous” or “accidental”;<sup>105</sup> paradigmatic examples included situations where one of two required witnesses left the room to use the lavatory before the other witness had completed his signature, where a typist dropped a paragraph, or where a husband and wife each inadvertently signed the will prepared for the other.<sup>106</sup> Notice that in all of these situations, the testator has a fixed intent, but the actions of others, or improper supervision, have caused a problem. Indeed, the reforms explicitly bar relief for failure to execute a document or for post-execution changes of mind.<sup>107</sup> The reforms do not address or remedy irresolution.

Finally, the reforms focus on the interpretation of a document. The “right question,” under the harmless error reform, is “whether the document embodies the unequivocal testamentary intent of the decedent.”<sup>108</sup> What must be established, “in a clear and convincing manner,” is that “the testator adopted the document as his or her will.”<sup>109</sup> Uniform Probate Code section 2-805 only permits reformation of mistaken

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105. John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP., Jan.–Feb. 2004, at 28, 29 [hereinafter Langbein, *Curing Execution Errors*]; see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b rptr’s note (AM. LAW INST. 2015) (referring to “innocent” defects).

106. See Langbein, *Major Reforms*, *supra* note 60, at 7–10 (listing examples of cases involving mistaken wills); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2015) (“A will that fails to comply with one or another of the statutory formalities, and hence would be invalid if held to a standard of strict compliance with the formalities, may constitute just as reliable an expression of the intention as a will executed in strict compliance.”); see also Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 581 (describing as the “prototypical case of clerical error where the case for a reformation is so compelling” as one in which “terms [were] deleted or garbled by a typist”).

107. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. h (AM. LAW INST. 2015) (explaining circumstances under which relief is barred).

108. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 34; see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2015) (“Only a harmless error in executing a document can be excused under this Restatement.”).

109. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 2015).

terms contained in a “governing instrument.”<sup>110</sup> The reforms do not contemplate new, improvisational methods for expressing testamentary wishes. Rather they adopt a traditional picture of the testator setting down his considered, final wishes in an authenticated writing.<sup>111</sup> All that would change is that “harmless errors” in the execution of that writing, or in its terms, could be ignored, so long as the intent that the document serve as the testator’s will is proven by “clear and convincing evidence.”

### *III. The Clear and Convincing Evidence Standard Applied*

Fewer than a dozen states have adopted one or both of the mistake correction reforms either by statute or judicially.<sup>112</sup> How many other states will follow is unclear. One factor that may bear on the choice is experience with the application of the new provisions in the states that have adopted them.<sup>113</sup> That

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110. UNIF. PROBATE CODE § 2-805 (amended 2010) (UNIF. LAW COMM’N 2013).

111. See Langbein, *Excusing Harmless Errors*, *supra* note 10, at 4 (“If legal policymakers were put to the choice between a regime of no Wills Act formalities, on the one hand, versus the Wills Act as traditionally applied on the other hand, there would be a large consensus in favor of the status quo.”).

112. Ten states have adopted UPC section 2-503 in whole or in part: California (CAL. PROB. CODE § 6110(c)(2) (West 2015)); Colorado (COLO. REV. STAT. § 15-11-503 (2014)); Hawaii (HAW. REV. STAT. ANN. § 560:2-503 (LexisNexis 2015)); Michigan (MICH. COMP. LAWS § 700.2503 (2014)); Montana (MONT. CODE ANN. § 72-2-523 (2014)); New Jersey (N.J. STAT. ANN. 3B:3-3 (West 2015)); Ohio (OHIO REV. CODE ANN. § 2107.24 (LexisNexis 2015)); South Dakota (S.D. CODIFIED LAWS § 29A-2-503 (2015)); Utah (UTAH CODE ANN. § 72-2-503 (LexisNexis 2015)); and Virginia (VA. CODE ANN. § 64.2-404 (2015)). California and Ohio limit the harmless error rule to attestation errors, while Colorado and Virginia exclude almost all signature errors. Six states have adopted UPC section 2-805: Colorado (COLO. REV. STAT. § 15-11-806 (2014)); Florida (FLA. STAT. § 732.615 (2014)); New Mexico (N.M. STAT. ANN. § 45-2-805 (LexisNexis 2014)); North Dakota (N.D. CENT. CODE § 30.1-10-05 (2015)); South Carolina (S.C. CODE ANN. § 62-2-601(B) (2015)); and Utah (UTAH. CODE ANN. § 75-2-805 (LexisNexis 2015)). Courts in New York have adopted the principles of Restatement section 12.1. See *In re Estate of Herceg*, 747 N.Y.S.2d 901 (N.Y. Super. Ct. 2002) (applying principles of Restatement section 12.1 to allow extrinsic evidence on the issue of intent).

113. I emphasize that this experience is but one factor. As with much of wills law, little empirical data exists explaining why the reforms have not been more widely adopted. The reasons might range from legislative inertia to disagreement about the likelihood that more wills would be contested to rejection of the concept of the reform.

experience is sobering. Some courts seem to apply the clear and convincing evidence standard as the drafters intended—to uphold wills afflicted with only trivial errors while weeding out challenges where the evidence is truly mixed and conclusions about the testator’s intent seem unreliable. Others, however, have struggled. In one category of cases, courts seem bewildered by what they need to find clear and convincing evidence of. Uniform Probate Code section 2-503, for example, requires a high degree of certainty that the document was intended as decedent’s will. Courts in these cases have inquired instead whether there is a high degree of certainty that a particular dispositional outcome was intended. A second problem involves confusion about what it means for evidence to be “clear and convincing.” Courts have not always been careful about the probative value of the evidence on which they rely. Finally, although the drafters urged appellate courts to police the clear and convincing evidence requirement “with rigor,” standards of review—especially review standards relating to trial courts’ factual findings—are very lenient.

The universe of case law is not particularly large. There is no way to ascertain whether the cases are typical of disputes arising around wills generally or mistaken wills particularly.<sup>114</sup> It is possible that the reforms are working as their proponents expected, deterring litigation in all but the most contested cases.<sup>115</sup>

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114. Even those wills scholars who have relied on sets of reported cases as data have noted the many distortions in the sample. *See, e.g.*, Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1430–32 (2013) [hereinafter Hirsch, *Incomplete Wills*] (noting that “skewing could result from the data set’s limitation to decedents whose estates are probated”). *See also generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (explaining the general problem of selection effects in studies of cases).

115. *But see* Sherwin, *supra* note 8, at 471 (“Economic models of litigation and settlement behavior suggest that a high standard of proof will not have a substantial effect on the volume of disputes actually litigated.”). *See also* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 629–30 (2015) (explaining that empirical studies of probated wills in one California county showed high rates of litigation, suggesting that “probate has become the domain of the messy estate”).

The reformers’ claim that the clear and convincing evidence standard would deter trivial litigation assumes that potential contestants, familiar with the newly-reformed law, will decide whether or not to litigate based on a rational assessment of their chances of prevailing. *See* Langbein, *Excusing Harmless*

That said, if the reforms are meant to correct only well-evidenced technical defects, the cases are troubling. The problem derives from the fact that many of the cases depart from the paradigm the reforms contemplate—a testator with a clearly formed intent which he has tried to express in a single document, but who is tripped up by an errant detail of execution or expression. This testator’s technical mistakes might have an evidentiary solution. But the testators in the cases that seem most to trouble the courts have ambiguous, fluid intentions, often expressed in multiple documents, and their mistakes extend beyond the narrow bounds of the reforms. Courts are as concerned to effectuate the intentions of these more tentative testators as they are the more certain testators the reforms envision. To achieve this goal, they must push against, and sometimes overstep, the narrow boundaries of the reforms.

#### A. Some Benchmark Cases

The paradigm case for applying the will execution reform rule as the reform’s drafters seem to have envisioned it would involve a purely technical execution error coupled with virtually uncontradicted evidence that the noncompliant document was nonetheless intended as the decedent’s will. In this regard, consider *Estate of Berg*.<sup>116</sup> Shirley Berg’s 2003 will was witnessed by two witnesses and contained an attestation clause creating a presumption of due execution.<sup>117</sup> Nonetheless, it was undisputed

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*Errors, supra* note 10, at 39 (“[C]ases that arise in well-settled categories of section 12(2) doctrine would not be litigated under the American pro-waiver rule, for all the reasons that people do not in general bring hopeless lawsuits.”). There is little empirical evidence to support the claim that decisions whether or not to bring will contests are based on assessments of their chances of prevailing at trial, as opposed to intensity of feelings based on family circumstances. See generally Naomi Cahn & Amy Zietlow, “Making Things Fair”: An Empirical Study of How People Approach the Wealth Transmission System, 22 ELDER L.J. 325 (2015) (reporting data from interviews that showed that there was more conflict in remarried and stepparent families than in other families).

116. No. 268584, 2006 WL 2482895 (Mich. Ct. App. Aug. 29, 2006).

117. *Id.* at \*1. On the function of attestation clauses, see DUKEMINIER & SITKOFF, *supra* note 9, at 154 (explaining that attestation clauses give rise to a rebuttable presumption of due execution and may allow a will to be admitted to probate even if the witnesses predecease the testator or cannot recall the events of execution).

that one of the witnesses did not actually see Berg sign the will or acknowledge her signature as required by the Michigan will execution statute.<sup>118</sup> Thus, under traditional law, Berg's will could not be admitted to probate.<sup>119</sup> But Michigan has adopted UPC section 2-503, allowing the court to inquire whether the defect in execution truly raised doubts about Berg's intent.<sup>120</sup> The evidence showed that Berg had called the scrivener and told him that she wanted to update her will, that the newly prepared will conformed to her instructions, that she told the scrivener that she no longer wanted the disposition in her prior will, and that she reviewed and approved the revised will just one or two days before its execution.<sup>121</sup>

The execution defect in *Berg* is exactly the sort of error to which the execution reform statute is addressed. The case involves an attestation mistake, but attestation is, compared to writing and signature, the least essential formality.<sup>122</sup> Failure to probate the will made in 2003 would have resulted in the probate of an earlier will that did not reflect Berg's current intent.<sup>123</sup> No

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118. See *Estate of Berg*, 2006 WL 2482895, at \*1 (detailing the circumstances surrounding the attestation of the decedent's will); see also MICH. COMP. LAWS ANN. § 700.2502(1)(c) (West 2015) (describing the attestation requirements in Michigan).

119. See MICH. COMP. LAWS ANN. § 700.2502(1) (establishing that "a will is only valid" if all formalities are respected).

120. *Id.* § 700.2503.

121. *Estate of Berg*, 2006 WL 2482895, at \*2-3.

122. With respect to the South African experience, Langbein observed that the case law had produced a "ranking of the Wills Act formalities." Langbein, *Excusing Harmless Errors*, *supra* note 10, at 52. "Writing turns out to be indispensable" because "failure to give permanence to the terms of your will is not harmless." *Id.* "Signature ranks next in importance" because leaving a will unsigned raises "grievous doubt about the finality and genuineness of the instrument." *Id.* In contrast, attestation makes only a "modest contribution, primarily of a protective character. But the truth is that most people do not need protecting, and there is usually strong evidence that want of attestation did not result in imposition." *Id.* The comments to UPC section 2-503 and Restatement section 3.3 both emphasize and reinforce this de facto hierarchy.

One scholar has argued that the objectives of the will execution reform would be more effectively achieved simply by abolishing the requirement of attestation. See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 541 (1990) (proposing "abolishing the attestation requirement altogether"); Lindgren, *supra* note 5, at 1025 (arguing that remedying attestation mistakes is the chief goal of the will execution reform).

123. See *In re Estate of Berg*, No. 268584, 2006 WL 2482895, at \*2-3 (Mich.

one disputed the evidence showing that the newer will exactly reflected Berg's final testamentary wishes.<sup>124</sup> Denying probate would have served no purpose. From a reliability standpoint, the error was truly innocuous. And that is what the court held.<sup>125</sup> The case serves as a template, illustrating the paradigmatic application of Uniform Probate Code section 2-503 to save a will from needless invalidation on entirely technical grounds.

What makes *Berg* so appealing in its application of Uniform Probate Code section 2-503 is clarity of the evidence of both the mistake and the testator's intent. But often the evidence is far murkier. *Estate of Windham*<sup>126</sup> dealt with a will that Esther Vera Windham had properly executed on January 17, 2003 devising her estate to her son.<sup>127</sup> Sometime later, Windham had crossed out her son's name on her copy of the will, and written in the name of her daughter.<sup>128</sup> Surrounding this change, Windham had written in the will's margin comments about her family and her reasoning for making the change.<sup>129</sup> In the weeks prior to her death, after she altered her copy of the will, she contacted her attorney and expressed her intention to change the will to benefit her daughter.<sup>130</sup>

Had Windham crossed out her son's name on the January 17, 2003 will itself, she might have revoked the will by physical act.<sup>131</sup> But the markings were made on a copy, not on the original

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Ct. App. Aug. 29, 2006) (detailing the Court's findings with respect to the testator's intent).

124. *Id.*

125. *Id.*

126. No. 287937, 2010 WL 293064 (Mich. Ct. App. Jan. 26, 2010).

127. *See id.* at \*1 (detailing the circumstances under which the will was created and its subsequent changes).

128. *Id.*

129. *Id.*

130. *Id.*

131. The trial court apparently considered this theory; the statute providing for revocation by physical act is cited in the appellate court's opinion. *Estate of Windham*, 2010 WL 293064, at \*1. Under this statute, a will may be revoked by "a revocatory act on the will," if the testator "performed the [revocatory] act with the intent and for the purpose of revoking the will or a part of the will." MICH. COMP. LAWS ANN. § 700.2507(1)(b) (West 2015). The appellate court's opinion does not precisely describe the trial court's reasoning, but there would be no reason even to consider applying UPC section 2-503 if the will had been revoked under the revocation statute.

will, so technically they could not physically revoke it.<sup>132</sup> Again under traditional law, the inquiry would end there, but because Michigan had adopted Uniform Probate Code section 2-503(b)<sup>133</sup> the court could consider whether, notwithstanding the technical problem, Windham's interlineations were intended as a revocation of her will.<sup>134</sup> The answer is not entirely clear. Surely she would not have crossed out her son's name from the will if she remained determined that he should receive her estate. On the other hand, the inclusion of explanatory comments raised the possibility that, in the court's words, "she lacked testamentary intent when she marked up her copy of the original January 17, 2003 will and was only thinking of this marked up copy as a draft."<sup>135</sup> Moreover, her conversations with her attorney subsequent to the alteration could be interpreted to show that she did not believe she had effectively revoked her will simply by marking it up, and that she knew she needed to execute a further document.<sup>136</sup>

*Windham*, then, is quite unlike *Berg* because the technical error is not trivial but raises uncomfortable questions about whether the testator had reached a completely final decision about disinheriting her son in favor of her daughter. Again, unlike *Berg*, the evidence was conflicting and inconclusive. Under these circumstances, excusing the error and giving legal effect to her marks might not implement the testator's wishes. This is exactly what the trial court found, and the appellate court agreed: "We conclude that the trial court did not clearly err by finding that Carr did not establish by clear and convincing evidence that Windham intended for the marked-up copy of the January 17, 2003, will to result in a revocation of her original January 17, 2003, will."<sup>137</sup> This case serves as a template opposite to *Berg*,

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132. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. f (AM. LAW INST. 2015) ("The revocatory act must be performed on the will."). But see *In re Estate of Stoker*, 122 Cal. Rptr. 3d 529 (Cal. App. 2011) (presenting an unusual decision in which revocatory acts performed on a copy of a will were deemed an effective revocation).

133. MICH. COMP. LAWS ANN. § 700.2503(b) (West 2015).

134. *Estate of Windham*, No. 287937, 2010 WL 293064, at \*1 (Mich. Ct. App. Jan. 26, 2010).

135. *Id.*

136. *Id.* at \*2.

137. *Id.*

declining to apply Uniform Probate Code section 2-503 where the error is not innocuous and the evidence is mixed.

*Berg* and *Windham* might be seen as benchmark cases. The attestation error that gave rise to the litigation in *Berg* was precisely the sort of meaningless misstep that had in the past led to unnecessary invalidation of a will the court was confident the testator wanted. The will execution reform was written precisely to avoid such a result, and was applied exactly as the reformers contemplated to permit probate in *Berg*. But the statute was not intended to correct all errors. The revocation error that gave rise to the litigation in *Windham* was not meaningless, and the accompanying evidence could not clarify what the testator truly wanted. The will execution reform was not meant to permit probate where it is unclear that the testator has come to a settled conclusion as to her wishes, and thus the court appropriately declined to apply the statute in *Windham*. Notice also that the clear and convincing evidence standard does seem to be doing some important work in both cases. In *Berg*, the clarity of the evidence of both the execution mistake and the Berg's ultimate dispositive intention makes it easy to excuse the error. By contrast, the lack of clarity in *Windham* is what makes it feel dangerous to excuse the error. Unfortunately, as we shall see, not all cases share the qualities of these benchmark decisions.

### *B. Intending the Will, Intending the Outcome*

Charles Kuralt was an iconic TV personality, known for his "On the Road" stories, for which he traveled America's back roads in a mobile home seeking off-beat people and places.<sup>138</sup> He was also a fraud, carrying on, behind his wife's back and without her knowledge, a nearly thirty year affair with a woman known as Shannon (or, sometimes, as Pat).<sup>139</sup> He and Shannon traveled together and maintained regular contact; he provided support for

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138. See *Charles Kuralt*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Charles-Kuralt> (last visited Nov. 2, 2015) (offering a short biography of Charles Kuralt) (on file with the Washington and Lee Law Review).

139. See *In re Estate of Kuralt*, 981 P.2d 771, 772 (Mont. 1999) (setting out the facts relevant to the case).



her and her children, with whom he was also close.<sup>140</sup> In 1985, Kuralt purchased a twenty-acre parcel of property on the Big Hole River in Montana, where he and Shannon built a cabin.<sup>141</sup> Subsequently, he purchased the two parcels adjacent to this property on both the upstream and downstream sides—together the parcels totaled ninety acres.<sup>142</sup>

It appears that Kuralt wanted Shannon to have title to the Montana property.<sup>143</sup> In 1989, he executed a holographic will in which he devised Shannon “all my interest in land, buildings, furnishings and personal belongings on Burma Road, Twin Bridges, Montana.”<sup>144</sup> The holograph was technically valid in all respects,<sup>145</sup> but it was revoked by the express revocation clause of a formal will Kuralt made in 1994.<sup>146</sup> That will devised all of Kuralt’s real property to his wife, Petie.<sup>147</sup> But Kuralt apparently remained determined that Shannon receive the Montana property. In 1997, he deeded Shannon the original 20-acre parcel, but for secrecy purposes he disguised the gift as a sale; Kuralt had provided Shannon the funds.<sup>148</sup> Kuralt and Shannon allegedly agreed on the same procedure for the remaining acreage,<sup>149</sup> but before that plan could be carried out, Kuralt became ill and was hospitalized in New York.<sup>150</sup> From there, he hand wrote a letter that was a gift to the trusts and estates professors of every American law school. It stated:

June 18, 1997

Dear Pat—

Something is terribly wrong with me and they can’t figure out what. After cat-scans and a variety of cardiograms, they agree

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140. *Id.* at 772.

141. *Id.* at 772–73.

142. *Id.* at 773.

143. *Id.* at 772.

144. *Id.*

145. See MONT. CODE ANN. §§ 72-2-521, 72-2-522 (2015) (setting out the requirements for a valid holographic will).

146. *In re Estate of Kuralt*, 981 P.2d 771, 773 (Mont. 1999).

147. *Id.* at 774.

148. *Id.*

149. *Id.*

150. *Id.*

it's not lung cancer or heart trouble or blood clot. So they're putting me in the hospital today to concentrate on infectious diseases. I am getting worse, barely able to get out of bed, but still have high hopes of recovery . . . if only I can get a diagnosis! Curiouser and curiouser! I'll keep you informed.

I'll have the lawyer visit the hospital to be sure you *inherit* the rest of the place in MT, if it comes to that.

I send love to you & [your youngest daughter,] Shannon. Hope things are better there!

Love,

C<sup>151</sup>

Kuralt used only his initial, but the Montana Supreme Court without directly addressing the issue found the “signature” to be adequate, stating that “Mr. Kuralt’s letter of June 18, 1997 meets the threshold formal requirements for a valid holographic will; . . . the letter is entirely in Mr. Kuralt’s handwriting and was signed by him.”<sup>152</sup> Thus the “only issue” was “whether Mr. Kuralt possessed the requisite testamentary intent in writing the letter.”<sup>153</sup> Notice that, had the Court ruled otherwise on the

151. *Id.*

152. *Id.* at 772 n.1. There is ample precedent in disputed signature cases for holding an initial to be a valid signature. *See generally, e.g., In re Young*, 397 N.E.2d 1223 (Ohio Ct. App. 1978); *In re Morris’ Estate*, 74 Cal. Rptr. 32, 33 (Cal. App. Dep’t Super. Ct. 1969); *Trim v. Daniels*, 862 S.W.2d 8, 10 (Tex. Ct. App. 1992).

153. *In re Estate of Kuralt*, 981 P.2d 771, 772 n.1 (Mont. 1999). Several scholars have noted that UPC section 2-503’s displacement of the formalities of will execution will make the existence *vel non* of testamentary intent the central issue in many cases—a development troubling in light of the lack of any clear test for defining or determining testamentary intent. *See* Kathleen R. Guzman, *Intent and Purposes*, 60 KAN. L. REV. 305, 352 (2011)

The need for attention to testamentary intent has become even more acute over the past two decades. . . . Nowhere is this need more vivid than in jurisdictions adopting or influenced by the Restatement (Third) of Property and the Uniform Probate Code, which come closest to raising intent to a document-determinative position.

Lindgren, *supra* note 5, at 1018 (“Now that any formality can be dispensed if the document was intended to be a will, the real limitation will be testamentary intent.”); Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. (forthcoming 2016) (manuscript at 39–40) [hereinafter Glover, *A Taxonomy*] (“[T]he harmless error rule and the reformation doctrine give courts significantly more discretion to decide issues of testamentary intent than under traditional law.”), available at <http://ssrn.com/abstract=2590209>.

signature question, it would have had to face virtually the identical issue under Montana's version of Uniform Probate Code section 2-503. The question would be whether, despite technical non-compliance with the formal requirements, Kuralt intended the document to be his will.<sup>154</sup>

The District Court granted summary judgment to the Estate, holding that the letter "clearly contemplates a separate testamentary instrument not yet in existence to accomplish the transfer of the Montana property,"<sup>155</sup> but the Supreme Court reversed, finding, in light of the extrinsic evidence of Kuralt's intent to make the transfer, that "there arises a question of material fact as to whether Mr. Kuralt intended, given his state of serious illness, that the very letter of June 18, 1997, effect a posthumous disposition of his 90 acres in Madison County."<sup>156</sup>

The District Court, "following an abbreviated evidentiary hearing" on remand, found that the letter was indeed a valid holographic codicil to Kuralt's formal 1994 will.<sup>157</sup> This time the Montana Supreme Court affirmed.<sup>158</sup> It stated that "the record supports the District Court's finding that the June 18, 1997 letter expressed Kuralt's intent to effect a posthumous transfer of his Montana property to Shannon" and that "the June 18, 1997 letter expressed Kuralt's desire that Shannon inherit the remainder of the Montana property."<sup>159</sup> The Court's conclusion is plausible, but—and this was the Court's gift to trusts and estates professors—the question of Kuralt's intent to transfer the property was *not* the issue in the case. The issue was, as the

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154. See Glover, *A Taxonomy*, *supra* note 153, at 24 (distinguishing "donative" testamentary intent, the intent that the document make a gift effective at death, from "operative" testamentary intent, "concerned with whether decedent intended a document that expresses donative intent to be legally effective").

155. *In re Estate of Kuralt*, 981 P.2d 771, 772 (Mont. 1999).

156. *Id.* at 776.

157. See *In re Estate of Kuralt*, 15 P.3d 931, 933 (Mont. 2000) (recounting the district court's reevaluation of the evidence that found the letter to be a valid holographic will displaying testamentary intent).

158. *Id.*

159. *Id.* at 933–34. See Glover, *A Taxonomy*, *supra* note 153, at 24 (distinguishing "operative" testamentary intent, the intent that a document have legal effect at death, from "substantive" testamentary intent, "concerned with identifying the specific gifts that the decedent intended to make"). The court in *Kuralt* clearly was not drawing distinctions this fine.

Court had correctly stated in its first decision, whether the letter of June 18 was itself intended to transfer the property to Shannon or, stated otherwise, whether Kuralt intended the letter to serve as a codicil to his will. Recall that the will execution reform was not intended to displace the requirement that the decedent's testamentary wishes be embodied in an authoritative document.<sup>160</sup> The issue in *Kuralt* was whether the letter *was* that document. The *Kuralt* case is infamous for its demonstration of how easy it is to slide from one question—whether the decedent intended a document to be his will—to the very different question of whether the decedent intended a particular dispositive outcome.<sup>161</sup>

Courts are clearly capable of differentiating these questions. In *Estate of Smoke*,<sup>162</sup> Clark Smoke made a will in 1977 in which he left only \$1,000 to his son, who was then a young child, with the remainder left to his siblings.<sup>163</sup> Two different letters written much later, in 2001 and 2002, expressed Smoke's view that his son should receive Smoke's interest in acreage jointly owned with Smoke's two surviving siblings. One, to the siblings, stated, "I feel that the property should be partitioned in 3 equal parcels . . . to resolve the issue of who owns what. I am getting older and I want to avoid any problems of being able to devise my share . . . to my son."<sup>164</sup> Neither letter was eligible for probate as a will because

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160. *Supra* notes 98–114 and accompanying text.

161. Another illustration of this slide is *In re Estate of Southworth*, LC No. 09-046567-DE, 2011 WL 2623381 (Mich. Ct. App. July 5, 2011), a case explicitly invoking Uniform Probate Code section 2-503. In *Southworth*, the decedent made, but did not deliver, a deed giving her farm to petitioner. *Id.* at \*1. The court found that UPC section 2-503 applied to defects in deeds as well as wills, and based on the scrivener's testimony that the decedent had told her she wanted the farm to go to the petitioner, held that petitioner should receive the farm property. *Id.* at \*3. "Applying the undisputed factual evidence regarding decedent's intent to the plain language of MCL 700.2503," the Court of Appeals wrote, "the probate court did not err in concluding that clear and convincing evidence of decedent's intent to pass her [farm] to petitioner was presented." *Id.* That may be so, but of course the issue under Uniform Probate Code section 2-503 is not whether the decedent wanted to pass property to the recipient, but whether she intended a particular document to be the means of passing the property.

162. No. 2004-675901-DE, 2007 WL 4415499 (Mich. Ct. App. Dec. 18, 2007).

163. *See id.* at \*1 (describing the events and circumstances that led to litigation).

164. *Id.*

neither was properly signed or witnessed.<sup>165</sup> Smoke's son sought probate under Uniform Probate Code section 2-503, but the court held that probate was properly denied. The court noted that "the proponent of the document must demonstrate that the document itself represents a valid and more recent testamentary instrument" and that it is "not enough" that the document reflects an intent "to someday make changes to his will" or "abandoned the intent embodied and formalized in the will."<sup>166</sup> Although the decedent spoke of wanting to be able to devise the land to his son, "the decedent does not actually purport to devise anything in the letter."<sup>167</sup> Under these circumstances, "the probate court correctly found that respondent had not presented clear and convincing evidence that the decedent intended the letters to replace, amend, or revoke his earlier will."<sup>168</sup>

It might seem overly technical to insist on proof that the document is intended as the testator's will, as opposed to proof that the testator had a particular dispositive wish.<sup>169</sup> But that is what the drafters of the will execution reform provided. They had a declared reason for doing as they did. As we have seen, the reform does not question—but indeed is premised on—the view that a will properly executed serves as a safe harbor for the careful testator, who then may cease to worry that the unreliable, self-serving testimony of others might disturb his formally stated plan.<sup>170</sup> An unbounded inquiry into the testator's over-arching desires could completely disrupt this function. This might have been true even for Kuralt. Kuralt first devised the Montana property to Shannon in a holograph.<sup>171</sup> He then made a formal

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165. *Id.* at \*2.

166. *Id.*

167. *Id.* at \*3.

168. *Id.*

169. *But see* Guzman, *supra* note 153, at 361 (arguing, with respect to testamentary intent, that wills law should "[eliminate] the requirement that the decedent have intended the precise document proffered to be 'The Will'").

170. *See* Langbein, *Excusing Harmless Errors*, *supra* note 10, at 6 ("[A] legal system should be able to preserve relatively high levels of formality, in order to enhance the safe harbor that is created for the careful testator . . . without having to invalidate every will in which the testator does not reach the harbor.").

171. *See In re Estate of Kuralt*, 981 P.2d 771, 773 (Mont. 1999) ("In the event of my death, I bequeath to Patricia Elizabeth Shannon all my interest in

will that did not mention the Montana property specifically, but that did have a separate provision for real property—in favor of his wife.<sup>172</sup> Why? Perhaps the provisions of the formal will were largely inserted by his lawyer in New York, and Kuralt didn't feel able to say much about them lest he expose his long-term affair. Or perhaps he changed his mind. How can we know? Subsequent to executing the formal will, Kuralt deeded the original Montana acreage to Shannon, suggesting he *did* want her to have at least that.<sup>173</sup> But the evidence that he was planning to make the same arrangement for the remaining 90 acres largely came from Shannon. Her interest is obvious. It is no answer to say that time simply cut his Kuralt's gift plan short. Kuralt knew how to write a holograph clearly and straightforwardly devising property; he had done so once before.<sup>174</sup> Yet instead he wrote his chatty letter. Free-form litigation into these questions of Kuralt's "real" intent would be less a reform of the Wills Act than an abandonment of its aspiration that the decedent express his final testamentary wishes in an authenticated document. Presumably this is why the will execution reform permits investigation of a testator's intent that a document serve as a will, not the testator's dispositive intent.

Ambiguity about whether the document was truly intended as the final will *can* capture ambiguity about the testator's final dispositive intent. Again, *Kuralt* is illustrative. Kuralt's final letter speaks of having his lawyer visit the hospital at an unspecified future point in time to be sure that Shannon inherits—presumably via some transaction that the lawyer will facilitate.<sup>175</sup> Read literally, it does not presently give, devise, or

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land, buildings, furnishings and personal belongings on Burma Road, Twin Bridges, Montana.”).

172. *See id.* (“I devise all my real property (including any condominium) which is used by me as a residence or for vacation purposes, together with the buildings and improvements thereon, if any, to my wife, PETIE, if she shall survive me.”).

173. *See id.* at 774 (“On April 9, 1997, Mr. Kuralt deeded his interest in the original 20—acre parcel with the cabin along the Big Hole River to Shannon.”).

174. *See supra* note 144 and accompanying text (providing the text of the holographic will that clearly identifies the property in Montana as meant for Shannon).

175. *See Estate of Kuralt*, 981 P.2d at 774 (“I’ll have my lawyer visit the hospital to be sure you *inherit* the rest of the place in MT. if it comes to that.”).

otherwise transfer anything. Kuralt's earlier holograph, in contrast, was explicit, stating, "In the event of my death, I bequeath to Patricia Elizabeth Shannon all my interest in [the Montana property]."<sup>176</sup> Since Kuralt clearly knew how to draft a document using language expressing present testamentary intent, it is not fanciful to think he lacked such intent with respect to the June 18 letter.<sup>177</sup> Thus, a focus on his intent with respect to the documents alone reveals uncertainty, without resort to a free-form, unlimited inquiry into his overarching wishes. This, at any rate, seems to be the design of the statute, which expressly requires "clear and convincing evidence that the decedent intended *the document or writing* to constitute" his will.<sup>178</sup> And this is why it is noteworthy when courts depart from that design, engaging in a very different inquiry than the statute authorizes.

Another recent and controversial case, *In re Estate of Ehrlich*,<sup>179</sup> illustrates the gap between the two approaches and the potential dangers of moving away from the narrow statutory question. Richard Ehrlich, who had for fifty years been a trusts and estates lawyer, died in 2009, survived by a niece and two nephews.<sup>180</sup> He had had no contact with the niece and one of the nephews for over twenty years, but he had an on-going relationship with the second nephew, Jonathan, and had told his closest friends that Jonathan was the person to whom he meant to leave the bulk of his estate.<sup>181</sup> The only testamentary document that could be located after Richard's death was a fourteen-page instrument with Richard's name and law firm address printed in the margin of each page.<sup>182</sup> The document made specific cash bequests to the niece and

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176. *Id.* at 773.

177. *But see* Estate of Harless, 310 P.3d 550, 554 (Mont. 2013) (declining to probate a letter under section 2-503 because the letter "was not intended to be a will, nor did it provide for distribution of [the testator's] assets upon [her] death").

178. UNIF. PROBATE CODE § 2-503 (amended 2010) (UNIF. LAW COMM'N 2013); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 2015) (requiring that the proponent of an improperly executed will establish "by clear and convincing evidence that the decedent adopted *the document* as his or her will").

179. 47 A.3d 12 (N.J. Super Ct. App. Div. 2012).

180. *See id.* at 13–14 (relating the facts at issue).

181. *Id.* at 14.

182. *Id.*

nephew with whom Richard had been out of contact.<sup>183</sup> Twenty-five percent of the residue was to pass to a trust for the benefit of a friend, Kathryn Harris, and the remaining seventy-five percent of the residue was to pass to Jonathan.<sup>184</sup>

Neither Richard nor any witness signed the document.<sup>185</sup> On the top right-hand corner of the cover page, however, appeared a notation in Richard's handwriting: "Original mailed to H.W. Van Sciver, 5/20/2000."<sup>186</sup> Harry Van Sciver was named as executor and trustee in provisions of Richard's purported will, but he predeceased Richard "and the original of the document was never returned."<sup>187</sup>

The will could only be probated under UPC section 2-503.<sup>188</sup> Most of the opinion is devoted to the controversial question of whether the complete absence of a signature renders UPC section 2-503 inapplicable.<sup>189</sup> A vigorous dissent argued that the reform statute "may be invoked only in a circumstance where the document 'was not executed in compliance' with [the Wills Act]; it does not apply if the document is not executed at all."<sup>190</sup> The majority disagreed, asserting that "the plain language of the provision . . . expressly contemplates an unexecuted Will within its scope. Otherwise what is the point of the exception?"<sup>191</sup>

This part of the opinion is disputable enough<sup>192</sup> and has received considerable attention.<sup>193</sup> But in some ways it is the

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See N.J. STAT. ANN. § 3B:3-3 (West 2005) (codifying UPC section 2-503).

189. See *In re Estate of Ehrlich*, 47 A.3d 12, 16–20 (N.J. Super. Ct. App. Div. 2012) (providing the court's analysis of this central issue).

190. *Id.* at 20.

191. *Id.* at 17.

192. Recall the hierarchy of formalities, with the writing and signature at the apex of importance. *Supra* note 122 and accompanying text. There is also a slippery slope issue. See Langbein, *Excusing Harmless Errors*, *supra* note 10, at 23–24 ("[S]ignature is the formality that permits us to distinguish between drafts and wills. [If probate of an unsigned will is permitted,] the risk arises that any unsigned draft, any scrap of paper, can be argued to be an intended, but unexecuted will.").

193. See, e.g., Anthony R. La Ratta & Melissa B. Osorio, *What's in a Name? Writings Intended as Wills*, 28 PROB. & PROP. 47, 50–53 (2014) (describing *Ehrlich* as "perhaps the most liberal application of the harmless error doctrine



remainder of the opinion that is more remarkable. According to the court, Uniform Probate Code section 2-503 requires that the proponent of a defective instrument prove “by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent, and was thereafter assented to by the testator.”<sup>194</sup> However, Uniform Probate Code section 2-503 does not speak to whether a document expresses the decedent’s “testamentary intent”; it speaks to whether the decedent intended a particular document to serve as his or her will.<sup>195</sup>

As in *Kuralt*, the difference is not simply technical. The court in *Ehrlich* noted that the will’s main beneficiary, Jonathan, “was the natural object of decedent’s bounty”<sup>196</sup> and that “in the years following the drafting of [the defective document], and as late as 2008, decedent repeatedly orally acknowledged and confirmed the dispositive contents therein to those closest to him.”<sup>197</sup> Thus, “the unrefuted proof is that the decedent intended Jonathan to be the primary, if not exclusive, beneficiary of his estate, an objective the purported will effectively accomplishes.”<sup>198</sup> Even though there was unrefuted testimony that Richard wanted to eliminate the provision in favor of Kathryn, and even though the document “is only a copy of the original will sent to decedent’s executor,”<sup>199</sup> the court held that it was properly admitted to probate because any other outcome would have been “intent-defeating.”<sup>200</sup>

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to date”).

194. *Id.* at 18. The requirement that the document have been reviewed by the testator derives from *In re Macool*, 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010). See *infra* notes 162–175 and accompanying text (discussing *In re Macool*). Both cases are criticized in Glover’s *A Taxonomy of Testamentary Intent*. Glover, *A Taxonomy*, *supra* note 153, at 41–48.

195. See UNIF. PROBATE CODE § 2-503 (amended 2010) (UNIF. LAW COMM’N 2013) (“[T]he document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: 1) the decedent’s will . . .”).

196. *In re Estate of Ehrlich*, 47 A.3d 12, at 18. (N.J. Super. Ct. App. Div. 2012).

197. *Id.*

198. *Id.*

199. *Id.* at 19.

200. *Id.*

If the document was only a copy—and that indeed is what it was—then Ehrlich could not have intended *that* document to be his will.<sup>201</sup> Had there not been evidence of a change of heart about the gift to Kathryn, it would be tempting to ignore this problem.<sup>202</sup> But because there was un rebutted evidence that Ehrlich had changed his mind about at least part of the will, it is difficult to agree that the evidence was clear and convincing that he wanted this exact document to be probated. What the court seems to be saying is that the disposition in the purported will comes closer to effectuating Ehrlich’s intent than would intestacy, under which Jonathan would take no more than the disfavored niece and nephew.

The execution reform statute’s framing of the issue—whether the decedent intended the disputed writing to constitute his will—ties the court’s inquiry about intent to a particular instrument. Without that focus, the inquiry risks becoming almost completely detached from anything about the document before the court and, if *Ehrlich* is in any way typical, correspondingly unbounded in scope. Asking whether a given document was intended as a will is quite different from asking whether the decedent would probably prefer its disposition to intestacy. Under that test, any draft could be offered as a will, as could virtually any earlier revoked will, as these documents in most cases show a dispositive intent different from the outcome supplied by the intestacy statutes. We *could* have wills law that asks directly about what outcome might best approximate the testator’s dispositive intent: probate of the will, intestacy, or reformation of terms. However, the history, language, and

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201. Ironically, as noted by the dissent, there are rules under which copies of lost wills can be probated, and the facts might have supported probating the will under those rules here. *Id.* at 24 (Skillman, J., dissenting). As the dissenting judge explained, “Although N.J.S.A. 3B:3-3 does not authorize the admission to probate of the unexecuted copy . . . there is common law doctrine under which a copy of a lost will may be admitted to probate if the party seeking probate can present satisfactory evidence of the original will’s contents . . .” *Id.* at 24. The dissent would have remanded for further findings on whether the common law requirements had been met. *See id.* (discussing what steps would have been taken going forward by the dissent).

202. To some extent the court *did* ignore it. Even after noting that Ehrlich “wished to delete the bequest to his former friend, Kathryn Harris,” *id.* at 14 (majority opinion), the court asserted that the unexecuted document “accurately reflects his final testamentary wishes.” *Id.* at 19.

comments to the reform provisions all confirm that wholesale change of this sort was not what was intended.<sup>203</sup> Again, the purpose of the reforms was to deal with minor, “harmless” errors in the expression of fixed and specific intentions, not to create a new law of wills that would permit wide-ranging inquiries about general donative intent.<sup>204</sup>

Yet, as these cases show, the courts *do* inquire. In terms of the evidentiary considerations that animate the wills law reforms, *Kuralt* and *Ehrlich* alike are “mistakes” and go well beyond the reforms’ literal boundaries. Yet it is hard to fault the courts for trying to carry out the wishes of these testators. Their errors do not line up precisely with the terms of the reforms, but that is because they are not the sort of testators the reforms contemplate. They do not have one, fixed intent that their wills inadvertently fail to express. Rather, they are ambivalent and change their minds over time; they cannot quite get to closure. The reforms, applied literally, will not help them. But the courts do not seem to accept the reforms’ limits. Instead, they push beyond those limits to respond to those testamentary intentions that *can* be discerned, even though they are not the intentions the reforms contemplate.

### C. Clear, but Convincing?

There is no agreed upon formula encapsulating what is “clear and convincing evidence.” Here are some sample statements. The evidence must be “so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.”<sup>205</sup> “Clear and convincing evidence is more than a mere preponderance; it is highly probable evidence free from serious or substantial doubt.”<sup>206</sup> “Clear and convincing evidence is that amount of evidence which produces in

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203. See Part II.C *supra* (examining the development of the will execution and mistake correction reforms in wills law).

204. See *supra* Part II.C (explaining the limited scope of the reforms).

205. *In re Estate of Hoch*, No. 09-00532, 2012 WL 1379846, at \*5 (N.J. Super. Ct. App. Div. Apr. 23, 2012) (quoting *In re Seaman*, 133 N.J. 67, 74 (1993)).

206. *In re Estate of Wilfong*, 148 P.3d. 465, 468 (Colo. App. 2006).

the trier of fact a firm belief or conviction about the existence of a fact to be proved.”<sup>207</sup>

It is common, however, for courts to vary in their formulation and expression of a legal standard. No evidentiary standard can define itself; all are indeterminate to some degree. Still, the idea behind requiring clear and convincing evidence seems intuitive enough; the factfinder need not be absolutely certain, but highly confident, about the fact in issue.<sup>208</sup> Unfortunately, courts often fail to explain fully why they are so confident about the evidence before them, and thus it is not clear how well the clear and convincing evidence standard is functioning as an evidentiary safeguard.

*In re Estate of Hall*<sup>209</sup> is a “textbook” case illustrating the power of UPC section 2-503 in the case of botched will executions.<sup>210</sup> In June 1997, Jim Hall and his second wife, Betty Lou Hall, met with their lawyer, Ross Cannon, to discuss the terms of a joint will.<sup>211</sup> The joint will, once executed, would supersede an earlier will that Jim executed in 1984 in favor of his

207. *In re Isvik*, 741 N.W.2d 638, 648 (Neb. 2007); see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e, rptr’s n.6 (AM. LAW INST. 2015) (listing additional interpretations of the “clear and convincing evidence” standard in various jurisdictions).

208. “Absolute certainty about the truth of assertions can seldom be established,” and thus we can only be more or less confident or seek “a higher degree of probability” than would be attained under the conventional preponderance standard. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2015). The literature on burdens of proof has variously described the functions of proof burdens in terms of confidence, probability, and the allocation of error and risk. See, e.g., Ronald J. Allen, *How Presumptions Should Be Allocated—Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POLY 627, 641 (1994) (discussing allocation of the risk of error between litigants); Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385, 389–94 (1985) (discussing the current body of literature concerning the application of probability theory to the proof process); J. P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 251–54 (1944) (discussing confidence levels).

209. 51 P.3d 1134 (Mont. 2002).

210. See *DUKEMINIER & SITKOFF*, *supra* note 9, at 185 (utilizing *Hall* to illustrate the operation of UPC section 2-503); *STEWART E. STERK ET AL.*, *ESTATES AND TRUSTS* 243 (4th ed. 2011) (utilizing *Hall* to illustrate the practical effects of UPC section 2-503).

211. See *Estate of Hall*, 51 P.3d at 1135 (reciting the factual scenario considered by the court).

daughters from a previous marriage.<sup>212</sup> “After making several changes” to a draft the lawyer had sent them, “Jim and Betty apparently agreed on the terms of the Joint Will” and were prepared to execute it “once Cannon sent them a final draft.”<sup>213</sup> Before the changes were finalized, the meeting ended, at which time “Jim asked Cannon if the draft could stand as a will until Cannon sent them a final version.”<sup>214</sup> Cannon replied that the will “would be valid if Jim and Betty executed the draft and he notarized it.”<sup>215</sup> No one else was in the office at the time to serve as an attesting witness.<sup>216</sup> Thus, Jim and Betty signed the will and Cannon notarized it.<sup>217</sup> Jim died in October 1998 without executing any further testamentary documents.<sup>218</sup>

In the absence of the witnesses required under the applicable Montana wills act,<sup>219</sup> the will could be probated only under UPC section 2-503.<sup>220</sup> The court found the evidence that Jim intended the marked up document to be his final will to be clear and convincing.<sup>221</sup> It relied on the Joint Will’s specific revocation of all earlier wills and on Jim’s instruction, when Jim and Betty returned from Cannon’s office, that Betty should physically destroy the earlier, 1984, will.<sup>222</sup> It also relied on the following colloquy, in which Betty testified:

Question: Do you know if [Jim] gave [Sandra and Charlotte, Jim’s daughters] a copy of the new will?

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* Under UPC section 2-502(a)(3), notarized wills are valid without witnesses. UNIF. PROBATE CODE § 2-502(a)(3) (amended 2010) (UNIF. LAW COMM’N 2013). However, this provision has not been added to Montana’s will execution statute; it certainly was not in effect in Montana when *Hall* was decided.

218. *Id.*

219. *See* MONT. CODE ANN. § 72-2-522(c) (West 2015) (requiring the signatures of two individuals who witnessed the testator’s signing of the same document).

220. MONT. CODE ANN. § 72-2-523.

221. *In re Estate of Hall*, 51 P.3d 1134, 1136 (Mont. 2002).

222. *Id.*

Answer: I don't believe he did, no.

Question: Do you know why?

Answer: Well, I guess because we didn't have the completed draft without all the scribbles on it.

Question: So he thought that will was not good yet?

Answer: No, he was sure it was good, but he didn't give it to the girls. And we didn't give it to my son. We didn't give it to anybody.

Question: Why?

Answer: Because it wasn't completely finished the way Ross was going to finish it.<sup>223</sup>

The court acknowledged that “all the scribbles” left Betty in doubt that the will was yet in final form, but dismissed this doubt in light of her later statement that “[Jim] was sure it was good.”<sup>224</sup> The court added that “[w]hen asked if it were Jim’s and her intent for the Joint Will to stand as a will until they executed another one, she responded, ‘Yes, it was.’”<sup>225</sup> Moreover, “Sandra points to no other evidence that suggests that Jim did not intend for the Joint Will to be his will.”<sup>226</sup> Based on this evidence, the Montana Supreme Court affirmed the District Court’s decision to admit the document to probate.<sup>227</sup>

The evidence is more mixed than the court acknowledged. On one side, the lawyer told Jim and Betty that the marked up document would be valid if signed and notarized.<sup>228</sup> On that basis, apparently, Jim had Betty destroy the earlier will, which was also expressly revoked in the later document.<sup>229</sup> Betty testified that Jim intended the will to stand until they executed another one.<sup>230</sup> But on the other side, Betty also testified, in a part of the colloquy the court ignored, that Jim and Betty did not give the document to their children because “we didn’t have the

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1135.

229. *Id.*

230. *Id.* at 1136.

completed draft” and “it wasn’t *completely finished* the way Ross was going to finish it.”<sup>231</sup> This testimony is consistent with the fact that Jim referred to the document as “a draft” that was not the “final version.”<sup>232</sup> And while Betty testified that it was Jim’s intent as well as her own that the Joint Will should stand, her interest makes her a somewhat unreliable narrator on that point. Only Jim could testify altogether reliably about his intent, and of course—and this is what makes these cases so hard—he was not available at the trial to clarify his intentions.

If the question at hand were “*could* a court credibly decide that Jim intended the mark up as his will?,” the answer almost certainly would be “yes.” But the question at hand is whether (to recur to the formulations with which this section began) the evidence is clear enough to enable a court “to come to a clear conviction, without hesitancy,”<sup>233</sup> of Jim’s intent or whether the evidence is “free from serious or substantial doubt”<sup>234</sup> or produces “in the trier of fact a firm belief or conviction about the existence of a fact to be proved.”<sup>235</sup> The court simply did not address some of the more discomfiting possibilities raised by the evidence. Perhaps Jim left the marked-up will alone because of his attorney’s assurances. However, thinking in a slightly different way, can we be confident that Jim did not have second thoughts about benefitting his daughters? Quite a while passed between the execution of the mark up, in June, and Jim’s death, in October, but this cuts two ways. Perhaps he never formally executed the will because he thought it unnecessary in light of what had been done in June. But perhaps he never formally executed the will because he did not want to finalize it. Neither the trial nor the appellate court seems to have considered these possibilities; certainly they do not appear in the opinion.

The same lack of explicit attention to potentially countervailing evidence can be seen in *In re Estate of Herceg*,<sup>236</sup>

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231. *Id.* (emphasis added).

232. *Id.*

233. *In re Estate of Hoch*, No. 09-00532, 2012 WL 1379846, at \*5 (N.J. Super. Ct. App. Div. Apr. 23, 2012) (quoting *In re Seaman*, 133 N.J. 67, 74 (1993)).

234. *In re Estate of Wilfong*, 148 P.3d 465, 468 (Colo. App. 2006).

235. *In re Isvik*, 741 N.W.2d 638, 648 (Neb. 2007).

236. 747 N.Y.S.2d 901 (N.Y. Surr. Ct. 2002).

which involves the reformation of a will for mistake. Eugenia Herceg's 1999 will contained a residuary clause, but the clause named no beneficiary.<sup>237</sup> Her prior will's residuary clause devised the residue to her nephew Sergio or, if he failed to survive her, to Sergio's wife Columba.<sup>238</sup> Sergio predeceased the testator, and Columba petitioned "for construction of the will by reading the residuary clause to be the same as decedent's prior will."<sup>239</sup> The attorney who drafted the 1999 will offered evidence that when the earlier will was redrafted in 1999 a computer glitch caused "some lines from the residuary clause" to be "accidentally deleted."<sup>240</sup>

"Obviously a mistake has been made," the court noted.<sup>241</sup> The question was whether the mistake could be corrected given the traditional law barring unattested extrinsic evidence.<sup>242</sup> The court found itself facing a conflict between "two long-standing policies of the Law of Wills" one of which would prevent it from supplying via extrinsic evidence "what the testator has not," and the other of which required it "to ascertain the intention of the testator to avoid intestacy."<sup>243</sup> Relying primarily on the Restatement reform—then in draft<sup>244</sup>—that permits consideration of "any evidence of testator's intent, but raising the standard of proof from a preponderance of the evidence to clear and convincing evidence,"<sup>245</sup> the court decided that it could indeed consider extrinsic evidence.<sup>246</sup>

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237. *See id.* at 902 (examining the conflicting clauses in Herceg's will).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 903.

242. *See id.* ("The difficulty in this case is that there is a line of cases holding that where the name of the beneficiary is missing it cannot be supplied by construction or reformation of the will. . . . [E]xtrinsic evidence cannot be admitted unless there is an ambiguity in the will.")

243. *Id.*

244. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 12.1 (AM. LAW INST., Tentative Draft No. 1, 2003).

245. *In re Estate of Herceg*, 747 N.Y.S.2d 901, 904 (N.Y. Surr. Ct. 2002).

246. The court also considered some New York case law, but admitted that its holding was "a significant step beyond" the cited cases. *Id.* at 904–05. "Nevertheless," wrote the court, "it seems logical . . . to choose the path . . . recommended by the Restatement in order to achieve the dominant purpose of carrying out the intent of the testator." *Id.* at 905.



Five facts were adduced in support of the court's conclusion that "the evidence is *clear and convincing* that Columba Pastorino is the intended beneficiary of the residuary" of Herceg's estate.<sup>247</sup> First, not only did the residuary clause of Herceg's prior will give the residue to Colomba if Sergio failed to survive, but the residuary clauses of two earlier wills contained an identical residuary disposition.<sup>248</sup> Second, Herceg had named Columba as alternative executrix in her will, demonstrating that "Columba had not fallen out of favor with the testatrix and been deliberately removed from the residue."<sup>249</sup> Third, one of Herceg's intestate heirs, a niece, who would take if the residuary clause failed, consented to the requested reformation, and was willing to acknowledge that the omission of a name in the residuary clause was a typographical error.<sup>250</sup> Fourth, the attorney-scrivener's affidavit stated that "Mrs. Herceg's express intent was to continue the remainder of her property distribution as it was in the previous will."<sup>251</sup> Finally, there is a legal presumption against intestacy, especially with respect to residuary clauses.<sup>252</sup>

This evidence could have been examined more critically than the case reflects. The residuary clauses of Herceg's prior wills reflect the intent she had when she wrote those wills. But she wrote a new will in 1999,<sup>253</sup> presumably because she had changed her mind with respect to some devises in her earlier wills. We cannot be sure whether her intent with respect to the residue remained constant. The fact that Columba was retained as alternative executrix shows only that Herceg had not changed her mind about Columba in that role. We still cannot be certain whether Herceg changed her mind with respect to the residue. The niece's testimony, self-sacrificing as it may be, is irrelevant to the question at hand; without more information about her relationship to Herceg, it is impossible to determine what she can reliably tell us about Herceg's wishes. Nor is the attorney entirely

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247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 905.

251. *Id.*

252. *Id.* at 903.

253. *Id.* at 902.

reliable, as he might support Columba's interpretation in order to avert a lawsuit that could otherwise arise out of his negligence in failing to complete the residuary clause. The presumption against intestacy is not a fact at all, and even if Herceg did intend to die testate, the presumption tells us nothing about whom she might have wanted to take her residuary estate.

If the purpose of the clear and convincing evidence standard is to produce an especially careful, searching inquiry about will-making errors, the *Hall* and *Herceg* courts' reluctance to consider or discuss alternative interpretations of the evidence is disquieting. Recall that one function of the clear and convincing evidence standard is to impose a higher sense of responsibility on the judge.<sup>254</sup> The reforms contemplate that the judge will respond "by rendering a thorough, reasoned set of findings that deal with the relevant contested facts."<sup>255</sup> But in neither *Hall* nor *Herceg* does the court actually discuss the full range of possibilities presented by the evidence, raising questions whether the standard is functioning as intended to force the trial judge "to do an especially careful job."<sup>256</sup>

Some courts appear to take more care. Consider *In re Macool*,<sup>257</sup> a case with some similarities to *Hall* and *Herceg*.<sup>258</sup> Louise Macool executed a will in 1995 in which she named her husband as the sole beneficiary and her step-children and step-grandchildren as contingent beneficiaries.<sup>259</sup> In 2007 she executed a codicil in which she named as contingent co-executors different step-children than had been named in the 1995 will.<sup>260</sup>

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254. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e (AM. LAW INST. 2003) (positing that the clear and convincing standard "imposes a heightened sense of responsibility on the trier of fact").

255. *Id.*

256. *Id.*

257. 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010).

258. There are, as we will see, also differences. It is unclear whether *Macool* is exactly parallel to any other decision given the court's statement that "the facts underlying this case are so uniquely challenging that they have the feel of an academic exercise, designed by a law professor to test the limits of a student's understanding of probate law." *Id.* at 1261.

259. See *id.* (recounting the various steps taken by Macool in her attempts to plan the division of her estate).

260. *Id.* at 1262.

Less than a month after her husband's death in 2008, she went to her lawyer's office "with the intent of changing her will."<sup>261</sup> She provided the lawyer a handwritten note covering many specific wishes, almost none of which were described in terms immediately comprehensible to anyone other than Louise.<sup>262</sup> But her lawyer discussed the issues with Louise, "using her handwritten notes as a guide,"<sup>263</sup> and in her presence dictated a new will.<sup>264</sup> The lawyer's secretary then typed a draft of the will.<sup>265</sup> Louise left the lawyer's office to have lunch, and the lawyer expected her to make an appointment to review the draft, but—another fact delighting trusts and estates professors everywhere—she died an hour later without ever seeing the draft will.<sup>266</sup>

Even had its instructions been entirely clear, the handwritten note could not be probated as a holographic will because it lacked a signature.<sup>267</sup> The typed will also lacked both signature and witnesses, and thus it, too, could not be probated as a formal will.<sup>268</sup> It was argued that the draft should

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261. *Id.* at 1261–62.

262. The note read:

get the same as the family *Macool gets*

Niece

Mary Rescigno [indicating address] If any thing happen[s] to Mary Rescigno[,] her share goes to he[r] daughter Angela Rescigno. If anything happen[s] to her it goes to her 2 children. 1. Nikos Stylon 2. Jade Stylon

Niece + Godchild LeNora Distasio [indicating address] if anything happe[ns] to [her] it goes back in the pot

I [would] like to have the house to be left in the family Macool.

I [would] like to have.

1. Mike Macool [indicating address]

2. Merle Caroffi [indicating address]

3. Bill Macool [indicating address]

Take

*Id.* at 1262.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 1264.

268. *See* N.J. STAT. ANN. § 3B:3-2(a)(3) (West 2005) (requiring two witnesses to sign the document).

nonetheless be admitted to probate under UPC § 2-503.<sup>269</sup> In addressing this claim, the court conceded that “the record clearly and convincingly shows that decedent intended to alter her testamentary plan.”<sup>270</sup> But that did not conclude the analysis whether there was “evidence establishing, by clear and convincing evidence, that decedent intended the draft will prepared by [the attorney] to constitute her binding and final will.”<sup>271</sup> Although the draft “substantially reflect[ed]” Louise’s handwritten notes,<sup>272</sup> the attorney had included some of the designated contingent beneficiaries, but had omitted others.<sup>273</sup> In addition, he had sought to implement the note’s instruction to “have the house to be left in the family Macool,” but he testified that he was unsure whether he had accurately captured her wishes.<sup>274</sup> Louise had not specifically accepted any of these provisions.<sup>275</sup> Under the circumstances, the court could not “conclude, with any degree of reasonable certainty, that [the attorney’s] approach would have met with decedent’s approval.”<sup>276</sup> Thus, the trial court had been correct in determining that there was “insufficient evidence from which to conclude that decedent intended the particular draft document that [her attorney] prepared to be her will.”<sup>277</sup>

*Macool* is not a total match with either *Hall* or *Herceg*. The testators in *Hall* did review the changes the lawyer made to their

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269. See *In re Macool*, 3 A.3d 1258, 1264 (N.J. Super. Ct. App. Div. 2010) (“We next address plaintiff’s argument that under *N.J.S.A.* 3B:3-3, the draft will should be admitted because there is clear and convincing evidence that decedent intended this document to constitute her will, or alternatively, a partial revocation of her prior will.”) (citing N.J. STAT. ANN. § 3B:3-3 (codifying Unif. Probate Code section 2-503)).

270. *Id.* at 1264.

271. *Id.* In this part of the opinion, the court drew exactly the distinction that the courts in *Kuralt* and similar cases failed to make between “evidence showing decedent’s general disposition to alter her testamentary plans” and evidence establishing, by clear and convincing evidence, that decedent intended an identified document, in this case the draft will “to constitute her binding and final will.” *Id.*

272. *Id.* at 1262.

273. *Id.* at 1264.

274. *Id.* at 1265.

275. *Id.*

276. *Id.*

277. *Id.* at 1263.

will, whereas Louise Macool did not.<sup>278</sup> The problem in *Herceg* was a simple omission, whereas the draft in *Macool* may have included terms of which Louise might have disapproved. The lawyer in *Macool* conceded uncertainty about whether he had accurately implemented Louise's instructions, whereas the lawyers in the other cases seemed confident that they had (in *Hall*) or that they knew how they had failed (in *Herceg*).<sup>279</sup>

But all three cases ultimately turn on whether the evidence of the decedent's intent with respect to the document in question is clear and convincing. This analysis requires not just an enumeration of facts, but a consideration of what they do—and do not—tell us about the testator's perception of the document. The court in *Macool* could have chosen to discuss or emphasize only those facts showing how the dictated will would have carried out the main points in Louise's notes or, in the alternative, those showing how the overall design of the will would have implemented those of her wishes that could actually be discerned. But the court was careful not to do so, and equally careful in evaluating the gaps in what the evidence showed. If the clear and convincing evidence standard is to act as a real safeguard in the implementation of UPC section 2-503 and UPC section 2-805, we should expect courts to confront as honestly as in *Macool* the weaknesses of the evidence offered.

And yet the outcomes of *Hall* and *Herceg* are by no means absurd and, even if their reasoning is on the thin side, it is hard to argue that the cases are wrongly decided. Why do they not feel more controversial? One reason is that the level of formality in both cases was quite high. The will in *Hall* was notarized, which

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278. The court in *Macool* concluded that a writing can be admitted to probate as a will under New Jersey's codification of UPC section 2-503 only if "(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final asset to it." *Id.* at 1265. For a critique of this holding, see Glover, *A Taxonomy*, *supra* note 153, at 42.

279. See *In re Macool*, 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010) (mentioning that the lawyer who drafted the codicil in question indicated that the document was a rough draft, subject to review); *In re Estate of Hall*, 51 P.3d 1134, 1135 (Mont. 2002) (noting that the lawyer who drafted Mr. Hall's will believed that the draft would be valid if it was signed and notarized, even in the absence of attesting witnesses); *In re Estate of Herceg*, 747 N.Y.S.2d 901, 903 (N.Y. Super. Ct. 2002) (describing an affidavit from Ms. Herceg's lawyer, who drafted the will in question, which acknowledges a computer "glitch" that caused the deletion of lines from the residuary clause).

under today's UPC would have validated the will even in the absence of witnesses.<sup>280</sup> Herceg's will was properly executed. A second reason is that both cases involve scrivener errors, not mistakes by hapless testators who were indifferent or oblivious to the requirements for valid wills. Third, the testators in *Hall* and *Herceg* both come closer than Louise Macool to the paradigm contemplated by both the will execution and the mistake correction reforms. The testators seem to have reached final conclusions about the disposition of their property, endeavored to have embodied those decisions in an authoritative document, and were frustrated in achieving their ends only by circumstances out of their control. Paradoxically, the closer the testator conforms to the paradigm, the less careful the courts seem to be about openly confronting evidentiary weaknesses. Yet, if these three facts are determinative, it's hard to see what work the clear and convincing evidence standard is doing. It seems possible that the testators' conformity to the will-making paradigm is more important to the outcome of these cases than the evidentiary standard.

#### *D. Policing the Clear and Convincing Evidence Standard*

Over time, courts might more honestly confront the quality of the evidence before them if appellate courts scrutinized their factual findings and reversed those that were under-analyzed. The Comment to UPC section 2-503 explicitly encourages appellate courts to police the clear and convincing evidence standard "with rigor."<sup>281</sup> However, appellate review is unlikely to have much effect on lower court fact-finding because of the

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280. See *supra* note 143 and accompanying text (noting that the absence of a witness does not invalidate a notarized will under UPC section 2-502(a)(3)).

281. See UNIF. PROBATE CODE § 2-503 cmt. (amended 2010) (UNIF. LAW COMM'N 2013)

By placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (which courts at the trials and appellate levels are urged to police with rigor), Section 2-503 imposes procedural standards appropriate to the seriousness of the issue.

relatively low standard of review applicable in many of the decisions.<sup>282</sup>

As with the definition of “clear and convincing evidence,” courts differ in their formulations of the appropriate standard of review on appeal, some requiring that the trial court’s conclusion be “not clearly erroneous,”<sup>283</sup> and others requiring that it be supported by “competent substantial evidence.”<sup>284</sup> The procedural posture may matter, especially where a case has been decided by summary judgment in the court below.<sup>285</sup> And courts may distinguish between matters of law or of equity, both reviewable “de novo,”<sup>286</sup> and issues of fact, reviewable on a more deferential

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282. On the general problem of appellate review of probate litigation, see John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON AND JOHNSON FORTUNE* (1993))

The risk of error or worse in American probate adjudication is not adequately offset by the prospect of appellate review. Because the presumption of correctness that attaches to the trial court’s findings of fact is so difficult to overcome on appeal, [surrogate court judges have] little to fear. . . . On the Continent, by contrast, the disappointed civil litigant is entitled to review de novo, with no presumption of correctness below. Because review in these systems is retrial, the damage that an arbitrary, ignorant, or corrupt trial judge can cause is significantly reduced.

283. See *In re Estate of Windham*, No. 287937, 2010 WL 293064, at \*1 (Mich. Ct. App. Jan. 26, 2010) (“The standard of review of findings of fact made by a probate court sitting without a jury is whether those findings are clearly erroneous.”); see also *In re Gentile Trust*, No. 289809, 2010 WL 4137450, at \*6 (Mich. Ct. App. Oct. 21, 2010) (reviewing the probate court’s factual findings for “clear error”).

284. See *Morey v. Everbank*, 93 So. 3d 482, 489 (Fla. Dist. Ct. App. 2012) (explaining that it is not the appellate court’s function to conduct a de novo review of the evidence, but simply to “determine whether there exists in the record competent substantial evidence to support the judgment of the trial court”); *Reid v. Sonder*, 63 So. 3d 7, 10 (Fla. Dist. Ct. App. 2011) (“[I]n this case, it is not our function to conduct a de novo review of the evidence, but simply to determine whether there exists in the record competent substantial evidence to support the judgment of the trial court.”).

285. See, e.g., *In re Leach*, No. 304688, 2012 WL 4900516, at \*1 (Mich. Ct. App. Oct. 16, 2012) (“We review de novo a probate court’s ruling on a motion for summary disposition.”).

286. See *Purcella v. Olive Kathryn Purcella Trust*, 325 P.3d 987, 991 (Alaska 2014) (“[T]he superior court’s application of law to fact is reviewed de novo”); *In re O’Donnell*, 815 N.W.2d 640, 644 (Neb. Ct. App. 2012) (“Where an equity question is presented, appellate review of that issue is de novo.”).

standard such as “clear error.”<sup>287</sup> Sometimes courts find an issue such as the appropriateness of trust reformation to involve mixed questions of law and fact and purport to apply one standard (de novo) to the lower court’s legal conclusions and a separate standard (clear error) to its findings of fact.<sup>288</sup>

Courts in some cases have been quite clear that the requirement of clear and convincing evidence does not affect the standard of review: “even where proof of a fact in the trial court is required by clear and convincing evidence, the standard for appellate review is substantial evidence.”<sup>289</sup> This requires deference to the trial court, so “if there is a conflict in the evidence bearing on the question of decedent’s intent, or in the reasonable inferences to be drawn therefrom, we are bound by the trial court’s determination of that conflict.”<sup>290</sup> This deference is all the stronger where the issue involves the credibility of witnesses: “We ‘grant particular deference to the trial court’s factual findings when they are based primarily on oral testimony, because the trial court, not this court, performs the function of judging the credibility of witnesses and weighing conflicting evidence.’”<sup>291</sup> This strong deference could affect the operation of

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287. See *Purcella*, 325 P.3d at 991 (“We review the superior court’s findings of fact for clear error.”). On the history of the separate standards of review in law and in equity, see generally Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 190–217 (1937).

288. *Purcella*, 325 P.3d at 991; see also *In re Estate of Southworth*, No. 297460, 2011 WL 2623381, at \*2 (Mich. Ct. App. July 5, 2011) (reviewing the probate court’s analysis of a will’s language “de novo as a question of law,” but also noting that when the probate court engages in factfinding, a clear error standard of review is applied).

289. *In re Estate of Lara*, No. H039060, 2014 WL 2108962, at \*6 (Cal. Ct. App. May 20, 2014); see also KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* § 340 (7th ed. 2013) (anticipating the problem of substantial error review in cases where the standard of proof is clear and convincing error).

290. *Lara*, 2014 WL 2108962, at \*6 (quoting *In re Estate of Beebee*, 258 P.2d 1101, 1105 (Cal. Dist. Ct. App. 1953)); see also *Gassmann Revocable Living Tr. v. Reichert*, 802 N.W.2d 889, 892 (N.D. 2011) (“[E]ven when reviewing findings made under a clear and convincing evidence standard, determination of the credibility of witnesses is a function of the trial court.”).

291. *Purcella v. Purcella Tr.*, 325 P.3d 987, 991 (Alaska 2014) (quoting *Day v. Williams*, 285 P.3d 256, 260 (Alaska 2012)); see also *In re Estate of Windham*, No. 287937, 2010 WL 293064, at \*1 (Mich. Ct. App. Jan. 26, 2010) (“[T]he reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings of fact . . . because of the probate court’s unique vantage point regarding witnesses [and] their testimony.”).



the UPC and Restatement reforms because, as is evident from the case descriptions in this Article, decisions involving the reforms often turn on the testimony of witnesses who (allegedly) heard the decedent talk about his estate plan, were present when the will was executed, received letters from the decedent, or otherwise have become privy to information possibly relating either to the decedent's circumstances or wishes. In theory, appellate courts could ensure that lower courts applied the clear and convincing standard, while still deferring to lower court credibility determinations. In practice, this may be a tricky line to draw.

It is difficult to tell from the small number of cases explicitly considering the standard of appellate review how great a role deference will play. In one case raising the issue of whether the creator of a trust revoked it by mistake, meaning only to change the trustee, the appellate court, employing a "de novo" review standard, reached an "independent conclusion as to whether there was clear and convincing evidence" about whether the settlor's unambiguous language of revocation accurately reflected her intent.<sup>292</sup> The higher court found the evidence of intent to be "at least evenly balanced."<sup>293</sup> Thus "even taking into consideration that the trial court saw and heard the testimony of witnesses,"<sup>294</sup> the court on appeal reversed the lower court's decision finding that the trust was not revoked.<sup>295</sup> This approach seems entirely consistent with the mistake correction reform, which counsels caution against reformation unless the mistake is proven to a high degree of confidence—confidence that is more difficult to attain if the evidence is truly mixed.

Some of the appellate cases contain statements that seem at odds with the reformers' concept of appellate review, even where

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292. See *In re Isvik*, 741 N.W.2d 638, 648 (Neb. 2007) (analyzing whether a letter signed and mailed by the settlor to the Bank, which unambiguously stated that she was revoking her trust, was actually intended only to discharge the Bank as trustee, and therefore the revocable trust should be subject to reformation based upon mistake).

293. *Id.*

294. *Id.*

295. See *id.* (concluding that "the county court erred in reforming the unambiguous written notice of revocation which Isvik submitted to the trustee").

the outcomes do not. In *Purcella v. Olive Kathryn Purcella Trust*,<sup>296</sup> Kathryn Purcella sought in 2010 to reform an irrevocable trust she had created in 2009, arguing that the trust instrument did not conform to her original intent.<sup>297</sup> Multiple witnesses—including one of her children, a daughter-in-law, and two different lawyers—testified that Kathryn “understood the effect of the trust at the time it was executed.”<sup>298</sup> The court below found these witnesses’ testimony “more credible than Kathryn’s,”<sup>299</sup> and thus denied the reformation. The appellate court affirmed, stating: “Because we give deference to the superior court’s credibility determinations, the fact that Kathryn’s testimony contradicted the testimony of these other witnesses is not a sufficient basis for finding clear error.”<sup>300</sup> Again, the outcome seems entirely consistent with the reformation statute; if the evidence conflicts, it is not “clear and convincing.” Yet the appellate court’s talk of deference seems inconsistent with the idea of “rigorous” review. Had the lower court found Kathryn’s testimony to be more credible than the other witnesses, would the appellate court have deferred to that factual finding, and upheld a trust reformation even though the evidence conflicted?

The same question arises in *Reid v. Sonder*.<sup>301</sup> Here, Sonder’s trust, to be funded by a pour-over from his testate estate, provided that “after giving effect” to enumerated charitable gifts, his nurse Cecilia Reid was to receive a cash gift of \$25,000 and Sonder’s apartment.<sup>302</sup> There were insufficient funds to pay all the gifts, and thus if Reid’s gift was truly to take effect only *after* the charities were paid, she would not receive the apartment.<sup>303</sup> Reid petitioned for reformation, arguing that Sonder did not intend this result, notwithstanding the trust’s explicit terms.<sup>304</sup>

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296. 325 P.3d 987 (Alaska 2014).

297. *See id.* at 991 (claiming misrepresentations in regard to the “nature and purpose of the documents [that] she signed”).

298. *Id.* at 992.

299. *Id.*

300. *Id.*

301. 63 So. 3d 7 (Fla. Dist. Ct. App. 2011).

302. *See id.* at 9 (setting out the provisions of the trust).

303. *Id.*

304. *Id.* at 9–10.

The trial court denied the reformation, and the appellate court affirmed.<sup>305</sup> It stated that “it is not our function to conduct a *de novo* review of the evidence, but simply to determine whether there exists in the record competent substantial evidence to support the judgment by the trial court.”<sup>306</sup> This standard held even though the standard of proof on the reformation issue was “clear and convincing evidence.”<sup>307</sup> The court described the interaction of the two standards as follows:

In denying the petition for reformation, the probate court necessarily determined Reid did not meet her burden of proving the allegations of the petition by clear and convincing evidence. In civil cases prosecuted under this standard, “an appellate court may not overturn a trial court’s finding regarding the sufficiency of the evidence unless the finding is unsupported by record evidence, or as a matter of law, *no one* could reasonably find such evidence to be clear and convincing.”<sup>308</sup>

One judge vigorously dissented on the reformation issue, adducing seven pages’ worth of evidence that Sonder absolutely wanted Reid to take the apartment regardless of what the charities took.<sup>309</sup> In the dissenting judge’s view, the evidence was indeed clear and convincing that Sonder would have wanted his trust reformed.<sup>310</sup> Had the probate court taken this view, the appellate court would have been obliged to affirm.

As in *Purcella*, the lower court in *Sonder* was cautious about reforming unambiguous terms where there was conflicting evidence about the settlor’s intent.<sup>311</sup> Under these circumstances,

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305. *Id.* at 11.

306. *Id.* at 10 (citations omitted).

307. *Id.*

308. *Id.* (quoting *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. Dist. Ct. App. 1998)) (emphasis added).

309. *See id.* at 11–18 (Wells, J., concurring in part and dissenting in part) (arguing that the majority’s “conclusion not only renders superfluous section 736.0415 but ignores the record as well”).

310. *See id.* at 18 (“[B]ecause it was proved by clear and convincing evidence that both the accomplishment of the settlor’s intent and the terms of the trust were affected by a drafting mistake . . . the reformation sought should have been granted.”).

311. *See id.* at 10 (majority opinion) (concluding that the record was not so clear as to allow for judicial reformation of the will).

deferential standards of appellate review will not disrupt the operation of the reform, under which the status quo is maintained unless there is a high degree of certainty that a mistake has been made. But where the evidence is mixed, reasonable trial courts can reasonably reach divergent conclusions about the credibility of witnesses and the weight of the evidence. Thus it is not impossible for a trial court to determine, on mixed evidence, that the evidence supporting a proposed reformation is clear and convincing. If the appellate courts stick by their statements about deferring to the trial court determinations of fact, it is unclear how seriously they will scrutinize these lower court decisions. This is hardly the rigorous policing of the clear and convincing evidence standard that the drafters of the reform prescribed.

While some scholars have suggested, consistent with the reformers, that the clear and convincing evidence standard should lead to a more searching level of appellate scrutiny,<sup>312</sup> it is hardly surprising that a wills law reform provision has not generally altered longstanding rules regarding appellate review. These rules allocate decision-making authority based on the relative institutional competence of trial and appellate courts and on considerations of efficiency.<sup>313</sup> Presumably these factors are as pertinent to litigation over wills as to any other area of litigation. Thus, it is not realistic to expect that appellate scrutiny will push lower courts to be more careful about their fact finding.

However, as is true with respect to the lower courts' somewhat casual application of the clear and convincing evidence standard, the cases on appeal do not as a general matter feel particularly controversial, but they do not feel typical either. Neither *Purcella* nor *Reid* involved the dropped paragraph or misdescribed donee paradigmatic under the mistake correction reform. The settlor in *Purcella* appears simply to have changed

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312. See generally, e.g., Edward H. Cooper, *Civil Rule 50(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 655 (1988); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 KAN. L. REV. 1, 39–40 (1991).

313. See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 444–47 (2004) (outlining and critiquing traditional rationales for appellate court deference).

her mind about the terms of the trust she created.<sup>314</sup> The comments to Restatement section 12.1 specifically address this situation, stating that reformation is not available “to modify a document in order to give effect to the donor’s post-execution change of mind . . . or to compensate for other changes in circumstances.”<sup>315</sup> The facts—and the mistake—in *Reid* are more complicated, involving a technical drafting problem whose significance did not become clear until the lower court interpreted the language of the trust.<sup>316</sup> This was not the classic scrivener’s error that misrendered the testator’s wishes, but rather a case where the settlor never formed a wish pertaining to the choice that ultimately had to be made among gifts.<sup>317</sup> Because the facts of the cases depart from the reform statute’s model, the lower courts in these cases, unlike the courts in *Kuralt* and *Ehrlich*, declined to intervene. Under these circumstances, the deferential standard of review seems beside the point. It is where the lower courts stretch to remedy mistakes outside the paradigm of the reforms that the deferential standard of review might make the most difference. In these cases, the extent of appellate court deference will determine in part whether testators who do not fit the reforms’ model—because they never reached a final decision, or because they changed their mind—will be protected.

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314. See *Purcella v. Purcella Tr.*, 325 P.3d 987, 991–95 (Alaska 2014) (reciting the facts of the case).

315. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. h (AM. LAW INST. 2015). On post-creation changes in circumstances, see *Morey v. Everbank*, 93 So. 3d 482, 491 (Fla. Dist. Ct. App. 2012) (“[D]eterioration in the decedent’s financial circumstances between the time he executed estate planning documents and the date of death . . . did not constitute a ‘mistake’ requiring reformation of trust documents.”).

316. As the court below construed the trust, by including the \$25,000 cash gift in the same paragraph as the gift of the apartment, the attorney made the entire gift to Reid subject to abatement. *Reid v. Sonder*, 63 So. 3d 7, 9 (Fla. Dist. Ct. App. 2011).

317. While there was little dispute that the settlor wished that Reid receive his apartment, it was not clear that the settlor even considered the possibility that the trust would lack sufficient cash to cover all the designated gifts. *Id.* at 10–11.

*IV. Implications*

When we see a will that is properly executed, we tend to assume that it was truly intended by the testator. But we could be wrong. The testator might have lacked mental capacity,<sup>318</sup> or the apparent will might have been written as a joke or stratagem.<sup>319</sup> Conversely, when we see a will that is not properly executed, we think we know that the decedent did not intend the document to serve as his will. But here again we could be wrong. The decedent might not have understood that, for example, his signature needed to be observed by two witnesses or that the two witnesses needed to see each other sign. Or the decedent's lawyer may have failed to competently supervise the will's execution.

How confident must we be about the mistake before we correct the error? In the case of the apparently-improper will, the answer built into the will execution and mistake correction reforms is "very confident." Proof of the testator's intent in these cases can only be based on evidence extrinsic to the will, evidence that the decedent cannot rebut or correct. This evidence is thought in most instances to be inherently unreliable and dangerous. Thus, before steps are taken to correct apparent errors, the evidence of the testator's intent must be "clear and convincing." But if the objective of the clear and convincing evidence standard is to provide reliability, the case law to date is a bit discouraging. Courts do not consistently demand all that much in the way of proof.

In this Part of the Article, I consider the reforms in light of the conventionally-accepted objective of wills law, which is to carry out individuals' wishes with respect to the disposition of their property at death. I first evaluate the reforms' effect on the safe harbor function of wills, assessing why incentives that are used in other areas of law to produce clarity *ex ante* might not

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318. On the requirement of mental capacity, see generally DUKEMINIER & SITKOFF, *supra* note 9, at 266–74; 1–12 SCHOENBLUM, PAGE ON THE LAW OF WILLS § 12.17 (LexisNexis Matthew Bender 2015).

319. See *Fleming v. Morrison*, 72 N.E. 499, 499 (Mass. 1904) (presenting a situation in which a will was executed allegedly for the purpose of inducing the beneficiary to sleep with the testator); Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 542 n.75 (describing "wills" executed as part of Masonic order initiation ceremonies).

work for wills. I then question whether the safe harbor accurately describes all testators' will-making processes. As it turns out, wills law acknowledges two rather different testamentary selves, one who is capable of unambiguous, once and for all decision making, and another who is distinctively less self-reliant in making his wishes clear. These two selves implicate somewhat divergent views of testamentary freedom. The clear and convincing evidence standard is meant to mediate between these selves and these views. Not surprisingly, it has not been altogether effective in doing so.

#### A. Safe Harbors

Let us return to the reforms' premise: it is only human to err. Testators, as well as their attorneys, sometimes will hash up a will's execution, include a mistaken term, or omit an intended provision. These mistakes are often of trivial import and obvious. Rather than pretending that an error was not made, the law can forgive it.<sup>320</sup> But to ensure that the law does not entirely give up on the functionalism of form, it will attend only to errors of a certain kind: "innocuous," "innocent," "harmless" errors. And these errors must be proved by evidence that is "clear and convincing."<sup>321</sup> The will-execution and mistake-correction reforms function as limited exceptions to otherwise-adequate general principles. They are not meant to change the requirements for a valid will, but simply provide a mechanism to prevent meaningless blunders from defeating a testator's convincingly evidenced intent.

This formulation fits into established tropes with which we think about other legal fields. The requirements for due execution of wills and the doctrines precluding extrinsic evidence of intent are rules. Either a will is signed or it is not; either it is witnessed by the specified number of witnesses or it is not; either its words accurately reflect the testator's wishes or they do not.<sup>322</sup> These

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320. See *supra* Part II.A (discussing the logical underpinning of the harmless error doctrine).

321. See *supra* Part II.B (discussing the reasoning behind the harmless error doctrine and the standards courts use in applying it).

322. On rules and standards, see generally Duncan Kennedy, *Form and*

rules make best sense *ex ante*, when the objective is to encourage the testator to provide the clearest, most reliable possible evidence of his desires.<sup>323</sup> But rules will be rules, always overly broad or narrow, and they operate indiscriminately, invalidating intended alongside unintended wills.<sup>324</sup> Post hoc, fact and circumstance based adjustments are needed. These are provided by the reforms, which operate as standards;<sup>325</sup> they do not prescribe the facts that will establish that the testator intended the document to serve as a will or that the terms of the will are mistaken.<sup>326</sup> Standards allow us to look at a wider universe of facts and to achieve results more equitable than the rules permit.<sup>327</sup>

Ordinarily the *ex ante/ex post* framework addresses incentives.<sup>328</sup> Rules operating *ex ante*, like the Wills Act

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*Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Kathleen Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

323. See generally Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125 (2013) [hereinafter Kelly, *Restricting Testamentary Freedom*] (enumerating *ex ante* considerations relevant to the exercise of testamentary freedom); see also Cass R. Sunstein, *Problems With Rules*, 83 CALIF. L. REV. 953, 961 (1995) (“The key characteristic of rules is that they attempt to specify outcomes before particular cases arise. Rules are largely defined by the *ex ante* character of law.”).

324. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 70 (1983) (describing the over- and under-inclusiveness of rules); Kennedy, *supra* note 322, at 1689 (same); see also Sunstein, *supra* note 323, at 1022 (“Because of their *ex ante* character, rules will usually be overinclusive and underinclusive with reference to the arguments that justify them.”).

325. See Sullivan, *supra* note 322, at 66 (stating that standards “spare individuals from being sacrificed on the altar of rules”).

326. See Sunstein, *supra* note 323, at 965 (“With a standard, it is not possible to know what we have in advance.”).

327. While the reforms do not specify which facts must be proven to show a document was intended to be a will or a term is mistaken, they also do not seem to envision an all-things-considered type of analysis. As noted earlier, Uniform Probate Code section 2-503 requires a showing that the decedent intended “the document or writing” to constitute his will, and Uniform Probate Code section 2-805 requires evidence of “what the transferor’s intention was and that the terms of the governing instrument were affected by a mistake.” UNIF. PROBATE CODE § 2-503 (amended 2010) (UNIF. LAW COMM’N 2013). The analysis is not meant to be holistic.

328. See Rose, *supra* note 322, at 591 (describing how the *ex ante* perspective encourages consideration of matters “from the perspective of persons



execution rules, are incentives for clear thinking, clear exposition, and clear authentication. If it is determined that an issue is best addressed *ex ante*, then rule violations are generally not excused, lest we weaken the incentives that led to the adoption of the *ex ante* rule in the first place.<sup>329</sup> On this reasoning, the automatic-invalidity rule for noncompliant wills seems appropriate.<sup>330</sup>

If we take this view, the kind of free-ranging, all-things-considered analysis of a case such as *Ehrlich* is troubling because it threatens the safe harbor function of wills.<sup>331</sup> The forces that conspire against will making are strong;

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similar to the parties at the outset of their relationship, and then figure out how we want them to think and act *before* all contingencies become realities”).

329. *See id.* at 592

To put it baldly, the *ex ante* perspective generally means sticking it to those who fail to protect themselves in advance against contingencies that, as it happens, work out badly for them. No muddiness here. All parties are presumed to be clear-sighted overseers of their own best interests; it is up to them to tie up all the loose ends that they can, and the courts should let the advantages and disadvantages fall where they may. Why? Because this will encourage people to plan and to act carefully, knowing that no judicial cavalry will ride to their rescue later.

330. Glover, *Decoupling*, *supra* note 24, at 625 (“[T]he rule of strict compliance encourages those who desire to distribute their property through wills to comply with the prescribed will-execution formalities.”); *see also* STERK, *supra* note 210, at 228 (“[T]he mysteries created by the formalities channel testators to lawyers, who are trained in . . . preparing wills.”).

331. *See* Pamela R. Champine, *My Will Be Done: Accommodating the Erring and Atypical Testator*, 80 NEB. L. REV. 387, 438 (2001) (“[P]reservation of a safe harbor is essential to a will reformation doctrine.”); Glover, *Decoupling*, *supra* note 24, at 620 (“[W]ill formalities form a safe harbor for the exercise of testamentary freedom. When testators communicate testamentary intent through a written, signed, and attested document, they have assurance that the court will recognize her expression of testamentary intent as legally valid.”); Lindgren, *supra* note 5, at 1031 (“[I]f we gave up a will requirement or . . . requirement of testamentary intent, we would create an administrative nightmare—any evidence would be relevant to show how a decedent would want her property distributed. We would remove the finality or safe harbor of a will and discourage efficient estate planning.”).

The “safe harbor” of wills law differs significantly from safe harbors in other areas of law, where “a safe harbor describes behavior that will not be penalized, and leaves other facts that fall outside the safe harbor to be judged case-by-case.” Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. (forthcoming 2016), available at <http://ssrn.com/abstract=2613543>. For a discussion of safe harbors in tax law, see generally Emily Cauble, *Safe Harbors in Tax Law*, 47 CONN. L. REV. 1385 (2015).

confronting death, property and family in one simultaneous act is not easy. The testator who nonetheless manages in light of these forces to formulate and state his wishes may well want them protected against subsequent assaults—not only by self-interested potential beneficiaries, but from his own post-will changes of mind.<sup>332</sup> The idea here is that once the testator tells his story, he can be confident it will not be altered and that he can, as it were, cross off his to-do list the emotionally difficult task of providing for post-mortem distribution of probate assets.<sup>333</sup> The safe harbor protects him from having to state his reasons for doing as he did, and from attempts to disrupt his well-considered plan.<sup>334</sup> Once he has stated his intent, no more needs to be—or should be—done.

If this is an accurate description of wills, then the old automatic-invalidity and no-extrinsic-evidence rules have clear advantages. While in some cases they will indeed defeat intent, they nonetheless prevent litigation that many testators might find quite troubling in their open exploration of the testators' private lives, sexual affairs, or preferences among friends and relatives. If the point of making a will is to prevent under-informed guessing about what the testator might have or probably wanted, then there is wit to a hard-edged rule that puts such questions out of bounds.<sup>335</sup>

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332. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1047 (2004) [hereinafter Hirsch, *Default Rules*] (describing testators' peace of mind in knowing that their assets will be distributed as they have directed); Orth, *supra* note 8, at 81 ("Some objective criteria by which persons may signal their final desires with respect to succession to their property are desirable, thus allowing subsequent fact-finders to proceed quickly and inexpensively to process their estates.").

333. See Champine, *supra* note 331, at 435 ("[T]he testator understands that he executes the document for the purpose of expressing his wishes. There is no reason he would expect an inquiry to occur after death that could change the dispositive scheme he adopted.").

334. See Lindgren, *supra* note 5, at 1031 ("[T]he problem with probate is that the person whose wishes we want to implement is dead. She can no longer speak. In a system without the safe harbor of a will, a testator might have to go to extraordinary lengths to ensure that her wishes were followed after her death.").

335. For further commentary on whether a relaxation of Wills Act formalities, specifically the adoption of the harmless error rule, actually results in a reduction in the number of "valid" wills being denied probate due to noncompliance with required formalities, see generally Orth, *supra* note 8, at

In wills cases, however, the line of reasoning that focuses on incentives seems to fit imperfectly.<sup>336</sup> The contracting party who fails to put his agreement in writing where the Statute of Frauds so requires will learn from the invalidity of his contract to get it in writing next time. However, testators do not get a second chance; they learn nothing from the invalidation of their wills.<sup>337</sup> Perhaps other potential will-makers will hear what happened to their unfortunate acquaintance, and the Wills Act incentives will operate for them—or send them scurrying to a (competent) lawyer. But this may not be very likely.<sup>338</sup> Or perhaps the incentive is addressed to the lawyer. Yet this, too, is questionable because apart from the prospect of malpractice liability or reputational loss, she is not punished if a will fails due to improper execution. It is not her dispositive wishes that will be defeated. Adding to the complexity is the potential unjust enrichment to unintended beneficiaries if “harmless” mistakes are not corrected.<sup>339</sup>

The reforms appear to seek a legal middle ground. They allow consideration of only a narrow range of mistakes—those involving efforts to enter the safe harbor—and only where failure is proven to a high degree of certainty via the clear and convincing evidence standard. They assume that testators have formed a fixed intent, and address only the problem of inadvertent errors in setting out those wishes in the will or properly executing the completed document. Read literally, the

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336. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 618 (1992) (suggesting that facilitative rules such as those governing will execution do not fit easily into the ex ante/ex post framework).

337. Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 634 (2009) [hereinafter Hirsch, *Text and Time*] (“[E]state planning is a one-time (or at best infrequent) activity.”); Hirsch, *Default Rules*, *supra* note 332, at 1041 (describing how testators are “mortals who, as such, can only die once” and thus may not incur the information costs necessary to learn inheritance rules).

338. See Hirsch, *Default Rules*, *supra* note 332, at 1055 (asserting that the rules of intestacy are “relatively obscure” and expressing doubt that people outside the decedent’s family would know whether a transfer occurred via intestacy as opposed to an estate plan).

339. On the importance of preventing unjust enrichment, see generally Langbein & Waggoner, *Reformation of Wills*, *supra* note 38, at 524–25, 572–77, 590.

reforms preclude, as did prior law, inquiry into broad questions of dispositive intent.<sup>340</sup>

As we have seen, sometimes courts have found it difficult to stay within the limits written into the reforms, and the clear and convincing evidence standard has not prevented them from crossing the lines. But that may be less about the courts than about testators themselves, many of whose will making does not seem to conform to the safe harbor paradigm.<sup>341</sup> Testators often stray from the safe harbors they created in earlier wills, scribbling changes on the document itself, preparing new documents whose connection with their wills is unclear, or otherwise indicating changed views.

Much of the scholarship assessing the possible effects of the harmless error and mistake correction reforms assumes that these non-conforming testators will be people with relatively low levels of either sophistication or resources, or both. Well-to-do testators, presumably better informed than those with fewer resources, will consult attorneys,<sup>342</sup> who, in turn, will only endeavor harder to avoid litigation.<sup>343</sup> It is less affluent testators, who cannot afford good (or any) estate planning who will cobble up their wills at home or scribble their intentions in holographic documents that may or may not be meant to have legal effect.<sup>344</sup>

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340. Langbein specifically considered the safe harbor function of wills and clearly did not mean to undermine it. Langbein, *Excusing Harmless Errors*, *supra* note 10, at 4, 70.

341. See Hirsch, *Default Rules*, *supra* note 332, at 1047–50 (describing resistance to estate planning).

342. See Glover, *The Therapeutic Function*, *supra* note 77, at 173 (expressing concern that “a rule of relaxed formalism could encourage testators to execute wills informally and without the assistance of a lawyer”); Guzman, *supra* note 153, at 353 (arguing that “nebulous” standards for determining testamentary intent “more likely [affect] the holographic will and, thus, testators who are less educated, with . . . less wealth or ability to visit lawyers”); Hirsch, *Default Rules*, *supra* note 332, at 1051 (“[A]ssorted studies have all found a pronounced correlation between wealth and testation—the more prosperous one’s circumstances, the likelier one is to execute a will.”).

343. See *supra* notes 56–57 (describing how draftsmen will strive to avoid litigation).

344. See Hirsch, *Incomplete Wills*, *supra* note 114, at 1426 (“[I]ncompleteness [in wills] typically stems from planning errors, often encountered in wills produced by lay drafters[, who tend to be] testators of lesser means.”); see also Glover, *A Taxonomy*, *supra* note 153, at 17–18 (“When an estate-planning lawyer prepares a will, donative testamentary intent is

The case law challenges these assumptions. In *Kuralt*, *Hall*, and *Herceg*, the testators all had access to—and at some point in the testation process actually used—attorneys.<sup>345</sup> Nor did these testators, especially Kuralt, lack means. The problem seems to be broader than lack of resources, experience, or good advice.

### B. Testamentary Freedom and the Selves of Wills Law

Underneath the old, unforgiving rules of wills law and the reforms lie two somewhat discordant visions of testamentary freedom and of the self who makes a will. Courts and commentators alike agree that, with but a few exceptions related to family protection, the goal of wills law is to carry out the wishes of the testator.<sup>346</sup> In this view, will making is an exercise of freedom of choice; the testator decides what is to be done with his property. The testator envisioned here, the one making choices, is rational in something like the manner presumed by traditional law and economics literature. He is autonomous, capable of making for himself the testamentary decisions that advance his self-determined aims, whatever those aims might be (and they are not for others to judge).<sup>347</sup> A testator capable of

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rarely an issue[, but holographs,] typically drafted by lawmen without the aid of an attorney . . . lack cogent drafting that clearly evinces the testator's intent to make gifts that become effective at death.”).

345. Indeed, one of the saddest aspects of teaching strict-compliance and no-reformation rule cases is that so many of them involve instruments prepared by lawyers. See generally, e.g., *In re Groffman*, [1969] 1 WLR 733 (PD), 1969 WL 26902 (attorney failed to supervise execution ceremony); *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991) (attorneys erroneously believed that a signature on the self-proving affidavit obviated the need for the testator to sign the will itself); *Conn. Junior Republic v. Sharon Hosp.*, 448 A.2d 190 (Conn. 1982) (attorney inserted incorrect charitable beneficiaries, using an outdated will).

346. See Gulliver & Tilson, *supra* note 13, at 2 (“[O]ne fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.”); see also Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 5–18 (1992) (surveying the reasons conventionally thought to justify testamentary freedom); Kelly, *Restricting Testamentary Freedom*, *supra* note 323, at 1133–38 (same).

347. For arguments that we do, however, judge, especially in the context of mental capacity, see generally Jane B. Baron, *Empathy, Subjectivity and*

making these choices is also capable of learning and following the rules of will execution—or of consulting an attorney who can properly guide him. Similarly, he is capable of saying what he means in his will, and meaning what he says. He will make no errors in signing his will because he is anxious to put his intent beyond question. For the same reason, he will clearly and unambiguously state his wishes; that is the very point of the will-making enterprise. *This* testator is deciding once and for all; he seeks the safe harbor. Once he enters it, he needs no further help from the law because he has been self-reliant and has protected himself. For this person, the automatic invalidity rule and the no extrinsic evidence rule are appropriate. More accurately, because this testator's will is properly executed and unambiguously written, the invalidity and evidentiary rules are irrelevant.

But wills law recognizes another self and another view of testamentary freedom. Consider just a few common situations that can disrupt the most rational, well-considered estate plans: a beneficiary named in a will dies before the testator, the testator divorces the spouse named as a beneficiary in his will, or a child is born after the will is executed.<sup>348</sup> The self-determining, self-reliant testator would revise his estate plan in response to these events by writing a new will or preparing a codicil, and we *could* have rules that would in effect require such vigilance by letting the estate plan misfire if the testator failed to make a revision.<sup>349</sup> But we do not. Every state has a statutory scheme that names a substitute taker for the deceased devisee,<sup>350</sup> revokes testamentary gifts to divorced spouses,<sup>351</sup> and provides a share

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*Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043 (1987); Leslie, *supra* note 5.

348. All of these have in common that they involve events arising after the will has been executed and reveal the effect on wills of the passage of time. See generally Hirsch, *Text and Time*, *supra* note 337.

349. See *id.* at 625 n.81 (noting that diligent testators will revise estate plans); *id.* at 630 (“[W]hether lawmakers should update an estate plan . . . where the testator has not lifted a finger to amend the will is ultimately the most interesting . . . question we have before us.”).

350. These rules are “anti-lapse” rules. For an example, see DEL. CODE ANN. TIT. 12, § 2313 (West 2015).

351. For a typical revocation on divorce statute, see FLA. STAT. ANN. § 732.507(1) (West 2007) (“Any provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that

for a “pretermitted” child.<sup>352</sup> These rules contemplate a different self. The testator here, the one who takes no steps to protect his own estate plan, is rational in the more complicated manner described by recent behavioral law and economics literature. *This* testator, however self-determining and self-reliant he might have been at the pre-will stage, is, post-will, fallible and vulnerable. Perhaps due to the changes in circumstances he is emotional; perhaps he is just inattentive. Wills law *could* require him to be more deliberate and self-determining in exercising his testamentary freedom, as it could require him to protect himself, but it does not. Rather, it tolerates his errors and shields his estate from the consequences of his failures.

This tolerance extends beyond failures to keep wills updated. The principle *falsa demonstratio non nocet* (mere erroneous description does not vitiate) allows courts simply to disregard certain mistaken terms, such as incorrect house numbers, that are inessential to the devise at hand.<sup>353</sup> The doctrine of dependent relative revocation protects a testator who revokes his earlier will based on a mistaken belief that he has executed a new, valid will by permitting probate of the earlier, apparently-revoked will in lieu of intent-defeating intestacy.<sup>354</sup> In the case of “secret trusts,” courts permit admission of extrinsic evidence to prove that a seemingly-absolute devise was made based on the devisee’s promise to hold the property in trust.<sup>355</sup> These are all preventable

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person or upon the dissolution or annulment of the marriage.”).

352. For a typical pretermitted child statute, see NEB. REV. STAT. ANN. § 30-2321 (West 2014).

353. See, e.g., *Arnheiter v. Arnheiter*, 125 A.2d 914, 915 (N.J. Super. Ct. Ch. Div. 1956) (describing how a testator devised her interest in “No. 304 Harrison Avenue, Harrison, New Jersey,” but owned No. 317 on that same street and allowing a devise of testator’s interest in “premises known as Harrison Avenue, Harrison, New Jersey”).

354. See generally *DUKEMINIER & SITKOFF*, *supra* note 9, at 229–34; 2-21 *SCHOENBLUM, PAGE ON THE LAW OF WILLS* § 21.57 (LexisNexis Matthew Bender 2015). Sometimes intestacy may come closer than the earlier will to approximating the testator’s intent. For discussion of this problem, see generally George E. Palmer, *Dependent Relative Revocation and its Relation to Relief for Mistake*, 69 MICH. L. REV. 989, 998–99 (1971); Richard F. Storrow, *Dependent Relative Revocation: Presumption or Probability?*, 48 REAL PROP. PROB. & TR. L.J. 497, 508–09 (2014).

355. Some courts allow extrinsic evidence also in the case of the “semi-secret trust,” where the will indicates that the devisee is to hold the property as trustee, but does not describe the trust beneficiary. On secret and semi-secret

mistakes, and we *could* say that those who make them deserve to have their wishes defeated because they have not taken sufficient care in preparing their wills. But again we do not. Preventing unjust enrichment is one part of the story, but another part has to do with acceptance of the propensity to err.

Some of the bungled execution and interpretation cases seem to involve this erring testator. In variations of Kuralt's situation, they write letters or other documents that gesture toward the wills they are going to make—but they do not quite make them. Or they execute wills with ambiguous terms; they don't say what they mean or mean what they say. They seem tentative or ambivalent. They cannot quite bring themselves to the once-and-for-all decisional closure that would allow them to enter the safe harbor. Or, in other cases, involving what might be—but aren't clearly—alterations to a valid will, they do not stick to their previously made decisions. For these testators, the automatic invalidity and no-extrinsic-evidence rules are perilous.

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. Still, the typology can be helpful in understanding the larger objectives of the reforms—and particularly the use of the clear and convincing evidence standard.

Clarity, efficiency, and intent-effectuation would all be easiest to attain were all testamentary selves conventionally rational and self-reliant. The will would literally speak for itself. One way of understanding the automatic-invalidity and no-extrinsic-evidence rules is as efforts to turn potentially-erring selves into self-reliant ones. But for reasons we have seen—the dead do not learn, nor do others learn from their experience—the strategy has been ineffectual.<sup>356</sup>

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trusts, see generally *DUKEMINIER & SITKOFF*, *supra* note 9, at 433; 5-40 *SCHOENBLUM, PAGE ON THE LAW OF WILLS* § 40.13 (LexisNexis Matthew Bender 2015).

356. See *Kennedy*, *supra* note 322, at 1699 (“If the argument for rules is to work, we must anticipate that private parties will in fact respond to the threat of the sanction of nullity by learning to operate the system. But real as opposed



How might the law extend a bit of mercy to the errant testator, without giving up on encouraging at least some self-reliance and protecting safe harbors? The reforms draw the line at a limited category of “harmless” errors, errors of very specific kinds—the errors of testators who have come close to the first testamentary model, who have made once-and-for-all decisions.<sup>357</sup> They then employ the clear and convincing evidence standard to ensure that the errors excused are only errors of the specified kinds. But it appears that it is difficult to cabin judicial sympathy for the erring self to the precisely specified categories. And this is why it is not surprising to see the cases slip from the narrow range of errors specified in the statute to the broader range of issues raised by cases like *Kuralt* and *Ehrlich*.<sup>358</sup>

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Years of applying the automatic invalidity and no-extrinsic evidence rules have been ineffectual at changing erring selves into self-reliant selves. While the rhetoric and some of the reality of wills law has always emphasized the rational, choosing self for whom wills rules are a means for furthering self-determined ends, other parts of wills law protect the emotional, ambivalent self, who for whom wills rules are not a path for self-actualization and, in some cases, may only impede it. Both selves are a part of wills law.<sup>359</sup> If wills law were concerned only with the line between determinate rules and fact-sensitive adjudication, the clear and convincing evidence standard might serviceably address the problem.<sup>360</sup> But the divergence between the self-reliant choosing self and the erring irresolute self—the self that cannot

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to hypothetical legal actors may be unwilling or unable to do this.”).

357. The commentary makes clear that not all errors will or should be corrected. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. h (AM. LAW INST. 2015) (explaining that reformation is not available “to modify a document in order to give effect to the donor’s post-execution change of mind” or “to compensate for other changes in circumstances” such as an asset’s loss of value after the will’s execution).

358. See *supra* Part III.B (discussing the *Kuralt* and *Ehrlich* cases).

359. Cf. Rose, *supra* note 322, at 593 (suggesting that the law oscillates between crystals and mud rather than choosing between them).

360. But see Sherwin, *supra* note 8, at 476 (arguing that the clear and convincing evidence standard is not a compromise but “simply a choice to promote accuracy at some expense to the various benefits of formality rules”).

bring itself to choose—is not a divergence that is evidentiary in nature. Because wills law embraces not only the choosing self but also the erring self, the clear and convincing evidence standard has not, and will not, function as a serious limit on mistake correction.

### *V. Conclusion*

The reforms to wills law's musty will-execution and no-reformation rules were meant as technical fixes to long-recognized technical problems. Lest anyone worry that large-scale change was intended, the reforms permit correction only of a narrow universe of technical defects and require that those defects be proven by clear and convincing evidence.

Examination of the case law applying the clear and convincing evidence standard shows that it has been difficult to cabin the reforms to the specific technical errors that the reformers had in mind. This slippage demonstrates the limitation of thinking about wills entirely in technical terms. For at least some testators some of the time, will making is not the process postulated by the traditional rhetoric of free testation, a process of once-and-for-all self-determining choice. Rather, it is a more tentative, ambivalent, on-going process in which closure is hard to attain. Wills law is pulled in opposing directions, encouraging—but not always demanding—clarity and care.

The courts' problems applying the clear and convincing evidence standard derive in great measure from the difficult facts with which the courts must deal. The very different testamentary selves that the law currently recognizes make and change their wills in very different ways. A true reform of wills law requires open acknowledgement and embrace of these differences.