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A TAXONOMY OF TESTAMENTARY INTENT

*Mark Glover**

INTRODUCTION

“Intention being the life and soul of a will, it can hardly be imagined, I presume, that a man can make a will without *intending* to do so, or give by it more than he *means* to give.”¹ In this statement, Justice Carr of the Supreme Court of Virginia identifies a fundamental principle within the law of succession, namely that intent, or more specifically testamentary intent, is the cornerstone of a will.² This principle was ingrained in the law long before Justice Carr made his proclamation in 1834, and it persists today.³ Indeed, a will’s validity and the ultimate disposition of the decedent’s estate continue to turn upon the decedent’s testamentary intent.

Despite the importance of testamentary intent, a single cohesive understanding of the principle is elusive. Courts espouse the significance of testamentary intent but often conflate various conceptions of the term.⁴ For example, Justice Carr’s explanation of the principle contains two separate ideas. First, the law validates a will only if the testator intends the document to constitute a legally effective will.⁵ Second, a will can dispose of property only in the manner in which the testator intended.⁶

Legal scholars have done little to clarify the contours of testamentary intent. When referencing the principle, they often follow the lead of their jurist counterparts and confuse or combine different ideas. For instance, mirroring Justice Carr’s understanding, Professor John Langbein explains that the principle of testamentary intent encapsulates “two broad issues . . . :

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¹ *Boisseau v. Aldridges*, 32 Va. (5 Leigh) 222, 234 (1834) (emphasis added).

² See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. g (AM. LAW INST. 1999) (“To be a will, the document must be executed by the decedent with testamentary intent . . .”).

³ *Compare Arndt v. Arndt*, 1 Serg. & Rawle 256, 263 (Pa. 1815) (“It is not his will, say its opponents, because, from the evidence, it appears that the *animus testandi* was wanting. This is resting the cause on its true point.”), with *Thomas v. Copenhaver*, 365 S.E.2d 760, 762 (Va. 1988) (“To be a valid will, the writing must have been executed with testamentary intent.”).

⁴ See *infra* Section I.A.

⁵ See *Boisseau*, 32 Va. (5 Leigh) at 234.

⁶ See *id.*

did the decedent intend to make a will, and if so, what are its terms?”⁷ Both Justice Carr and Professor Langbein include the intent to make a will and the intent to make specific dispositions of property under the general umbrella of testamentary intent. But are both properly understood as elements of testamentary intent? If so, what is the relationship between the two? Moreover, are these the only components of testamentary intent? Or are there more?

The answers to these questions are not readily apparent from case law or from legal scholarship. Unfortunately, confusion regarding the meaning of this fundamental principle results in misapplication of doctrine and misunderstanding within the scholarly discourse of the law.⁸ As Professor Katherine R. Guzman explains, “jurisprudential incoherence” has resulted from a “haphazardly defined and applied” testamentary intent doctrine, and “[t]he history of relevant litigation displays that [this incoherence] is nothing new.”⁹ Because of the prominent role that the testamentary intent doctrine plays within the law of wills, Guzman concludes that “[a] deepened understanding of testamentary intent has always been worth the effort.”¹⁰

Recognizing the importance of testamentary intent and the persistent uncertainty surrounding it, this Article seeks to cultivate a deeper understanding of the doctrine by untangling the various strands of testamentary intent. It does so by developing a taxonomy of testamentary intent that can provide guidance to courts charged with evaluating the validity and meaning of wills as well as clarity to the theoretical discussion of the law in this area. With a better understanding of the various strands of testamentary intent and the relationship among them, a more coherent and consistent body of law can develop.

This Article proceeds in three parts. Part I lays the foundation for the taxonomy by describing the general testamentary intent requirement and prior attempts to decipher the meaning of the term. Part II develops the taxonomy by identifying the three primary strands of testamentary intent, including donative testamentary intent, operative testamentary intent, and substantive testamentary intent. Finally, Part III examines the implications of the taxonomy. Specifically, it explains how the taxonomy can bring clarity and consistency to various components of the law of wills and therefore how the taxonomy can foster jurisprudential coherence within the testamentary intent doctrine.

⁷ See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

⁸ See *infra* Part III.

⁹ Katherine R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 307-08 (2011); see also James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1017 (1992) (“Unfortunately, testamentary intent is not well understood or defined.”).

¹⁰ Guzman, *supra* note 9, at 308.

I. THE CONFUSION

The requirement that a valid will be executed with testamentary intent,¹¹ or in its Latin form, *animus testandi*,¹² appears in a long line of case law.¹³ In an early example, the Supreme Court of Pennsylvania explained: “Though no particular form of words is necessary to give validity to a will, yet all the books agree, that the *animus testandi* is an indispensable ingredient.”¹⁴ In some states, this testamentary intent requirement is implicit in probate statutes that place the burden of establishing the lack of testamentary intent on the will’s contestant¹⁵ or that set forth the types of evidence that can be used to establish testamentary intent.¹⁶ South Dakota goes further and makes the requirement more explicit by placing the element of testamentary intent into the statutory definition of a “will.”¹⁷ But regardless of where this requirement appears, all states mandate that the decedent execute a will with testamentary intent.

¹¹ See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. g (AM. LAW INST. 1999).

¹² See, e.g., *Little v. Sugg*, 8 So. 2d 866, 881 (Ala. 1942) (“If a will is procured by undue influence, it is not essential that the beneficiary participated in thus procuring it. If it is so procured, the *animus testandi* is absent, regardless of who may be the guilty agent.”); Diane J. Klein, *How to Do Things with Wills*, 32 WHITTIER L. REV. 455, 471-72 (2011) (“The presence of *animus testandi* is the most important . . . will-making requirement; it is a *sine qua non* of will-making.”).

¹³ See, e.g., *Edmundson v. Estate of Fountain*, 189 S.W.3d 427, 430 (Ark. 2004) (“To be valid as a will, an instrument must be executed with testamentary intent”); *Utay v. Urbish*, 433 S.W.2d 905, 909 (Tex. Ct. Civ. App. 1968) (“An instrument is not a will unless it is executed with testamentary intent.”); *Mitchell v. Donohue*, 34 P. 614, 615 (Cal. 1893) (“No particular words are necessary to show a testamentary intent.”); *Case of Barnet’s Appeal*, 3 Rawle 15, 20 (Pa. 1831) (“It seems that nothing has been settled as universally true, but that the *animus testandi* must have been present.”).

¹⁴ *Stein’s Lessee v. North*, 3 Yeates 324, 325 (Pa. 1802) (per curiam).

¹⁵ See, e.g., ALASKA STAT. § 13.16.170 (2014); CAL. PROB. CODE § 8252 (West 1991 & Supp. 2016); COLO. REV. STAT. § 15-12-407 (2015); HAW. REV. STAT. ANN. § 560:3-407 (LexisNexis 2015); IDAHO CODE § 15-3-407 (2009); ME. REV. STAT. ANN. tit. 18-A, § 3-407 (2012); MICH. COMP. LAWS ANN. § 700.3407 (West 2002); MINN. STAT. ANN. § 524.3-407 (West 2012); MONT. CODE ANN. § 72-3-310 (2015); N.M. STAT. ANN. § 45-3-407 (2014); N.D. CENT. CODE § 30.1-15-07 (2010); S.C. CODE ANN. § 62-3-407 (2009 & Supp. 2015); S.D. CODIFIED LAWS § 29A-3-407 (2004); UTAH CODE ANN. § 75-3-407 (LexisNexis 1993 & Supp. 2015).

¹⁶ See, e.g., CAL. PROB. CODE § 6111 (West 2009); 15 GUAM CODE ANN. § 611 (2005). Reference to testamentary intent in state statutes occasionally appears in other contexts. See, e.g., ALASKA STAT. § 13.12.545 (2014); CAL. PROB. CODE § 6226 (West 2009); OR. REV. STAT. ANN. § 125.440 (West 2003 & Supp. 2015); WYO. STAT. ANN. § 3-3-604 (2015).

¹⁷ S.D. CODIFIED LAWS § 29A-1-201(52) (2004 & Supp. 2015) (“‘Will’ means an instrument, including a codicil, executed with testamentary intent”).

A. *Obscurity Persisted*

Despite the importance of testamentary intent, courts have done little to clarify the meaning of the requirement. As one prominent treatise explains:

The courts have said again and again that the test whether or not an instrument is testamentary . . . is whether it was executed with . . . testamentary intent. While this is a standard form of orthodox statement, it is in itself of little help since it does not explain what . . . testamentary intent is.¹⁸

Indeed, some courts have espoused the fundamental status of testamentary intent without delineating the contours of the term.¹⁹ For example, the Supreme Court of Pennsylvania explains that “[t]estamentary intent is the very breath of life of a will.”²⁰ But despite referencing testamentary intent multiple times, the court does not explain the requirement.²¹

By contrast, some courts do attempt to define the meaning of testamentary intent. One California Court of Appeals explains that “[n]o particular words are necessary to show a testamentary intent’ as long as the record demonstrates that the decedent intended the document to be his or her last will and testament.”²² That testamentary intent would entail the intent to make a will may be intuitive, but such an explanation directly conflicts with how other courts have defined the requirement.²³ For instance, one Texas

¹⁸ 1 WILLIAM H. PAGE, PAGE ON THE LAW OF WILLS § 5.6, at 175-76 (rev. ed. 2003) (footnote omitted); see also JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 264 (8th ed. 2009) (“There are many possible components to testamentary intent: intent that a document be used as evidence after death, intent that a document convey no present interest, intent that it be a will, intent that it not be a will substitute, intent to execute a document, intent that it be final unless later revoked, intent that after death certain beneficiaries receive certain property, and so on.”); Lindgren, *supra* note 9, at 1017 (“Unfortunately, testamentary intent is not well understood or defined.”).

¹⁹ See, e.g., *Minton v. Minton*, 374 S.W.3d 818, 821-22 (Ark. Ct. App. 2010); *Succession of Gourgis*, 1 So. 3d 528, 533 (La. Ct. App. 2008); *Succession of Mott*, 715 So. 2d 1258, 1259 (La. Ct. App. 1998); *Garner v. Williams*, No. 5, 1986 WL 4604, at *3 (Tenn. Ct. App. Apr. 18, 1986).

²⁰ *In re Sunday’s Estate*, 31 A. 353, 356 (Pa. 1895).

²¹ See *id.* at 355-56.

²² *Gularte v. Pradia (In re Estate of Stoker)*, 122 Cal. Rptr. 3d 529, 536 (Cal. Ct. App. 2011) (quoting *Di Paulo v. Wittmer (In re Wunderle’s Estate)*, 181 P.2d 874, 878 (Cal. 1947)); see *Biddle v. Biddle*, 36 Md. 630, 637 (1872) (“[T]he testator must . . . have the intention to make his will”); *Simonelli v. Chiarolanza*, 810 A.2d 604, 608 (N.J. Super. Ct. App. Div. 2002) (“[T]estamentary intent concerns whether the document was intended to be a will.”).

²³ In fact, the California Court of Appeal’s articulation of testamentary intent conflicts with the explanation found in the case to which it cites. Compare *In re Estate of Stoker*, 122 Cal. Rptr. 3d at 536 (citing *In re Wunderle’s Estate*, 181 P.2d at 878) (explaining that the decedent must intend “the document to be his or her last will and testament”), with *In re Wunderle’s Estate*, 181 P.2d at 878 (explaining

Court of Appeals takes the view that “[t]estamentary intent does not depend on the testator’s realization that he is making a will.”²⁴ Instead, the court explains that testamentary intent refers to the testator’s “intent to express his testamentary wishes in the instrument offered for probate.”²⁵ Therefore, whereas the California court suggests that the decedent must intend the document to be a will, the Texas court explains that the decedent must simply intend the document to operate as a will. This distinction is subtle, but it results in conflicting understandings of the testamentary intent requirement.

Furthermore, this distinction is not the only divergence of understanding that one finds in the case law involving testamentary intent. For instance, one California court explains that a long line of cases holds “that, in order for a document to be the last will of a deceased person, it must appear therefrom that the decedent intended by the very paper itself to make a disposition of his property in favor of the party claiming thereunder.”²⁶ Under such an understanding, when discerning the decedent’s testamentary intent, the court’s primary task is to identify whether the decedent intended a particular document to constitute a legally effective will.

An understanding of testamentary intent that focuses on a specific document may seem straightforward. However, other courts directly contradict this understanding. For example, the New York Court of Appeals explains that “it is essential to the validity of a will that the testator was possessed of testamentary intent, however, we decline the formalistic view that this intent attaches irrevocably to the document prepared, rather than the testamentary scheme it reflects.”²⁷ In contrast to the California court, which focused on the document that is purported to be a will, the New York

that the decedent must intend “to make a disposition of his property after his death in favor of the party claiming thereunder”).

²⁴ *In re Estate of Romancik*, 281 S.W.3d 592, 596 (Tex. App. 2008).

²⁵ *Id.*; see also *Foy v. Foy (In re Estate of Foy)*, G044837, 2012 WL 3127333, at *4 (Cal. Ct. App. Aug. 2, 2012) (“The basic test of testamentary intent is not the testator’s realization that he was making a will, but whether he intended by the particular instrument offered for probate to create a revocable disposition of his property to take effect only upon his death.” (internal quotation marks omitted)); *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955) (“The animus testandi does not depend upon the maker’s realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death.”); Lindgren, *supra* note 9, at 1017 (explaining that “[a]t . . . times, the doctrine is described so narrowly that, unless the testator intended to fall within the legal category called will, he wouldn’t meet the requirement” and suggesting that this characterization of testamentary intent is inappropriate).

²⁶ *Gillen v. Dotta (In re Dotta’s Estate)*, 64 P.2d 741, 742 (Cal. Dist. Ct. App. 1937).

²⁷ *Snide v. Johnson (In re Snide)*, 418 N.E.2d 656, 657 (N.Y. 1981) (citations omitted); see also *In re Nadal’s Will*, 2 Haw. 400, 405 (1861) (“[W]hile the law has not made it requisite that a will should assume any particular form, or be couched in language technically appropriate, it should disclose the real intention of the maker respecting the posthumous destination of his property.”).

Court of Appeals centered its understanding of testamentary intent on the estate plan that is expressed through the document's terms.²⁸

While the courts in California and New York appear to define testamentary intent differently, others seem to include both courts' understandings of testamentary intent in their explanations of the requirement. As previously discussed, Justice Carr of the Supreme Court of Virginia eloquently explains the importance of testamentary intent: "Intention being the life and soul of a will, it can hardly be imagined, I presume, that a man can make a will without *intending* to do so, or give by it more than he *means* to give."²⁹ Similarly, the Supreme Court of Pennsylvania explains that the validity of a will presents two questions: "(1) Is this a will? That is, was it intended to be a disposition of property to take effect after death? (2) Is it sufficiently certain and definite as to be capable of intelligent interpretation and enforcement?"³⁰ The court concludes by explaining that "[b]oth questions must be answered in the affirmative, else the writing [should not be] admitted to probate as a will."³¹ Thus, the courts of last resort of Pennsylvania and Virginia seem to include both the intent that a specific document operate as a will and the intent that specific testamentary gifts be expressed through the terms of the document in their articulations of the testamentary intent requirement.

Thus, while it is clear that "[t]o be a will, a document must be executed with testamentary intent,"³² what this requirement entails is far from certain. Various articulations of the testamentary intent requirement are strewn throughout the case law dealing with the validity of wills. Indeed, courts from across jurisdictions often express conflicting understandings of the requirement, or they provide little explanation as to the requirement's meaning. In short, despite that courts universally recognize the importance of testamentary intent, no well-defined understanding of this fundamental doctrine has emerged from case law.

B. *Clarity Attempted*

Given the centrality of testamentary intent in the law of wills, one would think that the uncertainty surrounding the doctrine would attract sig-

²⁸ While the contrast between the California court and the New York court is clear, sometimes a court's explanation of testamentary intent is unclear as to whether testamentary intent refers to the document that is purported to be a will or to the testator's estate plan that is reflected in the document. *See, e.g.,* *Arndt v. Arndt*, 1 Serg. & Rawle 256, 263 (Pa. 1815) ("All the cases that have been, or can be cited, will be narrowed at last to this simple question [regarding testamentary intent]. Does it appear from the evidence, that the testator intended the contents of this writing for his last will?").

²⁹ *Boisseau v. Aldridges*, 32 Va. (5 Leigh) 222, 234 (1834) (emphasis added).

³⁰ *In re Gaston's Estates*, 41 A. 529, 529 (Pa. 1898).

³¹ *Id.*

³² *Lewis v. Lamb*, No. 09-06-201 CV, 2007 WL 2002901, at *3 (Tex. App. July 12, 2007).

nificant scholarly attention. However, legal scholars generally have done little to explain the contours of the testamentary intent requirement. Typically, they mention testamentary intent in passing,³³ or they recount one or more of the explanations found in case law without providing much additional guidance regarding the specifics of the requirement.³⁴ Two scholars, however, have endeavored to provide clarity.

The first is Professor James Lindgren, who recognized the need for a deeper understanding of the testamentary intent requirement over twenty years ago.³⁵ Lindgren writes:

Unfortunately, testamentary intent is not well understood or defined. Often the requirement is described in such broad terms that it can just as easily apply to a will substitute, such as a trust. At other times, the doctrine is described so narrowly that, unless the testator intended to fall within the legal category called will, he wouldn't meet the requirement. Neither extreme is true.³⁶

Recognizing that the courts had conflated and intertwined different conceptions of the doctrine and hoping to provide clarity, Lindgren attempted to untangle the various strands of testamentary intent.³⁷

In particular, Lindgren identifies eight “subcategories of testamentary intent.”³⁸ His first subcategory is channeling intent, which he describes as the “[i]ntent that a document fit into the legal category called ‘will.’”³⁹ As previously discussed, this subcategory is identifiable in case law in which courts sometimes explain that the decedent must intend “the document to be

³³ See, e.g., Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills*, 64 S.C. L. REV. 403, 413 (2012) (“Extrinsic evidence can be introduced to prove testamentary intent”); Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1343 (2011) (“Although courts, especially probate courts, are accustomed to ascertaining testamentary intent, they are not well-practiced in investigating subjective motivations.”); Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 389 (2013) [hereinafter Sneddon, *Will as Personal Narrative*] (“With the declaration of the document as a will, the overture also evidences testamentary intent.”).

³⁴ See, e.g., Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 119 (2008) (“Testamentary intent requires that the testator intend the will to be the final disposition of the testator’s real or personal property upon his or her death.”); Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 MERCER L. REV. 1137, 1142-43 (1997) (“[A] will is an expression of the testator’s desires regarding ownership of her property after death. This is not quite complete, however. We would not wish to give effect to such an expression unless the testator intended that we do so. The courts have put this in terms of a requirement of testamentary intent” (internal quotation marks omitted)).

³⁵ See Lindgren, *supra* note 9, at 1016-20.

³⁶ *Id.* at 1017.

³⁷ See *id.* at 1016-20.

³⁸ *Id.* at 1017.

³⁹ *Id.* (adding that “[d]ocuments have been admitted to probate where the testator has not intended that the document fit into the legal category called a will” and that “[t]his kind of intent is neither necessary nor sufficient”).

his or her last will and testament.⁴⁰ Related to channeling intent, Lindgren's second subcategory is probative intent.⁴¹ He explains that this is "[i]ntent that isn't limited to passing nonprobate assets."⁴² Put more clearly, probative intent is the intent to dispose of property through the probate process.⁴³ Although Lindgren distinguishes channeling intent and probative intent, they are interconnected. By definition, a will disposes of probate assets.⁴⁴ Therefore, if a decedent intends a document to be a will, that is if a decedent possesses channeling intent, she necessarily also possesses probative intent.

Mirroring the connection between channeling intent and probative intent, Lindgren's third and fourth subcategories are similarly related. He explains that the third subcategory of testamentary intent is ambulatory intent.⁴⁵ This is the "[i]ntent that a document take effect at death, i.e., that the document not be immediately effective."⁴⁶ Similarly, the fourth subcategory is delayed dispositive intent, which is the "[i]ntent that a document transfer property at death (that no present interest be conveyed)."⁴⁷ The connection between these subcategories is obvious. If a decedent intends a document to take effect at death, then she necessarily intends no transfer of property to take place immediately. Thus, if the decedent possesses ambulatory intent, she necessarily possesses delayed dispositive intent. These subcategories of testamentary intent are frequently found in case law that typically couples the two together.⁴⁸ For example, one Texas Court of Appeals

⁴⁰ *Gularte v. Pradia (In re Estate of Stoker)*, 122 Cal. Rptr. 3d 529, 536 (Cal. Ct. App. 2011) (quoting *Di Paulo v. Wittmer (In re Wunderle's Estate)*, 181 P.2d 874, 878 (Cal. 1947)); see *supra* notes 22-25 and accompanying text.

⁴¹ See Lindgren, *supra* note 9, at 1017.

⁴² *Id.* ("This element is neither necessary nor sufficient.")

⁴³ See *id.* ("A letter designed to convey property outside of probate would typically lack probative intent, as would insurance, a revocable inter vivos trust, and a payable on death account."). For background on the distinction between the transfer of property within and without the probate system, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

⁴⁴ See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 41 (9th ed. 2013) ("*Probate property* is property that passes through probate under the decedent's will . . . or by *intestacy*.").

⁴⁵ Lindgren, *supra* note 9, at 1017 ("*Ambulatory intent* . . . is a necessary condition, at least as to the provisions that deal with typically testamentary matters.").

⁴⁶ *Id.* ("A letter to an attorney to draft changes in a will would typically lack ambulatory intent because it is designed to be acted on during life, as would a form setting up a Totten Trust (which would at least be designed to alter the nominal ownership of a bank account).").

⁴⁷ *Id.* at 1017-18 ("A will usually conveys no present interest, not even the nominal interests or encumbrances of Totten Trusts. This is not a necessary element, because other purposes besides the disposition of property are testamentary.").

⁴⁸ See sources cited *supra* note 25.

explains: “The intent required is to make a revocable disposition of property to take effect after the testator’s death.”⁴⁹

Lindgren’s fifth and sixth subcategories of testamentary intent are also related. The fifth, which is labeled executory intent, is the “[i]ntent to execute the document” or, put differently, “[a]n intent to . . . finalize the document.”⁵⁰ The sixth is nontentative intent.⁵¹ Lindgren describes this subcategory as the “[i]ntent that the estate planning scheme not be tentative.”⁵² Again, the similarities between executory intent and nontentative intent are apparent. The execution of a will is considered strong evidence of the will’s finality.⁵³ Thus, if a decedent intends to execute a will, she also intends that the estate plan expressed in the will be final. Similar to their coupling of ambulatory intent and delayed dispositive intent, courts frequently reference executory intent and nontentative intent in tandem. For instance, the Supreme Court of Georgia explains: “The intention of the testator must not only be final, as to the dispositive clauses of the will, but as to the execution also.”⁵⁴

Finally, like the first three pairs of subcategories, Lindgren’s seventh and eighth subcategories of testamentary intent are related. He explains that the seventh subcategory is descriptive testamentary intent, which he describes as “[i]ntent that the document describe an estate plan.”⁵⁵ The eighth subcategory is evidentiary intent, which is the “[i]ntent that the document be used after death as evidence of the estate plan.”⁵⁶ Thus by descriptive intent, Lindgren refers to the decedent’s intent that the will describe specific testamentary gifts, and by evidentiary intent, he refers to the idea that that the will be a legally effective expression of those gifts. Although Lindgren isolates evidentiary intent, it is unclear how this subcategory differs from his previously described nontentative intent subcategory.⁵⁷ If the decedent’s intent is nontentative, the decedent would seem to intend that the will be

⁴⁹ Cason v. Taylor, 51 S.W.3d 397, 405 (Tex. App. 2001).

⁵⁰ Lindgren, *supra* note 9, at 1018 (“*Executory intent* . . . should be present in all wills.”).

⁵¹ *Id.* (“This condition is necessary, but not sufficient.”).

⁵² *Id.*

⁵³ See Langbein, *supra* note 7, at 495 (“Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent.”). For instance, “[t]he signature tends to show that the instrument was finally adopted by the testator as his will and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling.” Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941) (footnote omitted).

⁵⁴ Mealing v. Pace, 14 Ga. 596, 631 (1854); see also Waller v. Waller, 42 Va. (1 Gratt.) 454, 461 (1845) (“The formalities of the law are writing and signing, and when these are united with final testamentary intent, the instrument is a valid will.”).

⁵⁵ Lindgren, *supra* note 9, at 1018 (“Many documents can describe an estate plan, whether put into force or not. This condition is necessary, but not sufficient.”).

⁵⁶ *Id.* (“This element is neither necessary nor sufficient.”).

⁵⁷ See *supra* notes 51-52 and accompanying text.

used as evidence of her intent. Conversely, if the decedent intends the will to have evidentiary import, her intent would necessarily be nontentative.

Although Lindgren's framework makes progress toward clarifying the testamentary intent requirement, it does not resolve all the doctrine's uncertainty. In fact, it perhaps raises more questions than it answers. For instance, it is unclear why the previously discussed distinctions between related subcategories are significant.⁵⁸ Moreover, Lindgren's identification of the eight subcategories of testamentary intent does little to guide courts in their task of determining whether the testamentary intent requirement has been satisfied. He explains: "The typical will has all eight and having all eight is sufficient to establish testamentary intent. Lacking one or more attributes may lead to an absence of testamentary intent, or it may not."⁵⁹ This explanation provides courts no direction in applying the testamentary intent doctrine. While Lindgren makes a noble attempt at clarity, he himself later acknowledged its shortcomings. In fact, he characterizes the framework as "a fumbling attempt to disentangle" the meaning of testamentary intent.⁶⁰ Even Lindgren therefore recognizes that, while his framework represents progress toward a better understanding of testamentary intent, more work is needed.

Picking up where Lindgren left off, Professor Katheleen Guzman also sought to clarify testamentary intent.⁶¹ Like Lindgren, Guzman recognizes the uncertainty surrounding the doctrine and describes testamentary intent as "a piece of tricky business," "an extraordinarily elusive concept," and a "clumsy" doctrine.⁶² Also like Lindgren, Guzman attempts to give the unwieldy testamentary intent requirement meaningful structure. Whereas Lindgren divides the concept into eight subcategories, Guzman identifies testamentary intent's "discrete but overlapping primary and secondary functions."⁶³

She explains that testamentary intent's primary function "drive[s] the original finding of the will."⁶⁴ Elsewhere, she describes this primary function as "The Constitutive Properties of Testamentary Intent."⁶⁵ Thus, within Guzman's framework, testamentary intent's major function is to differentiate a will from a non-testamentary document. Put differently, testamentary

⁵⁸ See *supra* notes 39-57 and accompanying text.

⁵⁹ Lindgren, *supra* note 9, at 1017.

⁶⁰ DUKEMINIER, SITKOFF & LINDGREN, *supra* note 18, at 264.

⁶¹ See generally Guzman, *supra* note 9.

⁶² *Id.* at 306, 308 ("Although assorted indicators guide presumption and assessment over whether any basic 'intent' exists within a particular context, both the term and the thoughts it describes are inalterably subjective.").

⁶³ *Id.* at 310.

⁶⁴ *Id.*

⁶⁵ *Id.*

intent refers to the intent that a particular document constitute a will.⁶⁶ Within her discussion of this function, Guzman focuses exclusively on the law of will-execution.⁶⁷ If the decedent executed the document in compliance with the prescribed formalities, the law presumes she intended the document to be a will.⁶⁸ Conversely, if the decedent did not comply with the prescribed formalities, the law presumes that she did not intend the document to be a will.⁶⁹ Therefore, within Guzman's understanding, testamentary intent's principal role is to differentiate a document that the decedent intended to constitute a will from a document that she did not.

The secondary function of testamentary intent that Guzman identifies relates to a will's meaning.⁷⁰ She writes, "Upon the establishment of a will . . . , intent remains key but takes a slightly different thrust. No longer employed to assess whether the decedent intended the subject document to be a will, it now illuminates its meaning with principals of interpretation and construction."⁷¹ When the court interprets a will, its objective is to fulfill the actual intent of the testator regarding the disposition of her property.⁷² Relatedly, when the testator's actual intent is elusive, the court will apply rules of construction that are aimed at fulfilling the testator's probable intent.⁷³ Thus, regardless of whether the decedent's actual intent is identifiable or must be approximated through doctrines aimed at discerning the decedent's

⁶⁶ See *id.* at 310-12 ("[A] proffered document generally requires two components to qualify as a will: testamentary intent and formalities.").

⁶⁷ See Guzman, *supra* note 9, at 310-19 ("Intent and formalities, each critical, have . . . often worked in tandem. One may exist, or the other; both, or neither. Casting them in counterpoise, as is often done, suggests that each component has always held equal weight in assessing a document for probate. In reality, intent usually surrendered to formalities, an imbalance apparent in the asymmetry of some of this doctrine and, if listening hard, even in the language of the cases themselves.").

⁶⁸ See Langbein, *supra* note 7, at 514-15; J. G. Miller, *Substantial Compliance and the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 564-65 (1987); see also 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, 541-43 (1982).

⁶⁹ See DUKEMINIER & SITKOFF, *supra* note 44, at 171; Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 100 (2014).

⁷⁰ See Guzman, *supra* note 9, at 320-22.

⁷¹ *Id.* at 320.

⁷² See *Pihlajamaa v. Kaihlan (In re Estate of Kaila)*, 114 Cal. Rptr. 2d 865, 872 (Cal. Ct. App. 2001) (quoting *Newman v. Wells Fargo Bank*, 926 P.2d 969, 973 (Cal. 1996)) (summarizing "the rules that generally apply in discerning testamentary intent" and explaining that "[t]he paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible" (internal quotation marks omitted)); *Ware v. Minot*, 88 N.E. 1091, 1091 (Mass. 1909) ("[O]rdinary canons for the interpretation of wills, having been established only as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it.").

⁷³ See DUKEMINIER & SITKOFF, *supra* note 44, at 563 ("For cases in which the testator's actual intent is not evident, these rules [of construction] are designed to implement the probable intent of the typical testator.").

probable intent, the law's guidepost is testamentary intent.⁷⁴ This role in the construction and interpretation of wills is what Guzman labels testamentary intent's secondary function.⁷⁵

Like Lindgren's attempt at clarity, Guzman's identification of testamentary intent's primary and secondary functions represents a step toward a more developed understanding of the testamentary intent doctrine. However, also like Lindgren's framework, Guzman's does not resolve all of the doctrine's uncertainty. For example, the distinction between her primary and secondary functions of testamentary intent appears to be the determination of what constitutes a will and the determination of what a will means.⁷⁶ But Guzman discusses a variety of rules and doctrines within her discussion of the secondary function that are more related to testamentary intent's primary function. For example, she includes testamentary intent's role in will-revocation within its secondary function.⁷⁷ However, will-revocation, like will-execution, relates to the determination of what constitutes a will. In the context of will-execution, the court's task is to identify the presence of testamentary intent.⁷⁸ Conversely, in the context of will-revocation, the court's task is to identify the absence of testamentary intent.⁷⁹ In either context, testamentary intent refers to the intent that the document constitute a will.

Similarly, Guzman includes within her secondary function of testamentary intent various doctrines that deal with the issue of which documents constitute part of a will, including, for example, the doctrine of integration.⁸⁰ This doctrine holds that "a will initially comprises any pages actually present at execution and intended to be part of it."⁸¹ Therefore, she explains that under the doctrine of integration, "[t]wo intents are . . . required: testamentary and 'integrative.'"⁸² However, the distinction between

⁷⁴ See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document [including a will] is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."); see also *In re Estate of Cole*, 621 N.W.2d 816, 817-18 (Minn. Ct. App. 2001) ("The history of the construction of wills . . . has been shaped by two overriding rules. . . . [One of these rules is that] the court is to effectuate the testator's intent."); *In re Estate of Herceg*, 747 N.Y.S.2d 901, 903 (N.Y. Sur. Ct. 2002) ("Of course, the paramount objective in interpreting a will is to determine the intention of the testator . . .").

⁷⁵ See Guzman, *supra* note 9, at 320-22.

⁷⁶ See *id.* at 310. Compare *supra* notes 64-69 and accompanying text, with *supra* notes 70-75 and accompanying text.

⁷⁷ See Guzman, *supra* note 9, at 322.

⁷⁸ See *supra* notes 66-69 and accompanying text.

⁷⁹ See *infra* notes 157-160 and accompanying text.

⁸⁰ See Guzman, *supra* note 9, at 319-20 (discussing also the doctrines of incorporation by reference and acts of independent legal significance).

⁸¹ *Id.* at 319; see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.5 (AM. LAW INST. 1999).

⁸² Guzman, *supra* note 9, at 319.

testamentary intent and integrative intent is unclear.⁸³ If testamentary intent's primary function relates to whether the decedent intended a particular document to constitute a legally effective will,⁸⁴ the doctrine of integration would seem to simply extend that function across multiple documents.⁸⁵ In other words, a testator can intend a single document to constitute a legally effective will, or, under the doctrine of integration, the decedent can possess that same intent with respect to a group of documents. In either situation, testamentary intent's function would seem to be to distinguish a will from a non-testamentary document (or group of documents). Thus, while Guzman attempts to clarify the testamentary intent doctrine, her framework leaves room for further refinement.

In sum, both Lindgren and Guzman recognize the need for clarity regarding the contours of testamentary intent. Although they approach the issue in different ways, both try to unravel various strands of testamentary intent so that the doctrine's role in the law of wills is better understood. Their frameworks, however, do not resolve all of the uncertainty surrounding testamentary intent, and as such, the need for a deeper understanding of the doctrine remains.

II. THE TAXONOMY

As seen in Part I, confusion regarding the contours of testamentary intent persists. And as will be seen in Part III, this confusion is the origin of both doctrinal misapplication and theoretical misunderstanding within the law of wills. In response to this confusion, Lindgren suggested over twenty years ago that "it may help to develop a more coherent body of law if we had more precise terminology for the different strands of testamentary intent that might be present in a will."⁸⁶ Yet despite the long-standing need for clarity and its attendant benefits, no clear understanding has materialized. As such, this Part heeds Lindgren's suggestion and develops a taxonomy of

⁸³ *Id.* at 320 ("Each doctrine involves second-level intent inquires but also, in varying degrees, inquiry into whether original testamentary intent exists at all. The number, existence, and source of documents or act to be effectuated within probate are irrelevant without a purported will—something must anchor testamentary intent to any candidate for integration or incorporation.").

⁸⁴ *See id.* at 310-19; *see also supra* notes 64-69 and accompanying text.

⁸⁵ *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.5 note 1 (AM. LAW INST. 1999) ("Occasionally, a court suggests that either relation of sense or physical attachment is essential to integration, but the actual decisions tend strongly to support the view that any evidence will suffice so long as the court is satisfied that at the time of execution the separate papers were present and regarded by the testator as parts of the will he or she was making." (citation omitted)).

⁸⁶ Lindgren, *supra* note 9, at 1017; *see* Guzman, *supra* note 9, at 308 ("[M]ore precise tools construct more precise things and usually at a lower eventual cost. More importantly, they permit users to bring design to fruition and intent to purpose far more reliably than cumbersome instruments allow. [Thus.] [a] deepened understanding of testamentary intent has always been worth the effort.").

testamentary intent in hopes that from it “[a] more coherent body of law might emerge.”⁸⁷

A. *Donative Testamentary Intent*

The first strand of testamentary intent is donative testamentary intent. This strand is perhaps the most fundamental, and courts and scholars frequently reference this strand when they discuss testamentary intent. In essence, the issue underlying donative testamentary intent is whether the purported will expresses an intent to make gifts that become effective upon the decedent’s death.⁸⁸ As the Supreme Court of Kentucky explains: “An expression of testamentary intent has been uniformly held to require 1) a disposing of property 2) which takes effect after death.”⁸⁹ Lindgren labels this strand “ambulatory intent” or “delayed dispositive intent,”⁹⁰ and although Guzman does not specifically recognize donative testamentary intent, it is likely part of what she calls the primary function of testamentary intent.⁹¹ This strand of testamentary intent may seem straightforward, as the principal function of a will is to pass property upon death.⁹² However, the court’s task of deciding whether a document expresses donative testamentary intent is not always easy.

When an estate-planning lawyer prepares a will, donative testamentary intent is rarely an issue.⁹³ In such situations, the document invariably is captioned as the decedent’s “Last Will and Testament”⁹⁴ and begins with an

⁸⁷ DUKEMINIER, SITKOFF & LINDGREN, *supra* note 18, at 264.

⁸⁸ See *Mitchell v. Donohue*, 34 P. 614, 615 (Cal. 1893) (“No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death”); *McKay v. Kimble (In re Estate of Kimble)*, 871 P.2d 22, 25 (N.M. Ct. App. 1994) (“Testamentary intent . . . focuses on whether the testator intended the instrument to effect a disposition of property at the time of death.”); *Irvin v. Smith*, 497 S.W.2d 796, 799 (Tex. Civ. App. 1973) (“To have testamentary intention, testator must have intended by the particular instrument to make a revocable disposition of property to take effect on his death.”).

⁸⁹ *Mallory v. Mallory*, 862 S.W.2d 879, 881 (Ky. 1993).

⁹⁰ See Lindgren, *supra* note 9, at 1017-18; see also *supra* notes 45-49 and accompanying text.

⁹¹ See Guzman, *supra* note 9, at 310-19; see also *supra* notes 64-69 and accompanying text.

⁹² See *Edmundson v. Estate of Fountain*, 189 S.W.3d 427, 430 (Ark. 2004) (“A will is a disposition of property to take effect upon the death of the maker of the instrument.”); Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 166 (2008) (“Wills remain the archetypal vehicle for effecting gratuitous transfers of property interests at death.”).

⁹³ See Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 110 (2006) (“The testamentary intent requirement is usually not an issue with formal, attested wills.”).

⁹⁴ See Guzman, *supra* note 9, at 311 n.18; Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPAC L. REV. 665, 694 (2011) (“The first characteristic of the genre of wills is the lyrical title ‘Last Will and Testament.’ The title of the document conveys the ‘animus testandi,’ the testamentary intention.”).

introduction that identifies the testator and the testamentary nature of the document.⁹⁵ Moreover, a good lawyer ensures that the language of the will clearly articulates an intent to make gifts that take effect upon the decedent's death.⁹⁶ As such, the probate court seldom must wonder whether a formal document that is prepared by an attorney expresses donative testamentary intent.⁹⁷ Nonetheless, professionals do not draft all wills, and donative testamentary intent is therefore not always clear.

Donative testamentary intent is most frequently an issue with holographic wills,⁹⁸ which are informal wills that are typically drafted by laymen without the aid of an attorney.⁹⁹ As Professor Richard Lewis Brown explains: “[H]olographic wills invite suspicion as to the existence of testamentary intent [because they] are often informal documents, such as letters or memoranda, which lack any formal designation as a will or last testament.”¹⁰⁰ In addition to lacking an explicit designation as a will, holographs

⁹⁵ See Sneddon, *Will as Personal Narrative*, *supra* note 33, at 389 (“With the declaration of the document as a will, the overture . . . evidences testamentary intent.”).

⁹⁶ See Brown, *supra* note 93, at 110 (“The formal language of the instrument makes clear that the instrument is intended to dispose of the testator’s property, and that it is intended to take effect on the testator’s death.”).

⁹⁷ See Langbein & Waggoner, *supra* note 68, at 541-42 (“Testamentary intent is ordinarily inferred without difficulty from the contents of a will. When the document is captioned ‘Last Will and Testament’ and purports to dispose of the estate, there is seldom any objection that it lacks testamentary intent.”).

⁹⁸ See Gail Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 610 (1981); Brown, *supra* note 93, at 110-11; Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 170 n.65 (1988). Issues relating to donative testamentary intent do not arise solely with informal documents. Langbein and Waggoner explain: “Even the formalities for attested wills are common enough to other types of legal documents, and instruments that have nothing to do with testation could be said to comply with the Wills Act. It is the requirement of testamentary intent that prevents such things from qualifying as wills.” Langbein & Waggoner, *supra* note 68, at 541.

⁹⁹ See *Succession of Bacot*, 502 So. 2d 1118, 1121-22 (La. Ct. App. 1987); *In re Estate of Teubert*, 298 S.E.2d 456, 460 (W. Va. 1982) (“The purpose behind statutory recognition of holographic wills is to enable those persons who are unable or unwilling to secure the assistance of counsel to make a valid will in their own handwriting.”); UNIF. PROBATE CODE § 2-503 cmt. (amended 2010) (“For persons unable to obtain legal assistance, the holographic will may be adequate.”); Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. PROB. & TR. J. 27, 30 (2008) (“Without hiring a lawyer or involving witnesses, testators in some jurisdictions easily can put pen to paper, secure in the knowledge that the law must honor their final wishes.”). For an overview of holographic wills, see DUKEMINIER & SITKOFF, *supra* note 44, at 197-98.

¹⁰⁰ Brown, *supra* note 93, at 110; *see also* Boggess v. McGaughey, 207 S.W.2d 766, 767 (Ky. 1948) (“People are prone to write things in letters they never dreamed would be regarded as a will or be seized upon after death as making the ultimate disposition of their estates.”); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1073-74 (1996) [hereinafter Hirsch, *Inheritance and Inconsistency*] (“Inevitably, courts must contend with nettlesome questions concerning the intent of authors to render legally effective holographic documents that are offered for probate as wills. (Those nettles are most prickly when a holograph mixes testamentary declarations with ordinary communication, as when the alleged will appears within a diary or a letter to the alleged beneficiary.)” (footnote

sometimes lack cogent drafting that clearly evinces the decedent's intent to make gifts that become effective upon death. For instance, Brown suggests that some "holographic wills may evidence an intention to dispose of property, but fail to make clear when that disposition is to occur"¹⁰¹ and that "[o]ther holographic documents leave unclear how, or even whether, the testator intends to dispose of property."¹⁰² Ultimately, Brown concludes that "[t]he ambiguity of many homemade holographs leaves courts struggling to determine what the decedent intended."¹⁰³

The case of *In re Kimmel's Estate*¹⁰⁴ illustrates the difficulty that Brown describes regarding holographic wills.¹⁰⁵ In that case, the court had to determine whether a letter written by Harry Kimmel to his two sons, George and Irvin, expressed testamentary intent.¹⁰⁶ Kimmel's letter begins with a discussion of his sons' method of pickling pork and speculation regarding the harshness of the upcoming winter.¹⁰⁷ It then transitions to the author's mortality. Kimmel writes: "I have some very valuable papers I want you to keep fore me so if enny thing hapens all the scock money in the 3 Bank liberty lones Post office stamps and my home on Horner St goes to George Darl & Irvin."¹⁰⁸ Kimmel concludes by encouraging his sons to safeguard the letter: "Kepp this letter lock it up it may help you out."¹⁰⁹

The Supreme Court of Pennsylvania was left to decipher Kimmel's intent. Was this document simply a letter communicating concerns regarding Kimmel's mortality? Or alternatively, did Kimmel intend this document to express how his property should be distributed upon his death? Put simply, the court had to determine whether Kimmel intended the document to be an ordinary letter or to function as a will. Because of the informal nature of the document, the court's task of deciding whether Kimmel's letter evinced donative testamentary intent was not straightforward. As the court explained: "As is often the case in holographic wills of an informal character,

omitted)). *But see* Clowney, *supra* note 99, at 60 (reporting that in a review of probate records for Allegheny County, Pennsylvania "[n]ine times out of ten testators labeled their holographs 'Last Will & Testament' or 'My Will'").

¹⁰¹ Brown, *supra* note 93, at 113.

¹⁰² *Id.* at 115. *But see* Clowney, *supra* note 99, at 60 ("Even in cases where the documents submitted for probate lacked a proper label, testators typically employed dispositive language, mentioned death, and signed and dated their writings.").

¹⁰³ Brown, *supra* note 93, at 116. *But see* Clowney, *supra* note 99, at 60 ("The records from Allegheny County demonstrate that the authors of holographic wills clearly and consistently express testamentary intent in their homemade documents."); Langbein, *supra* note 7, at 496 ("Not all holographs are so problematic. The inference of testamentary intent is far stronger when explicit testamentary language is used.").

¹⁰⁴ 123 A. 405 (Pa. 1924).

¹⁰⁵ *Id.* at 406.

¹⁰⁶ *See id.* at 405.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (retaining significant mistakes from the original writing).

¹⁰⁹ *Id.*

much of that which is written is not dispositive; and the difficulty, in ascertaining the writer's intent, arises largely from the fact that he had little, if any, knowledge of either law, punctuation, or grammar."¹¹⁰ Despite the ambiguity caused by these difficulties, the court concluded that Kimmel's letter expressed an intent to make gifts that became effective upon his death.¹¹¹ The court reasoned:

It is difficult to understand how the decedent, probably expecting an early demise—as appears by the letter itself, and the fact of his sickness and inability to work, during the last three days of the first or second week preceding—could have possibly meant anything else than a testamentary gift¹¹²

The issue of donative testamentary intent that arises with purported holographic wills is not limited to documents prepared by the unsophisticated. For instance, compare *In re Kimmel's Estate* with *In re Estate of Kuralt*.¹¹³ Unlike Kimmel, an uneducated chair maker who died in 1921,¹¹⁴ Kuralt was a Peabody and Emmy Award-winning journalist, who is best known for his "On the Road" television segments.¹¹⁵ Kuralt died in 1997 leaving behind a formal will that was drafted by an attorney, which named his wife and their two children as the beneficiaries of his estate.¹¹⁶ Although this will seemed to dispose of his entire estate, a woman came forward claiming that Kuralt had executed a holographic will that left her a specific piece of real property. Unbeknownst to Kuralt's family, the woman had been romantically involved with Kuralt for nearly thirty years.¹¹⁷ Roughly two weeks before he died as a result of complication from lupus and a heart attack,¹¹⁸ Kuralt wrote his mistress a letter that described his health problems and mentioned the piece of property that the woman claimed Kuralt wanted her to have.¹¹⁹ Kuralt wrote: "I'll have the lawyer visit the hospital to be sure you *inherit* the rest of the place in [Montana] if it comes to that."¹²⁰

¹¹⁰ *In re Kimmel's Estate*, 123 A. at 406.

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ 15 P.3d 931 (Mont. 2000).

¹¹⁴ *See* DUKEMINIER & SITKOFF, *supra* note 44, at 198-99.

¹¹⁵ Joe Sexton, *Charles Kuralt, 62, Is Dead; Chronicler of the Country*, N.Y. TIMES (July 5, 1997), <http://www.nytimes.com/1997/07/05/arts/charles-kuralt-62-is-dead-chronicler-of-the-country.html?pagewanted=all&src=pm>.

¹¹⁶ *In re Estate of Kuralt*, 15 P.3d at 932.

¹¹⁷ *Id.* ("Over the nearly 30-year course of their relationship, Kuralt and Shannon saw each other regularly and maintained contact by phone and mail. Kuralt was the primary source of financial support for Shannon and established close, personal relationships with Shannon's three children.")

¹¹⁸ *See* DUKEMINIER & SITKOFF, *supra* note 44, at 209.

¹¹⁹ *In re Estate of Kuralt*, 15 P.3d at 933.

¹²⁰ *Id.*

The court was left to discern whether by this letter Kuralt expressed intent to make a gift of the property to his mistress that became effective upon his death.¹²¹ Of course, one could argue that Kuralt intended the letter to express donative testamentary intent, and indeed his mistress argued just that.¹²² However, this interpretation of the letter is far from certain, as the informal nature of the letter suggests that Kuralt did not intend the letter to express testamentary gifts.¹²³ Instead, the letter could be seen as simply expressing Kuralt's wish that his mistress receive the property and describing how he intended to carry out that intent, namely by having a lawyer draft a formal will.¹²⁴ Under this reading of the letter, Kuralt's actions at best suggest a lack of initiative brought about by the thought that he would have more time to get things in order. At worst, the language of the document and Kuralt's failure to subsequently prepare a formal will suggests an attempt to deceive his mistress.

Regardless of whether Kuralt's actions reflect lackadaisicalness or deceit, his failure to execute a formal will suggests that the letter did not express an intent to make a gift of the Montana property that was to become effective upon his death. Put differently, it is unclear whether Kuralt's letter expressed donative testamentary intent. Thus, both Kuralt's letter to his mistress and Kimmel's letter to his sons¹²⁵ highlight the fundamental importance of donative testamentary intent. If the ultimate goal of the law of wills is to distribute the decedent's estate according to the decedent's intent,¹²⁶ the courts must first decide whether a purported will describes gifts that are to become effective upon the decedent's death. If a purported will does not express intent to make testamentary gifts, the court should not validate the will because the decedent did not intend the document to operate as a will.

In addition to the distinction between formal wills and holographic wills, the distinction between the intent that the document be a will and the intent that the document function as a will is important to understanding

¹²¹ *Id.* at 933-34.

¹²² *Id.*

¹²³ See DUKEMINIER & SITKOFF, *supra* note 44, at 214 (“[T]here was much evidence that Kuralt intended to give Shannon his Montana property, but there was little evidence that he intended the 1997 letter itself to be a will.”); Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 27, 52 (2010) (“In *Kuralt* there was convincing evidence that the testator wanted his girlfriend to inherit the property. Still, the testator likely did not intend the proffered document, a letter, to be a will.” (footnote omitted)).

¹²⁴ See Brown, *supra* note 93, at 113 (describing Kuralt's language as “indicat[ing] nothing more than an intention to take future action—consulting a lawyer about the creation of a will . . .”).

¹²⁵ *In re Estate of Kuralt*, 15 P.3d at 933; *In re Kimmel's Estate*, 123 A. 405, 405 (Pa. 1924).

¹²⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 650-51 (2014); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 885 (2013).

donative testamentary intent. In neither *Kimmel* nor *Kuralt* did the court consider whether the decedent intended the document to fit within the legal category of a will.¹²⁷ Instead, each court considered whether the document expressed intent to make testamentary gifts regardless of whether the decedent understood that a will is the appropriate document in which to express such gifts.¹²⁸ This approach makes intuitive sense, as there is no obvious reason to deny those who are ignorant of the appropriate legal document for passing property upon death the ability to exercise testamentary freedom.

Because the decedent need not intend a will to fall within the legal category of a will,¹²⁹ a variety of documents could constitute wills. The letters at issue in both *Kimmel* and *Kuralt* illustrate this point, but the potential informal documents that could operate as wills are not limited to letters. As the court in *Kimmel* explains, “Deeds, mortgages, letters, powers of attorney, agreements, checks, notes, etc., have all been held to be, in legal effect, wills.”¹³⁰ Thus, donative testamentary intent specifically, and therefore the testamentary intent requirement generally, does not require the decedent to intend the document to be a will in name but instead requires the decedent to intend the document to be a will in character.¹³¹

Along with the idea that the decedent need not intend the purported will to be a will in name, the decedent also need not intend the document to have the legal consequences of a will other than effectuating gifts at death. For example, although courts sometimes state that the decedent must intend the will to be revocable,¹³² this need not be the case. Revocability is simply

¹²⁷ See *In re Estate of Kuralt*, 15 P.3d at 933; *In re Kimmel’s Estate*, 123 A. at 405 (“Is the paper testamentary in character?”).

¹²⁸ *In re Estate of Kuralt*, 15 P.3d at 934 (framing the issue as “whether Kuralt intended the letter of June 18, 1997 to effect a testamentary disposition of the Montana property”); *In re Kimmel’s Estate*, 123 A. at 405-06 (posing the question: “Is the paper testamentary in character?”).

¹²⁹ See *Smith v. Smith*, 232 S.W.2d 338, 341 (Tenn. Ct. App. 1949) (“Testamentary intent does not depend necessarily upon the testator’s understanding that in executing the particular paper he was making a will. If he manifests a clear intention to dispose of his property after his decease . . . , it is immaterial what he thought the instrument was which he executed.”).

¹³⁰ *In re Kimmel’s Estate*, 123 A. at 405 (quoting court below—Orphans’ Court of Cambria County, Reed, J., presiding) (internal quotation marks omitted) (“While the informal character of a paper is an element in determining whether or not it was intended to be testamentary, this becomes a matter of no moment when it appears thereby that the decedent’s purpose was to make a posthumous gift.” (citation omitted)); see *In re Will of Belcher*, 66 N.C. 51, 54 (1872).

¹³¹ Lindgren included the intent that the document be a will, which he labels channeling intent, in his framework of testamentary intent. Lindgren, *supra* note 9, at 1017. He acknowledges that this type of intent is not necessary for a valid will. *Id.* But by including this channeling intent within his framework, he may add confusion to the general testamentary intent requirement.

¹³² *E.g.*, *Nasland v. Nasland*, D055777, 2012 WL 1860050, at *22 (Cal. Ct. App. May 22, 2012) (“It [testamentary intent] means the testator’s general intent to make a revocable disposition of his or her property, effective on the testator’s death.” (quoting *Smith v. Smith* (*In re Estate of Smith*), 71 Cal. Rptr. 2d 424, 431 (Cal. Ct. App. 1998))); *In re Estate of Barton*, No. 10-08-00372-CV, 2009 WL 5155571, at *2 (Tex. App. Dec. 30, 2009) (“A document is not a will unless it is executed with testa-

a consequence of the decedent's intent that the document operate as a will.¹³³ If a decedent intends to make gifts that take effect upon death, the gifts are inherently revocable, but the decedent need not be specifically aware of the revocable nature of the gifts in order for the purported will to reflect donative testamentary intent.

Another legal consequence of a will that is not properly understood as a component of testamentary intent is found in Lindgren's framework. As previously discussed, Lindgren identifies probative intent as a strand of testamentary intent, which he describes as the intent to pass property through the probate process.¹³⁴ Assets that are distributed through a will necessarily pass through the probate system.¹³⁵ But because the decedent need not intend the purported will to fit within the legal category of a will, the decedent also need not intend that her estate pass through probate. Of course, a decedent could intend probate distribution, but such intent is not necessary. Therefore, Lindgren's probative intent, like the intent that a purported will be revocable, is not a component of testamentary intent. Instead, revocability and probate distribution are merely legal consequences of the decedent's testamentary intent.

In sum, donative testamentary intent is the first strand of testamentary intent that courts should consider when deciding whether a purported will satisfies the general testamentary intent requirement. This type of intent refers to whether the purported will expresses an intent to make a gift that becomes effective upon the decedent's death.¹³⁶ Although it is rarely an issue with formal wills that are prepared by professional estate planning attorneys, donative testamentary intent can be uncertain when laymen draft informal documents that are not explicitly identified as a will and that are not clearly drafted.¹³⁷

B. *Operative Testamentary Intent*

The second strand of testamentary intent is operative testamentary intent. Unlike donative testamentary intent, which is concerned with whether

mentary intent. The intent required is to make a revocable disposition of property to take effect after the testator's death." (citations omitted).

¹³³ *Loy v. Shepherd (In re Estate of Shepherd)*, 130 So. 2d 888, 890 (Fla. Dist. Ct. App. 1961) ("A will by nature is ambulatory; thus a will possesses the inherent quality of revocability. It has been said that an instrument which is irrevocable cannot be a will, whatever else it may be."); Klein, *supra* note 12, at 487 ("Wills are inherently revocable. A will does not take effect until the testator dies with the will unrevoked." (footnote omitted)).

¹³⁴ See Lindgren, *supra* note 9, at 1017; see also *supra* notes 41-43 and accompanying text.

¹³⁵ DUKEMINIER & SITKOFF, *supra* note 44, at 41.

¹³⁶ See *supra* notes 88-89 and accompanying text.

¹³⁷ See *supra* notes 93-103 and accompanying text.

a particular document expresses an intent to convey property upon death,¹³⁸ operative testamentary intent is concerned with whether the decedent intended a document that expresses donative testamentary intent to be legally effective. As one California Court of Appeals explains: “[F]or a document to be the last will of a deceased person, it must appear therefrom that the decedent intended *by the very paper itself* to make a disposition of his property in favor of the party claiming thereunder.”¹³⁹ Thus, once the court decides that a purported will surpasses the threshold requirement of describing testamentary gifts, it must decide whether the decedent specifically intended the document to be a legally effective expression of those gifts.¹⁴⁰

Just as donative testamentary intent can be difficult to discern,¹⁴¹ the identification of operative testamentary intent can also be problematic. Although a purported will may clearly describe testamentary gifts, such an expression of donative testamentary intent may be tentative or incomplete. For instance, a decedent typically takes notes and prepares rough drafts before preparing the document that she intends to be the definitive expression of her desired estate plan.¹⁴² Because the decedent is inevitably dead at the time of probate, the court’s task of deciding whether a purported will represents the final expression of the decedent’s testamentary intent could prove challenging.¹⁴³ Indeed, the court cannot simply ask the decedent whether she intended a document to be a legally effective expression of her desired estate plan or merely a rough draft of a potential will.

¹³⁸ See *supra* Section II.A.

¹³⁹ Gillen v. Dotta (*In re Dotta’s Estate*), 64 P.2d 741, 742 (Cal. Dist. Ct. App. 1937) (emphasis added).

¹⁴⁰ See *Van Giesen v. White*, 30 A. 331, 332 (N.J. Ch. 1894) (“[T]estamentary intent is the purpose to render effective the testator’s preference or desire, and consists of something more than the mere desire. The testator’s preference . . . is not alone sufficient to give direction to the property. It must be supported by the appearance of a purpose that the preference shall have effect.”); *Stein’s Lessee v. North*, 3 Yeates 324, 325 (Pa. 1802) (per curiam) (“There must be an advised purpose to make a present disposition of the party’s estate. Here it is but the signification of an intention to do a *future* act, and so not the testament itself, which must contain a *present* and *perfect* consent.”).

¹⁴¹ See *supra* notes 93-102 and accompanying text.

¹⁴² See *Case of Barnet’s Appeal*, 3 Rawle 15, 15 (Pa. 1831) (“Though a rough draft may be a testament, where the intent is clearly apparent, yet it is otherwise if it appear that the decedent viewed it as a mere outline to be filled up and completed by more detailed provisions”); Hirsch, *Inheritance and Inconsistency*, *supra* note 100, at 1065 (“[M]any persons are given to speak and write off the cuff, many persons commit to words tentative *drafts* of their wills and then have second thoughts when the time for inking draws near.”); Langbein, *supra* note 7, at 494-95 (“[T]he danger exists that [the decedent] may make seeming testamentary dispositions . . . without . . . finality of intention. Not every expression that ‘I want you to have the house when I’m gone’ is meant as a will.”). For an example of a contemporary court addressing this issue, see *In re Estate of Gonzalez*, 855 A.2d 1146, 1148-49 (Me. 2004) (deciding whether a decedent intended a preprinted will form to constitute a legally effective will when there was evidence that suggested the decedent intended the form to be a rough draft that he would redraft on another form).

¹⁴³ See *Gulliver & Tilson*, *supra* note 53, at 6-7.

To alleviate these evidentiary difficulties, the law prescribes the method by which the decedent can clearly communicate operative testamentary intent to the probate court.¹⁴⁴ Specifically, the law of wills requires that the decedent comply with a variety of formalities in order to execute a legally effective will. These formalities include the requirements that the will be written, signed by the decedent, and attested by two witnesses.¹⁴⁵ The decedent's compliance with these formalities provides robust evidence that the decedent intended the document to constitute a legally effective expression of testamentary intent.¹⁴⁶ As one leading casebook explains, "A competent person . . . is unlikely to execute an instrument in strict compliance with all of the Wills Act formalities unless the person intends the instrument to be his will."¹⁴⁷ Guzman similarly explains that "[f]ew people would undergo [the] ceremony [of will-execution] without holding testamentary intent."¹⁴⁸ Thus, when the decedent complies with the formalities of will-execution, the court presumes that the document reflects the decedent's operative testamentary intent.¹⁴⁹

Although a decedent likely intended a formally compliant document to constitute a legally effective will, and the law therefore presumes that such a document reflects operative testamentary intent, not all formally compliant documents are intended to be legally effective wills.¹⁵⁰ For example, there is small body of case law addressing purported wills of members of the Masonic Order that illustrates the role of operative testamentary intent.¹⁵¹ In these cases, Freemasonry candidates were obligated to execute wills as part of their initiation rite,¹⁵² and although the purported wills strictly complied with the formalities of will-execution and clearly described

¹⁴⁴ See Langbein, *supra* note 7, at 492-93.

¹⁴⁵ DUKEMINIER & SITKOFF, *supra* note 44, at 153; Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 423-25 (2009).

¹⁴⁶ See *Porche v. Mouch* (Succession of Porche), 288 So. 2d 27, 30 (La. 1973) ("The minimal formal requirements of the statutory will are only designed to provide a simplified means for a testator to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will."); Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 342-43 (2016).

¹⁴⁷ DUKEMINIER & SITKOFF, *supra* note 44, at 153.

¹⁴⁸ Guzman, *supra* note 9, at 311 n.18.

¹⁴⁹ See Langbein, *supra* note 7, at 513.

¹⁵⁰ Langbein & Waggoner, *supra* note 68, at 541-43.

¹⁵¹ See *id.* at 542 n.75.

¹⁵² *Vickery v. Vickery*, 170 So. 745, 745 (Fla. 1936) ("One of the qualifications for membership in Scottish Rite Masonry is that every candidate, prior to his being taken into the order, is required to execute his last will and testament, in the event he has not already prior thereto duly made his will."); *In re Watkins' Estate*, 198 P. 721, 721 (Wash. 1921) ("It was testified by members of the order that the making of a will was a part of the ceremony of the particular degree, required of all candidates who had not theretofore made a will.").

testamentary gifts,¹⁵³ the courts had to decide whether the decedents intended the documents to be legally effective wills or to be merely ceremonial documents that satisfied the Masonic initiation requirements.¹⁵⁴ These decisions were not straightforward, as evidence was presented that suggested the decedents executed the wills solely to complete their initiation and therefore did not intend the wills to be legally effective expressions of testamentary intent.¹⁵⁵ The Supreme Court of Virginia nicely summarizes the issue that arises in these and similar cases when it writes: “[O]ne may execute a paper with every formality known to the law, and by it devise all of his property, but, unless he intends *that very paper* to take effect as a will, it is no will.”¹⁵⁶ Thus, even if donative testamentary intent is clear, the validity

¹⁵³ See, e.g., *Shiels v. Shiels*, 109 S.W.2d 1112, 1113 (Tex. Civ. App. 1937) (quoting the decedent’s writing: “It is my will that all my property both real and personal should become the property of my mother, Charlott Jane Shiels.” (internal quotation marks omitted)); *In re Watkins’ Estate*, 198 P. at 721 (quoting the language of the purported will: “I wish my property, whatever it may be, divided into five parts and my youngest daughter to receive two parts, and the other to the other three children.” (internal quotation marks omitted)).

¹⁵⁴ See, e.g., *Vickery*, 170 So. at 746 (explaining that a will “should be presumed to have been made with testamentary intent when appearing to have been executed with required legal formalities” but when “uncertainty and doubt is . . . shown to have surrounded the supposed making and execution of the alleged will” the probate judge can “refus[e] to allow such doubtful will to probate as the testamentary act of the alleged testator . . .”); *Shiels*, 109 S.W.2d at 1113 (“Testamentary intent on the part of the maker is essential to constitute an instrument a will, regardless of its correctness in form. And the issue of such intention is not limited to the language of the instrument alone. The facts and circumstances surrounding its execution may be looked to in determining whether the maker intended it to be a testamentary disposition of his property or merely to be used for some other purpose.”).

¹⁵⁵ *Shiels*, 109 S.W.2d at 1113 (describing that the decedent “protested and said that he did not want to make a will, that he did not have anything to make a will for”); *In re Watkins’ Estate*, 198 P. at 722 (describing the testimony of one witness who testified that the decedent after executing the purported will remarked: “That is quite a josh” (internal quotation marks omitted)). Langbein and Waggoner label these cases as the “sham wills cases.” Langbein & Waggoner, *supra* note 68, at 541. Sham wills cases, however, are not limited to the Masonic wills cases. E.g., *Fleming v. Morrison*, 72 N.E. 499, 499 (Mass. 1904) (involving a will that was purportedly drafted and executed not with the intent that the document be legally effective but with the intent to induce the sole beneficiary to engage in a sexual relationship with the testator).

¹⁵⁶ *Early v. Arnold*, 89 S.E. 900, 901 (Va. 1916) (emphasis added); see also *McBride v. McBride*, 67 Va. (26 Gratt.) 476, 481 (1875) (“It must satisfactorily appear that he intended the very paper to be his will. Unless it does so appear, the paper must be rejected, however correct it may be in its form, however comprehensive in its detail, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity.”); *In re Watkins’ Estate*, 198 P. at 722 (“It is well settled, of course, that an instrument offered for probate as a will, however formal may have been its execution, will not be admitted to probate as such unless it was executed by the testator with testamentary intent. If it is executed . . . as a part of a ceremonial, for the purpose of deception, or for the purpose of perpetrating a jest, it is not a will”); *Guzman*, *supra* note 9, at 311 (“A document bearing all statutory formalities might raise a pragmatic or legal presumption that testamentary intent exists. Nevertheless, establishing its absence will usually prevent a will’s admission to probate or affect its vitality thereafter.” (footnotes omitted)).

of a purported will requires the court to determine whether the decedent intended the document to operate as a legally effective will.

The issue of operative testamentary intent intuitively arises in the context of the initial validation of a will, but it also arises in other contexts. For example, like will-execution, will-revocation requires the court to evaluate whether the decedent intended a will to be legally effective. Because a will only becomes effective upon death, the decedent can revoke a will at any time during life, and the probate court will not recognize it as a legally effective expression of the decedent's estate plan.¹⁵⁷ Thus, in contrast to will-execution, which presents the issue of whether the decedent initially intended a purported will to be legally effective,¹⁵⁸ will-revocation raises the issue of whether the decedent no longer intended a valid will to be legally effective.¹⁵⁹ Although will-execution and will-revocation present the probate court with slightly different issues, both require the court to determine whether the decedent intended a purported will to be legally effective and therefore both require the court to decipher the decedent's operative testamentary intent.¹⁶⁰

Neither Lindgren nor Guzman specifically identify operative testamentary intent, but both touch upon the issues raised by this strand of the testamentary intent doctrine. Lindgren, for instance, subdivides operative testa-

¹⁵⁷ See *DUKEMINIER & SITKOFF*, *supra* note 44, at 215.

¹⁵⁸ See *supra* notes 144-149 and accompanying text.

¹⁵⁹ The Restatement (Third) of Property explains that the testator may revoke her will by two methods. First, the testator can revoke a will by "executing a subsequent will that expressly revokes the will or specified part or that revokes the will or part by inconsistency . . ." *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 4.1 cmt. a (AM. LAW INST. 1999). Second, the testator may revoke her will by "performing a revocatory act on the will with the intent to revoke." *Id.* Thus, to revoke a previous will by executing a new will, the testator must possess operative testamentary intent with respect to the new will and therefore must not possess operative testamentary intent with respect to the previous will. Similarly, to revoke a will by physical act the testator must possess the intent to revoke, which is essentially the absence of operative testamentary intent. Just as testamentary intent is sometimes referred to in its Latin form, *animus testandi*, revocatory intent is sometimes referred to as *animus revocandi*. Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech"*, 1993 WIS. L. REV. 1525, 1560 n.138.

¹⁶⁰ In addition to will-execution and will-revocation, the issue of operative testamentary intent arises in other contexts, for instance with the doctrine of revival. "The question of revival typically arises under the following facts . . . : Testator executes will 1. Subsequently, testator executes will 2, which revokes will 1 Later, testator revokes will 2." *DUKEMINIER & SITKOFF*, *supra* note 44, at 238. The revival doctrine holds that, if the testator intends will 1 to be legally effective after the revocation of will 2, "the previously revoked will 1 is valid without having to be re-executed." *Id.*; see also UNIF. PROBATE CODE § 2-509(a) (amended 2010) ("The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed."). Thus, like will-execution and will-revocation, the revival doctrine focuses on whether the decedent intended a document to operate as a legally effective will. The doctrines of integration and incorporation by reference, which deal with the question of which documents constitute part of the will, also raise the issue of operative testamentary intent. See *infra* notes 173-176 and accompanying text.

mentary intent into three subcategories. First, he identifies executory intent, which he describes as the “[i]ntent to execute the document.”¹⁶¹ Second, he identifies nontentative intent, which he explains is the “[i]ntent that the estate planning scheme not be tentative or a sham.”¹⁶² Finally, he identifies evidentiary intent, which is the “[i]ntent that the document be used after death as evidence of the estate plan.”¹⁶³

Although Lindgren separately recognizes these subcategories, all three are components of operative testamentary intent, as each focuses on whether the decedent intended the purported will to be legally effective. For instance, if the decedent did not intend to execute a will, she lacked not only executory intent but also operative testamentary intent. As discussed previously, will-execution is the means by which the decedent communicates operative testamentary intent to the court.¹⁶⁴ Therefore, if the decedent did not intend to execute the will, she correspondingly did not intend the will to be legally effective. Likewise, if the testamentary gifts described in the document were tentative or a sham, the decedent lacked both nontentative intent and operative testamentary intent. Relatedly, if the decedent did not intend the document to be used as evidence of her estate plan, she lacked both evidentiary intent and operative testamentary intent. Put differently, when the decedent intends a purported will to be a sham, she necessarily does not intend the document to be used as evidence of her estate plan, and she consequently does not intend the document to be a legally effective will. Lindgren, therefore, implicitly recognizes operative testamentary intent as a component of the general testamentary intent doctrine. However, he adds potentially confusing complexity by unnecessarily dividing this strand into closely related subcategories.

Like Lindgren, who divides operative testamentary intent into multiple strands, Guzman improperly separates various rules and doctrines that focus on operative testamentary intent into different categories. As mentioned previously, Guzman describes the primary function of testamentary intent as “driving the original finding of a will,”¹⁶⁵ and she focuses her discussion on the law of will-execution.¹⁶⁶ Thus, Guzman’s primary function of testamentary intent raises the issue of operative testamentary intent.¹⁶⁷ However, she relegates other rules and doctrines that focus on operative testamentary intent to her secondary function of testamentary intent.¹⁶⁸ For instance, she separates will-revocation from will-execution and places it within the sec-

¹⁶¹ Lindgren, *supra* note 9, at 1018.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *supra* notes 144-149 and accompanying text.

¹⁶⁵ Guzman, *supra* note 9, at 310.

¹⁶⁶ See *id.* at 310-19; see also *supra* notes 64-69 and accompanying text.

¹⁶⁷ See *supra* notes 144-156 and accompanying text.

¹⁶⁸ See Guzman, *supra* note 9, at 319-22.

ondary function of testament intent.¹⁶⁹ But as previously explained, will-execution and will-revocation both deal with the same question: Did the decedent intend a purported will to be legally effective?¹⁷⁰ Will-execution focuses on the presence of this intent,¹⁷¹ while will-revocation focuses on the absence of this intent,¹⁷² but both involve the issue of operative testamentary intent.

As she does for will-revocation, Guzman separates the doctrines of integration and incorporation by reference from testamentary intent's primary function.¹⁷³ She does so despite that both focus upon the issue of operative testamentary intent. The doctrine of integration holds that all papers that were present at the time of will-execution and that the decedent intended to be part of the will are legally effective components of the will.¹⁷⁴ Similarly, under the doctrine of incorporation by reference, a document that is not present at the time of will-execution may be treated as part of the will if the language of the executed will describes the document and evidences the decedent's intent that the document be a legally effective component of the will.¹⁷⁵ Thus both integration and incorporation by reference are closely related to will-execution, as each focus on the decedent's intent that certain documents operate as part of a legally effective will. Guzman herself acknowledges the relationship between will-execution and these doctrines when she explains, "In addition to its growing centrality to a will's creation, intent figures prominently in a series of loosely grouped doctrines aimed at discerning the . . . documents that constitute a will."¹⁷⁶ Therefore, despite Guzman separating the integration and incorporation by reference doctrines from will-execution, the underlying issue of intent of all three is the decedent's intent that a particular document be a legally effective expression of her desired estate plan. Put simply, will-execution, integration, and incorporation by reference all address the issue of the decedent's operative testamentary intent.

In sum, although donative testamentary intent and operative testamentary intent are closely related, they are properly understood as independent components of the testamentary intent doctrine. Whereas, the donative strand of testamentary intent relates to whether a purported will describes testamentary gifts,¹⁷⁷ operative testamentary intent relates to whether the decedent intended a purported will to be a legally operative expression of

¹⁶⁹ *Id.* at 322.

¹⁷⁰ *See supra* notes 144-160 and accompanying text.

¹⁷¹ *See supra* notes 144-156 and accompanying text.

¹⁷² *See supra* notes 157-160 and accompanying text; *see also* Guzman, *supra* note 9, at 322 ("As with effecting a valid will, revoking one also requires intent, this time revocatory . . .").

¹⁷³ Guzman, *supra* note 9, at 319-20.

¹⁷⁴ DUKEMINIER & SITKOFF, *supra* note 44, at 241.

¹⁷⁵ UNIF. PROBATE CODE § 2-510 (amended 2010).

¹⁷⁶ Guzman, *supra* note 9, at 319.

¹⁷⁷ *See supra* Section II.A.

those gifts.¹⁷⁸ Before recognizing a document as a will, the probate court should first determine that the document reflects donative testamentary intent by describing testamentary gifts and then should evaluate operative testamentary intent by deciding whether the decedent intended the document to be legally effective.

C. *Substantive Testamentary Intent*

The third and final strand of testamentary intent is substantive testamentary intent. Unlike donative testamentary intent and operative testamentary intent, which both focus upon the determination of whether the decedent intended a particular document to be a legally effective will,¹⁷⁹ substantive testamentary intent focuses upon the interpretation of the decedent's will. The guiding principle in the construction of wills is that courts should interpret the will in a way that results in the distribution of the estate in the manner that the decedent intended.¹⁸⁰ As the Supreme Court of Mississippi explains: "The paramount and controlling consideration [of will construction] is to ascertain and give effect to the intention of the testator."¹⁸¹ The Supreme Court of Virginia similarly explains: "Our purpose of course is to find the testamentary intent. If a will reflects a clear intent . . . we honor that intent."¹⁸² Thus, once the court determines both that the purported will expresses testamentary gifts and that the decedent intended the document to be legally effective, the court must turn to the final element of the testamentary intent doctrine and construe the will in accordance with the decedent's intent.

The court's primary goal in interpreting a will is to ascertain the actual intent of the testator, or put differently, to decipher the true meaning of the testator's words.¹⁸³ To determine the decedent's actual intent, courts tradi-

¹⁷⁸ See *supra* notes 139-140 and accompanying text.

¹⁷⁹ See *supra* Sections II.A-B.

¹⁸⁰ See UNIF. PROBATE CODE § 2-601 cmt. (amended 2010) ("[T]he widely accepted proposition [is] that a testator's intention controls the legal effect of his or her dispositions."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.")

¹⁸¹ *Deposit Guar. Nat'l Bank of Jackson v. First Nat'l Bank of Jackson*, 352 So. 2d 1324, 1327 (Miss. 1977).

¹⁸² *Lane v. Starke*, 692 S.E.2d 217, 219 (Va. 2010).

¹⁸³ WASH. REV. CODE ANN. § 11.12.230 (West 2012) ("All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."); *In re Earle's Estate*, 85 A.2d 90, 93 (Pa. 1951) ("[I]t is the actual intent, as ascertained from the language of the will that must prevail in the light of the circumstances surrounding [the] testator at the date of the execution of the will."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. a (AM. LAW INST. 2003) ("The donor's intention controls the meaning of a donative document to the extent that the donor's

tionally use the plain meaning rule.¹⁸⁴ When applying this rule, courts attribute the plain meaning or typical understanding to the decedent's words, and they do not consider extrinsic evidence that suggests a contradictory interpretation of the will's language.¹⁸⁵ The Supreme Court of Mississippi explains: "The surest guide to testamentary intent is the wording employed by the maker of the will."¹⁸⁶ "[I]f the language of the will is clear, definite, and unambiguous, the court must give to the language its clear import."¹⁸⁷

Although the court's objective is to ascertain the actual intent of a decedent, such a goal is not always attainable. At times, the language of a will is ambiguous and as a result the plain meaning of the testator's words are inapprehensible.¹⁸⁸ Additionally, a considerable amount of time sometimes intervenes between the execution of a will and the testator's death, and consequently changed circumstances might suggest that the testator would want a different disposition of her estate than what the language of her will reflects.¹⁸⁹ In these circumstances, various canons of construction and presumptions of intent that are aimed at discerning the decedent's probable intent guide the court's task of deciphering the decedent's substantive testamentary intent.¹⁹⁰

intention is sufficiently established. In case of a conflict between the intention of an individual donor and a rule of construction or a constructional preference, the donor's intention, when sufficiently established, is controlling."); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 68-70 (2005).

¹⁸⁴ See DUKEMINIER & SITKOFF, *supra* note 44, at 328; Storrow, *supra* note 183, at 70-73.

¹⁸⁵ DUKEMINIER & SITKOFF, *supra* note 44, at 328 ("Under this rule, extrinsic evidence may be admitted to resolve certain ambiguities, but the plain meaning of the words of a will cannot be disturbed by evidence that the testator intended another meaning."); 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, 814 (2001) ("The plain meaning rule appears simple: courts shall not admit extrinsic evidence to contradict or add to the planning meaning of the words in a will.").

¹⁸⁶ *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659, 663 (Miss. 1987).

¹⁸⁷ *Bullard v. Bullard*, 97 So. 1, 2 (Miss. 1923); *accord In re Estate of Cole*, 621 N.W.2d 816, 818 (Minn. Ct. App. 2001) ("[T]he court is to avoid doing any violence to the words employed in the instrument and to distrust the reliability of looking to sources outside the instrument for information about its meaning . . .").

¹⁸⁸ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 cmt. a (AM. LAW INST. 2003) ("This section defines an ambiguity in a donative document as an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text. An uncertainty in meaning shows that the document contains an inadequate expression of the donor's intention. Ambiguities often but not necessarily arise in situations in which two or more constructions of the document are plausible.").

¹⁸⁹ DUKEMINIER & SITKOFF, *supra* note 44, at 327 ("Another difficulty in construing wills stems from the gap in time that intervenes between the making of a will and the testator's death. During this gap, which may span years or even decades, circumstances can change in a way that renders the will stale or obsolete."); Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 610-13 (2009) [hereinafter Hirsch, *Text and Time*].

¹⁹⁰ *In re Estate of Grulke*, 546 N.W.2d 626, 628 (Iowa Ct. App. 1996) ("If a simple reading of the will, using the words in their ordinary and natural sense, does not unmistakably reveal the maker's

For example, when interpreting wills, the courts generally employ a canon of construction that resolves ambiguity in favor of testacy over intestacy.¹⁹¹ As the New York Court of Appeals explains: “The idea of anyone deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary disposition as to justify almost any construction to escape it.”¹⁹² Other canons of construction that courts apply when interpreting wills include the constructional preferences that favor family members over non-family members,¹⁹³ that give the decedent favorable tax consequences,¹⁹⁴ and that presume the decedent’s intent accords with public policy.¹⁹⁵ Through the application of these and other constructional principles, the court attempts to determine the decedent’s probable intent in situations where her actual intent is ambiguous.

In addition to the various canons of construction that guide the court in resolving ambiguity in the language of a will, a variety of rebuttable presumptions aid the court in fulfilling the decedent’s substantive testamentary intent. But instead of resolving ambiguity caused by the decedent’s words,

intention, the court may resort to certain accredited canons of construction. These canons of construction permit us to impute a meaning conforming to the testator’s probable intention and one that is most agreeable to reason and justice.” (citation omitted)); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. a (AM. LAW INST. 2003) (“Rules of construction and constructional preferences assist in resolving many types of ambiguities, but they do not constitute evidence of the donor’s *actual* intention. They are devices that *attribute* intention to *individual* donors in particular circumstances on the basis of *common* intention.”); Storrow, *supra* note 183, at 80-81 (“What is less well known is what a court must do when even the admission of extrinsic evidence is insufficient to disclose the testator’s actual intent. At this juncture, the court will resort to will construction, the process of attributing intention to the words used by the testator with the aid of rules of construction and constructional preferences. By resorting to construction, a court is essentially declaring the testator’s intent itself to be ambiguous. The application of rules of construction, then, is calculated to endow the conveyance with some legal effect, albeit in favor of imputing an intent as the state identifies it.” (footnotes omitted)).

¹⁹¹ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3(c)(2) (AM. LAW INST. 2003) (describing the constructional preference for “the construction that favors completeness of disposition”); Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1473 (2013) (“Courts have created a presumption against intestacy . . .”).

¹⁹² *Hayes v. Hayes (In re Hayes’ Will)*, 188 N.E. 716, 718 (N.Y. 1934) (quoting 2 ISAAC F. REDFIELD, *THE LAW OF WILLS* *235 (Boston, Little, Brown & Co. 3d ed. 1876)) (internal quotation marks omitted); *accord In re Estate of Herceg*, 747 N.Y.S.2d 901, 903 (N.Y. Sur. Ct. 2002) (“[T]he testator is presumed to intend to avoid intestacy otherwise he or she would not have bothered to make a will.”).

¹⁹³ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3(c)(3) (AM. LAW INST. 2003) (describing the constructional preference for “the construction that favors family members over non-family members, the construction that favors close family members over more remote family members, and the construction that does not disinherit a line of descent”).

¹⁹⁴ See *id.* § 11.3(c)(4).

¹⁹⁵ See *id.* § 11.3(c)(6).

these presumptions address ambiguity raised by changed circumstances.¹⁹⁶ As mentioned previously, a substantial amount of time can pass between the execution of a will and the testator's death, and within this intervening period circumstances might change in ways that suggest the decedent's will no longer reflects her true substantive testamentary intent.¹⁹⁷

For example, the testator might execute a will while married that gives a substantial portion of her estate to her spouse. She then might divorce and subsequently die without changing her will to reflect this changed circumstance. In this situation, she very likely would not want her ex-spouse to receive the bulk of her estate, despite that her will unambiguously makes such a bequest.¹⁹⁸ Based upon the likelihood that the testator mistakenly failed to update her will,¹⁹⁹ the law of most states presumes that the testator would not want her surviving ex-spouse to receive the bequest and therefore renders any gifts to her ex-spouse ineffective.²⁰⁰

A similar presumption applies when the testator executes a will and subsequently marries. When a testator marries after executing a will that does not provide for her new spouse, the law presumes that she would want her spouse to share in her estate.²⁰¹ In such situations, the law in most states provides the surviving spouse a share of the decedent's estate despite that her will purports to disinherit her surviving spouse.²⁰² Again, the rationale underlying this presumption is that the testator's failure to update her will does not reflect a considered decision regarding testamentary intent but instead simply reflects inattentiveness.²⁰³ In sum, by presuming both

¹⁹⁶ DUKEMINIER & SITKOFF, *supra* note 44, at 562-63 ("For cases in which the testator's actual intent is not evident, these rules are designed to implement the probable intent of the typical testator."). See generally Hirsch, *Text and Time*, *supra* note 189.

¹⁹⁷ See *supra* note 189 and accompanying text.

¹⁹⁸ *Coughlin v. Bd. of Admin.*, 199 Cal. Rptr. 286, 287 (Cal Ct. App. 1984) ("[U]pon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, [testators] would most likely intend to provide for their new family members, and/or revoke prior provisions made for their ex-spouses.").

¹⁹⁹ *Id.* at 288 (explaining that testators "often fail to . . . revoke, not out of conscious intent, but simply from a lack of attentiveness").

²⁰⁰ UNIF. PROBATE CODE § 2-804(b) (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1(b) (AM. LAW INST. 1999) ("The dissolution of the testator's marriage is a change in circumstance that presumptively revokes any provision in the testator's will in favor of his or her former spouse."); DUKEMINIER & SITKOFF, *supra* note 44, at 239.

²⁰¹ DUKEMINIER & SITKOFF, *supra* note 44, at 563 ("The [state] statutes contain default rules that can be overcome by evidence that the testator deliberately omitted the surviving spouse and did not mistakenly fail to update the premarital will.").

²⁰² *Id.* ("At common law, a premarital will was revoked by the testator's marriage or marriage followed by the birth of issue. Although still in force in a few states, this rule has been overridden in most states by statutes that give a surviving spouse who is omitted from a premarital will an intestate share, otherwise leaving the premarital will intact.").

²⁰³ See *id.* ("These statutes correct for the testator's assumed mistake in neglecting to update a premarital will . . .").

that the testator would want her spouse to share in her estate and that she would not want her ex-spouse to take under her will, the law aims to distribute the testator's estate in the manner that she would prefer. These presumptions, therefore, illustrate how the law attempts to fulfill the decedent's substantive testamentary intent.

Unlike donative testamentary intent and operative testamentary intent,²⁰⁴ Lindgren does not include substantive testamentary intent within his framework.²⁰⁵ He explains that testamentary intent can include both the "[i]ntent that a document transfer property at death" and the "[i]ntent that the document describe an estate plan,"²⁰⁶ but he does not mention the intent to make specific gifts to specific beneficiaries within his discussion of the testamentary intent doctrine.²⁰⁷ Guzman fills Lindgren's omission and includes the interpretation and construction of wills within her framework.²⁰⁸ Specifically, she explains that during will interpretation "intent reigns supreme" and that, within this context, testamentary intent is "[n]o longer employed to assess whether the decedent intended the subject document to be a will" but is instead used to "illuminate[] [the will's] meaning with principals of interpretation and construction."²⁰⁹ As such, Guzman recognizes the distinction between donative testamentary intent and operative testamentary intent, which are concerned with whether the decedent intended a document to be a legally effective expression of testamentary gifts,²¹⁰ and substantive testamentary intent, which is concerned with identifying the specific gifts that the decedent intended to make.²¹¹

III. THE IMPLICATIONS

Without a clear and uniform doctrine, courts have struggled to consistently and predictably decide issues of testamentary intent. As Guzman explains, the lack of a well-defined testamentary intent doctrine "often generates sharply different outcomes in cases with no appreciable difference in their underlying intent-reflective facets."²¹² This unpredictability has its costs. For instance, it encourages protracted litigation, which not only has obvious economic costs but also has psychological and emotional costs for friends and family of the decedent, who must endure this litigation at a time

²⁰⁴ See *supra* notes 90, 161-164 and accompanying text.

²⁰⁵ See Lindgren, *supra* note 9, at 1017-18.

²⁰⁶ *Id.*

²⁰⁷ See *id.* at 1016-20.

²⁰⁸ Guzman, *supra* note 9, at 320-22; see also *supra* notes 70-75 and accompanying text.

²⁰⁹ Guzman, *supra* note 9, at 320. Guzman furthermore labels her secondary function of testamentary intent "The Constructional Properties of Testamentary Intent." *Id.* at 319.

²¹⁰ See *supra* Sections II.A-B.

²¹¹ See *supra* notes 179-182 and accompanying text.

²¹² Guzman, *supra* note 9, at 307.

when they are still grieving the loss of a loved one.²¹³ Going forward, the unpredictability of probate litigation regarding testamentary intent might increase as the law moves away from a formalistic approach to the validation, construction, and interpretation of wills and towards an approach that vests considerably greater discretion in courts to determine testamentary intent.²¹⁴ The two primary examples of this shift are the emergence of the harmless error rule and the development of the reformation doctrine.²¹⁵

The harmless error rule focuses on the decedent's operative testamentary intent. Under conventional law, courts simply look at whether the decedent strictly complied with the formalities of will-execution to decide the issue of operative testamentary intent.²¹⁶ This approach fosters predictable outcomes.²¹⁷ Instead of the court deciding the underlying issue of whether the decedent intended a will to be legally effective by weighing all available

²¹³ See *id.* (“Unpredictable outcomes encourage inefficient litigation and impose unnecessary economic and human costs on parties to it.”); see also Christopher C. French, *The “Ensuing Loss” Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions*, 13 NEV. L.J. 215, 255 (2012) (“Inconsistent and unpredictable outcomes . . . lead to inefficiencies in the legal system because it is harder to settle cases that have inconsistent and unpredictable outcomes, which in turn increases the parties’ and courts’ litigation costs.”). The unpredictability of probate litigation may also have psychological costs for the testator. See Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 438-43 (2012); Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 143-47 (2012).

²¹⁴ See Guzman, *supra* note 9, at 308 (“A deepened understanding of testamentary intent . . . is more critical now than ever given the enhanced role that intent plays in reducing a will’s formalities and tempering or even excusing documentary defects. Further, new technologies, expanded definitions of writings and signatures, broader entryways for extrinsic evidence, and ever-proliferating will substitutes will alter the methods of its expression in ways that may well require enhanced understanding of the term.” (footnotes omitted)).

²¹⁵ See John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 7-10 (2012) (describing the shift from the strict compliance and plain meaning rule to harmless error and reformation); John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, PROB. & PROP., Jan.-Feb. 2004, at 28, 28-30 [hereinafter Langbein, *Curing Execution Errors*]. Another example of the shift toward granting courts greater discretion to determine the decedent’s intent is the change from the identity theory of ademption to the intent theory of ademption. See DUKEMINIER & SITKOFF, *supra* note 44, at 374.

²¹⁶ See Langbein, *supra* note 7, at 489; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1045-47 (1994); see also *supra* Section II.B.

²¹⁷ Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN’S L. REV. 597, 630 (2014) (“[B]y channeling all valid wills into substantially the same form, the strict compliance requirement minimizes the court’s discretion in evaluating the genuineness of wills and consequently increases certainty regarding which wills are valid and which are not.”); see John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 51 (1987) [hereinafter Langbein, *Excusing Harmless Errors*] (reporting that an English law reform committee declined to recommend reform of the strict compliance requirement due to concerns “that by making it less certain whether or not an informally executed will is capable of being admitted to probate, [a dispensing power] could lead to litigation, expense, and delay” (internal quotation marks omitted)).

evidence, the court must simply decide whether the decedent left behind a formally compliant will.²¹⁸ Whereas courts may vary widely in how they decide the subjective issue of whether a decedent intended a document to be a legal effective will, courts likely decide the objective issue of formal compliance more consistently.²¹⁹

Although the strict compliance requirement is still the predominate method of deciding the issue of operative testamentary intent, a small block of states now allows courts to overlook formal defects and to exercise discretion in determining whether a decedent intended a noncompliant document to be a legally effective will.²²⁰ In these states, no longer are courts merely asked to decide the relatively straightforward issue of whether the decedent strictly complied with the prescribed will formalities. Instead, they are tasked with deciding the trickier issue of whether the decedent intended a will to be legally effective. When the issue before the court shifts from the objective issue of formal compliance to the subjective issue of the decedent's intent, courts may reach more inconsistent decisions.²²¹ Thus, by giving courts broader discretion, the harmless error rule interjects potentially greater inconsistency and unpredictability into the testamentary intent doctrine.

Contrary to the harmless error rule, which relates to the decedent's operative testamentary intent, the reformation doctrine is concerned with the decedent's substantive testamentary intent. Under conventional law, courts cannot add to, subtract from, or replace the language that the decedent chose to include in her will.²²² Put simply, courts cannot reform a will.²²³ Instead, courts traditionally take the language of a will as the definitive expression of the decedent's substantive testamentary intent,²²⁴ and they interpret the will in accordance with the plain meaning of the decedent's chosen words.²²⁵ By limiting the court's ability to decide the decedent's

²¹⁸ See Langbein, *Excusing Harmless Errors*, *supra* note 217, at 4-5.

²¹⁹ See Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 393 (2001) ("[T]he harmless error rule . . . reduce[s] the ability to predict in advance which writings will qualify as wills because [it] rel[ies] on extrinsic evidence of the testator's intent rather than formalities alone to establish the testamentary character of an instrument."). However, even when purportedly applying the strict compliance requirement, courts may reach inconsistent results. See Glover, *supra* note 217, at 643.

²²⁰ DUKEMINIER & SITKOFF, *supra* note 44, at 184 (explaining that a version of the harmless error rule has been adopted in California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia).

²²¹ See sources cited *supra* note 219.

²²² DUKEMINIER & SITKOFF, *supra* note 44, at 328.

²²³ *Id.*

²²⁴ See *id.*; see also *supra* Section II.C.

²²⁵ DUKEMINIER & SITKOFF, *supra* note 44, at 328.

substantive testamentary intent in this way, the conventional law fosters predictable and consistent outcomes.²²⁶

In opposition to the conventional law, a push is underway to allow courts to reform the language of wills in situations that suggests that the decedent's chosen words do not accurately reflect her substantive testamentary intent.²²⁷ The goal of this change is to avoid inequitable situations in which the decedent's property is distributed according to mistakenly drafted language that inaccurately describes the decedent's intended testamentary gifts.²²⁸ But while the emergence of the judicial reformation of wills may better fulfill the decedent's substantive intent in clear instances of mistaken draftsmanship, it could also introduce unpredictability into the testamentary intent doctrine. Like the potential inconsistency produced by allowing courts to validate formally defective wills,²²⁹ greater inconsistency in outcomes may result when courts consider extrinsic evidence of the decedent's substantive testamentary intent. Indeed, when courts focus on the subjective intent of the decedent rather than simply deciphering the plain meaning of the will's language, the decedent, her family, and other potential beneficiaries enjoy less certainty and predictability in how the court will interpret the meaning of the will's language.²³⁰

By increasing judicial discretion in deciding issues of testamentary intent, this overall shift in the law of wills necessitates a clear understanding of the issues that courts must decide when exercising their discretion. When testamentary intent is identified and interpreted through formalistic methods, the underlying issues can be obscured and conflated with relatively little harm. For instance, when applying the strict compliance requirement, the court need not understand that, through the proxy of formal compliance,

²²⁶ Champine, *supra* note 219, at 401 (“By limiting courts to the unambiguous language of the will, . . . testators receive assurance that their wishes will not be overturned because they are unpopular. More generally, the rule-oriented approach offer predictability to all testators, assuring them that their wishes, if expressed unambiguously, will be respected.”); 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, 1374 (2002) (“Some courts avoid using extrinsic evidence in interpreting a testator’s intent in order to provide some predictability to the . . . interpretation of will documents.”).

²²⁷ See UNIF. PROBATE CODE § 2-805 (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003).

²²⁸ DUKEMINIER & SITKOFF, *supra* note 44, at 337 (explaining that reformation can “avoid . . . harsh result[s]” when “there is overwhelming evidence of mistake and the testator’s actual intent”); Langbein & Waggoner, *supra* note 68, at 590 (“So long as it is human to err, instances of mistaken terms in wills are inevitable. The impulse to remedy these errors in order to prevent unjust enrichment is also deeply rooted in our sense of justice, which is why the simplistic rule forbidding relief against mistake [through reformation of the mistakenly drafted language] is dissolving.”).

²²⁹ See sources cited *supra* note 219.

²³⁰ See *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) (“To allow for reformation [of wills] would . . . lead to untold confusion in the probate of wills.”); Jarboe, Note, *supra* note 226, at 1374 (“Free use of extrinsic evidence in will interpretations threatens . . . certainty.”); see also *supra* note 226 and accompanying text.

it is deciding the issue of operative testamentary intent.²³¹ But when the court's focus is turned to the issues underlying these formalistic proxies, it must pay greater attention to how the issues are framed and articulated. For example, when deciding whether to validate a noncompliant will under the harmless error rule, the court must understand that the issue at hand is whether the decedent intended the will to be legally effective. If courts are unsure exactly what they must determine when applying the harmless error rule, inconsistent outcomes and doctrinal confusion are more likely. Indeed, without a clear understanding of the underlying issues, courts will add even greater uncertainty to the determination of testamentary intent.

In sum, the harmless error rule and the reformation doctrine give courts significantly more discretion in deciding issues of testamentary intent than under traditional law. These changes are representative of a larger shift within the law of wills from formalistic approaches to deciding issues of testamentary intent to approaches that give courts broad discretion to decide such issues. While the need for clarity existed previously, this shift increases the importance of a well-defined testamentary intent doctrine.²³² Guzman nicely summarizes this idea when she advises: "As 'formalism falls, intent rises'; as intent rises, heightened care must be afforded to its contours."²³³ With the concerns raised by vesting courts with greater discretion to decide issues of testamentary intent in mind, this final Part demonstrates how this Article's taxonomy clarifies the theoretical understanding and practical application of the testamentary intent doctrine.

A. *Harmless Error*

Operative testamentary intent refers to the decedent's intent that a will be legally effective.²³⁴ Courts typically decide this issue by evaluating the decedent's compliance with the prescribed formalities of will-execution.²³⁵ The decedent's compliance therefore serves as a proxy for the decedent's operative testamentary intent. As just discussed, the harmless error rule shifts the court's focus from the objective issue of formal compliance to the subjective issue underlying the proxy, namely the decedent's intent.²³⁶ It

²³¹ See *supra* Section II.B. The same is true is true when the court determines the issue of substantive testamentary intent through the application of the plain meaning rule. See *supra* Section II.C.

²³² See Guzman, *supra* note 9, at 352 ("The need for attention to testamentary intent has become even more acute over the past two decades, given the increasing recognition of its role in overcoming execution defects."); Lindgren, *supra* note 9, at 1010 ("When under the 1990 Code any document with testamentary intent qualifies as a will, the doctrine of testamentary intent will play a much greater role in the law of wills.");

²³³ Guzman, *supra* note 9, at 352.

²³⁴ See *supra* Section II.B.

²³⁵ See DUKEMINIER & SITKOFF, *supra* note 44, at 153.

²³⁶ See *supra* notes 220-221 and accompanying text.

does so by allowing the court to validate a formally deficient will if it is convinced that the decedent intended the will be legally effective.²³⁷ With this shift comes the need to clearly define what issues the court must decide when excusing a decedent's noncompliance. Specifically, in order to provide consistency and predictability to the testamentary intent doctrine, courts must understand that when applying the harmless error rule, they should focus on the issue of operative testamentary intent.

With this need for clarity in mind, policymakers have attempted to provide courts explicit guidance regarding the issues of testamentary intent that arise during the application of the harmless error rule. For example, the Uniform Probate Code's ("UPC") harmless error rule specifically states that the court can overlook a will-execution defect if "the decedent intended the document . . . to constitute . . . the decedent's will."²³⁸ Although this formulation of the harmless error rule could be more precise,²³⁹ the official commentary clarifies that the central issue underlying the harmless error rule is operative testamentary intent.²⁴⁰ The drafters of the *Restatement (Third) of Property* have been more specific and have directed the court's attention more explicitly toward operative testamentary intent. The Restatement explains: "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."²⁴¹ By including the phrase, "*adopted the document as his or her will*,"²⁴² the Restatement specifically places the court's focus on the issue of whether the decedent intended the will to be legally effective.

²³⁷ See Langbein, *Excusing Harmless Errors*, *supra* note 217, at 4-5.

²³⁸ UNIF. PROBATE CODE § 2-503 (amended 2010).

²³⁹ The phrase "intended the document . . . to constitute . . . the decedent's will" does not explicitly distinguish operative testamentary intent and donative testamentary intent. Whereas operative testamentary intent focuses on the issue of whether the decedent intended a will to be legally effective, donative testamentary intent focuses on the issue of whether a document expresses testamentary gifts. Compare *supra* Section II.B, with *supra* Section II.A.

²⁴⁰ The official comment explains that the harmless error rule "permits the proponents of the will to prove that the defective execution did not result from *irresolution* or from circumstances suggesting *duress or trickery* – in other words, that the defect was harmless to the purpose of the formality." UNIF. PROBATE CODE § 2-503 cmt. (amended 2010) (emphasis added). Because *irresolution*, *duress*, and *trickery* each involve a situation in which the central question is whether the decedent intended a will to be legally effective and not whether the document expresses testamentary gifts, the commentary clarifies that the issue underlying the harmless error rule is operative testamentary intent, not donative testamentary intent.

²⁴¹ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999).

²⁴² *Id.* (emphasis added).

Because the emergence of the harmless error rule is relatively new and not widespread,²⁴³ few state appellate court decisions involving the rule have been published. In recent years, however, New Jersey appellate courts have been some of the first to address issues related to the harmless error rule.²⁴⁴ Because New Jersey is one of the first states in which courts can look past the proxy of formal compliance and delve directly into the issue of operative testamentary intent, these recent appellate court cases could have widespread influence in shaping how courts apply the harmless error rule.²⁴⁵ Unfortunately, despite the relatively clear articulation of the issues underlying the harmless error rule, New Jersey courts have added unnecessary complexity and confusion to the testamentary intent doctrine. This confusion largely stems from the court's conflation of the various strands of testamentary intent.

The New Jersey courts' troubles with the testamentary intent doctrine are apparent in two recent cases: (1) *In re Probate of Will and Codicil of Macool*²⁴⁶ and (2) *In re Estate of Ehrlich*.²⁴⁷ In the first case, Louise Macool visited an attorney for assistance with drafting her will.²⁴⁸ The attorney and Macool discussed her desired estate plan, and she gave the attorney notes regarding specific gifts she wanted to make.²⁴⁹ After the meeting, Macool left the office, and the lawyer began to prepare a draft of the will.²⁵⁰ Macool, however, was never able to formally execute the will, as she died shortly after leaving the lawyer's office.²⁵¹ The will was submitted for probate, and because the document did not comply with the prescribed formalities, the court had to decide whether it satisfied New Jersey's harmless error rule.²⁵²

New Jersey modeled its statute after the UPC's harmless error rule, authorizing the court to validate a formally defective will "if the proponent of the document . . . establishes . . . that the decedent intended the document . . . to constitute . . . the decedent's will."²⁵³ Thus, despite some ambiguity in

²⁴³ See DUKEMINIER & SITKOFF, *supra* note 44, at 184 ("In 1990, the harmless error rule was codified in UPC §2-503 (1990, rev. 1997). Today, some version of the harmless error rule has been adopted by statute in ten states . . .").

²⁴⁴ See *infra* notes 246-247.

²⁴⁵ See 'Harmless Error' Statute Construed, ESTATE PLANNING, Mar. 2011, at 37, 38 ("To the extent that the *Macool* decision represents the final say with regard to New Jersey appellate courts' interpretation of the New Jersey harmless error statute, the decision provides needed clarity and guidance for lower court judges. Indeed the *Macool* interpretation of Uniform Probate Code section 2-503 may have influence beyond the boundaries of New Jersey.").

²⁴⁶ 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010).

²⁴⁷ 47 A.3d 12 (N.J. Super. Ct. App. Div. 2012).

²⁴⁸ *In re Macool*, 3 A.3d at 1262.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* (reporting that Macool "died approximately one hour after her meeting" with the attorney).

²⁵² *Id.* at 1262-63.

²⁵³ N.J. STAT. ANN. § 3B:3-3 (West 2007).

the wording of the statute,²⁵⁴ the central issue under New Jersey's harmless error rule, like the key issue under the UPC's harmless error rule, is operative testamentary intent.²⁵⁵ Nonetheless, the court in *Macool* added a secondary component to the harmless error analysis when it held: "[F]or a writing to be admitted into probate as a will under [New Jersey's harmless error statute], the proponent of the writing . . . must prove . . . that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it."²⁵⁶

The second prong of the *Macool* court's holding essentially restates the statute's requirement that the proponent establish that the decedent intended the document to be her will. If the decedent did not give her "final assent" to the will,²⁵⁷ she did not "intend[] the document or writing to constitute [her] will."²⁵⁸ Thus, the second prong of *Macool*'s harmless error analysis focuses on the key issue of operative testamentary intent. By contrast, the first prong of the holding in *Macool* adds an additional requirement, specifically that the decedent reviewed the will.²⁵⁹ The connection between this component of the harmless error analysis and operative testamentary intent is not clear. The decedent's review of the will certainly can serve as evidence that the decedent intended the will to be legally effective. However, the decedent could intend a document that she did not review to constitute a legally effective will. Indeed, the law traditionally imposes no general requirement that the decedent review the will prior to execution.²⁶⁰ Because *Macool*'s second prong of the harmless error analysis specifically requires the court to decide whether the decedent intended the document to constitute a legally effective will, the first prong is apparently unrelated to operative testamentary intent.

²⁵⁴ See *supra* notes 238-240 and accompanying text.

²⁵⁵ The court initially characterizes the primary issue in terms of operative testamentary intent when it states: "The [trial] court found, however, that plaintiff failed to establish, by clear and convincing evidence, that the decedent intended the document denoted . . . as a 'rough' draft to be her last and binding will." *In re Macool*, 3 A.3d at 1264. Indeed, the phrase "last and binding will" makes clear that the relevant issue is whether the decedent intended the will to be legally effective.

²⁵⁶ *Id.* at 1265.

²⁵⁷ *Id.*

²⁵⁸ N.J. STAT. ANN. § 3B:3-3 (West 2007).

²⁵⁹ *In re Macool*, 3 A.3d at 1265.

²⁶⁰ See UNIF. PROB. CODE § 2-502 (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 1999). Although the UPC and the Restatement do not contain an explicit requirement that the decedent review a will, some cases seem to suggest that such a requirement exists. See, e.g., *Chavez v. Mendoza (In re Estate of Mendoza)*, 356 P.2d 13, 16 (Nev. 1960) ("It needs no citation of authority to support the universally recognized rule that it is essential to the validity of a will that the testator know and understand the contents thereof."). However, these cases are better understood as suggesting that a decedent's review of a will and her understanding of its contents is simply one type of evidence of operative testamentary intent. See *In re Estate of Turpin*, 19 A.3d 801, 805-07 (D.C. 2011).

Although the requirement that the decedent review the will cannot be fully explained by concerns regarding operative testamentary intent, the requirement makes more sense in the context of substantive testamentary intent. As previously explained, substantive testamentary intent refers to the decedent's intent to make specific testamentary gifts.²⁶¹ If the decedent did not review the will prior to death, the possibility increases that the will does not reflect the decedent's substantive testamentary intent. The lawyer could have made mistakes while drafting the will, or the decedent could have changed her mind regarding specific gifts. Because a decedent might make last minute changes or bring mistakes to the drafting lawyer's attention, a requirement that the decedent review the will before the court can excuse a formal defect increases the likelihood that the will reflects her substantive testamentary intent. In fact, the court in *Macool* seems to explicitly recognize that the added requirement is most concerned with substantive testamentary intent when it explains that without the added requirement "a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes."²⁶²

The second case in which the New Jersey courts focus on both operative testamentary intent and substantive testamentary intent is *In re Estate of Ehrlich*.²⁶³ After Ehrlich's death, a search of his home and office produced no original will.²⁶⁴ However, his family did discover a copy on which Ehrlich indicated that he had sent the original to his executor.²⁶⁵ Unfortunately, the executor had predeceased Ehrlich, and the original will was never recovered.²⁶⁶ Ehrlich's family submitted the copy for probate, but because it did not comply with the prescribed will-execution formalities, the court was charged with deciding whether it could excuse the will's defects under the New Jersey harmless error statute.²⁶⁷ Guided by the decision in *Macool*,²⁶⁸ the court explained that "to overcome the deficiencies in formality," New Jersey's harmless error rule "places on the proponent of the defective instrument the burden of proving by clear and convincing evidence that the document was [(1)] in fact reviewed by the testator, [(2)]

²⁶¹ See *supra* Section II.C.

²⁶² *In re Macool*, 3 A.3d at 1265. The court elsewhere expresses similar concern: "Decedent's untimely demise prevented her from reading the draft will prepared by her attorney. She never had the opportunity . . . to clear up any ambiguity, modify any provision, or express her final assent to this 'rough' draft." *Id.* at 1264. Without the decedent's opportunity to clarify or modify the will, the court has less assurance that the will reflects her substantive testamentary intent.

²⁶³ *In re Estate of Ehrlich*, 47 A.3d 12, 15-16 (N.J. Super. Ct. App. Div. 2012).

²⁶⁴ *Id.* at 14.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 15-16.

²⁶⁸ *In re Prob. of Will & Codicil of Macool*, 3 A.3d 1258, 1265 (N.J. Super. Ct. App. Div. 2010); see also *supra* notes 253-256 and accompanying text.

expresses his or her testamentary intent, and [(3)] was thereafter assented to by the testator.”²⁶⁹

A careful comparison of *Macool* and *Ehrlich* reveals that the latter seems to graft an additional requirement on the former’s holding.²⁷⁰ Again, to the requirement that the decedent intend the will to be legally effective, *Macool* adds the requirement that the decedent review the will.²⁷¹ *Ehrlich* follows suit and requires that the decedent both review the will and give her final assent to it, but it also requires the court to find that the will “expresses [the decedent’s] testamentary intent.”²⁷²

Although the meaning of this additional prong of the harmless error analysis is unclear in isolation, the court’s discussion of whether the will’s proponent satisfied this requirement suggests that it is concerned with the decedent’s substantive testamentary intent. Indeed, after finding that Ehrlich had reviewed the will and assented to it,²⁷³ the court focuses on whether the will accurately describes his intended estate plan. The court explains that “[t]he unrefuted proof is that decedent intended [his nephew] to be the primary, if not exclusive, beneficiary of his estate, an objective the purported Will effectively accomplishes.”²⁷⁴ It continues: “Lest there be any doubt, in the years following the drafting of this document, . . . decedent repeatedly orally acknowledged and confirmed the [will’s] dispositionary contents”²⁷⁵ Ultimately, the court’s focus on Ehrlich’s substantive testamentary intent is clearest when it concludes that the unexecuted document “accurately reflects his final testamentary wishes.”²⁷⁶

While additional safeguards related to the decedent’s substantive testamentary intent could be advantageous, their inclusion within the harmless

²⁶⁹ *In re Ehrlich*, 47 A.3d at 18.

²⁷⁰ Compare *In re Macool*, 3 A.3d at 1265, with *In re Ehrlich*, 47 A.3d at 18.

²⁷¹ See *In re Macool*, 3 A.3d at 1265; see also *supra* notes 253-262 and accompanying text.

²⁷² *In re Ehrlich*, 47 A.3d at 18.

²⁷³ *Id.* (“[D]ecedent undeniably prepared and reviewed the challenged document. . . . [E]ven if the original for some reason was not signed by him, through some oversight or negligence[,] his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament.” (quoting *In re Estate of Ehrlich*, No. BUR-P-2009-2542, 2011 WL 10843131, at *5 (N.J. Super. Ct. Ch. Div. Apr. 6, 2011))).

²⁷⁴ *Id.* (“[T]he evidence strongly suggests that this remained decedent’s testamentary intent throughout the remainder of his life.”).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 19. In addition to extensively discussing Ehrlich’s substantive testamentary intent, the court also seems to include his donative testamentary intent in the harmless error analysis. For example, the court first explains: “In disposing of his entire estate and making specific bequests, the purported Will . . . expresses sufficient testamentary intent.” *Id.* at 18. Moreover, the court continues: “As the motion judge noted, in its form, the document ‘is clearly a professionally prepared Will and complete in every respect except for a date and its execution.’” *Id.* This discussion relates not to whether Ehrlich intended the will to be legally effective but instead to whether the document expresses testamentary gifts. In other words, the court is focusing not on definitive testamentary intent but on donative testamentary intent. See *supra* Section II.A.

error rule leads to inconsistent outcomes across factually similar cases. Under conventional law, the proponent of a formally compliant will does not have to independently establish that the will accurately expresses the decedent's substantive testamentary intent.²⁷⁷ Instead, in cases in which the decedent complies with the formalities of will-execution, the court typically presumes that the decedent reviewed the will prior to execution and that the will accurately reflects her intended estate plan.²⁷⁸ Thus, under New Jersey law, the way a will's proponent establishes that the decedent intended the will to be legally effective affects how the court decides whether the will accurately describes the decedent's testamentary gifts. When operative testamentary intent is established through the decedent's formal compliance, the court presumes that the will reflects the decedent's substantive testamentary intent, but when the will's proponent establishes operative testamentary intent with extrinsic evidence under the harmless error rule, the will's proponent must also establish the decedent's substantive testamentary intent through extrinsic evidence.²⁷⁹

A possible justification for this inconsistency is that cases of faulty execution present a greater risk that the purported will does not accurately describe the decedent's intended estate plan. In cases like *Macool* in which the decedent never attempted to execute the will,²⁸⁰ the presumption that the will accurately reflects the decedent's substantive testamentary intent may not be warranted because the decedent never had the opportunity to review the will. Indeed, the court's analysis in *Macool* supports this view. The court reasons that *Macool* "never had the opportunity to confer with counsel after reviewing the document to clear up any ambiguity [or] to modify any provision," and therefore her "untimely death deprives us of any reasonably reliable means of determining . . . whether she would have

²⁷⁷ In fact, in the absence of fraud or undue influence, the court will validate a formally compliant will even when it is convinced that the will does not accurately reflect the decedent's substantive testamentary intent. *See Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) ("A will duly executed and allowed by the court must . . . be accepted as the final expression of the intent of the person executing it. The fact that it was not in conformity to the instructions given to the draftsman who prepared it or that he made a mistake does not authorize a court to reform or alter it or remould it by amendments."); *DUKEMINIER & SITKOFF*, *supra* note 44, at 328 ("Under [the no reformation] rule, courts may not reform a will to correct a mistaken term to reflect what the testator intended the will to say.").

²⁷⁸ *E.g.*, *Griffith v. Diffenderffer*, 50 Md. 466, 486 (1879) ("Knowledge of its contents is, of course, essential to the validity of every will, but where the testamentary capacity is unquestioned, such knowledge, as a general rule, will be inferred from the execution of the will itself."); *see also DUKEMINIER & SITKOFF*, *supra* note 44, at 328 ("[C]ompliance with the Wills Act establishes a conclusive validation of the written words of the will that may not be challenged on the basis of extrinsic evidence of a different intent.").

²⁷⁹ *See supra* notes 253-276 and accompanying text.

²⁸⁰ *In re Prob. of Will & Codicil of Macool*, 3 A.3d 1258, 1262 (N.J. Super. Ct. App. Div. 2010); *see also supra* notes 248-252 and accompanying text.

viewed . . . the draft will as written as acceptable.”²⁸¹ The additional requirements imposed by New Jersey courts related to the decedent’s substantive testamentary intent might therefore be warranted because formally defective wills provide less assurance that they accurately describe the decedent’s intended testamentary gifts.

However, most instances in which courts could be tasked with applying the harmless error rule do not involve the complete absence of formality, but instead involve cases of botched will-executions. Indeed, most cases where the court would be asked to decide the issue of operative testamentary intent based upon extrinsic evidence are not cases like *Macool*, where the decedent did not attempt to execute the will, but are instead cases in which the decedent attempted to comply with the formalities of will-execution but failed due to mistake or ignorance.²⁸² In these situations, the decedent has just as much opportunity to review the will as cases in which the decedent successfully completed the will-execution ceremony, and as such, the same presumption that the will accurately describes the decedent’s substantive testamentary intent should apply. Moreover, even cases like *Macool* that involve no attempt of will-execution are not that troublesome. Because in these cases the court would likely never find that the decedent intended the will to be legally effective,²⁸³ the issue of whether the unexecuted document reflects the decedent’s true substantive testamentary intent would seldom have to be addressed.

Thus, the difference in the way that a will’s proponent establishes substantive testamentary intent under New Jersey law can lead to different out-

²⁸¹ *In re Macool*, 3 A.3d at 1264-65 (“Although the will drafted by [the lawyer] reflects one possible interpretation of decedent’s otherwise cryptic and ambiguous reference, we cannot conclude, with any degree of reasonable certainty, that this approach would have met with decedent’s approval.”); see also *supra* note 262 and accompanying text.

²⁸² See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 880 (2012) (“Most disputes over execution formalities . . . , at least based on reported decisions, seem to involve technical defects or obvious mistakes . . .”). The court itself acknowledges that the *Macool* case involves extraordinary circumstances. *In re Macool*, 3 A.3d at 1260-61 (“In his opening remarks before the trial court, plaintiff’s counsel characterized this case as one that ‘challenges the chancellor.’ We agree. The facts underlying this case are so uniquely challenging that they have the feel of an academic exercise, designed by a law professor to test the limits of a student’s understanding of probate law.”).

²⁸³ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 1999) (“The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless Among the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will.”); Langbein, *Curing Execution Errors*, *supra* note 215, at 30-31 (“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.”).

comes in cases that present equivalent evidence of the decedent's intent. When operative testamentary intent is established by the decedent's formal compliance, the court presumes that the will accurately reflects the decedent's substantive testamentary intent because she had an opportunity to review the will.²⁸⁴ Accordingly, the court will validate a formally compliant will even when there is no direct evidence that the decedent reviewed the will. By contrast, when the decedent's operative testamentary intent is established through extrinsic evidence under the harmless error rule, the court will invalidate the will in cases without direct evidence that the decedent reviewed the will.²⁸⁵ In both instances, the decedent intended the will to be legally effective and had the opportunity to review the will, yet the court will validate the will in one instance and invalidate the will in the other.

In sum, New Jersey's early experience with the harmless error rule illustrates the confusion and uncertainty surrounding the meaning of testamentary intent. This lack of a clearly defined testamentary intent doctrine has resulted in New Jersey courts adding unnecessary complexity to the harmless error analysis. Instead of focusing on the central issue of operative testamentary intent, the courts have misguidedly delved into the separate issue of substantive testamentary intent.²⁸⁶ In addition to deciding whether a decedent intended a formally defective will to be legally effective,²⁸⁷ New Jersey courts have added a determination of whether the purported will accurately describes the decedent's intended estate plan to the harmless error analysis.²⁸⁸ This additional requirement could lead to unpredictable application of the rule and inconsistent outcomes.²⁸⁹ This Article's taxonomy of testamentary intent, however, clearly identifies operative testamentary intent as the appropriate issue under the harmless error analysis,²⁹⁰ and thereby provides clarity to courts charged with applying the harmless error rule and promotes consistency across similar cases.

B. *Reformation*

Substantive testamentary intent refers to the decedent's intent to make specific testamentary gifts through the terms of her will.²⁹¹ Under conventional law, courts interpret the decedent's substantive testamentary intent by

²⁸⁴ See *supra* note 278 and accompanying text.

²⁸⁵ See *supra* notes 253-276 and accompanying text.

²⁸⁶ See *In re Estate of Ehrlich*, 47 A.3d 12, 18 (N.J. Super. Ct. App. Div. 2012); *In re Macool*, 3 A.3d at 1265; see also *supra* notes 253-276 and accompany text.

²⁸⁷ See N.J. STAT. ANN. § 3B:3-3 (West 2007).

²⁸⁸ See *In re Ehrlich*, 47 A.3d at 18; *In re Macool*, 3 A.3d at 1265; see also *supra* notes 259-262, 273-276 and accompanying text.

²⁸⁹ See *supra* notes 284-285 and accompanying text.

²⁹⁰ See *supra* Section II.B.

²⁹¹ See *supra* Section II.C.

discerning the plain meaning of the decedent's will.²⁹² As a result, courts traditionally take the will's language as the final expression of the decedent's intended estate plan, and they do not consider extrinsic evidence that suggests the will's language does not accurately reflect her substantive testamentary intent.²⁹³ But as explained above, there is a push to move away from the conventional law and to allow courts to reform a will when extrinsic evidence suggests that the will's language does not accurately describe the decedent's intended testamentary gifts.²⁹⁴ The emergence of the reformation doctrine shifts the court's focus from the plain meaning of the will's language to the underlying issue of the decedent's intent.

Although opponents of the reformation doctrine present several arguments for retaining the conventional law's focus on the will's plain meaning,²⁹⁵ one particular argument is based upon a conflated understanding of the various strands of testamentary intent. Specifically, when refusing to reform mistaken language in wills, courts frequently explain that the reformation doctrine would circumvent the requirement that a will comply with the prescribed will-execution formalities.²⁹⁶ For example, one New York Surrogate's Court explains:

It is axiomatic that in construing Wills, courts should not rewrite them. 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

²⁹² See *DUKEMINIER & SITKOFF*, *supra* note 44, at 328; *Cornelison*, *supra* note 185, at 814.

²⁹³ See *DUKEMINIER & SITKOFF*, *supra* note 44, at 328; *see also supra* Section II.C.

²⁹⁴ See UNIF. PROBATE CODE § 2-805 (amended 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003); *see also supra* notes 227-228 and accompanying text.

²⁹⁵ *E.g.*, *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) ("Strong policy reasons also militate against the requested reformation. To allow for reformation in this case would open the floodgates of litigation The number of groundless will contests would soar."); *DUKEMINIER & SITKOFF*, *supra* note 44, at 328 ("The usual justification for these rules is the worst evidence problem. Because a testator is unable to corroborate or refute extrinsic evidence of intent that is at odds with the words of her will, she is protected from fraud and error by categorically excluding such evidence."); Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 2 (1990) ("Reformation would . . . weaken the internal structure of the formalism of estate law.").

²⁹⁶ *See, e.g.*, *In re Last Will and Testament of Daland*, No. 2920-MA, 2010 WL 716160, at *4 (Del. Ch. Feb. 15, 2010) ("[I]n order to reform the 2003 Will . . . the court would have to rewrite the will Petitioner nonetheless argues that, like trusts, wills can be reformed on the basis of mistake. . . . Petitioner, however, has ignored a significant distinction between wills and trusts: there are statutory [formalities] for the execution of wills."); *Flannery*, 738 N.E.2d, at 746 ("[T]he reformation of a will, which would dispose of estate property based on unattested testamentary language, would violate the Statute of Wills."); *see also Cornelison*, *supra* note 185, at 817.

say), is to risk allowing him to rewrite it, abrogating the statutes of Wills and effectively reintroducing the discarded concept of oral Wills.²⁹⁷

Thus, under this view, the reformation doctrine is inappropriate because when courts consider extrinsic evidence of the decedent's substantive testamentary intent, they in essence validate oral wills, which do not satisfy the conventional law's requirements that a will be written, signed, and witnessed.²⁹⁸

Although courts continue to rely upon this unattested language argument when refusing to reform wills,²⁹⁹ Professors John Langbein and Lawrence Waggoner presented a persuasive critique of this argument more than three decades ago.³⁰⁰ Drawing a connection to previous scholarship related to the reformation of contracts,³⁰¹ Langbein and Waggoner argue that allowing courts to reform wills based upon extrinsic evidence of the decedent's intent does not amount to the recognition of oral wills.³⁰² They explain: "Whereas an oral will instances total noncompliance with the Wills Act formalities, a duly executed will with a mistakenly rendered term involves high levels of compliance with both the letter and the purpose of the Wills Act formalities."³⁰³ Under this view, a fundamental difference distinguishes admitting extrinsic evidence to establish the existence of an oral will from considering extrinsic evidence that suggests a properly executed will does not accurately reflect the decedent's intended estate plan.

At the heart of Langbein and Waggoner's argument is the notion that the formalities of will-execution and the reformation doctrine are concerned with different strands of testamentary intent. On the one hand, a duly executed will assures the court that the decedent intended it to be a legally effective expression of her estate plan,³⁰⁴ or, put in terms of this Article's taxonomy, the purpose of will-execution formalities is to provide evidence of

²⁹⁷ *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (N.Y. Sur. Ct. 1997) (quoting *In re Estate of Jean Northcott* (N.Y. Sur. Ct. Sept. 21, 1995) (unpublished opinion)) (internal quotation marks omitted).

²⁹⁸ DUKEMINIER & SITKOFF, *supra* note 44, at 328 ("It is sometimes . . . said that admitting evidence of intent other than the language of the will would violate the requirement of the Wills Act that a testamentary disposition be in writing, signed by the testator, and attested by witnesses."); Langbein & Waggoner, *supra* note 68, at 528 ("When the particular mistake that has affected a will is one that would require a court to supply an omitted term or to substitute language outside the will in place of a mistaken term, the objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act. In these cases reformation would appear to have the courts interpolating unattested language into the will.").

²⁹⁹ See *supra* note 296 and accompanying text.

³⁰⁰ See Langbein & Waggoner, *supra* note 68, at 567-71.

³⁰¹ *Id.* Specifically, Langbein and Waggoner rely upon the work of Professor George Palmer. See generally George E. Palmer, *Reformation and the Statute of Frauds*, 65 MICH. L. REV. 421 (1967); George E. Palmer, *Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833 (1967).

³⁰² Langbein & Waggoner, *supra* note 68, at 567-71.

³⁰³ *Id.* at 569.

³⁰⁴ See DUKEMINIER & SITKOFF, *supra* note 44, at 153; Langbein, *supra* note 7, at 514-15.

the decedent's operative testamentary intent.³⁰⁵ On the other hand, the reformation doctrine is concerned with the decedent's substantive testamentary intent. When considering whether to reform a will, the court must decide whether the will accurately describes the decedent's intended testamentary dispositions.³⁰⁶ Although Langbein and Waggoner do not explicitly refer to the distinction between these different strands of testamentary intent, they hint at it when they explain: "In the typical case of mistaken terms, there has been due execution and the issue is the meaning or completeness of a single disputed term. In such circumstances the finality of the testator's intent is not in question"³⁰⁷

Thus, when courts invoke the unattested language argument when refusing to reform wills, they conflate different issues of testamentary intent. Under conventional law, a will must be written, signed, and attested to ensure that the decedent intended it to be legally effective.³⁰⁸ When a court considers extrinsic evidence in a reformation case, it does not rely on the unattested language to establish the decedent's operative testamentary intent. Indeed, the decedent's completion of the will-execution ceremony has already settled this issue. Instead, the unattested language is used to resolve a different issue, namely the decedent's substantive testamentary intent.³⁰⁹ Consideration of extrinsic evidence in reformation cases therefore does not undermine the requirement that a will be properly executed because the reformation doctrine and the will-execution ceremony are concerned with two distinct issues of testamentary intent.

Ultimately, judicial conflation of the various strands of testamentary intent has caused both practical misapplication of the harmless error rule and theoretical misunderstanding of the reformation doctrine. In New Jersey, courts have added unnecessary complication to the harmless error rule out of concern regarding the decedent's substantive testamentary intent when, instead, the focus of the harmless error analysis should be on the decedent's operative testamentary intent.³¹⁰ Similarly, courts have conflated operative testamentary intent and substantive testamentary intent when considering whether to reform wills that contain mistaken terms. Although the reformation doctrine is concerned solely with whether the will's language

³⁰⁵ See *supra* Section II.B.

³⁰⁶ See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003) ("A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was."); Langbein & Waggoner, *supra* note 68, at 529 n.27 ("The question in a mistake case is whether an instrument that otherwise satisfies the letter and spirit of the Wills Act fails in one particular to evidence the testator's intended disposition.").

³⁰⁷ Langbein & Waggoner, *supra* note 68, at 570.

³⁰⁸ See *supra* notes 144-149 and accompanying text.

³⁰⁹ See Langbein & Waggoner, *supra* note 68, at 570-71.

³¹⁰ See *supra* Section III.A.

accurately describes the decedent's intended testamentary dispositions, courts have relied upon an argument that focuses on the decedent's operative testamentary intent when refusing to adopt the reformation doctrine.³¹¹ As these examples illustrate, courts have consistently struggled with issues of testamentary intent.³¹² Going forward, however, this Article's taxonomy can provide guidance to courts that grapple with the harmless error rule, the reformation doctrine, and other areas within the law of wills that involve the identification and interpretation of the decedent's intent.

CONCLUSION

Testamentary intent is a fundamental yet elusive concept within the law of wills. Courts and scholars consistently espouse the importance of testamentary intent, but a clear and consistent understanding of the term has failed to develop. As Professor Kathleen Guzman explains, a "haphazardly defined and applied" testamentary intent doctrine has produced "jurisprudential incoherence."³¹³ This incoherence likely will continue to grow as courts are granted greater discretion to identify and interpret the decedent's intent.³¹⁴ The goal of this Article is therefore to cultivate jurisprudential coherence within the law of wills by systematically defining the primary strands of testamentary intent and by encouraging deliberate application of the rules and doctrines that guide courts when deciding issues of testamentary intent.

This Article's taxonomy identifies three independent strands of testamentary intent. The first is donative testamentary intent, which focuses on whether a purported will describes gifts that become effective upon death.³¹⁵ When wills are professionally drafted, this strand is rarely at issue, but when decedents prepare informal documents without legal assistance, courts must at times decide whether the decedent intended a document to be a will or something else, such as a letter or an expression of lifetime gifts.³¹⁶ The second strand is operative testamentary intent, which focuses on whether the decedent intended a purported will to be legally effective.³¹⁷ Even if a purported will clearly describes testamentary gifts, the court must decide whether the decedent intended the document to be a legally enforceable expression of those gifts.³¹⁸ Finally, the third strand of testamentary

³¹¹ See *supra* Section III.B.

³¹² See also *supra* Section I.A.

³¹³ Guzman, *supra* note 9, at 307; accord *supra* Section I.A.

³¹⁴ See *supra* notes 227-233 and accompanying text.

³¹⁵ See *supra* Section II.A.

³¹⁶ See *supra* notes 93-103 and accompanying text.

³¹⁷ See *supra* Section II.B.

³¹⁸ See *supra* notes 141-149 and accompanying text.

intent is substantive testamentary intent.³¹⁹ This strand focuses on the substance of the specific gifts that are described in a will. Once the court decides that a purported will describes testamentary gifts and that the decedent intended the expression of those gifts to be legally effective, the court must identify the specific gifts that the decedent intended to make through the terms of the will.³²⁰

Thus, while courts and scholars frequently discuss testamentary intent as a single concept, conflating and entangling the various strands, testamentary intent actually encompasses three related but distinct issues. The confusion regarding the contours of testamentary intent has caused both practical misapplication and theoretical misunderstanding of various aspects of the law of wills. However, with this Article's taxonomy in place, a more consistent testamentary intent doctrine might emerge and a deeper understanding of the role of the decedent's intent within the law of wills can develop.

³¹⁹ See *supra* Section II.C.

³²⁰ See *supra* notes 179-190 and accompanying text.