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 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.”

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-

Wills have to be given effect when the testator has died and is unable to testify about what was intended.
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 docu-
ments quite apart from instances of
mistake, in situations in which refor-
mation would achieve a tax objective
that the donor would have wished.

The principle being recognized in the
Restatement is that wills and will
substitutes entail a common issue,
ascertaining the intention of a
deceased transferor.

(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 malprac-
tice liability.

Unifying the Law of Probate and
Nonprobate Transfers
Since World War II the use of nonpro-
bate modes of transfer on death has
burgeoned. Far more wealth now
flows through the main will substi-
tutes (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 pro-
bate and nonprobate transfers alike.
The harmless error and reformation
rules now being applied to mistakes
in wills are part of this process of uni-
fication, because they are the rules
that have long applied in the nonpro-
bate 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

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 experi-
ence abroad was that the harmless
error rule did not breed litigation. Each
pointed to the report of an Israeli
court, prepared for the British
Columbia Law Reform Commission,
which explained that the Israeli ver-
sion of the harmless error rule "actu-
ally prevents a great deal of unnecessary
litigation," because it "eliminates dis-
putes 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 com-
ment; 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 formal-
ties. The requirement of a writing is so
fundamental to the purpose of the exe-
cution 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 docu-
mentary 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

**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.