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Coming to Terms with the Uniform Probate Code's Reformation of Wills

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**COMING TO TERMS WITH THE UNIFORM PROBATE CODE'S
REFORMATION OF WILLS**

Wayne M. Gazur*

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I. INTRODUCTION

With little fanfare,¹ the 2008 amendments to the Uniform Probate Code (UPC) adopted the doctrine of reformation in the context of wills, as well as

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1. The new section introduced by the 2008 revisions, UPC section 2-805, garnered surprisingly little commentary, particularly in light of the importance of the doctrine it supplanted. *See, e.g.*, John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 71 n.156 (2009) (discussing the UPC's incorporation of the Uniform Trust Code's concept of reformation); James R. Walker, *Correcting Documentary Misdescription with Reformation*, 39 COLO. LAW. 97, 98–99 (2010) (discussing the need for broader reformation relief and the UPC's adoption of the minority view on reformation). However, the section is drawn from RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (2003), where the adoption of reformation did generate discussion. *See, e.g.*, Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 389–90 (2001) (discussing the Restatement's adoption of the reformation doctrine and exploring the value of the change); Emily Sherwin, *Clear*

other kindred donative instruments,² on account of mistake.³ This Essay focuses on the reformation of wills and the impact that this little-heralded provision may carry.

While the introduction of reformation to the UPC is largely an improvement,⁴ it raises a number of concerns. This Essay proposes that reformation of wills is not only doctrinally distinct from the interpretation of

and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice, 34 CONN. L. REV. 453, 473–76 (2002) (analyzing the proposed clear and convincing evidence standard and arguing that it only ends up diminishing accuracy without preserving the advantages of formalities); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 30 (2004) (enumerating four factors identified by scholarly literature as having significant influence on the Restatement’s adoption of the reformation doctrine). The judicial reception to the Restatement proposal has been mixed. The Indiana Supreme Court followed the Restatement position in reforming a testamentary trust. See *Carlson v. Sweeney*, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E.2d 1191, 1200 (Ind. 2008). At least one New York Surrogate Court opinion expressly applied it to a will. See *In re Estate of Herceg*, 747 N.Y.S.2d 901, 905 (Sur. Ct. 2000). Other New York Surrogate Courts have reached different results in the application of reformation to beneficiaries with special needs. See, e.g., *In re Rappaport*, 866 N.Y.S.2d 483, 488 (Sur. Ct. 2008) (granting reformation); *In re Rubin*, 781 N.Y.S.2d 421, 426 (Sur. Ct. 2004) (rejecting reformation). Several courts have expressly rejected the Restatement position. See, e.g., *In re Last Will & Testament of Daland*, No. 2920-MA, 2010 WL 716160, at *5 (Del. Ch. Feb. 15, 2010) (declining to adopt the Restatement position); *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) (“To allow for reformation in this case would open the floodgates of litigation . . .”); *In re Lyons Marital Trust*, 717 N.W.2d 457, 462 (Minn. Ct. App. 2006) (finding no authority to reform an unambiguous will).

2. UPC section 2-805 provides that a “court may reform the terms of a governing instrument.” UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012) (emphasis added). While the focus of this Essay is on wills, reformation under the UPC is not so limited, but instead applies to any “governing instrument,” which includes:

a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

Id. § 1-201(18), 8 U.L.A. at 21.

3. See *id.* § 2-805, 8 U.L.A. at 238.

4. As discussed in the text that follows, the plain meaning rule generally prohibits the use of extrinsic evidence of the testator’s subjective intent in the reformation of wills on account of mistake. See *infra* note 11 and accompanying text. The plain meaning rule has been roundly criticized by most contemporary commentators; for example, Professor Hirsch has referred to it as “the meaningless plain meaning rule.” See, e.g., Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1117 (1996). Professors Langbein and Waggoner’s *tour de force* 1982 article in the *Pennsylvania Law Review* made the case for abandoning the plain meaning rule, supplanting it with a reformation remedy. See John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 590 (1982). As discussed in this Essay, their work provided the early direction for the 2008 UPC amendment. See *infra* notes 39–40 and accompanying text. That said, in the ensuing years, the UPC otherwise increased the amount of extrinsic evidence admissible in the interpretation of wills, consequently addressing some of the common drafting mistakes noted in the Langbein and Waggoner article. See *infra* notes 26–40 and accompanying text.

ambiguous wills⁵ but also a more troubling measure that has the potential to create more, possibly unfounded, will contests.⁶ Further, while the closely related doctrine governing the interpretation of ambiguous wills needs to be clarified and made uniform by the UPC, the new reformation measure fails to meet these needs.⁷

Part II of the Essay briefly discusses the plain meaning rule and its role in addressing and reforming ambiguities in instruments, while Part III describes the companion no reformation rule. The origin and operation of the new UPC reformation rule is discussed in Part IV of the Essay, and Parts V and VI assess its impact in the overall context of the UPC. In Part VII, the Essay proposes a clarification of the rule to address the longstanding, but unevenly applied, doctrine of ambiguity. With those substantive interpretative issues addressed, the remainder of the Essay adopts a cautionary tone: Part VIII questions the impact of the new rule on estate litigation and estate planning practice. In Part IX the Essay accordingly proposes clear limits on the role of juries in reformation proceedings. With Part X the Essay concludes by recommending safeguards that might be desirable for some testators to avoid unforeseen complications arising from the UPC's adoption of reformation.

II. THE PLAIN MEANING RULE

With limited exceptions,⁸ a valid will must be in writing⁹ and must satisfy execution formalities.¹⁰ The “plain meaning rule” protects the role of these requirements by acting as a statute of frauds—precluding the introduction of extrinsic evidence of the testator's subjective intent.¹¹ In addition to its special

5. See *infra* note 61 and accompanying text.

6. See *infra* text accompanying notes 53–55.

7. See *infra* text accompanying notes 112–14.

8. A very limited number of states permit oral, or nuncupative, wills in limited circumstances and for limited amounts and types of property. See, e.g., IND. CODE ANN. § 29-1-5-4 (LexisNexis 2011) (limiting nuncupative wills to the disposition of personal property not to exceed \$1,000, or \$10,000 if in active military service in time of war); WASH. REV. CODE ANN. § 11.12.025 (West 2012) (limiting nuncupative will dispositions by members of the armed forces or persons employed on a vessel of the United States merchant marine to wages or personal property, and limiting other testators to disposing personal property not to exceed \$1,000 value). Electronic wills are permitted in Nevada. See NEV. REV. STAT. ANN. § 133.085 (LexisNexis 2009). For a discussion of potential future developments, see Christopher J. Caldwell, Comment, *Should “E-Wills” Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 474–78 (2002).

9. See, e.g., UNIF. PROBATE CODE § 2-502(a)(1) (amended 2010), 8 U.L.A. 136 (Supp. 2012) (“[A] will must be . . . in writing.”).

10. With the exception of holographic wills, a valid will must be attested by witnesses or, under the UPC, acknowledged before a notary public or other individual authorized by law to take acknowledgements. See *id.* § 2-502(a), 8 U.L.A. at 136.

11. The principle of reliance on the “plain meaning” or “clear meaning” of a writing is found in contexts other than wills. See, e.g., Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 232 (2004) (discussing the

execution formalities, a will is different from other legal instruments—such as contracts—because it is a statement of solely one individual: the testator. Further, that individual is always deceased and unable to testify when the instrument is interpreted, raising the possibility of fraud and unreliable, self-serving testimony by those hoping to change the outcome under the will.¹² Thus, courts strongly prefer to apply the plain meaning rule.¹³

Despite this preference, the rule is subject to two exceptions, both of which focus on ambiguities in the instrument. The “latent ambiguity” exception permits the introduction of extrinsic evidence to resolve an ambiguity that is not clear on the face of the instrument but instead manifests itself when the will is applied to the assets, apparent beneficiaries, and other circumstances of the decedent’s estate.¹⁴ The resolution of a latent ambiguity is generally subject to a

application of the plain meaning rule in statutory construction); Jerald D. Stubbs, *The Federal Circuit and Contract Interpretation: May Extrinsic Evidence Ever Be Used to Show Unambiguous Language Is Ambiguous?*, 39 PUB. CONT. L.J. 785, 785–86, 787 (2010) (discussing the predominance of the plain meaning rule in recent years as the preferred rule for contract interpretation in the Court of Appeals for the Federal Circuit). The applications of the plain meaning principle share some overlaps. See, e.g., Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 561–70, 587–93 (2005) (discussing the application of the plain meaning rule to wills and contracts). For nuances of the plain meaning rule, see Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 819–34 (2001) (discussing the plain meaning rule and its diminishing application due to judicially created exceptions); Scott T. Jarboe, Note, *Interpreting a Testator’s Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1370 (2002) (discussing the plain meaning rule and suggesting that a court’s construction of a will should include evidence of the way in which the testator used language rather than of actual intent). The plain meaning rule does not bar the admission of extrinsic evidence for other non-interpretational purposes, such as establishing the testator’s lack of capacity or the presence of fraud, duress, or undue influence. See generally JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 159–221 (8th ed. 2009) (discussing the doctrines of incapacity, undue influence, fraud, or duress); *id.* at 340–41 (comparing extrinsic evidence rules for different types of ambiguities).

12. See, e.g., *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (Sur. Ct. 1997) (quoting *In re Estate of Jean Northcott* (N.Y. Sur. Ct. Sept. 21, 1995) (unpublished opinion) (in declining to reform will based on testimony of sons seeking to benefit, the court quoted from an earlier New York decision: “To permit a draftsman to tell us, often years after a Will has been signed, what it is supposed to say (which, in many instances, we fear, will amount to what it should have said, rather than what it does say), is to risk allowing him to rewrite it We need not point out the damage that could be done by an unscrupulous draftsman, who might collude with beneficiaries to redefine the parameters of a bequest.”); Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners’ Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 3 (1990) (“Courts . . . 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.” (footnotes omitted)).

13. See *supra* note 12 and accompanying text.

14. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmt. c (2003). When faced with an early ambiguity case, the Supreme Court stated: “[A]s a latent

preponderance of the evidence standard.¹⁵ In contrast, “patent ambiguities,” which are clear on the face of the instrument, are resolved by judicial construction rather than by admitting extrinsic evidence of the testator’s intent.¹⁶ However, in practice, courts increasingly admit extrinsic evidence to interpret patent ambiguities.¹⁷

The uncomfortable result of hewing strictly to the patent ambiguity rule and barring the admission of extrinsic evidence of the testator’s intent is demonstrated by a typical case, *Marsh v. Delta Gamma Anchor Center for Blind Children (In re Estate of Lewis)*.¹⁸ In *In re Estate of Lewis*, the decedent’s holographic will devised her house and its “entire contents” to one beneficiary, who was also the personal representative.¹⁹ The will devised the residue of the estate to a college fund and various charities.²⁰ In the will, the decedent stated that her jewelry and coins were “temporarily” located at a bank and that she intended “to be more specific at a later date”²¹—but the will made no mention of stock certificates. After the death of the testatrix, jewelry, coins, and stock certificates valued at approximately \$180,000 were found in the house.²²

The trial court held that the bequest of the contents of the house did not include the jewelry, coins, and stock certificates; instead, these were part of the residue.²³ The 1990 UPC governed the case, but no section specifically addressed this situation.²⁴ The Colorado Court of Appeals affirmed,²⁵ finding support from a general rule articulated in other jurisdictions that “unless a contrary intention is clearly expressed in the will, a devise of a house and its contents does not include items such as stock certificates, bank accounts, checks, insurance policies, deeds, mortgages, and securities.”²⁶ The court held that since the decedent included some examples of her home’s contents that she intended to devise to the personal representative, the failure to mention items of such value suggested that she did not consider them to be “contents.”²⁷ The court further

ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence.” *Patch v. White*, 117 U.S. 210, 217 (1886).

15. See, e.g., *Phipps v. Barbera*, 498 N.E.2d 411, 414 (Mass. App. Ct. 1986) (holding that a latent ambiguity resulting from a partial fit of a description in a will is shown by a preponderance of the evidence); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.2 (2003) (“An ambiguity . . . [is construed] in accordance with the donor’s intention, to the extent that the donor’s intention is established by a preponderance of the evidence.”).

16. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmt. b (2003); Cornelison, *supra* note 11, at 819–20.

17. See Cornelison, *supra* note 11, at 819–20.

18. 93 P.3d 605 (Colo. App. 2004).

19. *Id.* at 606.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See *id.* at 607.

25. *Id.* at 609.

26. *Id.* at 607.

27. *Id.*

reasoned that the specific inclusion of residuary takers evidenced the decedent's intention that these takers should receive a considerable sum and that including the jewelry, coins, and stocks in the "contents" would significantly decrease the residue.²⁸

While attorneys might rely on commonly accepted terms for which contradictory extrinsic evidence is not appropriate,²⁹ one would hope that the Colorado court would have entertained extrinsic evidence on what the testatrix intended by her use of words in a will that she herself drafted.³⁰ What was this layperson actually thinking when she wrote the phrase, "entire contents"?³¹ However, the court apparently applied the plain meaning rule, treating this as a patent ambiguity for which extrinsic evidence was not admissible.³²

In practice, dealing with ambiguities under the plain meaning rule is much more textured and uncertain than it may seem in theory. Some courts have created exceptions or employed strained interpretations or other distortions of the rule.³³ Because addressing mistakes is the common concern, other doctrines,

28. *Id.* at 608.

29. However, if open reformation of wills is permitted, no term is beyond flyspecking by a litigant. Some refuge may be afforded by the longstanding canon of construction that the use of a legal term invokes that term's normal meaning accorded by the law. *See, e.g.,* Longy Sch. of Music, Inc. v. Pickman, 183 N.E.2d 289, 291 (Mass. 1962) ("The words of the will are to be given their ordinary meaning unless an intention to use them in a different sense is shown." (citing *Smith v. Livermore*, 10 N.E.2d 117, 124 (Mass. 1937); *Franklin Square House v. Siskind*, 78 N.E.2d 649, 650 (Mass. 1948))). And, this canon would be stronger with an attorney-drafted will. Indeed, the Restatement, in another section dealing with testator intent, gives some deference to attorney-drafted instruments. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 cmt. e (2003). Still, it is clear that attorneys make mistakes, misunderstand concepts, or employ clumsy language—thereby opening the will to possible admission of extrinsic evidence of a mistake.

30. If the house had contained normal furnishings and not the other items there would not have been a case. The Colorado court might have stretched the latent ambiguity exception to permit evidence of the testatrix's subjective intent once the other, "unusual" assets were discovered, particularly in light of the will's other language speaking to their seemingly temporary disposition. *See Lewis*, 93 P.3d at 606. However, courts that apply the plain meaning rule strictly typically would not stretch in that manner. For example, in *Mahoney v. Grainger*, 186 N.E. 86 (Mass. 1933), the testatrix intended to devise her estate to her many cousins, although she was survived by an elder relative of those devisees, an aunt. *Id.* at 86. Her attorney used the language "to my heirs at law," *id.*, which resulted in the entire estate passing to the aunt, thus precluding the cousins. *Id.* at 87. The court rejected the argument that the plural word "heirs" introduced a latent ambiguity in the will when only *one* heir would take—thereby declining to consider the issue of intended devisees. *Id.*

31. *See Lewis*, 93 P.3d at 606.

32. The court did not use the phrase "plain meaning rule" in its opinion, but that is apparently what it employed. *See Lewis*, 93 P.3d at 607–08 (considering only the specific language of the will to determine intent). UPC section 1-103 preserves general rules of law and equity to the extent not displaced by the UPC. UNIF. PROBATE CODE § 1-103(amended 2010), 8 U.L.A. 14 (Supp. 2012).

33. *See generally* Cornelison, *supra* note 11, at 819–34 (discussing the plain meaning rule and exceptions to its strict application); Greenawalt, *supra* note 17, at 561–70 (same).

such as dependent relative revocation, have been liberally applied to ameliorate scrivener's errors and other mistakes.³⁴

III. NO REFORMATION RULE

The no reformation rule is a close companion to the plain meaning rule.³⁵ While courts can properly separate the two rules, they share a common principle: a will cannot be rewritten by a court using contradictory extrinsic evidence of the testator's intent.³⁶

Under the plain meaning rule discussed above, extrinsic evidence may be admitted to aid in interpreting the instrument but only if the instrument itself contains an ambiguity.³⁷ In comparison, reformation usually involves correcting a mistake—the presence of which is supported by extrinsic evidence—in an unambiguous instrument.³⁸

In a path-breaking 1982 article, Professors Langbein and Waggoner proposed the open reformation of wills as a more direct (and intellectually honest) approach to dealing with mistakes.³⁹ The Uniform Law Commission embraced that approach twenty-six years later with the adoption of UPC section 2-805.⁴⁰

IV. THE FUNDAMENTALS OF UPC SECTION 2-805

UPC section 2-805 is succinct:

The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention

34. See, e.g., *De Paul v. Irwin* (Estate of Anderson), 65 Cal. Rptr. 2d 307, 307 (Ct. App. 1997) (applying the doctrine of dependent relative revocation to revive an omitted portion of a revoked will and incorporate the provisions in the subsequent revoking will); Frank L. Schiavo, *Dependent Relative Revocation Has Gone Astray: It Should Return to Its Roots*, 13 WIDENER L. REV. 73, 74 (2006) (arguing that the doctrine of dependent relative revocation is no longer applied consistently and is often stretched to cover situations for which it was not intended).

35. See, e.g., *DUKEMINIER ET AL.*, *supra* note 11, at 335–36 (describing both rules as operating in tandem to bar the admission of extrinsic evidence).

36. See, e.g., *Flannery v. McNamara*, 738 N.E.2d 739, 743–48 (Mass. 2000) (applying the plain meaning rule and the no reformation rule as separate rules). There also is a distinction between interpretation of a will, where the testator's intent is discovered, and construction of a will, where canons of presumed intention are applied. See generally Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 82 (2005) (emphasizing the distinction between interpretation and construction of wills).

37. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmts. b & c (2003).

38. See *infra* notes 55–60 and accompanying text.

39. See Langbein & Waggoner, *supra* note 4, at 522.

40. UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.⁴¹

This concept was adapted from Uniform Trust Code section 415,⁴² which in turn was based on section 12.1 of the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement).⁴³ However, its ultimate roots lie in Professors Langbein and Waggoner's proposal for open reformation of wills on grounds of mistake, safeguarded by the use of a clear and convincing evidence standard in the admission of extrinsic evidence.⁴⁴

Section 2-805 has two critical features—establishing the transferor's intention and defining what constitutes a mistake in expression or inducement.⁴⁵ The Restatement's comments expand on these features and illustrate when reformation is and is not appropriate.⁴⁶

In terms of establishing what the transferor's intention was, Illustration 2 of the comments describes *G*, who devises his estate to his sister, but later has a change of heart and wishes to devise the estate to his niece, the daughter of the sister.⁴⁷ *G* mistakenly believed that his oral communication of this change to the niece would be valid.⁴⁸ Illustration 2 explains that reformation does not apply because there was no mistake in the original will.⁴⁹ In Illustration 3, *G* devises bonds to his daughter, *A*, and the residue to a friend.⁵⁰ The bonds decline in value to only half of what they were worth at time of execution, and *G* probably would have left more to *A* had he known that the bonds would depreciate.⁵¹ Again, Illustration 3 explains that no reformation remedy is appropriate because *G*'s mistake did not relate to facts that existed when the will was executed.⁵²

While clever, either illustration as an obstacle to reformation can be sidestepped if the claimant establishes a convincing timeline that precedes or accompanies the decedent's execution of the will and produces the inference that

41. *Id.*

42. "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intention and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." UNIF. TRUST CODE § 415 (amended 2005), 7C U.L.A. 514–15 (2006).

43. This lineage is recited in the official comment to UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

44. See Langbein & Waggoner, *supra* note 4, at 584–85, 590.

45. See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

46. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmts. a, e, & g–n (2003).

47. *Id.* cmt. h, illus. 2.

48. *Id.*

49. *Id.*

50. *Id.* illus. 3.

51. *Id.*

52. *Id.*

a mistake was made in drafting the instrument.⁵³ In that sense, the potentially malleable accounts of what *G*'s intention was produce new opportunities for the assertion of unfounded claims by disappointed devisees.⁵⁴ Because the instruments in both illustrations are not ambiguous,⁵⁵ this reformation option opens a new litigation avenue by potentially expanding the role of extrinsic evidence.

Illustrations 4 and 6 deal with two alternate devises to *A*.⁵⁶ In Illustration 4, the will devised \$1,000, but extrinsic evidence, "including the testimony and files of the drafting attorney, shows that there was a mistake in transcription and that *G*'s intention was to devise \$10,000 to *A*."⁵⁷ In Illustration 6, the will devised \$1,000, but extrinsic evidence "shows that there was a mistake in transcription and that *G*'s intention was not to devise any property to *A*."⁵⁸ Both illustrations conclude that the mistake can be reformed upon the introduction of clear and convincing evidence.⁵⁹ In both of these illustrations, there was no patent or latent ambiguity, so that application of the plain meaning rule would have barred introduction of the extrinsic evidence.⁶⁰ Indeed, this demonstrates how reformation of instruments affected by mistake differs from interpretation of ambiguous instruments.

53. See, e.g., *Sec. Nat'l Bank v. Rickert (In re Trust Created by Isvik)*, 741 N.W.2d 638, 647–48 (Neb. 2007) (dealing with the timing of a purported written revocation of a trust countered by conflicting extrinsic evidence that failed to satisfy a clear and convincing evidence standard in a proceeding for reformation).

54. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. h, illus. 2 & 3 (2003).

55. *Id.* However, one must be careful in making categorical determinations of what language is ambiguous or not and whether that will determine the outcome. Courts can strain to consider extrinsic evidence of the testator's subjective intent. Such a strained case is demonstrated by *Krause v. Krause (In re Estate of Gibbs)*, 111 N.W.2d 413 (Wis. 1961), involving a bequest to "Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin." *Id.* at 415. While a Robert J. Krause did live at that address (but was a stranger), the Wisconsin Supreme Court upheld the award of the bequest to the testator's friend, Robert W. Krause, in spite of the absence of any ambiguity, applying a vague "details of identification" rationale. *Id.* at 418.

56. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4 & 6 (2003).

57. *Id.* illus. 4.

58. *Id.* illus. 6.

59. *Id.* illus. 4 & 6.

60. *Id.*; see also *DUKEMINIER ET AL.*, *supra* note 11, at 340 ("Under the plain meaning rule the words of the will cannot be disturbed by evidence that another meaning was intended . . ."). The comments and illustrations in the Restatement search for the testator's subjective intent through the admission of extrinsic evidence. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 10–12 (2003). This Essay likewise adopts the testator's subjective intent as a normative guide. In that respect, it rejects other proposed approaches to divining intent. See, e.g., Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 384–93 (2011) (summarizing the scholarly debate concerning interpretation of wills, including the application of objective standards of intent).

The comment to Uniform Trust Code section 415 likewise captures the distinction between reformation on account of mistake and interpreting an ambiguity in an instrument:

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent.⁶¹

As the comments to both the Restatement and the Uniform Trust Code recognize, reformation and the interpretation of ambiguous documents are distinct, yet closely related, doctrines that may be easily confounded. Although including reformation in the UPC was an improvement, the UPC should have clearly addressed how to apply both doctrines in tandem. Accordingly, this Essay later proposes a clarifying revision of the UPC.⁶²

V. PLACING UPC SECTION 2-805 IN PERSPECTIVE

Section 2-805 opens wills to the possible admission of more extrinsic evidence of the testator's subjective intent.⁶³ Under the provision, a will can be reformed if it is proven by clear and convincing evidence that a mistake was made in the will, such that it does not reflect the testator's intent.⁶⁴ That mistake could include an omitted devisee, an errantly included devisee, an incorrect amount, or an omitted clause.⁶⁵ At first blush, this is a significant departure from the traditional plain meaning rule.⁶⁶ However, the UPC already affords numerous opportunities for the admission of extrinsic evidence on other issues,⁶⁷ and those issues can impact "who receives what" in a given circumstance, no less than what might occur under section 2-805. Indeed, although one can only speculate, the cumulative impact on outcomes in probate litigation as a result of extrinsic evidence admitted under these other provisions would likely outweigh the potential impact of section 2-805, due to the diverse circumstances

61. UNIF. TRUST CODE § 415 cmt. (amended 2005), 7C U.L.A. 515 (2006).

62. See *infra* notes 122–24 and accompanying text.

63. See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

64. *Id.*

65. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. h, illus. 2 & cmt. i, illus. 4–6 (2003).

66. See DUKEMINIER ET AL., *supra* note 11, at 340.

67. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmts. b & c (2003); DUKEMINIER ET AL., *supra* note 11, at 336, 340–43.

envisioned by those rules and their more commonplace nature.⁶⁸ Still, in situations where section 2-805 might be invoked, its existence could influence outcomes that would be very important to the interested parties. Further, as discussed later, section 2-805 has the potential to create more uncertainty in the estate planning and administration process in a much broader fashion.⁶⁹

Aside from its role in interpreting the will, extrinsic evidence is admissible to prove the testator's lack of capacity and the presence of fraud, duress, or undue influence, apparently under a lesser preponderance of the evidence standard.⁷⁰ The claim of a pretermitted spouse or child may in part turn on the testator's statements or other evidence outside the will.⁷¹ Extrinsic evidence can be introduced to prove testamentary intent,⁷² as well as other facts concerning the execution, alteration, or revival of instruments.⁷³ Likewise, extrinsic evidence can be introduced in "[d]etermining whether a revocatory act was accompanied by revocatory intent."⁷⁴ Indeed, the inquiries into revocation, dependent relative revocation, and revival are directly intent-based, with intent in the close cases being shown by extrinsic evidence.⁷⁵

The rules of construction found in Article 2, Part 6 of the UPC, such as antilapse and ademption, can be overridden by "a finding of a contrary intention,"⁷⁶ and extrinsic evidence is admissible for the purpose of rebutting the rules of construction.⁷⁷ Extrinsic evidence can also play a role within a given rule of construction, such as ademption.⁷⁸

68. See, e.g., deFuria, *supra* note 12, at 21–22, 27–28, 35 (supporting reformation because, in part, courts already allow extrinsic evidence for fraud, the personal usage exception, insane delusion, and pretermisison).

69. See *infra* Part VIII.

70. See DUKEMINIER ET AL., *supra* note 11, at 342–43; deFuria, *supra* note 12, at 21, 35. While UPC section 2-501 requires that the testator be "of sound mind," UNIF. PROBATE CODE § 2-501 (amended 2010), 8 U.L.A. 132 (Supp. 2012), the other causes of action that developed under the common law are preserved by UPC section 1-103, which provides that the principles of law and equity supplement the UPC unless displaced by the particular provisions of the UPC, *id.* § 1-103, 8 U.L.A. at 14. The UPC sections allowing the admission of extrinsic evidence are silent as to the evidentiary standard, suggesting that it is the typical preponderance of the evidence standard applied in civil litigation.

71. See UNIF. PROBATE CODE § 2-301 (amended 2010), 8 U.L.A. 122–23 (Supp. 2012) (omitted spouse); *id.* § 2-302, 8 U.L.A. at 124 (pretermitted child).

72. See *id.* § 2-502(c), 8 U.L.A. at 136.

73. See *id.* § 2-503, 8 U.L.A. at 141.

74. See *id.* § 2-507 cmt., 8 U.L.A. at 146.

75. See *id.* § 2-507 & cmt., 8 U.L.A. at 146; *id.* § 2-509, 8 U.L.A. at 150–51.

76. *Id.* § 2-601, 8 U.L.A. at 157–58.

77. *Id.* cmt. The comment also explains the 1990 revisions to this section. One purpose of the revisions was to delete a particular sentence, "a possible, though unintended, reading [of which] . . . might have been that it prevented the judicial adoption of a general reformation doctrine for wills, as approved by . . . the Restatement (Third) of Property." *Id.*

78. See *id.* § 2-606(a)(6), 8 U.L.A. at 179–80 (extrinsic evidence could be involved in proving the testator's intention as to ademption of a devise).

In a similar manner, the rules of construction in Article 2, Part 7, such as survival, can be overridden by “a finding of a contrary intention.”⁷⁹ In particular, section 2-704, dealing with powers of appointment, allows extrinsic evidence to overcome the statute’s presumption that a blanket-exercise clause does not exercise a power of appointment that requires a reference to the power.⁸⁰

Thus, prior to the addition of section 2-805, the UPC allowed the admission of extrinsic evidence on a number of fronts, generally subject to a lesser preponderance of the evidence standard.⁸¹ It would be an overstatement to claim that section 2-805 alone will add an overwhelming new wave of extrinsic evidence that could erode written wills. The UPC’s 1990 changes in particular ameliorated some of the execution and formality mistakes identified in Langbein and Waggoner’s 1982 article,⁸² further narrowing the potential added impact of section 2-805. However, section 2-805 is not without its faults. Most troubling is the type of situation described in Illustrations 4 and 6 of the Restatement, which opens the door to controversies beyond the construction of will terms.⁸³ As discussed later, they raise the possibility of more will contests from disappointed persons who are omitted entirely from the will or who otherwise received a disappointing amount.⁸⁴

VI. INTERACTIONS WITH OTHER SECTIONS OF THE UPC

Comment i of the Restatement section 12.1 offers a comprehensive definition of “mistake”:

A mistake of expression arises when a donative document includes a term that misstates the donor’s intention . . . fails to include a term that was intended to be included . . . or includes a term that was not intended

79. *Id.* § 2-701, 8 U.L.A. at 184–85.

80. *See id.* § 2-704 cmt. 8, U.L.A. at 189.

81. *See supra* note 70 and accompanying text.

82. The UPC’s adoption of the harmless error rule in section 2-503, *see* UNIF. PROBATE CODE § 2-503 & cmt. (amended 2010), 8 U.L.A. 146 (Supp. 2012), and the admission of extrinsic evidence of testamentary intent in section 2-502(c), *see id.* § 2-502(c), 8 U.L.A. at 145, responded to several of the circumstances Langbein and Waggoner identified that needed reform. *See* Langbein & Waggoner, *supra* note 4, at 523. The principal case is *Snide v. Johnson (In re Snide)*, 437 N.Y.S.2d 63 (Ct. App. 1981), discussed in Langbein & Waggoner, *supra* note 4, at 562–66. A lawyer supervised a simultaneous will execution, but husband and wife each signed the will prepared for the other. *In re Snide*, 437 N.Y.S.2d at 63–64. The mistake was not discovered until after the husband’s death. *Id.* at 64. The court allowed reformation of the will by carving out a limited exception for the specific circumstance. *Id.* at 64–65. This is now addressed by UPC section 2-503. *See* UNIF. PROBATE CODE § 2-503 & cmt. (amended 2010), 8 U.L.A. 141 (Supp. 2012).

83. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4 & 6 (2003).

84. *See infra* Part VIII.

to be included A mistake in the inducement arises when a donative document includes a term that was intended to be included or fails to include a term that was not intended to be included, but the intention to include or not to include the term was the product of a mistake of fact or law.⁸⁵

Under this broad definition, it would seem that any ambiguity in a will would be a mistake, as the testator's intent would surely be to have his or her wishes clearly carried out.⁸⁶ The use of the term "contents," as in *In re Estate of Lewis*,⁸⁷ or "my friends"⁸⁸ to identify a class would constitute such a mistake of expression. However, if these properly fall within the scope of the ambiguity doctrine, it appears that Restatement section 12.1 and UPC section 2-805 do not supply a remedy; this is discussed in the next Part.⁸⁹ However, a failure to adequately address lapse issues,⁹⁰ to include or exclude a spouse or children,⁹¹ or a host of other common drafting deficiencies short of ambiguities,⁹² *would* fall within a mistake of expression to which the Restatement applies.⁹³ Some of these mistakes, such as not anticipating lapse, are partially addressed by provisions such as UPC sections 2-603 and 2-604.⁹⁴ However, as comment k of Restatement section 12.1 acknowledges, section 2-805 has the potential to

85. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i (2003).

86. Professor Volkmer's recurring column in *Estate Planning* magazine raised the query of "whether Irving Duke's will contained a 'mistake' 'in expression'" under section 2-805. See Ronald R. Volkmer, *Federal Preemption of State Revocation by Divorce Statute*, 39 EST. PLAN. 43, 47 (2012). He was referring to *Radin v. Jewish Nat'l Fund (Estate of Duke)*, 133 Cal. Rptr. 3d 845 (Ct. App. 2011), *cert. granted*, 272 P.3d 976 (Cal. Mar. 21, 2012), in which the court found that no ambiguity existed—and therefore extrinsic evidence was inadmissible—when a will provided that charities should take the residue should the testator and his wife both die simultaneously. *Id.* at 847, 853. Consequently, the estate passed by intestacy. *Id.* at 847. The failure to anticipate what would happen if simultaneous death (a rare event) did *not* occur would be a clear drafting mistake that would not effectuate the testator's intent.

87. See *supra* notes 18–28 and accompanying text.

88. This, of course, is the pivotal ambiguous language that failed in the famous case, *Clark v. Campbell*, 133 A. 166, 168 (N.H. 1926).

89. See *infra* Part VII.

90. See, e.g., *McElligott v. Murray (In re Estate of Connolly)*, 222 N.W.2d 885, 887 (Wis. 1974) (interpreting a will that was silent on disposition of the estate in the event the legatee predeceased the testatrix).

91. See, e.g., *Dye v. Battles (Estate of Dye)*, 112 Cal. Rptr. 2d 362, 365 (Ct. App. 2001) (interpreting a reciprocal will that was silent on the disposition of the estate in the event the spouse did not survive, and when the status of adopted-out children was not addressed).

92. Many mistake cases can arise as a result of scrivener's error. See, e.g., *Feaver v. Blacksill (In re Estate of Blacksill)*, 602 P.2d 511, 513 (Ariz. Ct. App. 1979) (interpreting a will containing a mistakenly transcribed residuary clause).

93. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. a (2003).

94. See UNIF. PROBATE CODE § 2-603 (amended 2010), 8 U.L.A. 163 (Supp. 2012) (antilapse statute); *id.* § 2-604, 8 U.L.A. 178–79 (addressing the consequences of a lapsed devise).

supplant rules of construction.⁹⁵ Lapse issues in particular fall within the purview of reformation, which could add language to create or defeat a substitute gift.⁹⁶

VII. INTERACTIONS WITH THE AMBIGUITY DOCTRINE

The potential application of section 2-805 to situations involving an ambiguous instrument is not clear on a first reading. Section 2-805, in a somewhat beguiling fashion, suggests that reformation plays a broader role in the ambiguity doctrine, by expressly rejecting any requirement that ambiguity is necessary for the admission of extrinsic evidence.⁹⁷ The relevant language from section 2-805 is cryptic: “The court may reform the terms of a governing instrument, even if unambiguous”⁹⁸ Use of the phrase “even if” suggests that reformation might apply in situations stemming from a patent or latent ambiguity, *in addition to* situations where the language is unambiguous.

The comments to the Restatement, however, provide some guidance. First, comment d of Restatement section 12.1 suggests that only the plain meaning rule, and not the ambiguity doctrine, is eliminated as it applies to reformations: “The so-called plain-meaning rule is disapproved to the extent that that rule purports to exclude extrinsic evidence of the donor’s intention.”⁹⁹ The comment harmonizes the intent-protecting role of the plain meaning rule with the more liberal reformation remedy because the higher standard of clear and convincing evidence will play the same role.¹⁰⁰

Further, Restatement sections 11.1, 11.2, and 11.3 quite clearly address ambiguities, both latent and patent, as a separate matter.¹⁰¹ Section 11.2 admits extrinsic evidence in resolving such ambiguities, subject to only a preponderance of the evidence standard.¹⁰²

95. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. k (2003).

96. Lapse can occur when “a devise . . . fails for any reason.” UNIF. PROBATE CODE § 2-604 (amended 2010), 8 U.L.A. 178–79 (Supp. 2012). When the reason for failure relates to “a mistake of fact or law,” section 2-805 provides that a “court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor’s intention” if proven by clear and convincing evidence. *Id.* § 2-805, 8 U.L.A. at 238.

97. *See id.*

98. *Id.*

99. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. d (2003).

100. *See id.* cmt. e (noting that the clear and convincing evidence standard of proof tilts “the risk of an erroneous factual determination” on the “party seeking reformation,” which is “appropriate because the party seeking reformation is seeking to establish that a donative document does not reflect the donor’s intention”).

101. *See, e.g., id.* § 11.2(b)(2) (specifically including patent ambiguities).

102. *Id.* § 11.2(a).

Comment c of Restatement section 12.1 coordinates the provisions, makes clear that reformation is limited to situations with unambiguous language, and emphasizes the importance of the evidentiary standard:

The important difference between section 11.2 and this section is the burden of proof. Ambiguity shows that the donative document contains an inadequate expression of the donor's intention. Here, because there is no ambiguity, clear and convincing evidence is required to establish that the document does not adequately express intention.¹⁰³

Returning to *In re Estate of Lewis* discussed above, section 2-805 would apparently not apply and would not admit extrinsic evidence of the testator's subjective intent concerning the meaning of a home's "contents."¹⁰⁴ That is an issue of ambiguity—a patent ambiguity—which the Restatement's explanation reserves for other sections of the Restatement, notably sections 11.1, 11.2, and 11.3.¹⁰⁵

If the Restatement's structure and comments are considered in their totality by a court and accepted as persuasive in the court's interpretation of the sweep of section 2-805,¹⁰⁶ then the rules regarding latent and patent ambiguities would remain in force *if already adopted* by that state—thus, the status quo would be preserved.¹⁰⁷ Consequently, it is not certain that a court would view "reformation" as a broad, overarching remedy for any type of mistake. It also appears to be inconsistent with the Restatement's structure to conclude that the adoption of section 2-805 rejected the troublesome patent ambiguity exclusionary rule.¹⁰⁸ One cannot rely on section 2-805 as permitting the admission of extrinsic evidence of testator intent in the cases of patent ambiguity under the banner of reformation.¹⁰⁹

103. *Id.* § 12.1 cmt c.

104. *See supra* notes 18–28 and accompanying text.

105. *See supra* notes 101–02 and accompanying text.

106. Some states, by statute, adopt official comments as the intent of the legislature. *See, e.g.*, R.I. GEN. LAWS § 6A-9-710 (Supp. 2011) ("It is the intention of the general assembly that the official comments to this chapter [on secured transactions] . . . represent the express legislative intent of the general assembly and shall be used as a guide for interpretation of this chapter."). Without a statutory directive, the official comments may be referred to in matters of interpretation. *See, e.g.*, *Prime Fin. Servs. v. Vinton*, 761 N.W.2d 694, 705 n.6 (Mich. App. 2008) ("Although the official comments [to Article 9 of the Uniform Commercial Code] do not have the force of law, they are useful aids to interpretation and construction of the UCC."); NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 52:5, at 365–67 (7th ed. 2012) ("Many jurisdictions have found, for example, that the UCC's official comments are 'persuasive assistance in construing and applying the Code.'" (quoting *Regatos v. N. Fork Bank*, 257 F. Supp. 2d 632 (S.D.N.Y. 2003) and collecting cases from other jurisdictions)).

107. *See* UNIF. PROBATE CODE § 1-103 (amended 2010), 8 U.L.A. 14 (Supp. 2012) (preserving principles of law and equity as supplementary to the UPC).

108. *See supra* notes 101–07 and accompanying text.

109. *See supra* notes 101–07 and accompanying text.

The potential mischief is not limited to patent ambiguities. If the doctrine of latent ambiguity were folded into section 2-805 as one provision broadly dealing with reformation for mistake, then the enhanced clear and convincing evidence standard would be extended, for the first time, to the latent ambiguity cases.¹¹⁰ If that were true, section 2-805 would be intent-defeating (and more restrictive than current doctrine), as the latent ambiguity cases could very well be more prevalent than the exceptional mistake (reformation) cases described in Illustrations 4 and 6 of Restatement section 12.1;¹¹¹ yet the latent ambiguity cases would be subjected to the higher evidentiary standard of reformation.

Consequently, a legislature adopting the section 2-805 doctrine of reformation must understand that it is not simultaneously and coherently addressing the patent and latent ambiguity doctrine.¹¹² The Restatement did that, but in a separate suite of sections.¹¹³ Section 2-805 drew instead from the stand-alone reformation section.¹¹⁴ It seems peculiar that a state would enact section 2-805 and the more liberal (and potentially troubling) doctrine of reformation, while not addressing the longstanding patent and latent ambiguity doctrine.

Section 2-805 could be more finely layered through the addition of a new sentence drawn from section 11.1 of the Restatement and the elimination of the confusing ambiguity language in the original text of section 2-805. For example, section 2-805 could be rewritten as follows:

The court may resolve an uncertainty in meaning that is revealed by the text of a will or by extrinsic evidence, other than direct evidence of intention contradicting the plain meaning of the text, if the testator's intent is proved by a preponderance of the evidence.¹¹⁵ The court may reform the unambiguous terms of a governing instrument if it is proved by clear and convincing evidence what the transferor's intention was,

110. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.2(a) (2003).

111. See *id.* § 12.1 cmt. i, illus. 4 & 6.

112. Five states have adopted UPC section 2-805: Colorado (COLO. REV. STAT. § 15-11-806 (2011)); Florida (FLA. STAT. ANN. § 732.615 (West Supp. 2012)); New Mexico (N.M. STAT. ANN. § 45-2-805 (LexisNexis Supp. 2011)); North Dakota (N.D. CENT. CODE § 30.1-10-05 (2010)); and Utah (UTAH CODE ANN. § 75-2-805 (LexisNexis Supp. 2012)). Notably, Massachusetts, one of the strictest adherents to the plain meaning rule, adopted the UPC, effective March 31, 2012. See MASS. GEN. LAWS ANN. ch. 190B, §§ 1-101 to 7-503 (West 2012). However, it appears that Massachusetts did not include section 2-805 in its version of the UPC.

113. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 11.1–.3 (2003).

114. See *id.* § 12.1.

115. A more comprehensive option would be the adoption of the language of sections 11.1 to 11.3 of the Restatement. See *id.* §§ 11.1–.3. Some states have adopted statutes dealing with ambiguities in wills and the role of extrinsic evidence. See CAL. CIV. PROC. CODE § 1856 (2007); GA. CODE ANN. § 53-4-56 (2011); OKLA. STAT. ANN. tit. 84, § 174 (West 1990).

and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.¹¹⁶

The addition of the sentence dealing solely with wills does admittedly detract from the function of section 2-805 in unifying the reformation of all governing instruments.¹¹⁷ However, in spite of the UPC's path in promoting the general convergence of these instruments, wills still require special treatment with respect to formalities of execution, so the convergence remains incomplete.¹¹⁸ Most important, the sentence addresses the primary step of dealing forthrightly and uniformly with the doctrine of ambiguity before addressing the doctrine of reformation on account of mistake.

VIII. A NEW ERA OF ESTATE LITIGATION?

Illustrations 4 and 6 of the Restatement are troubling, and should be troubling to capable attorneys, because the intent-effectuating protection of the wills they draft can now be drawn into question, even if no ambiguity or error

116. In comparison, the language of section 2-805 states:

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

UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

117. See *supra* note 2.

118. The convergence is still a work in progress. See, e.g., Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 569–70 (2008) (discussing the manner in which formalities associated with wills preclude the establishment of a blanket rule for wills and other similar instruments). A discussion of the issues to be considered in the coordination of the requirements and impacts of wills and will substitutes is beyond the scope of this Essay. The formalities required for a will still exceed those for other instruments, even under the relaxed rules of the Uniform Probate Code. See *supra* notes 8–10 and accompanying text. That formalism has been criticized by commentators. See, e.g., James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1032 (1992) (arguing that formalities should be kept no more than “necessary to achieve a reliable and efficient system of succession”). As noted earlier in this Essay, reformation applies to a broad array of governing instruments, of which wills are just one type. See *supra* note 2. However, for the layperson, it is probably true that the execution of a will is still considered a more momentous, final, and special ritual, often requiring the services of an attorney, that “takes care of my final wishes,” as compared with a beneficiary designation or the like. “After the [will execution] ceremony was concluded upon the present occasion, I felt all the easier; a stone was rolled away from my heart.” HERMAN MELVILLE, *MOBY DICK OR, THE WHALE* 233 (California Press 1981) (1851). Should there be more regard for the testator's written statements in a will, and more certainty of result, as compared to other governing instruments? Reformation dealing with taxation issues would continue to be governed by UPC section 2-806, UNIF. PROBATE CODE § 2-806 (amended 2010), 8 U.L.A. 238 (Supp. 2012), where the stakes tend not to be zero sum in terms of the beneficiaries. See generally Jane Caddell Paddison & Randi M. Grassgreen, *Court-Approved Trust Modifications—Binding Effect on the IRS and Tax Consequences*, 41 COLO. LAW 55, 59 (2012) (analyzing the tax consequences of liberalized state modification statutes).

appears on the face of the instrument.¹¹⁹ Section 2-805 puts claims of the “disappointed devisee” beyond the hurdle of the plain meaning rule, and now the claimant is left to accumulate “evidence” of the mistake.¹²⁰ Certainly, judicial responses such as granting summary judgment can cut short claims without any basis.¹²¹ Moreover, the burden of persuasion would fall on the contestant claiming a “mistake.”¹²² Nevertheless, this implies a conclusion that placing all wills at risk of possibly unwarranted litigation is outweighed by the benefits of correcting mistakes in a few wills.

Unfounded claims impose a cost on estate administration in terms of litigation and settlements. Professor Sherwin has argued with respect to will formalities that “[a]ttaching a clear and convincing evidence standard to a dispensation statute . . . does not contain the volume of litigation.”¹²³ If that is also true of reformation proceedings, then opening wills to the possible admission of more extrinsic evidence can only add to estate litigation.¹²⁴ Sadly, the careful testator would need to establish the proof of a negative, and the well-advised testator may need to take extra measures to establish that proof. Extra measures, particularly those involving attorneys, impose additional costs in terms of fees and time. Professor Champine eloquently stated the larger concern:

The burden of assuring that a challenge to an accurate will is unsuccessful requires the testator to control any and all extrinsic evidence of intent that may come before the court after his death. To attempt to satisfy this burden, the testator who is concerned about an intent-defeating reformation might feel compelled to explain his reasons for dispositive choices that he would prefer to keep private; to limit conversations with family and friends about estate planning in order to limit the possibility of misunderstandings that could create a belief

119. See *supra* notes 56–60 and accompanying text.

120. See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

121. See, e.g., Gary E. Bashian, *Summary Judgment Motion in a Will Contest: An Updated Proponent’s Perspective*, 83 N.Y. ST. B.A. J. 30, 30 (2011) (“[Summary judgment] can limit the issues or award the broadest types of relief by ending all claims. When granted, it can avoid years of potential litigation and expense.”).

122. See UNIF. PROBATE CODE § 3-407 (amended 2010), 8 U.L.A. 56 (Supp. 2012).

123. Sherwin, *supra* note 1, at 476.

124. “To allow for reformation in this case would open the floodgates of litigation and lead to untold confusion in the probate of wills. It would essentially invite disgruntled individuals excluded from a will to demonstrate extrinsic evidence of the decedent’s ‘intent’ to include them. The number of groundless will contests could soar. We disagree that employing ‘full, clear and decisive proof’ as the standard for reformation of wills would suffice to remedy such problems. . . . Judicial resources are simply too scarce to squander on such consequences.” *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000).

reformation was appropriate; and to generate additional supporting documentation reinforcing his clearly stated wishes.¹²⁵

Professor Champine's observations concerning privacy run counter to some current recommendations that an effective means to prevent will contests is for the testator to engage in ante-mortem conversations and disclosures with family.¹²⁶ Or, if there is disclosure, it must be done very carefully to avoid creating a record supporting a mistake that was manifested in the final instruments. "Very carefully" suggests that the testator's lawyer will prudently insist on being present at any disclosure event, preparing or reviewing the disclosures, and so forth. Again, that is an additional cost imposed on the planning process.

The evidence in Illustrations 4 and 6 of the Restatement section 12.1 comes from "the testimony and files of the drafting attorney."¹²⁷ This is comforting because attorney testimony might be more reliable;¹²⁸ however, as noted by other commentators, attorney testimony is far from disinterested, as it also touches on liability for professional malpractice and the attorney's reputation.¹²⁹ It also assumes that the drafting attorney is still alive to testify, that he or she recalls such fine points from a single drafting exercise out of hundreds, if not more, engagements, and that such types of notes are retained.¹³⁰ Forms are used; nuance gets lost; time passes.

125. Champine, *supra* note 1, at 437.

126. See, e.g., Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547, 559 (2010) (discussing the fact that "telling the children (or others) ahead of time what their shares in the estate will be may reduce the risk of a post-mortem dispute"); David Gage et al., *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 511 (2004) (recommending active involvement of adult children in the parents' planning process).

127. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4 & 6 (2003).

128. The privilege between the decedent and his or her attorney is generally suspended in a will contest. See EUNICE L. ROSS & THOMAS J. REED, *WILL CONTESTS* § 15:1, at 154 (rev. 2d ed. 2012).

129. See Champine, *supra* note 1, at 439–44.

130. This will place a premium on the use and retention of client questionnaires, letters to the client in which the terms of the instruments are discussed, etc. See Stephanie B. Casteel et al., *The Modern Estate Planning Lawyer: Avoiding the Maelstrom of Malpractice Claims*, 22 PROB. & PROP. 46, 50 (2008) (discussing the importance of using questionnaires and documentation of rejected planning options); Bradley E.S. Fogel, *Attorney v. Client—Privacy, Malpractice, and the Lack of Respect for the Primacy of the Attorney—Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 320–21 (2001) ("Therefore, in order to provide the greatest protection, a careful estate planning attorney should draft the protective letter to prevent beneficiaries from claiming that the attorney's advice was inadequate."); Lauren Rocklin, *How Estate Planners Can Avoid Malpractice Claims*, 39 EST. PLAN. 26, 29 (2012) (recommending that estate planners use a diary system for maintaining good attorney—client communications, devise operating procedures for documenting reasons for planning, and explain a client's justifications for certain planning decisions in a memorandum). The Colorado rules of professional conduct require retention of non-criminal matter files for ten years. See COLO. RULE OF PROF. CONDUCT 1.16A (2011). The files "consist of those

Other evidence of the testator's intention might be summoned by a self-interested claimant from other sources, such as oral conversations with the testator contemporaneous with the will's preparation, cards, letters, emails, and so forth.¹³¹ Restatement section 10.2 applies more generally in terms of discovering the testator's subjective intent, but this has relevance to the types of facts that might be summoned in the search for extrinsic evidence supporting reformation: "In seeking to determine the donor's intention, all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence."¹³²

The Restatement section 10.2 comments hint at the broad variety of possible sources of extrinsic evidence. Some extrinsic evidence of intention may come from circumstances surrounding the execution of the instrument, such as the donor's occupation, property at time of execution of the document, and relationships with family members and other persons.¹³³ Another circumstance is whether the drafter was a layperson or an attorney.¹³⁴ Direct evidence of intention may include documents and testimony showing the donor's intention, the donor's oral or written declarations of intention, contents of the attorney's files, and oral or written statements made to the donor by the attorney or another concerning the contents or effect of the document to the extent that the donor acquiesced in the statements.¹³⁵ Post-execution events or statements of intent can shed light on the donor's intention at the time of execution.¹³⁶

While section 2-805 is, in part, aimed at addressing attorney malpractice in the preparation and execution of wills,¹³⁷ the more troublesome wills arise from holographs or typewritten wills executed without the benefit of professional advice. The malpractice issues fall away in that context, but the potential for

things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." *Id.* cmt. [1]. This apparently leaves it to an attorney to establish what document retention practices are followed in creating the "file."

131. The hearsay rule is generally not an obstacle to the admission of most extrinsic evidence in a will contest. *See, e.g.*, ROSS & REED, *supra* note 128, § 15:1, at 15-3 ("Documents which reflect multiple hearsay may be admitted in will contests, particularly if favorable to the proponent's cause."). However, in states that have enacted so-called Dead Man's statutes, such statute may be an obstacle to the introduction of statements by the decedent. *See, e.g., id.* § 15:3 & n.1, at 15-9 to -10 (excluding statements of the testator under the New York Dead Man's Statute (citing *Weber v. Burman*, No. 20875/06, 2008 WL 5460113 (N.Y. Sup. Ct. Dec. 18, 2008))); *Bradley v. Lewis (In re Estate of Eden)*, 99 S.W.3d 82, 89 (Tenn. Ct. App. 1995) (same). *See generally* DUKEMINIER ET AL., *supra* note 17, at 179-80 (discussing Dead Man's statutes).

132. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 (2003).

133. *See id.* cmt. d.

134. *See id.* cmt. e.

135. *See id.* cmt. f.

136. *See id.* cmt. g. Contrast this with the treatment of such information by Restatement section 12.1, discussed earlier. *Id.* § 12.1 cmt. h, illus. 3.

137. *See* Langbein & Waggoner, *supra* note 4, at 588-90.

contests increases.¹³⁸ We cannot assume that the lay testator will be careful in maintaining a pristine record surrounding the preparation of the instrument, even one that falls short of Professor Champine's recommendations.¹³⁹ Most testators will not be careful because he or she will not know that any problem exists unless advised by an attorney.¹⁴⁰ The testator will be deceased, and there will be no drafting attorney testimony. These typically messy cases promise to become messier under section 2-805 once the claimants become advised of the possibilities for dredging up conflicting accounts of what the testator was thinking.¹⁴¹

Conflicting accounts of what is in the will and what the testator intended could be readily created by testators who intentionally mislead their family members.¹⁴² An experienced trusts and estates attorney can point to a number of clients who told the family (or some members of the family) one thing, and then did another thing not as a change of heart, but as simple misdirection or a desire for privacy and control.¹⁴³ Section 2-805 now provides a litigating toehold with respect to the products of an unhappy family, which otherwise would not have been actionable in the absence of lack of capacity, undue influence, or other standard will contest bases.¹⁴⁴

Restatement section 12.1 comment e offers the following definition of the clear and convincing evidence standard:

Although this higher standard of proof defies quantification, it is generally agreed that it requires an assertion to be established by a high degree of probability, though not to an absolute or moral certainty or beyond a reasonable doubt.¹⁴⁵

138. See Richard Lewis Brown, *The Holographic Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 100 (2006) ("Holographic wills are notoriously prone to challenge.").

139. See Champine, *supra* note 1, at 437.

140. Cf., e.g., Brown, *supra* note 138, at 122 (noting that many lay people do not know the technical meaning of "heir").

141. See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

142. See, e.g., GENEEN ROTH, LOST AND FOUND: UNEXPECTED REVELATIONS ABOUT FOOD AND MONEY 114–17 (2011) (describing a situation encountered by a family where the father—an expert in probate law—claimed to have split the family's estate among his wife and his two kids in his will, but, based on New York law, he could—and did—shelter much of the estate for his wife's benefit alone).

143. See *id.*

144. For another example of a situation where section 2-805 might result in litigation over the testator's intent, see *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991), where the testator created two wills in one day—the first to show his family one testamentary scheme splitting his real estate equally among siblings, and the other giving the real estate exclusively to his son. *Id.* at 635–36. The first will could arguably provide "clear and convincing evidence [of] the transferor's intention." See UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012).

145. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e (2003).

Although a Florida court was reviewing an action to set aside a final entry of default judgment, its description of the standard is more helpful:

Our review of the foregoing cases convinces us that a workable definition of clear and convincing evidence must contain both qualitative and quantitative standards. We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.¹⁴⁶

In comparison, Professor Begleiter's extensive work with attorney malpractice reports an emerging trend of the courts requiring written evidence of the testator's intent in claims asserting attorney malpractice for failure to effectuate that intent.¹⁴⁷ And, as a general matter, "[s]ome courts regard uncorroborated testimony of an interested witness as not 'clear and convincing.'"¹⁴⁸ Nevertheless, the extent of these types of claims in the reported cases should give one pause, particularly because one would assume that many claims are settled.¹⁴⁹

IX. LIMITING THE JURY'S ROLE IN REFORMATION

It is commonly observed that, as compared with judges, juries may favor contestants in will disputes.¹⁵⁰ Some of those same tendencies could be manifested in will contests styled as reformation proceedings, fueling the concerns expressed above. In that regard, the clear and convincing evidence standard would be a better barrier to unfounded claims in a bench trial, in the

146. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. Dist. Ct. App. 1983).

147. See Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 368, 375 (2003).

148. WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* 4 (4th ed. 2010).

149. "Few [will contests] are successful and the cost of litigation may force a settlement even when a contest has no merit." *Id.* at 643. "[T]he odor of the strike suit hangs heavily over this field." John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978).

150. See DUKEMINIER ET AL., *supra* note 17, at 204 (citing Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 626–27, 648 (1987); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 91–92 (1953)); MCGOVERN ET AL., *supra* note 148, at 636 ("[J]uries in will contests are 'more disposed to work equity for the disinherited' than to follow the law." (quoting Langbein, *supra* note 149, at 65)); *id.* at 636 ("[J]ury trials 'appear to improve materially the [contestants'] chances for success.'" (quoting Schoenblum, *supra*, at 627)).

hands of a skilled, experienced judge.¹⁵¹ It would be riskier to permit a random lay jury to decide the case, particularly if the judge is reluctant to keep matters from the jury.¹⁵²

The UPC provides that “a party is entitled to a trial by jury in [a formal testacy proceeding and] any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.”¹⁵³ Consequently, if the bracketed language is adopted by an enacting state, the UPC permits a jury trial in a will contest, which is always in a formal testacy proceeding.¹⁵⁴ Further, although UPC section 3-407 does not speak to whether the issue is for the judge or jury, it does list “mistake” as one of the bases of a will contest,¹⁵⁵ opening the door to reformation which is couched in terms of “a mistake of fact or law.”¹⁵⁶

Although the UPC permits jury trials in will contests, it would not permit the jury to decide matters of law.¹⁵⁷ Reformation of donative transfers, including wills, is based on equitable principles.¹⁵⁸ One might conclude that the reformation of wills, even under the UPC structure, is an equitable remedy reserved to the court, but that is not clear.¹⁵⁹ Consequently, a clarifying sentence could be added to section 2-805: “Reformation of a governing instrument is a

151. See, e.g., *Will Contests on Trial*, *supra* note 150, at 96 (discussing the “distrust of the jury’s capacity” in applying an increased evidentiary standard).

152. See, e.g., *id.* at 95–96 (suggesting that eliminating the jury in will contests may be a favorable solution).

153. UNIF. PROBATE CODE § 1-306(a) (amended 2010), 8 U.L.A. 31 (Supp. 2012).

154. The alternative basis for a jury trial in UPC section 1-306(a) based on the Seventh Amendment to the U.S. Constitution is not needed. Indeed, reliance on the Seventh Amendment in probate matters can be unfruitful. For example, will contests would otherwise be considered equitable in nature and not a factual question for a jury. *MCGOVERN ET AL.*, *supra* note 148, at 636 (citing *Wilson v. Wilson (In re Estate of Johnson)*, 820 A.2d 535, 540 (D.C. 2003); *Petition of Atkins*, 493 A.2d 1203, 1204 (N.H. 1985); *Riddell v. Edwards*, 32 P.3d 4, 8 (Alaska 2001)). Generally there is no right to trial by jury in a suit for breach of trust, again stemming from the equitable nature of trusts. *Id.* at 599 (citing *In re Trust Created by Hill*, 499 N.W.2d 475, 490 (Minn. Ct. App. 1993); *Kann v. Kann*, 690 A.2d 509, 516 (Md. 1997); *Mest v. Dugan*, 790 P.2d 38, 39 n.3 (Or. Ct. App. 1990); *RESTATEMENT (SECOND) OF TR. § 197* (1959); *CAL. PROB. CODE § 17006* (1990)). That said, the law is not that clear-cut, as the grounds of a will contest may, in part, speak to a question of law, and otherwise to questions of fact. See Ronald R. Volkmer, *Trustee’s Defenses Upheld in Two Recent Cases*, 39 *EST. PLAN.* 43, 44–45 (2012).

155. See UNIF. PROBATE CODE § 3-407 (amended 2010), 8 U.L.A. 56 (Supp. 2012).

156. *Id.* § 2-805, 8 U.L.A. at 238.

157. See *id.* § 1-306(a), 8 U.L.A. at 31.

158. *RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. c* (2003) (“Equity has long recognized that . . . donative documents can be reformed . . .”).

159. Section 2-805 does state that the “court may reform” an instrument. UNIF. PROBATE CODE § 2-805 (amended 2010), 8 U.L.A. 238 (Supp. 2012). Comment e of the Restatement, however, refers to “[w]hen the case is tried before a judge,” and the context suggests that the trier of fact is not limited to a judge. See *RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. e* (2003). A harmonizing interpretation would have the jury decide the factual issues in question but reserve the reformation decision to the court. However, those slippery distinctions and the possibility that a judge will excessively defer to the jury recommend a more clear-cut approach.

question of law to be decided by the court in formal proceedings, and is not a question of fact for a jury to decide.”¹⁶⁰

X. PROTECTING THE TESTATOR’S PREROGATIVE

Statistically, estate planners are the objects of a significant level of malpractice claims.¹⁶¹ Although a rational estate planner would not welcome a reformation proceeding, it may be better than a malpractice claim. This, of course, rests on several assumptions. First, some states limit malpractice claims against estate planning attorneys.¹⁶² Second, the reformation would need to meet the clear and convincing evidence standard, while the malpractice claim generally would be proved by a preponderance of the evidence.¹⁶³

Still, a confident attorney might, nevertheless, seek the assurance for his or her client that contests under the guise of reformation be discouraged. It appears that section 2-805 is a rule of law and not subject to waiver by the testator.¹⁶⁴ A determined testator could, however, choose to apply the strict plain meaning rule of a non-UPC jurisdiction, ousting application of that aspect of the UPC.¹⁶⁵ Another measure under the UPC that might discourage will contests would be the use of a comprehensive no-contest clause.

The UPC allows the application of a no-contest clause unless “probable cause exists for instituting proceedings.”¹⁶⁶ Comment c to Restatement section 8.5 suggests in its similar treatment of no-contest clauses that probable cause “exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.”¹⁶⁷ Case law directly interpreting the UPC section is sparse, but it suggests that good faith is required to establish probable cause.¹⁶⁸ A proffer of section 2-805

160. A portion of this language is taken from Colorado’s addition to the UPC section 2-503 harmless error section. *See* COLO. REV. STAT. § 15-11-503(3) (2011).

161. *See* Sharon B. Gardner, *Project Runaway—One Day You’re in as the Attorney and the Next Day You’re out!*, 1 *EST. PLAN. & COMMUNITY PROP. L.J.* 111, 113 (2008) (citing *Profile of Legal Malpractice Claims: 2004–2007*, 2008 ABA STANDING COMMITTEE ON LAW, PROF. LIAB. 4) (reporting that, for the years 2004–2007, 9.68% of malpractice claims arose from estate planning).

162. *See, e.g.,* Rocklin, *supra* note 130, at 27–31 (discussing the minority view strict privacy rule and statutes of limitation).

163. *See* Champine, *supra* note 1, at 443–44.

164. *See id.* at 447–53 (proposing an opt-out system for reformation).

165. *See* UNIF. PROBATE CODE § 2-703 (amended 2010), 8 U.L.A. 188 (Supp. 2012) (“The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument . . .”).

166. *Id.* § 2-517, 8 U.L.A. at 157.

167. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 cmt. c (2003).

168. *See, e.g.,* Rodriguez v. Gavette (*In re* Estate of Shumway), 9 P.3d 1062, 1066 (Ariz. 2000) (including the good faith element in establishing probable cause).

extrinsic evidence would not need to meet the clear and convincing evidence standard to avoid a no-contest clause, and the bar would be a lower standard.

Aside from the probable cause issue, it is not clear whether any proceeding under section 2-805 would violate a no-contest clause, although very comprehensive drafting of an expansive no-contest clause is a better way to address this uncertainty. Many “contests” arise from a claim that the proffered will is invalid due to lack of capacity or undue influence, and those would typically be considered a contest under a no-contest clause.¹⁶⁹ Other “contests” arise after a will is admitted to probate, when a question arises as to the construction of a provision and the personal representative requests guidance from the court.¹⁷⁰ This type of controversy should not be considered a contest.¹⁷¹ However, it would seem that adding or removing devisees or increasing or decreasing the amounts of bequests, as envisioned by Illustrations 4 and 6 of Restatement section 12.1,¹⁷² would be considered the equivalent of proffering a rival will or codicil and should, therefore, be treated as a contest. If this is accurate, it would provide an additional safeguard against section 2-805 claims.¹⁷³ On the other hand, it would reduce the expansive use of section 2-805 to rewrite wills, rejecting the spirit of the illustrations in Restatement section 12.1;¹⁷⁴ one can’t have it both ways.

XI. CONCLUSION

UPC section 2-805 represents the culmination of several decades of scholarly criticism of the plain meaning rule. While the states have, to varying degrees, departed from a strict application of the plain meaning rule, enacting section 2-805 will be a clear change of direction. In a sense, this is another experiment of the UPC.¹⁷⁵

169. See, e.g., *Barry v. Am. Sec. & Trust Co.*, 135 F.2d 470, 470 (D.C. Cir. 1943) (referring to claims of undue influence and lack of capacity as a contest).

170. See *Reed v. Reed*, 569 S.W.2d 645, 646 (Tex. Civ. App. 1978).

171. See, e.g., MCGOVERN ET AL., *supra* note 148, at 643 (citing *Reed*, 569 S.W.2d at 648). See generally Ronald R. Volkmer, *Fiduciary Responsibilities and Liability of Trustees Examined by Courts*, 36 EST. PLAN. 41, 43 (2009) (discussing no-contest clauses and what constitutes a contest).

172. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4 & 6 (2003).

173. A no-contest clause is one of several tools to be employed in avoiding will contests. See, e.g., Blattmachr, *supra* note 126, at 564 (stating that a disinheritance clause will usually help reduce the risk of litigation arising).

174. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 cmt. i, illus. 4 & 6 (2003).

175. Another innovation in the 2008 amendments to the UPC is the notarized will. See UNIF. PROBATE CODE § 2-502(a)(3)(B) (amended 2010), 8 U.L.A. 136 (Supp. 2012). “[L]aw reformers should not shy away from legislative reform merely because it may not garner significant support at the outset. Legislative reform often takes an extended period of time to gain acceptance.” Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1085 (2006).

Although section 2-805 is a step forward, it does raise some concerns discussed in this Essay. The manufacture of unfounded claims against the estate is one of those concerns, but it may be mitigated through the use of no-contest clauses and by limiting the role of the jury. Further, a state legislature considering the adoption of section 2-805 might better serve the public by also addressing patent and latent ambiguity doctrines, rather than eagerly sprinting forward to embrace only reformation.