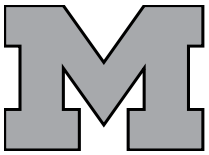

Michigan Law
University of Michigan Law School

Public Law and Legal Theory Working Paper Series

Working Paper No. 207 August 2010

Curing Execution Errors and Mistaken Terms in Wills

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Abstract:

Recent years have seen a remarkable change emerge in the way American courts treat cases involving errors in the execution or the content of wills. The courts have traditionally applied a rule of strict compliance and held the will invalid 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. Likewise, the courts have traditionally applied a no-reformation rule 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 court would not correct the will no matter how conclusively the mistake was shown.

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 Uniform Probate Code treats a noncomplying will as if it had been executed in compliance with the statutory formalities, if the proponent establishes by clear and convincing evidence that the decedent intended the document as his or her will. The new *Restatement of Property* endorses the harmless-error rule.

The new *Restatement* authorizes courts to reform mistaken terms in a will. The new *Restatement*'s reformation provision, which has now been codified in § 2-805 of the Uniform Probate Code and § 415 of the Uniform Trust Code, provides that a court may reform any donative document, including a will, "to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was."

The provisions of the new *Restatement* and the Uniform Probate Code 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 may now be remediable. Innocuous formal defects can be excused, and mistaken terms can be reformed, but only if counsel sees the issue and brings it forward and, in jurisdictions that have not codified the new rules, if the court is hospitable to them.

CURING EXECUTION ERRORS AND MISTAKEN TERMS IN WILLS[*]

John H. Langbein[**] and *Lawrence W. Waggoner*[***]

In recent years a remarkable change has begun to emerge in the way American courts treat cases involving errors in the execution or the content of wills. The courts have traditionally applied a rule of strict compliance and held the will invalid 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. Likewise, the courts have traditionally applied a no-reformation rule 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 court would not correct the will no matter how conclusively the mistake was shown.

Ironically, these intent-defeating results were reached in the name of legal requirements that are 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.[1] These formalities are designed to generate and preserve highly reliable evidence of intention. They 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 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.

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 Uniform Probate Code, promulgated in 1990 and now adopted in

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[*] This article is an expanded and updated version of an article by John H. Langbein that was published in Probate & Property 28 (Jan./Feb. 2004) and 51 Yale Law Report 36 (Summer 2004). The expanded and updated version was prepared by Lawrence Waggoner on August 5, 2010.

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[1] The Uniform Probate Code now provides that a notarized will is valid without the necessity of witnesses. *See* Unif. Probate Code § 2-502; Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 AM. C. TR. & EST. COUNS. J. 83 (2008), also at University of Michigan Public Law Working Paper No. 173, 2009, available at SSRN: http://ssrn.com/abstract=1505463.

several states,[2] treats a noncomplying will as if it had been executed in compliance with the statutory formalities, if the proponent establishes by clear and convincing evidence that the decedent intended the document as his or her will.

In some states in which such curative legislation is not in force, courts have developed a judicial substantial compliance doctrine. In *Will of Ranney*, 589 A.2d 1339 (N.J. 1991), the New Jersey Supreme Court validated a will that the attesting witnesses had failed to sign 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 should be allowed to prove by clear and convincing evidence that the will substantially complies with the statutory requirements.

A few years earlier, in *Re Snide*, 418 N.E.2d 656 (N.Y. 1981), the New York Court of Appeals 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 predating *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 Wills Restatement

The fledgling movement to excuse harmless execution errors and to reform mistaken terms in wills has now received reinforcement in the American Law Institute's *Restatement (Third) of Property: Wills and Other Donative Transfers*. The *Wills 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, gifts, will substitutes, capacity, undue influence, and construction.[3] A final volume covering

[2] Colorado, Hawaii, Michigan, Montana, New Jersey, South Dakota, Utah, and Virginia.

[3] The other *Restatement* relevant to this area, the *Restatement (Third) of Trusts*, is mainly concerned with whether a trust has been validly created and with the powers and duties of trustees, but not with the construction of the dispositive terms in trusts. Constructional law for all donative transfers is the province of the *Restatement (Third) of Property: Wills and Other Donative Transfers*.

class gifts,[4] powers of appointment,[5] present and future interests and perpetuities[6] has now been approved but not yet published in hard-bound volume. 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 old 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 nonprobate accounts, but laypersons acting without counsel often think that a will can trump a prior beneficiary designation. The *Restatement* rule implements the testator's intent in such cases but also protects the financial intermediary from double payment.

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[4] The draft covering class gifts was approved by the Institute at the 2004 annual meeting. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (Tentative Draft No. 4, Approved, May 2004). This draft will be published as part of the third volume of the *Restatement*. For a discussion of this draft, *see* Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993 (2007).

[5] The draft covering powers of appointment was approved by the Institute at the 2006 annual meeting. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (Tentative Draft No. 5, Approved, May 2006). This draft will be published as part of the third volume of the *Restatement*.

[6] The draft covering present and future interests and perpetuities was approved by the Institute at the 2010 annual meeting. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (Tentative Draft No. 6, Approved, May 2010). This draft will later be published as part of the third volume of the *Restatement*. For discussions of this draft, *see* Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised*, University of Michigan Public Law Working Paper No. 199 (2010), available at SSRN: http://ssrn.com/abstract=1614934; Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations*, University of Michigan Public Law Working Paper No. 200 (2010), available at SSRN: http://ssrn.com/abstract=1614936; Lawrence W. Waggoner, *The American Law Institute Proposes Simplifying the Doctrine of Estates*, University of Michigan Public Law Working Paper No. 198 (2010), available at SSRN: http://ssrn.com/abstract=1612878. *See also* Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, University of Michigan Public Law Working Paper No. 206 (2010), available at SSRN: http://ssrn.com/abstract=1652791; Lawrence W. Waggoner, *Congress Should Impose a Two-Generation Limit on the GST Exemption: Here's Why*, University of Michigan Public Law Working Paper No. 205 (2010), available at SSRN: http://ssrn.com/abstract=1640742.

The leading decision, so far, under the Uniform Probate Code's harmless-error rule is *Estate of Hall*, 51 P.3d 1134 (Mont. 2002).[7] Jim Hall died at age 75 on October 23, 1998, survived by his wife, Betty, and two daughters from a previous marriage. In 1997, Jim and Betty's attorney transmitted to them a draft of a new joint will, which would replace Jim's thirteen-year-old earlier will. On June 4, 1997, Jim and Betty met at their attorney's office to discuss the draft. After making several changes, Jim and Betty agreed on the terms of the new will. Jim and Betty were prepared to execute the new will once the attorney sent them the final version.

At the conclusion of the meeting, however, Jim asked the attorney if the draft (as marked up) could stand as a will until the final version could be prepared. The attorney, apparently in ignorance of the statutory requirement of two attesting witnesses, advised them that the draft would be valid if Jim and Betty executed the draft and he notarized it. Betty testified that no one else was in the office at the time to serve as an attesting witness. Jim and Betty proceeded to sign the will and the attorney notarized it without anyone else present. When they returned home, Jim told Betty to tear up his earlier will, which she did.

Jim died before the final version could be prepared and properly executed. The probate court upheld the draft under Montana's enactment of the Uniform Probate Code's harmless-error statute. On appeal, the Supreme Court of Montana affirmed, saying that the uncontradicted testimony that Jim's intent for the joint will "to stand as a will until [the attorney] provided one in a cleaner, more final form" was sufficient to support the trial court's judgment admitting the will to probate.

Mistaken Terms

Section 12.1 of the *Restatement* authorizes courts to reform mistaken terms in a will. Section 12.1, which was subsequently codified in § 415 of the Uniform Trust Code and § 2-805 of the Uniform Probate Code, provides that a court may reform any donative document, including a will, "to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was."[8]

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[7] The Iowa Court of Appeals in an unpublished opinion, Estate of Phillips, 2002 WL 1447482 (Iowa Ct. App. 2002), declined to adopt the *Restatement*'s harmless-error rule on the ground that adopting such a view was a matter for the legislature. In Estate of Sky Dancer, 13 P.3d 1231 (Colo. Ct. App. 2000), the court rejected an unsigned document purporting to be the decedent's will, saying: "[Colorado Revised Statutes] § 15-11-503 [UPC § 2-503] is limited in its application to those instruments which are not executed in strict compliance with the requisites of § 15-11-502 [UPC § 2-502], not to those which are not executed at all."

[8] *See* Erickson v. Erickson, 716 A.2d 92 (Conn. 1998), upholding the use of extrinsic evidence to correct a mistake in an unambiguous will. *But see* Flannery v. McNamara, 738 N.E.2d 739 (Mass. 2000), in which the court unfortunately refused to adopt the *Restatement*'s reformation rule. Had the court adopted the *Restatement*'s reformation rule, reformation should nevertheless have been denied because the evidence in favor of reformation was extremely weak. We agree that reformation (but not the *Restatement*'s reformation rule) should have been refused. Concurring in result, Justice Greaney

The *Restatement*, in § 12.2, also endorses the movement to allow courts to modify wills, trusts, and other donative documents quite apart from instances of mistake, in situations in which modification would achieve a tax objective that the donor would have wished. Section 12.2 is also now codified in the Uniform Probate Code (§ 2-806) and the Uniform Trust Code (§ 416).

The decision that best exemplifies the *Restatement*'s reformation doctrine is *Estate of Herceg*, 193 Misc.2d 201, 747 N.Y.S.2d 901 (Sur. Ct. 2002), the residuary clause of the will of Eugenia Herceg stated: "All the rest, residue and remainder of the property which I may own at the time of my death, real and personal, and wheresoever the same may be situate."

The drafting attorney filed an affidavit stating that the current will was a redraft of a previous will, and in redrafting that previous will using computer software, "some lines from the residuary clause were accidentally deleted." The previous will, which was admitted into evidence, identified the residuary legatee as the testator's nephew or, if he failed to survive, the nephew's wife.

The court noted that the traditional rule that the court cannot supply missing names to correct a mistake conflicts with the primary objective of ascertaining the intention of the testator. Quoting liberally from the *Restatement*, the court concluded that "it seems logical to this court to choose the path of considering all available evidence as recommended by the *Restatement* in order to achieve the dominant purpose of carrying out the intention of the testator.... [W]hat makes sense is to construe the will to add the missing provision by inserting the names of the residuary beneficiaries from the prior will."

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.

1. *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 many topics the law has been changed to treat probate and nonprobate transfers alike.

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agreed, stating that he suspects that, "in an appropriate case, the court will conclude that an unambiguous will should be reformed because of a proven mistake in expression or inducement." "When that case arrives," he said, "the court will either have to reject or revise what is said about reformation in this opinion or struggle to create an ambiguity, where none exists, in order to permit reformation."

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 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 ostensibly new rules being recognized by the courts and endorsed in the *Restatement* turn out, therefore, to be quite old; what is new is the application beyond will substitutes to wills. 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 absorbed as the probate rule, is that in cases of mistake in the execution or of 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.

Although execution errors have traditionally been the province of state law and state courts, the unusually broad preemption provision of the federal Employee Retirement Income Security Act (ERISA) has forced the federal courts into this area. ERISA preempts any state laws "insofar as they may now or hereafter relate to any [ERISA-covered] employee benefit plan." When an employee seeks to change the beneficiary of his or her employee benefit plan, but does not properly execute the change-of-beneficiary form, ERISA itself contains no provision dealing with the matter. The absence of a federal statutory provision on point, together with the preemption of relevant state law, has forced the federal courts to fill the gap by producing federal common law where none previously existed.[9] The scholarly literature suggests that the federal courts should look to the *Restatement of Wills and Other Donative Transfers* as a source of federal common law.[10]

2. *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

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[9] *See, e.g.*, Davis v. Combes, 294 F.3d 931 (7th Cir. 2002), upholding under federal common law an unsigned change-of-beneficiary form that the employee had filled out in her own handwriting and turned in to her employer's benefits coordinator, who accepted and processed the application as though it were complete. *See also* Metropolitan Life Ins. Co. v. Johnson, 297 F.3d 558 (7th Cir. 2002); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1994). The federal case law is collected in Meredith H. Bogart, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447 (2003).

[10] T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185 (2004); Jill M. Perry, *A Fiduciary Solution to ERISA's Problem of Inconsistent Oral Promises*, 28 J. PENSION PLANNING & COMPLIANCE 1 (Winter 2003). *See also* Sarabeth A. Rayho, Note, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Benefit Plans*, 106 MICH. L. REV. 373 (2007)..

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. Persons who under the strict-compliance rule would have benefitted from proving an intent-defeating technical defect now lose the incentive to do so under the new rule, because under the harmless-error standard 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 the transferor meant it to be.

Not only is the harmless-error rule never applied to excuse compliance with the writing requirement, it is also seldom 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.

More recently, cases have begun to emerge in which the supervising attorney, with the client and all witnesses present, circulates one or more estate-planning documents for signature, and fails to notice that the client or one of the witnesses has unintentionally neglected to sign one of the documents. This often, but not always, arises when the attorney prepares multiple estate-planning documents—a will, a durable power of attorney, a health-care power of attorney, and perhaps a revocable trust. In *Sisson v. Park Street Baptist Church,* 24 E.T.R.2d 18 (Ont. Gen. Div. 1998), the Ontario Court of Justice applied a harmless-error rule even though Ontario, unlike some other Canadian provinces, had not enacted such a rule by legislation. Although one of the witnesses (the drafting attorney!) inadvertently failed to sign the testator's will, the court nevertheless validated the will because the court was "satisfied that the will actually reflects the intention of the testatrix." The court found that "the ... absence of legislation on point should not stop the court from developing the common law where, in circumstances like this, there has been substantial compliance, given that the dangers which two witnesses are to guard against does not exist here."

Snide and *Sisson* are cases in which there is no doubt that the testator intended to execute the will. Because the evidence convincingly demonstrates that the testator or witness had every intention of affixing his or her signature, the failure to do so was the

product of confusion, not design, and is therefore a harmless error that can properly be excused under § 3.3 of the *Restatement* or § 2-503 of the Uniform Probate Code.[11]

3. *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.

4. *Malpractice Liability*. Although most execution blunders occur when laypersons attempt testation without the help of counsel, cases (such as the cases we have highlighted in this article—*Ranney*, *Snide*, *Hall*, and *Sisson*) do occur in which counsel's negligence causes or contributes to the error. Cases of mistaken terms more often involve a lawyer-drafter, who has misrendered instructions or omitted intended terms. In 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 merely 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 *Restatement*'s remedies for mistake (the harmless-error rule, reformation) respond to the simple truth that preventing loss is better than compensating loss.

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[11] In Allen v. Dalk, 826 So.2d 245 (Fla. 2002), the Florida Supreme Court refused to remedy by constructive trust a case in which the testator inadvertently failed to sign her will in an execution ceremony, supervised by her attorney, that left no doubt that the testator intended to execute the will. Although Florida had not enacted the harmless-error rule of the Uniform Probate Code, the court speculated—erroneously in our view—that such a case would not be saved under that rule.

New Tools for the Probate Lawyer

The provisions of the *Wills Restatement* 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 may now be remediable. Innocuous formal defects can be excused, and mistaken terms can be reformed, but only if counsel sees the issue and brings it forward and, in jurisdictions that have not codified the new rules, if the court is hospitable to them.

When confronting such cases, lawyers will find the *Restatement (Third) of Property: Wills and Other Donative Transfers* to be a deep resource. The *Wills Restatement* is a work of reference as well as authority, whose Reporter's Notes guide the user to the case law, legislative developments, and scholarly literature. The *Restatement* covers the entire law of wills, gifts, will substitutes, capacity, undue influence, and construction, and it points to a battery of techniques that can be used to resolve cases of ambiguity without having to invoke the curative doctrines of harmless error and reformation that have been emphasized in this article.