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ARTICLES

MISTAKES IN WILLS RESULTING FROM SCRIVENERS' ERRORS: THE ARGUMENT FOR REFORMATION

Joseph W. deFuria, Jr.*

A will is usually the most important document of a lifetime. Spouses are provided for, children are rewarded, favored friends are remembered. Others may be intentionally slighted. The instrument encompasses a gamut of emotions; it not only allows the testator to dispose of his property at death, but also forces him to sort out his feelings for those who have most affected his life. Whatever its provisions, a will provides great comfort to a testator; he is secure in the knowledge that his affairs are in order.

Considering the importance of such a document, one might expect that drafting mistakes discovered after the death of the testator would be easy to correct. After all, estate law teaches that the intention of the testator is of paramount concern in construing a will. Ironically, the law makes virtually no allowance for human error in the drafting of this ultimate document.1 Instead, most courts disallow reformation of a will after probate to correct a mistake,2 even if the mistake is a scrivener's error.3 Thus, property may be

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1. Nor does the law allow for mistakes in the execution of the document. Execution statutes must be strictly followed to ensure that a will can be probated. See, e.g., In re Peters, 107 N.J. 263, 526 A.2d 1005 (1987); Dukeminier, Cleansing the Stables of Property: A River Found at Last, 65 IOWA L. REV. 151, 154-57 (1979). Professor John Langbein has suggested that a doctrine of substantial compliance be adopted to cure the results of defective execution. See Langbein, Substantial Compliance With the Wills Act, 88 HARV. L. REV. 489, 513-30 (1975). In other words, if a will "substantially complies" with the applicable execution statute, it should be probated. Id.

2. See T. ATKINSON, LAW OF WILLS § 58, at 273-81 (2d ed. 1953).

3. In this Article, the terms "scrivener" or "drafter" or words of similar import refer to the person who drafts the will, whether a layman or professional. Thus, it encompasses both
dispersed to unintended beneficiaries, and named beneficiaries may receive unintended dispositions.  

Testators would be shocked to learn that relatively “minor” scriveners’ errors can completely thwart their last wishes. Such drafting errors frequently result in unjust enrichment to an unintended beneficiary, against the testator’s wishes.

The rationale behind the general axiom that a will may not be reformed after probate to correct a mistake is that the danger of fraud is too great, especially when the one person who unquestionably knows what was intended—the testator—is unable to testify. Introduction of extrinsic evidence to correct the mistake would sanction unattested testamentary language, in direct violation of the Statute of Wills. Reformation would, therefore, weaken the internal structure of the formalism of estate law.

This Article argues that a scrivener’s error in drafting a will, including one that results in an omission from the document, should be correctable in determining the operation of a will. A drafting error is an innocent misrepresentation made by the drafter to the testator. The effect of the misrepresentation on the testator is similar to the effect of fraud, undue influence, or duress, in that such conduct vitiates the intent of the testator. Con-

ordinary typists and learned attorneys. The is term not intended to cover the author of a holographic will.

4. Discussion of an attorney’s liability for negligently drafting a will, including liability for acts of his agents, is outside the scope of this Article. For further discussion on this point, see generally Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161. 74 Cal. Rptr. 225 (1969) (attorney can be held liable to intended will beneficiaries for failure to fulfill client’s testamentary directions); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (same), cert. denied. 368 U.S. 987 (1962); Johnston, Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner, 67 IOWA L. REV. 629 (1982) (attorney can be held liable for negligent estate planning).

5. Generally, scriveners’ mistakes are imputed to the testator because once the testator has executed his will, he is deemed to have read it and to know of its contents. See Leonard v. Stanton, 93 N.H. 113, 36 A.2d 271 (1944) (scrivener’s error binding on testator); Farmers & Merchants Bank v. Farmers & Merchants Bank, 158 W. Va. 1012, 1019, 216 S.E.2d 769, 773 (1975) (same); G. THOMPSON, THE LAW OF WILLS § 136, at 215 (3d ed. 1947) (same); see also Mahoney v. Grainger, 283 Mass. 189, 191, 186 N.E. 86, 87 (1933) (draftsman’s error did not authorize court to reform executed will).

6. Professors John Langbein and Lawrence Waggoner, advocates of a “remedy-wrong-doing” rationale (that there should be a remedy for the “wrong doing” or mistake), propose that mistake cases should follow the rationale behind the imposition of a constructive trust, which allows reformation whenever an error regarding a beneficiary has been made in drafting a will. See Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?, 130 U. PA. L. REV. 521, 571-77 (1982).

7. Earlier commentators reasoned that attempted reformation constituted a collateral attack on the decree of the probate court, or that a request for reformation actually constituted one for specific performance, which could not be granted because there was no consideration between testator and beneficiary. G. THOMPSON, supra note 5, § 137.
sequently, courts should be able to cure a scrivener's mistake by allowing in extrinsic evidence to prove the error, just as they now do in cases involving fraudulent, deceptive, or unsavory conduct. Any danger of evidentiary fraud could be minimized, if not eliminated, by requiring the mistake to be proven by clear and convincing evidence.

This Article first examines the orthodox view of scriveners' errors within the general framework of rules that virtually prohibit reformation for mistake. Next, this Article analogizes the effect of a drafter's mistake to that of an innocent misrepresentation, which, from the viewpoint of the admissibility of extrinsic evidence, should be treated in the same manner as a claim of fraud, undue influence, or duress. Within this overall context, the growing trend among courts to liberalize the traditional rules regarding the admission of extrinsic evidence in will construction cases to ascertain the intent of the testator takes on new meaning. This Article then explores other areas of estate law in which some courts routinely allow corrections to be made in wills, either under the guise of construction or by way of more conventional dogma. Finally, this Article compares its premise with established rules of reformation for *inter vivos* instruments, particularly will substitutes, to reinforce the argument that a scrivener's mistake, including one that results in an omission from a will, should be correctable.

**I. The Conventional View: No Reformation for Mistake**

Courts have always regarded the testator's intent as the touchstone in construing or interpreting the language of a will, but are generally unwilling to grant reformation to correct a mistake in a will after its probate. This attitude is explained in part by a traditional insistence on strict compliance with the formalistic requirements of the Statute of Wills, and in part by a more practical concern about evidentiary fraud in permitting the introduction of extrinsic evidence to prove a mistake when the testator is no longer available to testify. Thus, the testator's intent, absent any ambiguity in the

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9. Id. at 26-27, 448 A.2d at 202.

10. If the mistake is detected before probate, sufficient grounds may exist for invalidating the instrument as a will, and extrinsic evidence may be admitted to prove that the document lacks *animus testandi*. See, e.g., Fuller v. Nazal, 259 Ala. 598, 67 So. 2d 806 (1953).

11. See, e.g., Lomax v. Lomax, 218 Ill. 629, 634-35, 75 N.E. 1076, 1078 (1905) (unambiguous language cannot be reformed); Hoover v. Roberts, 144 Kan. 58, 60-61, 58 P.2d 83, 84-85 (1936) (mistake cannot be corrected by excising one term and substituting another); Van Elten v. Manufacturers Nat'l Bank, 119 Mich. App. 277, 287, 326 N.W.2d 479, 484 (1982) (probate court does not have equitable jurisdiction to entertain reformation action); Barner v. Lehr, 190
terms of the will, must come from the actual language of the instrument itself and not from conjecture about what the testator may have intended by the language he used. The inquiry focuses on the meaning of the words chosen by the testator, not on the meaning which the testator may have had but did not express. The central question is, therefore, "not what the testator meant to say but what he meant by what he did say." Most commentators have reiterated the "no reformation for mistake" rule with little discussion. Despite the overriding importance which courts attach to the intent of the testator in determining the operation of a will, courts will not permit extrinsic evidence to show what the testator truly intended, even if it is certain that there has been a mistake. Testamentary formalities clearly take precedence over substantive considerations.

Courts have also applied the no reformation rule when the mistake is a result of a scrivener's error, whether from ignorance, oversight, or inadvertence.

Miss. 77, 90, 199 So. 273, 277 (1940) (court cannot correct mistaken terms); Sadler v. Sadler, 184 Neb. 318, 322, 167 N.W.2d 187, 189 (1969) (citing G. THOMPSON, supra note 5, § 136) (testator's execution of his will ratifies any mistakes therein); Chrisman v. Cornell Univ., 1 N.J. Super. 486, 489-90, 62 A.2d 157, 158-59 (Ch. Div. 1948) (court cannot correct errors of a testator); Brokaw v. Peterson, 15 N.J. Eq. 194 (Prerog. Ct. 1854) (reformation is not available for mistake); In re Estate of Cruse, 103 N.M. 539, 541, 710 P.2d 733, 735 (1985) (extrinsic evidence is admissible to interpret a will, but is not admissible to show a mistake by the testator); In re Arnold's Estate, 200 Misc. 909, 911-12, 107 N.Y.S.2d 356, 358-59 (Sur. Ct. 1951) (testator's mistaken belief about living relatives is not grounds for denying probate to will), aff'd, 282 A.D. 670, 122 N.Y.S.2d 804 (1953).

12. Different rules relating to the admissibility of extrinsic evidence often apply when courts construe ambiguous will provisions. For further discussion on this point, see infra text accompanying notes 61-78.


15. See Steinbrenner v. Dreher, 140 Ohio St. 305, 309-10, 43 N.E.2d 283, 285 (1942) (holding that the actual words chosen by a testator determine her intent).

16. In re Estate of Winslow, 259 Iowa 1316, 1322, 147 N.W.2d 814, 818 (1967) (quoting In re Estate of Hogan, 259 Iowa 888, 889, 146 N.W.2d 257, 258 (1966)). Although extrinsic evidence may not be introduced to ascertain the intent of the testator, evidence of the testator's surroundings, including his family situation and his business and financial circumstances, is generally admissible to help the court understand how the language used in the will applies to the facts of the case. See Fidelity Union Trust Co. v. Noll, 125 N.J. Eq. 106, 107, 4 A.2d 379, 380 (Ch. 1939); In re Estate of Wendl, 37 Wash. App. 894, 897, 684 P.2d 1320, 1323 (1984).

17. See, e.g., Carr, Judicial Treatment of Ambiguous, Mistaken, and Uncertain Testamentary Dispositions: An Analysis of Iowa Cases, 24 Drake L. Rev. 409, 415 (1975); see also 4 W. PAGE, WILLS, § 32.9, at 270 (Cum. Supp. 1990) (evidence not admissible to show testator's intent where error was by draftsman); G. THOMPSON, supra note 5, § 137, at 426 (courts rarely, if ever, grant reformation of a will for mistake); 3 J. WIGMORE, EVIDENCE, § 2471, at 241 (Chadbourn rev. ed. 1970) (evidence admissible to interpret ambiguous words and phrases of document). But see Langbein & Waggener, supra note 6, at 577-86 (suggesting a principled reformation doctrine in lieu of "no reformation for mistake" rule); Warren, Fraud, Undue Influence, and Mistake in Wills, 41 Harv. L. Rev. 309 (1928) (generally discussing mistake and its application in several early cases).
tence. Courts have reasoned that to allow reformation would be to permit changes to the language of the document in direct violation of the Statute of Wills. Interpretation or construction is one thing; altering the language of the instrument after the death of the testator is another. Courts have treated omissions from wills caused by scriveners’ errors similarly, notwithstanding proof positive that the omission was a mistake. Even proffered testimony by the scrivener that the mistake was his rather than the testator’s has not persuaded courts to admit such evidence and reform the document. Fol-

18. See In re Estate of Blackshill, 124 Ariz. 130, 602 P.2d 511 (Ct. App. 1979) (reformation denied despite scrivener’s testimony that he made a mistake); Brunk v. Merchants Nat’l Bank, 217 Ark. 499, 504-05, 230 S.W.2d 932, 935 (1950) (mistaken amount of bequest will not trigger reformation); In re Estate of Mullin, 128 So. 2d 617 (Fla. Dist. Ct. App. 1961) (validity of codicil unaffected by scrivener’s error); Rivard v. Rivard, 285 Ill. 564, 121 N.E. 212 (1918) (will cannot be reformed for scrivener’s error); Fowler v. Black, 136 Ill. 363, 378, 26 N.E. 596, 598 (1891) (scrivener’s mistake not grounds for reformation of a deed); Union Planter’s Nat’l Bank v. Inman, 588 S.W.2d 757, aff’d, 588 S.W.2d 763 (Tenn. Ct. App. 1979) (court would not set aside will because of mistake of law or fact by the testator); In re Estate of Gray, 265 Wis. 217, 61 N.W.2d 467 (1953) (testimony of attorney-draftsman held inadmissible to show that the wording of a bequest was result of mistake); In re Will of Klagstad, 264 Wis. 269, 58 N.W.2d 636 (1953) (court had no jurisdiction to correct attorney’s substitution of word “nieces” for “nephews”).

19. See Hall v. Killingsworth, 253 F.2d 43 (D.D.C. 1958) (per curiam) (court will not supply name of beneficiary which was unwittingly omitted); Azar v. Azar, 262 Ala. 547, 550, 80 So. 2d 277, 280 (1955) (parol evidence not admissible to show terms that testator intended but did not use); In re Estate of Townsend, 221 Cal. App. 2d 25, 27-28, 34 Cal. Rptr. 275, 277 (1963) (court will not correct mistake of omission); Bimslager v. Bimslager, 323 Ill. 303, 306, 154 N.E. 135, 136 (1926) (evidence not admissible to add words to will); Stevenson v. Stevenson, 285 Ill. 486, 494, 121 N.E. 202, 205 (1918) (same); Engelthaler v. Engelthaler, 196 Ill. 230, 234-35, 63 N.E. 669, 670 (1902) (court declined to supply omitted name of beneficiary); Leibrandt v. Adler, 30 Ill. App. 2d 257, 262, 174 N.E.2d 228, 230 (1961) (extrinsic evidence not admissible to add terms to will); In re Estate of Fairley, 159 N.W.2d 286, 290 (Iowa 1968) (obvious omission not correctable); Hoover v. Roberts, 144 Kan. 58, 60-61, 58 P.2d 83, 84 (1936) (substitution of one phrase for another not permitted); Ratliff v. Yost, 263 Ky. 239, 248-49, 92 S.W.2d 95, 99 (1936) (terms will not be added to will on basis of extrinsic evidence); Deboe v. Brown, 231 Ky. 682, 687, 22 S.W.2d 111, 114 (1929) (extrinsic evidence inadmissible to add words to will); De Benedictis v. De Benedictis, 21 N.J. Super. 479, 483, 91 A.2d 368, 370 (Ch. Div. 1952) (omission made by a scrivener not correctable by parol evidence); In re Estate of Salvan, 132 A.D.2d 662, 664, 518 N.Y.S.2d 154, 156 (1987) (court will not correct omission); In re Kronen, 114 A.D.2d 1033, 1033, 495 N.Y.S.2d 471, 472 (1985) (court will not rewrite will or supply an omission), aff’d, 67 N.Y.2d 587, 496 N.E.2d 678, 505 N.Y.S.2d 589 (1986); Burger v. Hill, 1 Bradf. 360, 374 (N.Y. Sur. Ct. 1850) (court had no jurisdiction to supply omission by inserting words in will); Yates v. Cole, 54 N.C. (1 Jones Eq.) 75, 77-78 (1853) (inadvertently omitted words from will cannot be supplied); Farah v. First Nat’l Bank, 624 S.W.2d 341, 346 (Tex. Ct. App. 1981) (court will not supply alleged omission from will); Holcomb v. Newton, 226 S.W.2d 670, 672 (Tex. Civ. App. 1950) (court will not supply omitted name of beneficiary); Graham v. Graham, 23 W. Va. 36, 41 (1883) (court refused to insert necessary clause to rectify omission).

following the general rule for mistakes, most commentators have reaffirmed that rule with respect to omissions.\textsuperscript{21} Even though courts profess great concern about ascertaining the true intent of the testator, they often disregard that very intent when construing the provisions of a will in cases involving scriveners' mistakes, including omissions. Courts forget that language has enough limitations of its own without imposing additional barriers to hinder its interpretation.

There is, however, one type of case where courts appear willing to rectify mistakes, including those of a scrivener. When the mistake is apparent from the face of the will, and the testator's intent is also clear from the document itself, courts will correct the error.\textsuperscript{22} Because the written words furnish the basis for the correction, courts remain consistent in their concern for testamentary formalities. Courts react the same way to cases involving mistakes of omission by the testator or scrivener, provided that the intent of the testator is apparent from the will.\textsuperscript{23} One state even requires the correction of

directed scrivener to write something different from that which appears in will is inadmissible), \textit{aff'd}, 168 Conn. 411, 362 A.2d 834 (1975); \textit{In re} Estate of Winslow, 259 Iowa 1316, 1321-23, 147 N.W.2d 814, 818 (1967) (scrivener's testimony is not admissible to add to terms of will); Schwartz v. BayBank Merrimack Valley, N.A., 17 Mass. App. Ct. 169, 176, 456 N.E.2d 1141, 1146 (1983) (extrinsic evidence is inadmissible to show inadvertent omission by testator or mistake by scrivener), \textit{review denied}, 391 Mass. 1102, 459 N.E.2d 825 (1984); Lee v. Gaylord, 239 Mich. 274, 279-80, 214 N.W. 104, 106 (1927) (court cannot correct omission based on parol evidence from the scrivener); Goode v. Goode, 22 Mo. 518, 522 (1856) (evidence is not admissible to fill in words omitted by drafter); Andress v. Weller, 3 N.J. Eq. 604, 610 (Prerog. Ct. 1832) (omission made by scrivener in preparing will cannot be supplied by parol evidence); \textit{In re} Stern's Will, 117 N.Y.S.2d 374, 375 (Sur. Ct. 1950) (omission may not be supplied by oral testimony); \textit{In re} Estate of Kelly, 473 Pa. 48, 54, 373 A.2d 744, 747 (1977) (declarations made by testator to scrivener are not admissible to add to terms of will); Harrison v. Morton, 32 Tenn. (2 Swan) 461, 469 (1852) (proof of omission is not allowed into evidence); Farmers & Merchants Bank v. Farmers & Merchants Bank, 158 W. Va. 1012, 1019, 216 S.E.2d 769, 773 (1975) (parol evidence of draftsman may not be admitted to fill in a blank in will).

\textsuperscript{21} See, e.g., Gray, \textit{Striking Words Out of a Will}, 26 \textit{Harv. L. Rev.} 212, 215 (1913); see also T. Atkinson, \textit{supra} note 2, § 58, at 274-75 (no remedy on probate for mistakes of omission).


\textsuperscript{23} See Cook v. Worthington, 116 Ark. 328, 333, 173 S.W. 395, 397 (1915); \textit{In re} Estate of Wood, 226 So. 2d 46, 50 (Fla. Dist. Ct. App.), \textit{cert. denied}, 232 So.2d 181 (Fla. 1969);
mistakes or omissions in wills if they are apparent either from the context of the will or from extrinsic evidence.24

Although the prevailing view of "no reformation for mistake" is widespread, courts in a few jurisdictions have corrected mistakes and omissions either by substituting one word or phrase for another,25 or by allowing the scrivener's testimony to fill in a gap.26 These decisions are atypical and seem to be based on a belief that the testator's actual intent is more important than the strict ritual and evidentiary concerns that testamentary formalities address.27

Generally, however, courts are unwilling to correct a mistake in a will after probate, even though the error is that of the drafter. If finding the

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24. The testator's own declarations of intent, however, are not admissible. See OKLA. STAT. ANN. tit. 84, § 174 (West 1970 & Supp. 1987). This section also codifies the orthodox rule that extrinsic evidence may be admitted to explain a latent ambiguity in a will. For further discussion on this point, see infra text accompanying notes 69-75.

25. See, e.g., In re Estate of Ikuta, 64 Haw. 236, 244-45, 639 P.2d 400, 406 (1981); Burrier v. Jones, 338 Mo. 679, 685, 92 S.W.2d 885, 887 (1936) (en banc); Paris v. Erisman, 300 S.W. 487, 490 (Mo. 1927); Baker v. Grossglauser, 250 S.W. 377, 379 (Mo. 1923); Estate of Devries, 36 N.J. Super. at 35-36, 114 A.2d at 745-46; Bottomley v. Bottomley, 134 N.J. Eq. 279, 288, 35 A.2d 475, 481-82 (1944); Barrett v. Barrett, 134 N.J. Eq. 138, 148, 34 A.2d 579, 585 (1943); Herbert v. Central Hanover Bank & Trust Co., 131 N.J. Eq. 330, 337, 25 A.2d 7, 11 (Ch.), aff'd, 132 N.J. Eq. 445, 28 A.2d 544 (1942); Rowe v. Rowe, 113 N.J. Eq. 344, 349, 167 A. 16, 19 (1933); Creveling's Ex'r's v. Jones, 21 N.J.L. 573, 579 (Sup. Ct. 1845); Andress v. Weller, 3 N.J. Eq. 604, 609-10 (Prerog. Ct. 1832); In re Menick's Will, 124 N.Y.S.2d 573 (Sur. Ct. 1953); In re Britt's Estate, 249 Wis. 30, 33, 23 N.W.2d 498, 500 (1946); see also Hilton v. Kinsey, 185 F.2d 885, 888-89 (D.C. Cir. 1950) (words may be supplied in will); Jackson v. Schultz, 38 Del. Ch. 332, 335-36, 151 A.2d 284, 287 (1959) ("to her and her heirs" reformed to read "to her or her heirs").


27. In one fairly recent and celebrated case, the New York Court of Appeals allowed reformation of a reciprocal will which had been mistakenly signed by a husband instead of his wife. Each had accidentally signed the other's identical will. The court permitted both wills to be construed together to arrive at its result. The court, however, did not offer a significant rationale, other than general equitable principles, for its unusual result. See In re Snide, 52 N.Y.2d 193, 194-97, 418 N.E.2d 656, 657-58, 437 N.Y.S.2d 63, 64-65 (1981); see also Comment, Mistakenly Signed Reciprocal Wills: A Change in Tradition After In re Snide, 67 IOWA L. REV. 205 (1981) (advocating a two-step approach which adheres to statutory requirements and applies proper construction techniques to reach result analogous to Snide). A similar Canadian case predated the Snide decision. See In re Brander, [1952] 4 D.L.R. 688, 689 (hus-
testator's true intent is the paramount concern, extrinsic evidence should be admitted to prove a drafter's mistake. Fixing the burden of proof at a clear and convincing level would protect the reformation process from spurious or fraudulent claims.

II. RELAXING THE NO REFORMATION RULE FOR SCRIVENERS' MISTAKES

Because scriveners' errors can encompass more than one type of mistake, the effect of a drafter's error is often magnified. For example, an ostensibly simple clerical error may result in a beneficiary taking much less or much more of a pecuniary gift than the testator originally planned, while an error in the use of technical language necessary to produce a particular outcome may cause an altogether unintended beneficiary to receive the gift. Unintentional departures from the testator's instructions or inaccurate advice from the scrivener can produce similar results. The no reformation rule allows these kinds of mistakes to go uncorrected, frequently producing inequitable results and frustrating the testator's intent.

A case in point is Connecticut Junior Republic v. Sharon Hospital. In Connecticut Junior, the testator instructed his attorney to draft a second codicil to his will, implementing certain changes for tax purposes. In the first codicil, the decedent had already had his attorney substitute another group of charities for certain named charity beneficiaries of two trusts set up by the

band's name as beneficiary struck and wife's name substituted to admit reciprocal will to probate).

To some extent, the English tradition of no reformation for mistakes of omission presaged the principles which most American courts have followed in this area. Older English cases often held that an omission from a will could not be supplied by extrinsic evidence. See, e.g., In re Goods of Schott, 84 L.T.R. 571 (1901); In re Goods of Walkeley, 69 L.T.R. 419 (1893); Shadbolt v. Waugh, 162 Eng. Rep. 1267, 1268 (1831); Wickens' Court, 28 L.T. 467, 469 (1813); Fawcett v. Jones, 161 Eng. Rep. 1375, 1394 (1810). But, like their American counterparts, English courts allowed reformation if what was omitted was apparent from the rest of the will. See, e.g., Re Doland, [1969] 3 All E.R. 713; Re Riley's Will Trusts, [1962] 1 All E.R. 513; Re Whitrick, [1957] 2 All E.R. 467; Re Smith, [1947] 2 All E.R. 708. Conversely, there is also some English authority for the proposition that an omission from a will can be supplied by extrinsic evidence. See, e.g., Re Haygarth, 108 L.T. 756, 757-58 (1913); Castell v. Tagg, 163 Eng. Rep. 102 (1836). In addition, a recently enacted English statute allows courts to reform wills in cases of clerical or other types of scriveners' errors. See Administration of Justice Act, 1982, ch. 53, § 20(1). English courts have also permitted mistakenly inserted words to be deleted from a will. See, e.g., Morrell v. Morrell, 46 L.T.R. 485 (1882); see also Guardian, Trust, and Ex's Co. v. Inwood, 1946 N.Z.L.R. 614, 624 (C.A.) (court admitted mistakenly signed documents which omitted inconsistent first names). Here, however, American courts have not always followed the English example. See Note, Omission of Mistaken Insertions in Will Contests, 33 Ind. L.J. 556 (1958).

28. 188 Conn. 1, 448 A.2d 190 (1982).
29. Id. at 3, 448 A.2d at 192.
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initial will. When drafting the second codicil, however, the attorney-scrivener mistakenly omitted the second group of charities and reinstated the group designated in the original will. The testator then executed the second codicil without discovering the mistake. The error came to light only after the testator had passed away.

The trial court held that extrinsic evidence of a scrivener's error was not admissible to prove that the second codicil contained a drafter's mistake. The Supreme Court of Connecticut affirmed, reasoning that the ritual and evidentiary policies underlying the Statute of Wills, buttressed by stare decisis, outweighed the consequences of allowing the mistake to stand.

In a strong dissent, Justice Peters argued that the true intent of a testator should not be thwarted by a scrivener's mistake, especially where the error substantially misstated the testator's directives. More to the point, a scrivener's mistake can be looked upon as an innocent misrepresentation by the drafter to the testator that the will presented to the testator for his signature was the one prepared for him. Innocent misrepresentation is treated as the equivalent of fraud in terms of its legal consequences. Nevertheless, courts treat one type of innocent misrepresentation, the scrivener's error, the same as a mistake resulting from fraudulent or unsavory conduct. Thus, in a proceeding to determine the admissibility of a will to probate, extrinsic evidence should be admissible to prove the drafter's mistake. In other situa-

30. Id. at 3, 448 A.2d at 191.
31. Id. at 3-4, 448 A.2d at 192.
32. Id. at 4, 448 A.2d at 192.
33. Id. at 9, 448 A.2d at 194.
34. Id. at 14, 448 A.2d at 197-98.
35. Id. at 22, 448 A.2d at 200.
36. Id. at 23, 448 A.2d at 200.
38. See also Smith v. Richards, 10 U.S. (13 Pet.) 26 (1839) (action to set aside land purchase was valid regardless of whether misrepresentations were a product of fraud or mistake); Mears v. Accomac Banking Co., 160 Va. 311, 321, 168 S.E. 740, 743 (1933) (if misrepresentation, whether made innocently or knowingly, is acted on, the effect is the same).
39. Connecticut Jr. Republic, 188 Conn. at 22, 448 A.2d at 201-02. In considering the admissibility of extrinsic evidence, some courts have distinguished between probate proceedings (to determine if there is sufficient animus testandi for the instrument to stand as a will)
tions where the testator's intent is compromised or vitiated, as by fraud, undue influence, or duress, courts permit the introduction of extrinsic evidence to show that the will substantially misrepresents the true intent of the testator.40 When a will is the product of malfeasance or fraudulent representation, not only is evidence of the testator's surroundings and circumstances admissible,41 but also evidence of the testator's oral or written declarations of intention or affection.42 The hearsay rule is avoided because evidence of the testator's mental condition is relevant to his state of mind.43 Because the testator's mental state is relevant, there is little justification for treating mistake or omission cases differently from those involving deceptive or fraudulent conduct toward the testator.44

and construction proceedings (to interpret the meaning of the document). Many courts have permitted the introduction of extrinsic evidence in the first instance but not the second. See, e.g., Fuller v. Nazal, 259 Ala. 598, 67 So. 2d 806 (1953); In re Estate of Mullin, 128 So. 2d 617 (Fla. Dist. Ct. App. 1961); In re Estate of Burt, 122 Vt. 260, 169 A.2d 32 (1961); In re Klagstad's Will, 264 Wis. 269, 58 N.W.2d 636 (1953). Connecticut law, however, made no such distinction. See Connecticut Jr. Republic, 188 Conn. at 6-7, 448 A.2d at 193.


41. For example, circumstantial evidence is usually admissible in undue influence cases because acts of undue influence are rarely committed openly. See, e.g., Brown v. Emerson, 205 Ark. 735, 738, 170 S.W.2d 1019, 1021 (1943); In re Will of Thompson, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958); Kishfy v. Kishfy, 104 R.I. 61, 66-67, 241 A.2d 827, 830 (1968). Such evidence is also admissible in fraud cases. See Brown v. Gardner, 159 Ind. App. 586, 589, 308 N.E.2d 424, 428 (1974).


44. Interestingly, concepts of fraud, undue influence, and, to some extent, duress are very much interrelated in estate law. In fact, courts and commentators often view these actions as different manifestations of the same type of conduct by the perpetrator towards the testator. See, e.g., Comment, Duress and Undue Influence—A Comparative Analysis, 22 Baylor L. Rev. 572 (1970); Comment, Fraud, Undue Influence, and Captation in Wills—A Comparative Study, 34 Tul. L. Rev. 585 (1960); Note, Wills—Undue Influence—Fraud, 10 U. Pitt. L. Rev. 602 (1949). In addition, the concepts of fraud and undue influence are often used interchangeably, even though there is a difference between the two. See, e.g., In re Estate of Newhall, 190 Cal. 709, 718, 214 P. 231, 235 (1923); Wellman v. Carter, 286 Mass. 237, 253, 190 N.E. 493, 500 (1934); Gockel v. Gockel, 66 S.W.2d 867, 870 (Mo. 1933); In re Dand's Estate, 41 Wash. 2d 158, 163-64, 247 P.2d 1016, 1020 (1952); Collins, Undue Influence in Wills, 7 Ark. L. Rev. 116, 117 (1952); Gifford, Will or No Will? The Effect of Fraud and Undue Influence on Testamentary Instruments, 20 Colum. L. Rev. 862 (1920); Green, Fraud,
A scrivener's mistake or innocent misrepresentation also bears some relationship to the concept of constructive fraud. Constructive fraud occurs where the drafter's relationship to the testator tends to deceive others, to violate private confidences, or to injure the public interest. Thus, the testator may be justified in relying on the drafter to act in the testator's best interest, especially if the scrivener is a lawyer.

When analyzed for their effect on testamentary acts, mistake and fraudulent conduct are in large part functionally indistinguishable. Fraud arises from an inaccurate perception induced by another with the intention to deceive, while mistake arises from an inaccurate perception induced by another as a result of an innocent misrepresentation. Considering the similarities between the effect on a will of an innocent misrepresentation or mistake and that of deception or fraud, it is odd that courts treat these phenomena so differently. One commentator has suggested that courts are more willing

Undue Influence, and Mental Incompetency, 43 COLUM. L. REV. 176, 180 (1943). But see Estate of Smith, 212 Or. 481, 483, 320 P.2d 273, 274 (1958) (fraud exerted on testator is a class of undue influence).


46. See Asleson v. West Branch Land Co., 311 N.W.2d 533, 539 (N.D. 1981); see also Note, Executors and Administrators—Constructive Fraud on Probate Court, 1 MERCER L. REV. 121 (1949) (fraud tends to deceive or injure others, or is detrimental to the public interest); Note, The Virginia Doctrine of Constructive Fraud, 1 WASH. & LEE L. REV. 98, 98 n.2 (1939) (constructive fraud is the breach of a legal duty which tends to deceive others). A finding of constructive fraud often requires that the party perpetrating the innocent deception gain an advantage over the other party. See Barrett v. Bank of Am., N.T. & S.A., 183 Cal. App. 3d 1362, 1369, 229 Cal. Rptr. 16, 20 (1986). In this case, the scrivener-testator relationship would not be relevant to constructive fraud unless the scrivener were also an attorney whose fee for preparing the will was considered a pecuniary or beneficial interest under the will, rather than compensation for services rendered. Id.: see In re Estate of Small, 346 F. Supp. 600, 601 (D.D.C. 1972) (attorney acting as paid executor in a will he drew up had a financial interest which constituted a beneficial interest, voiding the commission earned); In re Estate of Margow, 77 N.J. 316, 328, 390 A.2d 591, 597 (1978) (court refused to allow person who gained position of executrix through unauthorized practice of law to benefit financially from appointment).


48. Id. at 385-88, 406; see also D. McDonald & J. Monroe, Kerr on the Law of Fraud and Mistake 429-42 (7th ed. 1952) (courts provide relief if will was fraudulently produced and omitted words); Langbein & Waggoner, supra note 6, at 581-83 (because testator forms an intent that he communicates to his attorney, testator's intent should be respected if attorney makes a mistake); Warren, supra note 17, at 333-39 (although courts find that allowing evidence of mistake could be abused, the trend is to admit such evidence).
to inquire into the underlying evidence surrounding fraudulent conduct because of the moral dishonesty associated with its perpetration. If the fundamental purpose of the will construction process is to ascertain the true intent of the testator, however, conduct involving mistake and fraud should be handled similarly. Courts should, therefore, admit extrinsic evidence to prove the existence of a scrivener's error. After determining the nature of the mistake, a court should be able to correct the error and reform the will. Requiring clear and convincing evidence to prove the mistake substantially lessens the danger of evidentiary fraud and answers many of the concerns underlying the traditional deference that courts give to the Statute of Wills.

III. THE TREND TOWARD ADMITTING EXTRINSIC EVIDENCE IN WILL CONSTRUCTION CASES

In the past, courts refused to admit extrinsic evidence in will construction cases because the written words of the will were are only words attested to by witnesses and formally acknowledged by the testator as his last wishes. Additionally, the parol evidence rule mandates that the written words alone form the basis for the interpretation of a document expressing the testator's desires. The recent trend among many courts, however, is to admit extrinsic evidence in will construction cases.

Conventional wisdom holds that explanations or interpretations of the language of a will must come from the document itself and not from sources

49. See T. Atkinson, supra note 2, § 56, at 264.

50. At the very least, a mistake or innocent misrepresentation should be rectified by the imposition of a constructive trust, which is the relief often granted for fraud. See Langbein & Waggoner, supra note 6, at 571-74.

51. Only a few jurisdictions have enacted legislation concerning the admission of extrinsic evidence to correct mistakes or resolve ambiguities. See, e.g., CAL. PROB. CODE § 105 (West 1956); GA. CODE ANN. § 53-2-94 (1982 & Supp. 1986); OKLA. STAT. ANN. tit. 84, § 174 (West 1990).

52. Courts view the admission of extrinsic evidence in a probate proceeding with much less concern than the admission of extrinsic evidence for the construction of a will. Extrinsic evidence must often be admitted in probate proceedings to determine if a will has present testamentary intent, because those factors which often invalidate intent, such as undue influence, fraud, or duress, can only be proved by extrinsic evidence. Such evidence would include the testator's declarations of feelings toward the particular claimants in the specific case. See Slough, Testamentary Capacity: Evidentiary Aspects, 36 Tex. L. Rev. 1, 27 (1957).

53. In many states, the parol evidence rule encompasses not only contracts, but also deeds and wills. See, e.g., OR. REV. STAT. § 41.740 (1983) ("When the terms of an agreement have been reduced to writing by the parties . . . there can be . . . no evidence of the terms of the agreement, other than the contents of the writing . . . . The term 'agreement' includes deeds and wills as well as contracts. . . ."); see also MONT. CODE ANN. § 72-11-304 (1989) (extrinsic evidence allowed where validity of agreement in dispute and mistake at issue).
extrinsic to the instrument. A growing number of courts have reasoned, however, that only by looking at the circumstances surrounding the writing of a will can its provisions be placed in context. After all, extrinsic evidence is necessary to identify the persons and property referred to in the will and to enable the court to apply the words of the will to the matters to which it relates.

Historically, these principles have been embodied by a calculus of evidentiary rules—rules of construction which are applicable whenever a court attempts to interpret or construe a will. The primary purpose of construction is to ascertain the testator's intent, although just how accurately this can be done is debatable. For example, courts have frequently misinterpreted the testator's intent through the use of the plain meaning rule. The plain meaning rule requires that the words of a will, absent any ambiguity, be interpreted using the most ordinary and customary meaning of the words, without resorting to extrinsic evidence. Because the testator may mean something entirely different from the ordinary use of a term, the plain mean-

54. This is particularly true when dealing with the testator's oral declarations. See 9 J. Wigmore, Evidence § 2471, at 229 (3d ed. 1940).

55. Such circumstances can include the existing facts at the time of the will's execution, the nature of the testator's property, the scheme of distribution, and the relationship to the testator of those persons taking under the will. See Fidelity Union Trust Co. v. Noll, 125 N.J. Eq. 106, 109, 4 A.2d 379, 380 (Ch. 1939); Spencer v. Gutierrez, 99 N.M. 712, 714, 663 P.2d 371, 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983); Smith, The Admissibility of Extrinsic Evidence in Will Interpretation Cases, 64 Mass. L. Rev. 123, 123 (1979); Comment, Wills—Construction—Use of Extrinsic Evidence, 49 Mich. L. Rev. 1262, 1262 (1951) [hereinafter Comment, Wills—Construction]. Other courts, however, have held that evidence of surrounding circumstances can be admitted only if there is an ambiguity in the language of a will. Other courts, however, have held that evidence of surrounding circumstances can be admitted only if there is an ambiguity in the language of a will. These courts seem to ignore the fact that only by examining the testator's circumstances at the execution of the will can the court apply the language of the will to the persons and things named therein. See, e.g., Gustafson v. Svenson, 373 Mass. 273, 276, 374, 376 N.E.2d 761 (1977); Hubbard v. Wiggins, 240 N.C. 197, 207, 81 S.E.2d 630, 637 (1954); Comment, Extrinsic Evidence and the Construction of Wills in California, 50 Calif. L. Rev. 283, 291 (1962).

56. Evidence of the circumstances and conditions surrounding the testator is admitted in part to place the court in the position of the testator at the time the will was executed. See In re Estate of Russell, 69 Cal.2d 200, 207, 444 P.2d 353, 360, 70 Cal. Rptr. 561, 568 (1968); In re Estate of Thompson, 164 N.W.2d 141, 146 (Iowa 1969); Guaranty Trust Co. v. Catholic Charities, 141 N.J. Eq. 170, 174, 56 A.2d 483, 486 (Ch. 1948); Bottomley v. Bottomley, 134 N.J. Eq. 279, 294, 35 A.2d 475, 483 (Ch. 1944); Huffman v. Huffman, 329 S.W.2d 139, 142 (Tex. Civ. App. 1959), aff'd, 161 Tex. 267, 339 S.W.2d 885 (1960); In re Estate of Gehl, 39 Wis. 2d 206, 210, 159 N.W.2d 72, 75 (1968). The declarations of the testator, however, are normally inadmissible unless the will is ambiguous. See infra text accompanying note 71.


ing rule can defeat the testator’s actual intent. The plain meaning rule is offset by the “personal usage” exception, which allows the admission of extrinsic evidence in will construction cases to show that the testator habitually used particular words or phrases idiosyncratically referring to certain persons.

To complement the plain meaning rule, most courts developed a different rule when confronted with ambiguous language in will construction cases. Extrinsic evidence was sometimes admissible to help explain uncertain or doubtful language in a will. The evidence could include facts relating to the situation of the testator, such as his property, his family, and the claimants under his will and their relation to him, and the circumstances existing at the time of execution. Such evidence was admissible only to show “what the testator meant by what he said, not to show what he intended to say.” Another type of extrinsic evidence sometimes admissible in ambiguity cases was direct evidence of the testator’s actual intent. Direct evidence of intent includes declarations of intention, informal writings or memoranda that preceded the will, and statements to the scrivener as to the meaning of the will’s language. Whether any extrinsic evidence was admissible and

59. The plain meaning rule has been under attack for some time. See, e.g., 9 J. WIGMORE, EVIDENCE § 2462, at 197-99 (Chadbourn rev. 1980). According to Wigmore: “The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth there can be only some person’s meaning; and that person, whose meaning the law is seeking, is the writer of the document.” Id. § 2462, at 198 (emphasis in original); see also RESTATEMENT (FIRST) OF PROPERTY § 241 comment c, § 242 comment a (1940) (the language of the will is considered to manifest the testator’s or conveyer’s intent).

60. See, e.g., Wettach v. Horn, 201 Pa. 201, 50 A. 1001 (1902); Moseley, 138 Tenn. at 13-14, 195 S.W. at 592.

61. Using extrinsic evidence as a way to resolve ambiguities in a will is related to the parol evidence rule that extrinsic evidence may help explain or supplement an ambiguous contract but not contradict a written term. See U.C.C. § 2-202 (1989).


64. See Graves, Extrinsic Evidence in Respect to Written Instruments, 2 VA. L. REV. 338, 347-49 (1915). Many courts blur the distinction between the admissibility of the testator’s declarations and evidence of the surrounding circumstances. Some courts hold that circumstantial evidence is always admissible, while declarations of intention can only be used if the language of the will is ambiguous. See, e.g., Baliles v. Miller, 231 Va. 48, 340 S.E.2d 805 (1986); In re Estate of Bergau, 103 Wash. 2d 431, 439, 693 P.2d 703, 707 (1985); RESTATEMENT (FIRST) OF PROPERTY § 242 comment j (1940) (for resolution of ambiguities, declarations of intent are admissible). Other courts allow both types of evidence to be admitted. See, e.g., In re Kremlick’s Estate, 417 Mich. 237, 240, 331 N.W.2d 228, 230 (1983).
sometimes the type of extrinsic evidence admissible often depended on whether the ambiguity was considered "patent" or "latent." Some courts enumerated a third type of ambiguity, called an "equivocation." How a court defined these well-known ambiguities often determined under what circumstances evidence extrinsic to the will could be used to interpret it.65

A patent ambiguity was one that was apparent on the face of the instrument. For example, two provisions in a will may directly conflict with one another. Consequently, no definite meaning can be ascertained from the language. Most courts originally held that extrinsic evidence was not admissible to explain a patent ambiguity, even if the will failed as a result, because allowing the admission of outside evidence would in effect create a new document out of the conflicts and uncertainties of the original.66 The exclusion of extrinsic evidence for patent ambiguities applied especially to the testator's declarations of intent.67 Thus, errors or omissions, whether made by the testator or the scrivener, could not be corrected when a patent ambiguity was involved.68

A latent ambiguity, which could be discovered only when the words of a will were applied to the facts surrounding the estate of the testator, could be explained by the use of extrinsic evidence.69 Because a latent ambiguity occurred when a will was clear on its face, but raised a question of interpretation when applied to the facts of the situation, courts reasoned that extrinsic evidence had to be used to ascertain the meaning of the testator.70 Such

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65. In addition, existing statutory and case law could be extrinsic aids in resolving will ambiguities. See In re Estate of McDonald, 20 Wis. 2d 63, 70, 121 N.W.2d 245, 248 (1963).
69. See Hauck, 153 Ind. App. at 261-62, 286 N.E.2d at 862.
evidence gave precise and explicit meaning to the language used by the deceased, and could even include evidence of the testator's direct statements of intent. For example, either the testator's oral declarations or the scrivener's explanations could be admitted if a latent ambiguity presented a question regarding the identity of a beneficiary, the identity of ambiguously described property, the testator's state of mind, or the testator's feelings toward the claimants under his estate.

Some courts delineated a third category of ambiguity, called an equivocation, while other courts treated equivocation as a type of latent ambiguity. For example, if an accurate description in a will applied equally to persons of the same name or to things of the same description, an equivocation resulted. Only then could extrinsic evidence of the testator's direct statements v. Altenheim, 120 Ind. App. 595, 601, 93 N.E.2d 203, 205 (1950); Widney v. Hess, 242 Iowa 342, 352, 45 N.W.2d 233, 239 (1950); Barnes v. Johns, 261 Ky. 181, 184, 87 S.W.2d 387, 389 (1935); In re Morrissey, 684 S.W.2d 876, 878 (Mo. Ct. App. 1984); Borah v. Lincoln Hosp. Ass'n, 153 Neb. 846, 46 N.W.2d 166 (1951); In re Estate of Klein, 434 N.W.2d 560, 561 (N.D. 1989); In re Estate of Thomas, 457 Pa. 546, 551, 327 A.2d 31, 34 (1974).


74. See, e.g., In re Estate of Fries, 221 Cal. App. 2d 725, 727, 34 Cal. Rptr. 749, 753 (1963).

75. See, e.g., Calder v. Bryant, 282 Mass. 231, 184 N.E. 440 (1933) (evidence of testator's dislike of spouse's relatives admitted to show testator's intent that no property pass to them under will). There are also a few cases permitting evidence of the testator's oral declarations of intent for other reasons. See, e.g., Stappas v. Stappas, 271 Ala. 138, 142, 122 So. 2d 393, 395-96 (1960) (testator's attorney permitted to testify regarding testator's communications to him regarding execution of will); Odens v. Veen, 234 Iowa 1029, 14 N.W.2d 705 (1944) (testimony of scrivener admitted because no objection raised); Rausch v. Libby, 132 N.J. Eq. 527, 531, 29 A.2d 378, 381 (Ch. 1942) (same); In re Rodgers' Estate, 374 Pa. 246, 251-52, 97 A.2d 789, 791 (1953) (testator's expressions of intent to revoke trust permitted). Such evidence could even include testimony of the draftsman about the testator's intentions. See In re Katich, 565 S.W.2d 468, 469 (Mo. Ct. App. 1978). These cases are highly atypical, however. According to some commentators, direct statements of the testator were widely allowed in will construction cases in the 1700's, while the rule against their use hardened in the 1800's. See Warren, Interpretation of Wills—Recent Developments, 49 Harv. L. Rev. 689, 706 (1936).
Mistakes in Wills

of intention be admitted.\textsuperscript{76} Those courts that recognized latent ambiguity as a broad category included not only equivocations, but also the situation where no person or thing exactly fit a description in the will, yet two or more persons or things partially answered the description.\textsuperscript{77} In any case, when dealing with a latent ambiguity or an equivocation, courts usually admitted extrinsic evidence to supplement and even vary the language of a will. The nature of the evidence offered to show the testator’s intent, rather than the type of mistake or ambiguity, was often the determining factor.\textsuperscript{78}

Many courts have relaxed these rigid rules regarding the admissibility of extrinsic evidence in will construction cases. For example, some jurisdictions have repudiated the plain meaning rule.\textsuperscript{79} In addition, several jurisdictions have abandoned the distinction between latent and patent ambiguities for purposes of determining whether extrinsic evidence can be heard, and hold that extrinsic evidence may be admitted to resolve either type of ambiguity.\textsuperscript{80} Other jurisdictions have even provided by statute for the admission of extrinsic evidence to correct an ambiguity.\textsuperscript{81} Some jurisdictions, however, still refuse to permit the testator’s direct statements of intent, except in cases of a latent ambiguity\textsuperscript{82} or equivocation.\textsuperscript{83}

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\textsuperscript{77} See, e.g., In re Estate of Morrissey, 684 S.W.2d 876, 878-79 (Mo. Ct. App. 1989); In re Estate of Gibbs, 14 Wis. 2d 490, 496, 111 N.W.2d 413, 417 (1961); see also Bartels v. Bartels, 1 Ohio Op. 2d 110, 112, 139 N.E.2d 695, 699 (1956) (where will identified legatee as testatrix’s brother but named testatrix’s nephew instead, evidence admitted to show testatrix intended property to pass to brother).


\textsuperscript{79} See, e.g., In re Estate of Russell, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); Comment, Wills—Construction, supra note 55, at 1261.

\textsuperscript{80} See In re Estate of White, 9 Cal. App. 3d 194, 201, 87 Cal. Rptr. 881, 884-85 (1970); In re Estate of Mohr, 7 Cal. App. 3d 641, 646-47, 86 Cal. Rptr. 731, 734 (1970); In re Estate of Gibson, 19 Ill. App. 3d 550, 553, 312 N.E. 1, 3 (1974); Anderson v. Dubel, 580 S.W.2d 404, 408 (Tex. Civ. App. 1979); 4 W. Page, LAW OF WILLS \$ 327, at 258-59 (Bowe-Parker ed. 1961); 3 Restatement (First) of Property §§ 241-248 (1940); J. Thayer, A Preliminary Treatise on the Law of Evidence 435 (1898); 9 J. Wigmore, Evidence § 2472, at 243 (3d ed. 1940); Carr, supra note 17, at 411; Smith, supra note 55, at 124; Comment, Admissibility of Parol Evidence to Explain Ambiguities in Wills, 42 Ky. L.J. 692, 695 (1954); Comment, Wills—Admission of Extrinsic Evidence to Explain Ambiguities in Wills, 35 N.C.L. Rev. 167, 171 (1956).


\textsuperscript{82} See In re Carvalho’s Will, 57 N.Y.S.2d 307, 310 (Sur. Ct. 1944).
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In courts where most relevant evidence is admissible, testimony of the scrivener regarding the testator's intentions is permitted to resolve an ambiguity,\(^{84}\) or even to correct a mistake in draftsmanship.\(^{85}\) The California courts were among the first state courts to permit a scrivener's testimony to resolve a latent ambiguity in a will.\(^{86}\) They also permit extrinsic evidence (excluding the oral declarations of the testator) to resolve such ambiguities with the aid of a relevant statute.\(^{87}\) Courts in California have even called for legislation to admit all relevant evidence, including the testator's oral declarations, to help resolve any ambiguity in a will.\(^{88}\)

Thus, the rules regarding the admissibility of extrinsic evidence in will construction cases have broadened considerably over the last several years. This relaxation of evidentiary rules has significant implications for reformation in mistake cases involving scriveners' errors. If extrinsic evidence can be admitted to clarify an uncertain provision in a will, even at the risk of altering what appears to be the intent of the language on the written page, then clear and convincing proof of such evidence should allow the correction of a mistake of omission. Although construction is not considered reformation, the end result is sometimes the same.\(^{89}\)

This idea is perhaps best illustrated by the development of a constructional rule which the courts of New Jersey have fashioned over the past


\(^{84}\) See, e.g., In re Estate of Katich, 565 S.W.2d 468, 469 (Mo. Ct. App. 1978); In re Estate of Bergau, 103 Wash. 2d 431, 436, 693 P.2d 703, 705-06 (1985).

\(^{85}\) See, e.g., In re Estate of Anderson, 359 N.W.2d 479, 481 (Iowa 1984).

\(^{86}\) See In re Estate of Dominici, 151 Cal. 181, 90 P. 448 (1907); In re Estate of Taff, 63 Cal. App. 3d 319, 325, 133 Cal. Rptr. 737, 741 (1976) (extrinsic evidence of testator's written and oral declarations to drafting attorney admissible to show what testator intended by use of term "heirs"). See generally In re Estate of De Moulin, 101 Cal. App. 2d 221, 224-25, 225 P.2d 303, 306 (1950) (admission of scrivener's testimony that she inadvertently omitted words from typed version of will overruled); Comment, Wills—Construction, supra note 55 (evidence of relationship between testator and beneficiary admitted to show intent of testator).

\(^{87}\) See CAL. PROB. CODE § 105 (West 1956). The provision states:

> When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.

Id.


\(^{89}\) See infra text accompanying notes 102-40.
several years. To carry out the true intent of the testator, New Jersey courts will open a will to interpretation, even if unambiguous on its face, and admit any extrinsic evidence, including direct statements of intention of the testator, when a contingency occurs that is not specifically provided for in the will. Such evidence is admitted as part of the factual circumstances surrounding the testator and his dispositive scheme. Even though applying this doctrine of “probable intent” means departing from the literal terms of the will and supplying a missing gap in the will’s provisions, the doctrine enables a court to correct mistakes or omissions in a will, including those of the scrivener, in order to carry out the intent of the testator. The New Jersey doctrine of probable intent is now codified by statute. Once the literal terms of a will become subject to alteration, it is only a small jump to allow reformation for scriveners’ mistakes. Indeed, construction in these probable intent cases practically replaces reformation.

The trend toward the abolition of dead man’s statutes is another area where the rules concerning the admission of extrinsic evidence have been recently relaxed. This is significant when applied to will construction cases, and in turn has an impact on proposed reformation for scriveners’ errors.

At common law, a person was not permitted to testify at trial concerning any conversation or interaction he may have had with the deceased. A

90. See Wilson v. Flowers, 58 N.J. 250, 277 A.2d 199 (1971). Extrinsic evidence “should be admitted first to show if there is an ambiguity and second, if one exists, to shed light on the testator’s actual intent.” See id. at 263, 277 A.2d at 207.

91. See In re Estate of Cook, 44 N.J. 1, 206 A.2d 865 (1965). This rule is contrary to that of most jurisdictions, where direct statements are traditionally excluded on grounds of unreliability. See 4 W. PAGE, supra note 17, § 32.7, at 254, § 33.9, at 305.


93. See Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 568, 178 A.2d 185, 189 (1962), modifying on other grounds, 67 N.J. Super. 564, 171 A.2d 348 (App. Div. 1961). The court in Robert ascribed “impulses which are common to human nature” to the testator to decide what he would have done had he anticipated the problem. Id. at 565, 171 A.2d at 187. (Both the Cook and Robert decisions ignored the plain meaning rule to ascertain the testator’s subjective intent.). The standard of proof is one of clear and convincing evidence. See also In re Estate of Ericson, 74 N.J. 300, 377 A.2d 898 (1977) (despite inadvertent addition to will, testator’s intent to maximize marital deduction and minimize estate taxes prevailed).


95. See, e.g., ILL. ANN. STAT. ch. 110, para. 8-201 (Smith-Hurd 1984), which states in relevant part:
majority of states, however, have recently either repealed, abrogated, or modified the common law rule to give courts more flexibility in admitting relevant, credible evidence when ascertaining the true nature of the transaction between the testator and a third party (usually a creditor). This trend is in line with the opinions of most commentators, who have repeatedly called for the abolition of such statutes. In addition, the Federal Rules of Evidence reject the principle of the dead man's statutes. The fact that dead man's statutes are usually inapplicable to proceedings to probate a will places courts in a better position to determine whether the testator has present testamentary intent, which, after all, is the purpose of a will probate proceeding. This same reasoning applies by analogy to cases of scriveners' errors. Ascertaining the testator's intent after probate should also be paramount. As long as clear proof of such intent is forthcoming, a mistake should not be allowed to take precedence over that intent.

In the trial of any action in which any party sues or defends as the representative of a deceased person... no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased... or to any event which took place in the presence of the deceased.... Some jurisdictions permit exceptions to the rule if one side or the other does introduce such evidence. See, e.g., id. at para. 8-102(a).


99. One other instance where extrinsic evidence often may be used to correct a mistake is where a claimant attempts to prove the contents of a will that has been inadvertently lost or mutilated before the death of the testator. See, e.g., In re Estate of Parker, 382 So. 2d 652, 653 (Fla. 1980); In re Estate of Crozier, 232 N.W.2d 554, 556 (Iowa 1975); In re Breckwoldt's Will, 170 Misc. 883, 886, 11 N.Y.S.2d 486, 489 (Sur. Ct. 1939); OHIO REV. CODE ANN. § 2107.26 (Anderson 1953). In this situation, clear and convincing evidence may be used to prove the contents of the will. See, e.g., Conkle v. Walker, 294 Ark. 222, 225, 742 S.W.2d 892, 894 (1988); Shrum v. Powell, 604 S.W.2d 869, 871 (Tenn. Ct. App. 1980); KAN. STAT. ANN. § 59-2228 (1939); WASH. REV. CODE ANN. § 11.20.070 (1967). Many jurisdictions even allow the testator's oral declarations to be used as corroborative proof of the will's contents. See, e.g., Cantway v. Cantway, 315 Ill. 244, 250, 146 N.E. 148, 149 (1925); Loy v. Loy, 246 S.W.2d 578, 579 (Ky. 1952); Miller v. Miller, 285 S.W.2d 373, 376 (Tex. Civ. App. 1956).
IV. CORRECTING SCRIVENERS’ MISTAKES UNDER THE GUISE OF TRADITIONAL DOCTRINE

Although seldom noticed or labelled as such, there are numerous exceptions to the “no reformation for mistake” rule—situations where extrinsic evidence is already admissible in will contests to correct the mistakes of the testator or the scrivener. These exceptions are usually matters of established doctrine in the law of wills. Surprisingly, however, few courts or commentators have focused on them as analogies to support the argument favoring a remedy for scriveners’ mistakes in wills. Those areas where mistakes in wills can be corrected either by traditional doctrine or under the label of construction include the personal usage exception to the plain meaning rule, the precept of falsa demonstratio non nocet, the principle of dependent relative revocation, and the doctrine of gifts by implication. In addition, courts may remedy a mistaken belief by the testator by calling it an insane delusion. Further, pretermission statutes often limit the extent to which a mistake about a child can interfere with the testator’s true intent. Finally, judicial and statutory reforms under the Rule against Perpetuities also prevent mistakes from disrupting a will’s dispositive scheme. All of these doctrines have one thing in common—they were created to give effect to the true intent of the testator, despite the technical and formalistic obstacles that often stand in the way. Even though reformation often occurs in the application of these doctrines, courts seldom speak in terms of reformation when applying them. Not surprisingly, most of these doctrines require proof of a clear and convincing nature, which is one way to ensure that such corrections are carefully considered by the court before being made.

Courts also routinely permit corrections when there are errors in punctuation or grammar in a will. These kinds of mistakes are generally not controlling, and corrections may be made if they clarify the meaning of the will. Even though courts view such errors as de minimis, grammar and punctuation especially may be crucial to the intended meaning of a will provision. If these kinds of mistakes can be reformed, then a scrivener’s error, which is considerably closer to a grammatical or punctuation error than a substantive error, should also be reformed.

100. With respect to mistake in general, one notable exception is Langbein and Waggoner. See Langbein & Waggoner, supra note 6, at 535-49.

A. The Personal Usage Exception

As stated previously, the personal usage exception is one way that courts have tempered the results of the plain meaning rule. Traditionally, the words in a will had to be given their customary and usual meaning ("plain meaning") even though the testator may not have intended that particular meaning to apply. The personal usage exception allows courts to give effect to the testator's personal vocabulary and permits extrinsic evidence to show that the deceased habitually used certain words or phrases idiosyncratically. The personal usage exception is one way courts prevent mistaken interpretations of words in a will from having any effect on its provisions. The exception to the plain meaning rule, however, is seldom viewed as a correction or reformation; instead, it is viewed as construction. From a functional viewpoint, though, there is little difference between permitting the written words to mean something else and correcting an outright error in a will. Only the rigid "no reformation for mistake" rule prevents courts from labelling the personal usage exception for what it is—a method of correcting the meaning of written words so that the actual intent of the testator is followed. If courts allow the testator's personal usage of a word or phrase, which contradicts the written word in the will, then courts should also admit extrinsic evidence of scriveners' errors. These errors are less dangerous from an evidentiary perspective.

B. Falsa Demonstratio Non Nocet

The doctrine of falsa demonstratio non nocet is another area where certain types of corrections are customarily permitted in wills, despite the general rule of "no reformation for mistake." The principle of falsa demonstratio prevents a false description in a will from vitiating the document. For example, if someone or something is described accurately in part, but incorrectly in other ways, the doctrine allows the false part of the description to be rejected if the part that is true describes the person or thing with reasonable certainty. Courts are much less hostile to crossing out language in a will than they are to adding words to the instrument. For one thing, eliminating

102. See, e.g., In re Estate of Gehl, 39 Wis. 2d 206, 211, 159 N.W.2d 72, 74-75 (1968); RESTATEMENT (FIRST) OF PROPERTY § 241 comment a, § 242 comment d (1940); T. ATKINSON, supra note 2, § 60, at 285-86, § 146, at 810; see also First Nat’l Bank & Trust Co. v. Baker, 124 Conn. 577, 1 A.2d 283 (1938) (customary meaning of word is accepted rule of interpretation, unless testator's unusual use of word is clearly indicated from examining entire will).

a word or phrase does not directly contravene any testamentary formalities, while inserting an unattested word or phrase does. The doctrine of *falsa demonstratio* thus allows certain kinds of mistakes to be corrected under the guise of traditional construction doctrine rather than reformation. Regardless of its label, the process and the final result are the same. The same treatment could also be given to scriveners' errors, allowing for their deletion if the rest of the will could stand alone. In both cases, the purpose of the testator is frustrated unless the deletion is made. If certain substantive errors can be corrected under this theory, then why not scriveners' mistakes? Scriveners' mistakes should, at a minimum, also be subject to correction under the doctrine of *falsa demonstratio non nocet*.

### C. Dependent Relative Revocation

Dependent relative revocation (DRR) is another exception to the "no reformation for mistake" rule. This doctrine traditionally comes into play when a testator executes one will and thereafter attempts to revoke it by making a testamentary disposition that proves ineffective. The doctrine can apply in other situations as well—for example, when a testator alters an executed will by crossing out some terms and adding new ones, or when the testator is mistaken about the death of a beneficiary, and crosses out that person's name to substitute another name. In these situations, many courts hold that the revocation of the second will, or will provision, is conditional on its ultimate validity and relative to the mistaken assumption upon which the revocation depended. Thus, many courts reason that the earlier will or provision can stand only if the sole alternative is intestacy.

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(C.A. 1946) (where two sisters accidentally signed each other's identical will, court granted probate by omitting the incorrect name to give effect to intent of testatrix).

104. See Briscoe v. Allison, 200 Tenn. 115, 120, 290 S.W.2d 864, 866 (1956). The doctrine is also applicable when a testator makes a second will which revokes a first, and then destroys the later one, incorrectly thinking that the earlier document will be brought back to life. Estate of Auburn, 18 Wis. 2d 340, 118 N.W.2d 919 (1963).

105. See, e.g., In re Pratt, 88 So. 2d 499, 501 (Fla. 1956).

106. See generally T. ATKINSON, *supra* note 2, § 88, at 453 (dependent relative revocation occurs when testator's revocation is induced by mistake, such as whether a beneficiary is still alive).

107. See Larrick v. Larrick, 271 Ark. 120, 124, 607 S.W.2d 92, 95 (Ct. App. 1980). With respect to the revocation of a later will, both the earlier one and the later one must reflect similar dispositive plans. See, e.g., In re Guardianship & Conservatorship of Estate of Tenant, 220 Mont. 78, 89-90, 714 P.2d 122, 129 (1986).

108. In the case of two wills, sometimes the later will is held to be effective, especially if the jurisdiction follows the "no revival of revoked wills" rule. Thus, in some jurisdictions, if an earlier will is revoked by a subsequent instrument, it cannot be revived under any circumstances. Compare In re Estate of Eberhardt, 1 Wis. 2d 439, 440, 85 N.W.2d 483, 484 (1957) (doctrine of dependent relative revocation can never be applied to revive a will that has been
The doctrine of DRR has been applied to cases where the revocation is by physical act or by execution of a subsequent instrument. Extrinsic evidence of the testator's intent is admissible in these cases to show what the testator would have wanted had he known the legal effect of his actions. The presumed intent of the testator is that, if he has executed a will, he does not intend to die intestate.

Dependent relative revocation allows mistaken assumptions regarding the revocation of a will, or one of its provisions, to be corrected. Courts usually admit parol evidence here, but not for mistakes in the execution of a will unless the will itself shows the mistaken belief. The different treatment is perhaps a result of two factors: (1) if the revocation is by physical act, then no physical evidence of an alternative disposition could ever be found on the face of the document because it has been destroyed; and (2) if the revocation is by subsequent instrument, the written words normally evidence a failed alternative plan of disposition. Protection against unreliable extrinsic evidence is preserved in both situations by requiring that the proof of mistake be clear and convincing. The extrinsic evidence usually consists of a duly executed will and the scrivener's testimony of what happened, or even the oral declarations of the testator. When viewed in this light, scriveners' errors should also be subject to correction. Reformation to correct an invalid revocation may contradict far more Statute of Wills' formalities (revocation statute) than does reformation to correct a scrivener's error. In addition, the kind of extrinsic evidence needed to correct a scrivener's mistake would be similar to that needed for dependent relative revocation. Again, clear and convincing evidence would be required to prove a scrivener's error.

D. Gifts by Implication

Courts correct mistakes in wills without acknowledging the implications of their actions when they imply a gift to a beneficiary, even though the

previously validly revoked) with Stewart v. Johnson, 142 Fla. 425, 194 So. 869 (1940) (when a testator revokes a will and his second will is later found to be invalid, the first will may be reestablished).


110. In addition, extrinsic evidence is necessary to determine whether the revocation by physical act was accompanied by the requisite intention to revoke. See Langbein & Waggoner, supra note 6, at 545.


112. If the scrivener's error resulted in an omission, however, some courts would not be able to give a remedy by analogy to DRR. See, e.g., In re Estate of Barker, 448 So. 2d 28, 32 (Fla. Dist. Ct. App. 1984).
testator has not expressly specified that particular beneficiary or class of beneficiaries as recipients of the gift. For a gift to be implied, the court must come to an inescapable conclusion that the testator intended such a gift. As one court explained:

“If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of [the] opinion that he has on the whole will sufficiently declared.”

Thus, an implied gift is often constructed when a reading of the will, including its general scheme, the property involved, and the persons named as beneficiaries, leads a court to believe that such a gift was intended. Gifts by implication are also raised when the testator, through error or omission, fails to provide for a specific contingency which then occurs.

Even though many courts insist that a finding of a gift by implication cannot be used as a way to correct a mistake by the testator or the draftsman, the doctrine nevertheless results in reformation to reflect the testator’s true intent. While it is argued that the only recourse to fill in an omission by the testator is for a court to imply a gift, the doctrine can correct mistakes in faulty draftsmanship by the scrivener under the guise of construction.

Courts will also imply gifts of future interests to effectuate the presumed intent of the testator. This commonly occurs when property is conveyed “to B for life, and if B dies without issue, to C,” and B dies survived by issue. According to the Restatement (First) of Property, an inference can be drawn that the transferor has created an interest in favor of B’s issue. Another

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116. See In re Estate of MacLean, 47 Wis. 2d 396, 405-06, 177 N.W.2d 874, 879 (1970).

117. See In re Trust of Pauly, 71 Wis. 2d 306, 310, 237 N.W.2d 719, 721 (1976).

118. See Re Main, [1947] 1 All E.R. 255 (Ch.); Comment, Gift Implied in Inter Vivos Transfer—A New Setting for a Familiar Result, 2 STAN. L. REV. 226, 227 (1949).

119. See RESTATEMENT (FIRST) OF PROPERTY § 272 (1940).
situation where courts will imply gifts of a future interest occurs when a testator bequeaths a fund in trust "to pay the income to A, B, and C for their lives, and at their death to pay the principal to D." If A dies, what happens to A's share of the income? Many courts hold that there are implied cross-remainders to the surviving life tenants. In other words, the cross-remainder in A's one-third share would read as follows: "to A for life, then, as to one-half of this share to B for life, then to C for life; and as to the other one-half of this share to C for life, then to B for life." Similar cross-remainders would be implied for B's share and C's share. Finally, some courts have implied gifts of a life estate to a beneficiary when there are words in a will that indicate an intent to give the life use to that person, even though there is no evidence of an express gift of the property's use to the person at whose death the remainder takes effect. In all of these situations, courts are remediying the effects of poor drafting, which can include scriveners' errors.

Although courts "imply" gifts in wills in several other situations as well, they rarely admit exactly what they are doing. For instance, the New Jersey courts imply bequests under the doctrine of probable intent. Other courts may imply gifts from precatory language. Still others imply invasion powers in a life tenant, or imply a general gift to charity when a gift to a particular charity fails (doctrine of cy pres). All of these "implied" gifts are evidence that courts can add provisions to a will to correct errors even though they formally reject reformation as an appropriate remedy for mistake (including that of a scrivener). If courts are willing to imply gifts based upon a reading of the whole will, they should correct scriveners' errors based upon the tenor of the entire will as well.

120. See generally Hartford Nat'l Bank & Trust Co. v. Harvey, 143 Conn. 233, 238-39, 121 A.2d 276, 280-81 (1956) (where testator's intent would be defeated, court can imply cross-remainders where two people are given a tenancy in common in a life estate, but no provision is made regarding the right of one at the death of the other to enjoy the other's income); Hartford-Connecticut Trust Co. v. Hartford Hosp., 141 Conn. 163, 171, 104 A.2d 356, 360 (1954) (where no express cross-remainder and terms of will did not imply otherwise, property passed intestate after death of beneficiary); Hunt v. Mitchell, 409 Ill. 321, 324, 99 N.E.2d 347, 349 (1951) (where no cross-remainder to surviving sibling, children of deceased sibling were entitled to land held as against surviving sibling or aunt); In re Brahaney's Will, 46 Misc. 2d 901, 905, 261 N.Y.S.2d 517, 522 (Sur. Ct. 1965) (cross remainders by implication are allowed only when intention of testator cannot be found in will).


122. See supra text accompanying note 94.


125. See, e.g., In re Will of Neher, 279 N.Y. 370, 18 N.E.2d 625 (1939).
E. Insane Delusion

Courts are also willing to minimize the effect of a mistake in a will when the error consists of a mistaken belief by the testator created by an insane delusion. When present testamentary capacity is impaired by an insane delusion, the part of the will that was caused by the delusion fails.\(^{126}\) Although an insane delusion differs from a mistake in that a mistake is correctable if the testator is told the truth,\(^ {127}\) invalidating the provision of the will affected by a delusion is one way in which courts remedy a mistaken belief by the testator, usually concerning a member of his family.\(^ {128}\) Extrinsic evidence is admissible in these cases to prove that the testator lacked testamentary capacity.\(^ {129}\) If extrinsic evidence is permitted to eliminate the effect of a delusion on a substantive provision of a will, such evidence should be allowed to prove the existence of a scrivener’s mistake, which also impairs the testator’s true intent. In appropriate cases, the court could then strike the offending provision from the will.

F. Pretermission

At common law, a child omitted from his parent’s will had no recourse. Legislatures remedied this situation in part with pretermission statutes, which were originally designed to prevent the unintentional disinheriting of children by the testator.\(^ {130}\) These statutes eventually took one of two forms. The Massachusetts type of statute provides that an omitted child shall be entitled to an intestate heir’s portion of the testator’s estate unless it appears that the omission was intentional.\(^ {131}\) The Missouri type of statute provides that a child shall be given an intestate heir’s share of the estate if he is not mentioned in the will.\(^ {132}\) Under the Massachusetts type of statute, extrinsic evidence is admissible to show that the omission was intentional.\(^ {133}\) Under

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126. Present testamentary capacity is a prerequisite to executing a valid will. If the entire will was caused by the insane delusion, the entire will fails. See generally T. Atkinson, supra note 2, § 52, at 243-44 (delusion affecting entire will vitiates testamentary capacity).
127. See, e.g., Dixon v. Webster, 551 S.W.2d 888, 893 (Mo. Ct. App. 1977).
128. See, e.g., In re City Nat’l Bank & Trust Co., 145 Conn. 518, 144 A.2d 338 (1958); In re Dovci’s Estate, 174 Pa. Super. 266, 101 A.2d 449 (1953); In re Will of Riemer, 2 Wis. 2d 16, 85 N.W.2d 804 (1957).
129. See, e.g., In re Estate of Camin, 212 Neb. 490, 503-04, 323 N.W.2d 827, 840 (1982).
130. Some statutes protect issue or heirs instead.
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the Missouri type of statute, extrinsic evidence is usually inadmissible to show that the testator intended to disinherit an omitted child. The modern trend, however, is to consider intent in both situations. The Uniform Probate Code also gives relief where the testator fails to provide for a living child in his will solely because he mistakenly believes the child to be dead. In addition, one jurisdiction has adopted the rule that a will may be reformed for a mistake if the error concerns the existence or conduct of the testator’s heir at law. This is broader than the typical pretermission statute.

Pretermission statutes generally attempt to remedy the effect of a possible mistake by the testator concerning the exclusion of his children (or issue or heirs) from his will. Even though the Massachusetts type of statute allows extrinsic evidence to prove that the exclusion was not a mistake, it is significant that extrinsic evidence is permitted to ascertain the actual intent of the testator. If an omission in a will regarding the testator's children (or issue or heirs) can be cured by legislative fiat, then similar legislation should remedy the omission created from a scrivener's error. It is a lesser jump toward reformation to supply a gap in the will's disposition when the scrivener has made a drafting mistake, as opposed to supplying an omission to a will because of a substantive error in failing to name a beneficiary. Scriveners' mistakes, which are not necessarily caused by the testator, are far more deserving of correction than these substantive errors.

G. Reformation to Correct a Violation of the Rule Against Perpetuities

Nine states authorize outright reformation of a will provision by a court to cure a perpetuities violation, either by statute or judicial decision. This


136. See UNIFORM PROBATE CODE § 2-302(b) (1983).


138. See, e.g., CAL. CIV. CODE § 715.5 (West Supp. 1981); IDAHO CODE § 55-111 (1979); MO. ANN. STAT. § 442.555 (Vernon Supp. 1982); OKLA. STAT. ANN. tit. 60, §§ 75-78 (West Supp. 1981); see also Langbein & Waggner, supra note 6, at 546 n.95 (statutes which allow for reformation of will where violation of Rule Against Perpetuities).

139. Estate of Chun Quan Yee Hop, 52 Haw. 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 467, 469, 474, 31 A. 900, 911, 913, 916 (1891); Berry v. Union Nat'l Bank, 164 W. Va. 258, 262 S.E.2d 766 (1980); see
equitable modification or perpetuities-cy pres doctrine allows courts to correct a mistake made either by the testator, his attorney, or scrivener who has unwittingly violated the Rule against Perpetuities. In jurisdictions where this doctrine has been adopted by judicial decision, most of the courts have candidly spoken of reformation. If a court can reform a substantive will provision by approximating the testator's intent to effectuate a gift, then a scrivener's error should be reformed as well, especially when proved by clear and convincing evidence. At the very least, by analogy to the perpetuities-cy pres doctrine, a scrivener's error should be subject to correction, especially if the mistake results in the frustration of the testator's intent and can be eliminated by a cy pres interpretation to carry out such intent. Which kinds of mistakes are deemed worthy of correction should not depend on exceptions to the "no reformation for mistake" rule, but should follow from those arguments justifying reformation for scriveners' errors.

V. THE ARGUMENT REINFORCED: A COMPARISON TO REFORMATION FOR INTER VIVOS INSTRUMENTS

A rule which allows reformation to correct a scrivener's error in a will follows established principles of reformation for inter vivos instruments in the areas of contract, property, and trust law. Each of these areas recognizes that reformation of an instrument to correct a scrivener's mistake can take place under certain circumstances. Because a scrivener's error is not a substantive one, and because will substitutes falling into the categories of contract, deed, or trust instruments can also be reformed under inter vivos reformation principles, it makes little sense to prohibit reformation for scriveners' mistakes in wills.

After all, the distinction between will substitutes and testamentary instruments is more one of form than of substance. In addition, the traditional
rationale for allowing reformation to a deed or contract, but not a will—
because the process of reformation is based upon the enforcement of an ex-
isting obligation between the parties, an idea which contradicts the donative
nature of a will. Further, courts will frequently re-
form deed or trust instruments for scriveners' errors at the request of the
transferor, provided the transferor of the property is a donor. Moreover, the
distinction between a deed and a will can sometimes become blurred when a
deed is presently executed, but is intended to take effect on the death of the
transferor, and can lend support to analogizing deed reformation for
scriveners' mistakes to proposed will reformation. Finally, because contrac-
tual will substitutes can be reformed for scriveners' errors even after the
death of the transferor-depositor, a comparison of contract reformation with
will reformation also is appropriate.

In contract law, a mutual mistake made by the parties to an agreement
which does not accurately express the intention of the parties is grounds for
reforming the contract. Parol evidence is admissible to establish such a
mistake, although the error must be proved by clear and convincing evi-
dence. Most courts hold that scriveners' mistakes in contracts are also

probate, changes in the nature of wealth holding and the need to reconcile nonprobate transfers with the supposed monopoly of probate).

144. See supra text accompanying notes 102-41.
146. See Newmister v. Carmichael, 29 Wis. 2d 573, 576-77, 139 N.W.2d 572, 574 (1966). Another ground for reformation is unilateral mistake by one of the parties accompanied by fraudulent or inequitable conduct by the other. See Lopinto v. Haines, 185 Conn. 527, 531, 441 A.2d 151, 154 (1981); Maryland Port Admin. v. John W. Brawner Contracting Co., 303 Md. 44, 59, 492 A.2d 281, 288 (1985); Johnson v. Johnson, 379 N.W.2d 215, 219 (Minn. Ct. App. 1985); Cokins v. Frandsen, 141 N.W.2d 796, 799 (N.D. 1966). Some courts even hold that a unilateral mistake may be reformed if the other party knew or should have known of the erroneous understanding. See Filippo Constr. Co. v. Mike Parks Diving Corp., 531 A.2d 263, 271 (D.C. 1987); see also 13 S. WILLISTON, CONTRACTS § 1585, at 555-56 (3d ed. 1970) (where a written instrument fails to express intent of parties due to mutual mistake in its interpretation, reformation is allowed); id. § 1549A, at 139-40 (discussing sample case which allows reformation of contract where mutual mistake frustrates parties' intent); Palmer, Refor-
mation and the Parol Evidence Rule, 65 MICH. L. REV. 833, 838 (1967) (courts should reform agreements whether incorrect term is a product of mutual mistake or intentional).


subject to reformation,\textsuperscript{149} based upon the theory that a scrivener's error really constitutes a mutual mistake by the parties to the contract.\textsuperscript{150} Even omissions, whether caused by a draftsman's error or not, can usually be reformed as a type of mutual mistake if the contract does not conform to the original intention of the parties.\textsuperscript{151}

Contractual will substitutes may also be reformed. For example, a life insurance policy may be reformed if a mutual mistake is established between the insured and the insurer, even after the death of the insured.\textsuperscript{152} The mistake may even involve the name of the beneficiary.\textsuperscript{3} Significantly, most courts hold that scriveners' errors in life insurance policies usually constitute mutual mistakes.\textsuperscript{3} Because a life insurance policy is functionally indistinguishable from a will in that a life insurance policy is revocable until the death of the insured (testator), and the interest of the beneficiary is ambulatory until the insured's (testator's) death,\textsuperscript{155} courts should permit reformation for scriveners' errors in wills. In addition, under the Uniform Probate Code, reformation appears available for joint bank accounts\textsuperscript{156} and for trust accounts.\textsuperscript{157} Clear and convincing evidence of an intent different from the words used in the account is permissible to prove a contrary meaning. This

\begin{footnotes}
\item[149.] See \textit{e.g.}, Gartner v. Gartner, 246 Minn. 319, 322, 74 N.W.2d 809, 812 (1956); Surlak v. Surlak, 95 A.D.2d 371, 380, 466 N.Y.S.2d 461, 475 (1983); Woodriff v. Ashcraft, 263 Or. 547, 551, 503 P.2d 472, 474 (1972).
\item[150.] See Williams v. Hudgens, 217 Ga. 706, 710, 124 S.E.2d 746, 750 (1962); see also Marano v. Corbisiero, 27 Misc. 2d 830, 832, 211 N.Y.S.2d 108, 111 (Sup. Ct. 1960) (a court cannot reform a lease unless there is a scrivener's error, mutual mistake, or fraud).
\item[153.] See Penn Mutual Life Ins. Co. v. Abramson, 530 A.2d 1202, 1210-11 (D.C. 1987).
\item[155.] See Langbein, supra note 142, at 1110.
\item[156.] See UNIF. PROB. CODE § 6-104(a) (1983).
\item[157.] See \textit{id.} § 6-104(c)(2).
\end{footnotes}
situation can include declarations of intention by the decedent-depositor.\textsuperscript{158} Most courts also allow parol evidence to vary the meaning of the language of a joint bank account.\textsuperscript{159} Because a joint bank account can approximate the incidents of a will,\textsuperscript{160} reformation should be available to help explain a testamentary provision in a will.

In property law, courts may reform a written instrument, such as a deed executed for consideration, if the mistake is mutual and if the writing does not accurately reflect the intention of the parties.\textsuperscript{161} Generally, the mistake must be as to the words in the deed rather than their legal effect.\textsuperscript{162} Parol evidence is admissible in a reformation action for a deed,\textsuperscript{163} and must be clear and convincing to support the correction.\textsuperscript{164} Scriveners' mistakes, viewed as mutual mistakes by most courts,\textsuperscript{165} are also subject to reforma-

\begin{itemize}
\item \textsuperscript{159} See, e.g., In re Estate of Matthews, 208 Kan. 492, 507, 493 P.2d 555, 564 (1972); see also Otto v. Klement, 656 S.W.2d 678, 682 (Tex. Ct. App. 1983) (certificate of deposit).
\item \textsuperscript{160} See Langbein, supra note 142, at 1112.
\item \textsuperscript{162} See Boone v. Grier, 142 Ariz. 178, 688 P.2d 1070 (Ct. App. 1984). But see Scott v. Grow, 301 Mich. 226, 237, 3 N.W.2d 254, 258 (1942) (no equitable relief where mistake as to legal effect of instrument which was deliberately executed and adopted).
\item \textsuperscript{163} See Ayers, 536 So. 2d at 1154.
\item \textsuperscript{164} See Hereford v. Unknown Heirs, 315 S.W.2d 412, 419 (Mo. 1958); Le Meehaute v. Le Meehaute, 585 S.W.2d 276, 281 (Mo. Ct. App. 1979); Praggastis v. Sandner, 40 Or. App. 477, 484, 595 P.2d 520, 524 (1979). But see Frierison v. Sheppard, 201 Miss. 603, 29 So. 2d 726 (1947) (proof beyond a reasonable doubt required).
Mistakes in Wills

Even omissions from a deed caused by an error of the draftsman have been reformed.

Significantly, in the case of a gift of a deed of property, the grantor may reform the deed if he makes a unilateral mistake and if the writing fails to express his true intent at the time he made the gift. This reformation is allowed even if the grantee will ultimately receive less than the writing initially granted him. Reformation is often available even after the death of the grantor, if the reformation is necessary to effectuate the grantor's intent.

As a corollary, because the grantee has not given any consideration, he usually may not reform a gratuitous deed as against the grantor. Nevertheless, many courts permit the grantee to reform a deed of gift as against the grantor's heirs after the grantor's death.

If a grantee has a remedy after the grantor's death for a mistake made in a deed of gift, then a will beneficiary who is the natural object of the testator's bounty should have a similar option. The only impediment seems to be the Statute of Wills, but its


169. See Comment, Mistake of Fact as a Ground for Affirmative Equitable Relief, 23 Harv. L. Rev. 608, 620 (1910).

170. See Spencer v. Spencer, 115 Miss. 71, 81, 75 So. 770, 771 (1917); Henderson, Mistake and Fraud in Wills—Part I: A Comparative Analysis of Existing Law, 47 B.U.L. Rev. 303, 393 (1967).

171. Presumably, this situation would also include a will substitute such as a joint tenancy deed in need of reformation.


173. See Dowding v. Dowding, 152 Neb. 61, 72, 40 N.W.2d 245, 250 (1949); Zabolotny v. Fedorenko, 315 N.W.2d 668, 672 (N.D. 1982); Hazlett v. Bryant, 192 Tenn. 251, 260, 241 S.W.2d 121, 125 (1951); see also Reinberg, 404 Ill. at 255, 88 N.E.2d at 852 (reformation of deed allowed as between grantees). In addition, some courts have held that where a would-be donor subsequently dies mistakenly believing he has made a valid gift, the donee may impose a constructive trust on the donor's heirs, especially if the intended donee is a natural object of the donor's bounty. See 5 A. Scott, The Law of Trusts § 466.2, at 3434 (3d ed. 1967).
purpose can be fulfilled by requiring clear and convincing proof of the mistake.

In trust law, a settlor's unilateral mistake is sufficient to reform an inter vivos trust, provided the settlor received no consideration for the creation of the trust. The same rule applies even after the death of the settlor, provided the reformation is necessary to carry out his intent. Courts have frequently corrected scriveners' errors by reforming unilateral mistakes in trust instruments. In addition, courts have corrected omissions resulting from scriveners' mistakes. Because a revocable inter vivos trust can imitate a will, in that the settlor can retain the equitable life interest and the power to alter or revoke the beneficiary designation, the differing result hinges on terminology. Significantly, a scrivener's error can serve as a basis to reform a pour over will. A court, however, generally will not reform a testamentary trust under similar circumstances, unless the will which contained the trust can be reformed.


177. See Connecticut Ill. Nat'l Bank & Trust Co. v. Art Inst., 341 Ill. App. 624, 637, 94 N.E.2d 602, 608 (1950), aff'd, 409 Ill. 481, 100 N.E.2d 625 (1951); Leitner v. Goldwater, 48 N.Y.S.2d 614 (Sup. Ct. 1944), aff'd, 269 A.D. 657, 53 N.Y.S.2d 460 (1945); see also Mortimer v. Mortimer, 6 Ill. App. 3d 217, 222, 285 N.E.2d 542, 546 (1972) (omission of power to revoke or modify trust susceptible to reformation); Findorff v. Findorff, 3 Wis. 2d 215, 225, 88 N.W.2d 327, 332 (1958) (to grant reformation of trust agreement, party must establish misrepresentation or fraud by settlor in omitting power to revoke); RESTATEMENT (SECOND) OF TRUSTS § 332 (1959) (trust may be reformed where power to revoke or modify trust omitted).

178. See Langbein, supra note 142, at 1113.


180. See also In re Estate of Manville, 112 Misc. 2d 355, 447 N.Y.S.2d 195 (Sur. Ct. 1982) (court denies request to interchange terms of inter vivos trust and testamentary trust to avoid Swedish gift tax).
Institutes, including revocable trusts, can be reformed for scriveners' errors, then
wills should also be able to be reformed under similar circumstances, espe-
cially when both kinds of instruments accomplish the same testamentary
objectives.

VI. Conclusion

When a scrivener's error occurs in a will, and is uncovered only after the
death of the testator, the disposition of the testator's estate may be thrown
into considerable disarray. Although scriveners' mistakes in wills can be
avoided through painstaking insistence on accuracy by the testator and his
draftsman, there is no way to eliminate completely the possibility of human
error. The traditional rule of "no reformation for mistake," including that
of a scrivener, no longer seems justified because the effect of a scrivener's
error is the same as that of fraud, duress, or undue influence—they all vitiate
the testator's intent. Because extrinsic evidence is admissible to prove unsa-
vory conduct that interferes with the testator's wishes, such evidence should
also be admissible to show a mistake that alters the testator's intent in much
the same way. The growing acceptance of the admissibility of extrinsic evi-
dence to shed light on will provisions in will construction proceedings indi-
cates that many courts are now more willing to accept clear and convincing
evidence to explain or even alter the words of the written document. More-
over, reformation already takes place in many areas of estate law, although
few courts acknowledge the process. Finally, because courts reform inter
vivos will substitutes based on scriveners' errors, courts should also reform
wills themselves, which are purer in form and serve the same purpose.181

A rule that allows reformation of a will or will provision for a scrivener's
error also makes practical sense. Scriveners' mistakes should not be allowed
to disrupt a testator's plan of distribution. By allowing reformation for a
scrivener's error, the testator's intent can be given the primary importance
that it deserves in the construction and reformation of wills.

181. One commentator has proposed a model statute which would allow reformation of a
will for mistake through the use of extrinsic evidence. See Henderson, Mistake and Fraud in