Curing Execution Errors and Mistaken Terms in Wills

The *Restatement of Wills* Delivers New Tools (and New Duties) to Probate Lawyers

By John H. Langbein

In recent years a remarkable change has been emerging in the way American courts treat cases involving errors in the execution or mistakes in the content of wills. When some innocuous blunder occurred in complying with the Wills Act formalities, such as when one attesting witness went to the washroom before the other had finished signing, the courts used to apply a rule of strict compliance and hold the will invalid. Likewise, in cases of mistaken terms, for example, when the typist dropped a paragraph from the will or the drafter misrendered names or other attributes of a devise, the courts applied a no reformation rule; the will could not be corrected no matter how conclusively the mistake was shown.



Ironically, these intent-defeating results were reached in the name of legal requirements that were meant to be intent-serving. The various state Wills Acts require three main formalities for attested wills—written terms, the testator's signature, and attestation by two witnesses. Wills have to be given effect when the testator has died and is unable to testify about what was intended. The formalities are designed to generate and preserve highly reliable evidence of intention. The requirement of written terms obliges the testator to articulate his or her intention. Compliance with the signature and attestation requirements provides evidence of genuineness and finality, while cautioning the testator about the seriousness of the document. In extreme cases the requirement that the will be attested by disinterested witnesses may also serve a protective function, to spare the testator from imposition.

The formalities are not difficult to comply with, and cases of breach mostly arise when the testator does not use counsel. What should be the consequence in a case in which the testator does not fully comply with the Wills Act formalities, but the evidence is very strong that the document was genuine and was intended to be the will? Under the strict compliance rule any formal breach, no matter how innocuous, results in invalidity, hence in a conclusive presumption that the will lacked testamentary intent. The alternative that has grown in favor in recent years is to treat the presumption of invalidity as rebuttable, and to allow the proponent of the defectively executed instrument to prove by an exceptionally high standard of proof (clear and convincing evidence) that the testator intended the instrument to be the will.

Cases involving omitted or mistaken terms raise a similar issue—whether to restore to a will language that was

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have been included within the will but was accidentally omitted or misrendered before the will was signed and attested.

The Trend Away from Formalism

Leading modern authority in a number of American states has now reversed the strict compliance and no reformation rules. Both by judicial decision and by legislation, the courts have been empowered to excuse harmless execution errors and to reform mistaken terms. Section 2–503 of the revised Uniform Probate Code, promulgated in 1990 and now adopted in several states, treats a noncomplying will "as if it had been executed in compliance with [Wills Act formalities] if the proponent . . . establishes by clear and convincing evidence that the decedent intended the document" as his or her will. (This provision also applies to cases of defective compliance with the formalities for revocation, in which a similar strict compliance rule was applied.)

In some states in which such curative legislation is not in force, courts have developed a judicial substantial compliance doctrine. In *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991), the New Jersey Supreme Court validated a will in which the attesting witnesses had failed to sign the will, because the lawyer who supervised the execution ceremony mistook the self-proving affidavit for the attestation clause and had the witnesses sign only the affidavit. Emphasizing that the purpose of the Wills Act formalities is to implement the testator's intent, the court said that insisting on strict compliance in that case "would frustrate rather than further the purpose of the formalities." The court reasoned that "when formal defects occur, proponents [of the defectively executed will should be allowed to] prove by clear and convincing evidence that the will substantially complies with the statutory requirements."

A few years earlier, in *In re Snide*, 418 N.E.2d 656 (N.Y. 1981), the New York Court of Appeal excused defective compliance with the requirement that the testator sign the will. *Snide* was one of the recurrent "switched wills" cases, in which two testators, usually husband and wife, execute their wills simultaneously, but an inattentive lawyer supervising the execution ceremony allows each testator mistakenly to sign the will prepared for the other. Each testator thus leaves unsigned the will that he or she intended to sign. The decisions before *Snide* treated such wills as void. In *Snide* the court excused the error. The court rejected the contention that strict compliance with the signature requirement of the Wills Act prevented remedy for "a mistake so obvious." The court did not order the unsigned will to be probated under a substantial compliance doctrine such as that in *Ranney*. Rather, the court reformed the mistaken terms of the will that the decedent actually did sign. The husband was the decedent, and the court ordered the names in his will corrected as he intended so that he left his property to his wife and not to himself.

The *Restatement*

This movement to excuse harmless execution errors and to reform mistaken terms in wills has now received powerful reinforcement in the American Law Institute's *Restatement (Third) of Property: Wills and Other Donative Transfers*. This *Restatement* is appearing in installments as it wends its way through the Institute's deliberative process. The first two volumes, published in final form in 1999 and 2003, cover the law of wills, will substitutes, and construction. Further volumes covering class gifts and powers of appointment are still in preparation. The reporter and principal drafter is Professor Lawrence W. Waggoner of the University of Michigan Law School, a leading academic authority on probate law, who also served as the principal drafter of the 1990 revision of the Uniform Probate Code. The two volumes of the *Restatement* now published contain curative doctrines empowering courts to excuse harmless execution errors and to reform mistaken terms in wills.

Execution Errors

Section 3.3 of the *Restatement* deals with execution errors, providing that "[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will." As does the Uniform Probate Code's harmless error rule, the *Restatement* rule also applies to defects in compliance with the revocation formalities.

A similar intent-serving provision disapproves the older rule that forbids a testator to alter by will the beneficiary designation in a will substitute such as a life insurance policy. Competent counsel will of course see to it that the transferor complies with the change-of-beneficiary requirements in insurance policies and other non-probate accounts, but laypersons acting without counsel often think that a will can trump a prior beneficiary designation. The *Restatement* rule (§ 7.2, comment *e*) implements the testator's intent in such cases but also protects the financial intermediary from double payment.

> Wills have to be given effect when the testator has died and is unable to testify about what was intended.

Mistaken Terms

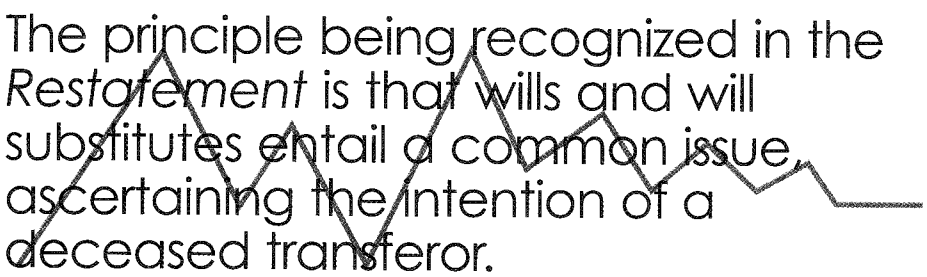
Section 12.1 of the *Restatement* authorizes courts to reform mistaken terms in a will. The measure is based upon an extensive body of supporting case law, which the *Restatement* canvasses in its Reporter's Notes. Section 12.1 provides that a court may reform any donative document, including a will, to "con-

form the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was."

The *Restatement* also endorses the movement to allow courts to reform wills, trusts, and other donative documents quite apart from instances of mistake, in situations in which reformation would achieve a tax objective that the donor would have wished. RESTATEMENT § 12.2 (extensive case law is reviewed in the Reporter's Notes).

Why the Change?

The reorientation toward a more intent-serving approach to the Wills Act formalities is the product of many influences. The scholarly literature that has accompanied the change has drawn attention to four main factors:



(1) the rise of the nonprobate system; (2) experience in other jurisdictions; (3) growing embarrassment that failure to cure well-proved mistakes inflicts unjust enrichment; and (4) concern to spare lawyers from needless malpractice liability.

Unifying the Law of Probate and Nonprobate Transfers

Since World War II the use of nonprobate modes of transfer on death has burgeoned. Far more wealth now flows through the main will substitutes (inter vivos trusts, beneficiary designations in pension accounts, life insurance policies, and POD/TOD accounts with banks, mutual funds, and brokerage houses) than passes through probate. A dominant theme of law revision activity during this period has been to unify the constructional principles across the field of probate and nonprobate transfers. Accordingly, on topics ranging from the slayer statutes (such as UPC § 2–803), to the Uniform Simultaneous Death Act, to the statutes dealing with the effect of divorce on prior wills and beneficiary designations (such as UPC § 2–804), the law has been changed to treat probate and nonprobate transfers alike. The harmless error and reformation rules now being applied to mistakes in wills are part of this process of unification, because they are the rules that have long applied in the nonprobate system. Courts of equity have for centuries exercised the power to reform (to "rectify" in English law) mistakes in trusts, deeds of gift, and beneficiary designations. Likewise, there is a well-developed doctrine of excusing defective compliance with the contractually required formalities for change-of-beneficiary designations in the nonprobate system for life insurance policies and joint-and-survivor accounts. (The life insurance substantial compliance cases are conveniently collected in Annot., 19 A.L.R.2d 5 (1951 & later supps.).)

The ostensibly new rules being recognized by the courts and endorsed in the *Restatement* turn out, therefore, to be quite old; what is new is applying them to wills as well as to will substitutes. The principle being recognized in the *Restatement* is that wills and will substitutes entail a common issue, ascertaining the intention of a deceased transferor. The lesson of the nonprobate system, now being absorbed as the probate rule, is that in cases of mistake in execution or mistaken terms, the purposes of the formal requirements can be served by allowing the proponent of the instrument to prove by clear-and-convincing evidence that the testator intended the transfer.

Experience Abroad

Versions of the harmless error rule for execution errors have been in effect for decades in various Australian and Canadian jurisdictions and in Israel. The Uniform Law Commission emphasized the successful experience in these countries when promulgating the harmless error provision of the Uniform Probate Code (§ 2–503), as did the American Law Institute in explaining the thinking behind *Restatement* § 3.3. Both groups pointed out that a main lesson of the experience abroad was that the harmless error rule did not breed litigation. Each pointed to the report of an Israeli judge, prepared for the British Columbia Law Reform Commission, which explained that the Israeli version of the harmless error rule "actually prevents a great deal of unnecessary litigation," because it "eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent." UPC § 2–503, extracts in comment; RESTATEMENT § 3.3, Reporter's Notes. Persons who under the strict compliance rule would benefit from proving an intent-defeating technical defect lose the incentive to do so, because under the harmless error rule the court will validate the will anyhow.

Experience with the harmless error rule in Australia and elsewhere has shown in what kinds of cases the rule is invoked. The *Restatement* explains that "a hierarchy of sorts has been found to emerge among the formalities. The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless . . . ." Similarly, the reformation rule of *Restatement* § 12.1 would never validate an oral will. Reformation is a rule of documentary practice, which conforms the language of the document to what it was meant to be.

Not only is the harmless error rule never applied to excuse compliance

with the writing requirement, it is also virtually never applied to excuse compliance with the signature requirement. One of the things that you are free to do with a will that has been drafted for you is to decide not to execute it. Failure to sign the will is seldom harmless, because it raises a grave doubt about whether the testator intended the instrument to be his or her will. Nevertheless, as we have seen in *Snide*, the switched wills case, rare circumstances can arise in which the testator's failure to sign his or her will ("a mistake so obvious") should be excused.

Consequently, almost all cases in which the harmless error rule has been applied have involved mistakes in complying with the attestation requirements. The *Restatement* observes: "Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused."

Preventing Unjust Enrichment

When an innocuous execution error defeats a will, or when a scrivener's mistake defeats a devise, the failure to implement the testator's intent not only frustrates the testator's wishes, but it also works unjust enrichment. The devisee or distributee who takes is unjustly enriched at the expense of the intended beneficiary. Preventing unjust enrichment is the central policy value of the law of restitution. The field of restitution emerged only in the twentieth century as a result of the fusion of law and equity, which allowed the common principle of preventing unjust enrichment to be generalized from the older law of quasi-contract and constructive trust. The modern understanding of the importance of avoiding unjust enrichment has been an important stimulus to the development of the rules curing harmless execution errors and reforming mistaken terms.

Malpractice Liability

Although most execution blunders occur when laypersons attempt testation without the help of counsel, cases (such as *Snide*) do occur in which counsel's negligence causes or contributes to the error. By contrast, cases of mistaken terms more often involve a lawyer-drafter, who has misrendered instructions or omitted intended terms. In these cases in which the lawyer might be liable to the intended beneficiaries for malpractice, it can be argued that making available a remedy to correct the mistake is unnecessary, because the curative doctrines benefit the lawyer, who would otherwise bear the malpractice liability. There are, however, many objections to this line of reasoning. Malpractice liability does nothing about the cases in which lawyers are not involved or not culpable. When there is a lawyer to sue, he or she may be wholly or partially judgment-proof—for example, when the lawyer is uninsured or underinsured. For devises of unique property, such as the family home or the family Bible, relief in damages cannot be adequate. Most importantly, what is wrong with the malpractice solution is that, by transforming the mistake claim into tort, it neglects the unjust enrichment intrinsic to mistake cases. Whereas most forms of malpractice cause deadweight loss that can only be remedied by compensation, in the testamentary mistake cases a benefit is transferred from the intended devisee to the mistaken devisee (or intestate taker). Because the mistaken devisee has no claim of entitlement, he or she is unjustly enriched. The malpractice solution leaves the unjust enrichment unremedied and instead creates a needless loss to be charged against the drafter. The mistake remedies (harmless error, reformation) respond to the simple truth that preventing loss is better than compensating loss.

New Vistas for the Probate Lawyer

The *Restatement* provisions endorsing the harmless error and reformation rules for American law bring new opportunities and responsibilities for probate lawyers. The older conventions of the strict compliance rule and the no reformation rule are now open to challenge everywhere. Lawyers processing probate matters need to be alert to the opportunity they now have to raise issues that used to be foreclosed. Sad cases of defeated intent that used to be beyond hope are now remediable, an innocuous formal defect can be excused, mistaken terms can be reformed, but only if counsel sees the issue and brings it forward.

Lawyers processing probate matters need to be alert to the opportunity they now have to raise issues that used to be foreclosed.

When confronting such cases, lawyers will find the *Restatement (Third) of Property: Wills and Other Donative Transfers* to be a deep resource. The *Restatement* is a work of reference as well as authority, which will guide the user to the case law, legislative developments, and scholarly literature. The *Restatement* covers the entire law of wills, and it points to a battery of constructional techniques that can be used to resolve cases of ambiguity (RESTATEMENT §§ 10–11) without having to invoke the curative doctrines of harmless error and reformation that have been emphasized in this article. ■

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