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Proof and Effect of Mistake As to the Provisions of Wills

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Comments

PROOF AND EFFECT OF MISTAKE AS TO THE PROVISIONS OF WILLS

I. Introduction

The purpose of this comment is to identify the types of mistakes in wills and to discuss generally the effect of each type. Primary attention will be given to the Missouri decisions. These types of mistakes are characterized as (1) mistakes in the inducement, (2) mistakes in the expression, (3) mistakes as to the legal effect, and (4) mistakes as to the instrument. With respect to each of these types, the discussion will focus on whether the courts will afford relief to the parties injured by the mistake. The initial question is whether extrinsic evidence is necessary to disclose the error and the testator's intent but for the error. If extrinsic evidence is required, the determinative issue is commonly whether the court will admit such evidence. The standards for the admission of such evidence will be treated in detail.

II. Mistakes in the Inducement

A mistake in the inducement relates "to facts outside the instrument itself"[1] and affects the formulation of the testator's intent concerning the disposition of his property.[2] Although the testator intends to execute the instrument that he does, he would not execute it with full knowledge of the facts. He is not mistaken about the instrument or its contents: both are as he intends them. Rather, the testator's mistake as to a matter extrinsic to the document induces him to select the dispositive plan contained therein.[3] For example, the testator may erroneously believe that his brother, his sole heir, has schemed against him. This is a mistake in the inducement if the testator is thereby induced to execute a will leaving his entire estate to a friend.

A. *The General Rule*

A party adversely affected by a mistake in the inducement might seek to have the relevant dispositive provision invalidated, causing the property purportedly disposed of by that provision to pass by the residuary clause or by intestacy. Under the Statute of Wills,[4] however, a court would normally refuse to invalidate the provision, because the testator duly executed the will with the intent that it dispose of his estate.[5] Professor

1. T. Atkinson, Wills § 59, at 278 (2d ed. 1953).
2. Henderson, *Mistake and Fraud in Wills*, 47 B.U.L. Rev. 303, 318 (1967).
3. 1 W. Page, Wills § 13.11, at 681 (Bowe-Parker rev. ed. 1960).
4. Statute of Wills, 32 Hen. 8, c. 1 (1540). This statute was superseded in England by the Wills Act, 7 Will. 4 & 1 Vict., c 26, § IX (1837), and in Missouri by §§ 474.310—.330, RSMo 1969.
5. Henderson, *supra* note 2, at 321. Reformation is normally not available to correct mistakes in the inducement. *See* pt. III, § A of this comment.

Atkinson's black letter law on the subject is that "[i]n absence of statute, relief will not be given for mistake in the inducement of the will . . . ."[6]

One commentator has interpreted the Missouri case of *Wood v. Carpenter*[7] as standing for this general rule.[8] In that case the testator stated in his will that the bequest to his daughter, together with certain advancements, made her total share equal to the shares of the other children. The bequest actually left the daughter with a smaller share. The Missouri Supreme Court said that the will was valid, even though the testator apparently based the bequest to his daughter on an erroneous calculation. Similarly, the court in *In re Garrison's Estate*[9] denied relief where the testator bequeathed to his daughter only one dollar, under the mistaken belief that she was to receive 80 acres of land under the will of the testator's father.

The overwhelming majority of jurisdictions follow the general rule. For example, courts have denied relief for the following mistakes in the inducement: The testator's mistaken belief that the beneficiary was his lawful spouse;[10] the testator's mistake as to the property that his relatives owned;[11] the testator's mistake as to the value of his property;[12] and the testator's mistaken belief that a material object of his bounty was living[13] or dead.[14]

The primary justification for denying relief is to maintain the integrity of the will as a written instrument against attack based upon extrinsic, and often oral, evidence.[15] Also, reliable proof of the mistake is difficult to obtain: the mistake is wholly subjective in nature, yet the subject is never available to testify.[16] Finally, inquiry into what the testator would have done had he not been mistaken is too conjectural to be undertaken, on the basis of extrinsic evidence.[17] In *Elam v. Phariss*[18] the Missouri Supreme Court used the following public policy argument to justify denial of relief for mistake in the inducement:

> It is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a

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6. T. ATKINSON, *supra* note 1, § 59, at 278.
7. 166 Mo. 465, 66 S.W. 172 (1902).
8. 1 W. PAGE, *supra* note 3, § 13.11.
9. 374 S.W.2d 92 (Mo. 1964).
10. Meluish v. Milton, L.R. 3 Ch. D. 27 (1876).
11. Riley v. Casey, 185 Iowa 461, 170 N.W. 742 (1919).
12. Barker v. Comins, 110 Mass. 477 (1872); *In re* Jones' Will, 85 N.Y.S. 294 (Sur. Ct. 1890).
13. *In re* Woods, 189 App. Div. 324, 178 N.Y.S. 573 (1919).
14. Estate of Holmes, 98 Colo. 360, 56 P.2d 1333 (1936); *In re* Tousey's Will, 34 Misc. 363, 69 N.Y.S. 846 (Sur. Ct. 1901); Bowerman v. Burris, 138 Tenn. 220, 197 S.W. 490 (1917).
15. Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 HARV. L. REV. 309, 329-30 (1928).
16. Henderson, *supra* note 2, at 322.
17. *Id.* at 323.
18. 289 Mo. 209, 232 S.W. 693 (1921).

multitude of fictitious mistakes than that it be purged of wills containing a few real ones.[19]

B. *Exceptions to the General Rule*

1. The Common Law Exception

The courts have created a narrow exception to the general rule. Relief may be granted if both the mistaken belief and its effect upon disposition appear on the face of the instrument.[20] In *Gifford v. Dyer*,[21] the testatrix mistakenly thought her son was dead and, therefore, did not mention him in her will. Refusing to give any relief for the mistake, the court upheld probate of the will against the son's attack. In dictum, however, the court originated the above-stated exception. In support of the exception, the court cited *Campbell v. French*,[22] an English case involving the doctrine of dependent relative revocation, as standing for the following proposition: "[W]hen the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this [supposition] appears on the face of the instrument of revocation, such revocation was held void."[23]

Although the suggested exception seems just and sound, those seeking relief for mistake in the inducement are seldom able to meet its require-

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19. *Id.* at 218, 232 S.W. at 695.

20. *In re* Tousey's Will, 34 Misc. 363, 69 N.Y.S. 846 (Sur. Ct. 1901); Gifford v. Dyer, 2 R.I. 99 (1852); Bowerman v. Burris, 138 Tenn. 220, 197 S.W. 490 (1917).

21. 2 R.I. 99 (1852). Under some pretermitted heir statutes the result would be different. *See* pt. II, § B of this comment.

22. 3 Vesey, Jr. 321, 30 Eng. Rep. 1033 (Ch. 1797).

23. 2 R.I. at 102. Where the testator revokes his will by burning, tearing, cancelling, or obliterating, as distinguished from a later testamentary instrument, while operating under a mistake of law or fact, the courts usually invoke the doctrine of dependent relative revocation by declaring that the revocatory intent manifested is conditioned upon the existence of the situation as believed by the testator and that the will is not revoked because the condition was not fulfilled. T. ATKINSON, *supra* note 1, § 88, at 452. The dictum in *Gifford v. Dyer* refers to revocation by subsequent testamentary instrument. When an express clause of revocation in a subsequent testamentary instrument is induced by mistake, the doctrine of dependent relative revocation is not usually applied, unless both the mistake and what the testator would have done if he had known the true situation appear from the face of the revocatory instrument. Board of County Comm'rs v. Scott, 88 Minn. 386, 93 N.W. 109 (1903); Tupper v. Tupper, 1 K. & J. 665, 69 Eng. Rep. 627 (Ch. 1855). Where a subsequent testamentary instrument does not contain an express clause of revocation but makes dispositions inconsistent with the will which are ineffective, there is modern English authority for carrying out the original will. Ward v. Van de Loeff [1924] A.C. 653. Most American decisions, however, follow the rule in French's Case, 1 Roll. Abr. 614 (0) 4 (1587), that mistake as to the validity of inconsistent dispositions of property by a later testamentary instrument does not prevent those dispositions from revoking the will, unless what the testator would have done if he had known the truth is apparent from the face of the later testamentary instrument containing the invalid dispositions. Hairston v. Hairston, 30 Miss. 276 (1855); Mort v. Trustees of Baker Univ., 229 Mo. App. 632, 78 S.W.2d 498 (K.C. Ct. App. 1935); *cf.* Ewell v. Sneed, 136 Tenn. 602, 191 S.W. 131 (1917). This being so, the rules in this country respecting the effect of mistake in the inducement of revocation by subsequent testamentary instrument are virtually identical with those governing the effect of mistake in the inducement of dispositive provisions in wills.

ments. One of the rare cases in which the court granted relief is *Penick's Executor v. Walker.*[24] In that case, the testator bequeathed to his daughter $10,000 in trust and provided that "[t]his sum can be made up of money from my insurance policies."[25] Upon the testator's death, the daughter received the policy proceeds of about $10,000 as beneficiary of the policies. The court held the bequest invalid, because the testator, apparently, had mistakenly believed that the policy proceeds would be part of his estate and had intended that his daughter receive a total of only $10,000.

2. Statutory Exceptions

The Missouri pretermitted child statute[26] creates an exception to the general rule. This statute affords relief for a testator's unintentional failure to provide for a child whom the testator believes dead when he executes the will, by giving such child an intestate share.

The Georgia statute is much broader. Section 113-210 of the Georgia Code provides that a testator's mistake of fact concerning the existence *or conduct* of an heir invalidates the will with regard to that heir.[27] Allegations of mistaken beliefs that have gone to trial on the merits include: That the testator's wife planned to murder him;[28] that the testatrix's husband was trying to deprive her of custody of their child;[29] that the testator's wife opposed him on a school bond issue;[30] that the caveatrix had spread false and malicious rumors about the testator;[31] that the testator's wife hated him;[32] and that the testatrix's daughter was dead.[33] Whether the testator executed the will under a mistake of fact as to the existence or conduct of an heir is a jury question.[34] The testator's declara-

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24. 125 Va. 274, 99 S.E. 559 (1919). In *Snyder v. Raymond,* 48 Idaho 810, 285 P. 478 (1930), there was evidence that the second will was executed under a mistaken apprehension that the testatrix's existing Indian will disposed only of allotted land held in trust by the government. The court denied probate of the second will. *See generally* T. ATKINSON, *supra* note 1, § 59, at 278; Annot., 17 A.L.R. 247 (1922).

25. 125 Va. at 276, 99 S.E. at 559 (1919).

26. § 474.240(2), RSMo 1969:

> If, at the time of the making of his will, the testator believes that any of his children are dead, and fails to provide for such child in his will, the child shall receive a share . . . equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

See also UNIFORM PROBATE CODE § 2-302 (pretermitted child statute), § 2-301 (after-acquired wife statute).

27. GA. CODE § 113-210 (1959): "A will executed under a mistake of fact as to the existence or conduct of an heir at law of the testator is inoperative, insofar as such heir at law is concerned, but the testator shall be deemed to have died intestate as to him." *See generally* Oliver, *Wills—Mistake of Fact as to the Existence or Conduct of an Heir,* 1 GA. S.B.J. 543 (1965).

28. Bohler v. Hicks, 120 Ga. 800, 48 S.E. 306 (1904).

29. Franklin v. Belt, 130 Ga. 37, 60 S.E. 146 (1908).

30. Watkins v. Jones, 189 Ga. 831, 193 S.E. 889 (1937).

31. Davis v. Aultman, 199 Ga. 129, 33 S.E.2d 317 (1945).

32. Moreland v. Word, 209 Ga. 463, 74 S.E.2d 82 (1953).

33. Pennington v. Perry, 156 Ga. 103, 118 S.E. 710 (1923).

34. Knox v. Knox, 213 Ga. 677, 101 S.E.2d 89 (1957).

tions are admissible to show his state of mind.[35] Although the inducement for the mistake can be from any source,[36] only an heir at law can invoke the statute.[37]

III. Mistakes in the Expression

A mistake in the expression is an error in the dispositive provisions of a will that results from a mistaken omission or inclusion, or a combination of the two.[38] For example, if the testator intended to bequeath $100 to his brother, Fred, but his will contains no provision to that effect, the error is one of omission. If the testator did not intend to bequeath $100 to Fred, but the scrivener mistakenly inserted the bequest, the mistake is one of inclusion. If the testator's will does not contain an intended gift of $100 to Fred and instead includes an unintended gift of $100 to his brother Ferdinand, the will contains two mistakes—omission of the gift to Fred and inclusion of the gift to Ferdinand. Such combined errors of omission and inclusion are considered under the category of misdescription.[39]

A. *Reformation*

Ostensibly, the equitable remedy of reformation could be utilized to correct mistakes in the expression. However, courts of equity regularly refuse to grant reformation of a will that varies from the testator's actual wishes;[40] only Tennessee holds to the contrary.[41] The courts have given different reasons for refusing this relief. One such reason is the possibility of fraud and perjury. As one court stated:

> To allow the reformation of a will in favor of disappointed devisees or contesting heirs and upon such evidence as they might produce after the death of the testator, would open the door for fraud and perjury to substitute designs of interested beneficiaries for the deliberately expressed intent of a testator.[42]

Another reason is that statute requires a will to be in writing; hence, the courts have no power to substitute different words for the written words of the testator.[43]

Neither of these reasons seems valid, however. The chance for fraud and perjury is just as great when a party to a contract seeks reformation, and the other contracting party is dead; yet, reformation may be granted. Moreover, equity will reform contracts and deeds, even though the Statute

35. Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961).
36. Adams v. Cooper, 148 Ga. 339, 96 S.E. 858 (1918).
37. Hixon v. West, 83 Ga. 786, 10 S.E. 450 (1889).
38. T. Atkinson, *supra* note 1, § 58, at 274.
39. *Id.; see* pt. III, § D of this comment.
40. *See* Fitzpatrick v. Fitzpatrick, 36 Iowa 674 (1873); Hoover v. Roberts, 144 Kan. 58, 58 P.2d 83 (1936); Mudd v. Cunningham, 181 S.W. 386 (Mo. 1915); Goode v. Goode, 22 Mo. 518 (1856).
41. *See* Greer v. Anderson, 36 Tenn. App. 507, 259 S.W.2d 550 (1953); Eatherly v. Eatherly, 41 Tenn. 461, 78 Am. Dec. 495 (1860). In *Greer* the court stated that equity has the power to reform a will by supplying an omission where the omission is apparent upon the face of the will.
42. Polsey v. Newton, 199 Mass. 450, 454, 85 N.E. 574, 575 (1908).
43. Decker v. Decker, 121 Ill. 341, 12 N.E. 750 (1887).

of Frauds requires that they be proved by a writing. The same could be done in the case of wills.[44]

As yet, the courts have not accepted these arguments. One reason is that in many cases the courts may accomplish reformation under the guise of construction.[45] In *Stuesse v. Stuesse*[46] the Missouri Supreme Court frankly acknowledged this:

> The question of correcting a draftsman's mistake is largely one of semantics, because although the generally accepted view is that a will cannot be reformed, the same result is accomplished under the name of "construction," and when a court construes a will as passing property not mentioned . . . or substitutes for misdescribed property . . . other property not described . . . it is in effect "reforming" the will.[47]

B. *Mistakes of Omission*

The statutes governing execution of wills give rise to a restriction on the power of courts to add mistakenly omitted provisions to a will. Until 1858 in England, wills devising real property and testaments bequeathing personal property were handled by separate courts.[48] The common law courts from the first refused to add words to devises of realty, which were governed by the Statute of Wills of 1540.[49] The Statute of Frauds of 1677 permitted oral testaments of personal property.[50] Before 1837 the ecclesiastical courts, which had exclusive jurisdiction over probate of testaments of personal property, could include clauses omitted by mistake from a written testament.[51] After 1837, however, when the statutes required the same formalities of execution for wills of real estate and personal property,[52] the ecclesiastical courts and the secular Court of Probate which succeeded to their jurisdiction in 1858 refused to add words to a will of personal property, despite clear evidence of the testator's intention.[53] Hence, the modern English rule is that words omitted by

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44. 1 W. PAGE, *supra* note 3, § 13.8, at 679.

45. Annot., 90 A.L.R.2d 924, 928 (1963) states: "What the courts undoubtedly mean by holding that a will cannot be reformed is that a suit for reformation is not the appropriate remedy, but that the appropriate remedy is a suit for construction."

46. 377 S.W.2d 389 (Mo. 1964).

47. *Id.* at 391-2, *citing* Annot., 90 A.L.R.2d 924, 928 (1963).

48. 1 W. PAGE, *supra* note 3, § 13.7, at 672.

49. Anonymous, Hill 29 Eliz. 149, 78 Eng. Rep. 80 (C.P. 1587). This case was decided under the English Statute of Wills, 32 Hen. 8, c. 1 (1540) *explained by* 34 & 35 Hen. 8, c. 5 (1542-43), which gave to persons holding by socage tenure power to devise the whole of their lands and to persons holding by knight service the power to devise two-thirds of their lands.

50. *See* Statute of Frauds, 29 Car. 2, c. 3, § 19, (1676). *See generally* Atkinson, *Brief History of English Testamentary Jurisdiction,* 8 Mo. L. REV. 107 (1943).

51. Castell v. Tagg, 1 Curt. Ecc. 298, 163 Eng. Rep. 102 (Prerogative Ct. Canterbury 1836). While the ecclesiastical courts had exclusive jurisdiction to determine what words should be admitted to probate, the High Court of Chancery by construction would determine what they meant. However, in 1971 the Chancery Division acquired both types of jurisdiction. *See* Administration of Justice Act of 1970, c. 31.

52. Wills Act, 7 Will. 4 & 1 Vict., c. 26 (1837).

53. Mitchell v. Gard, 3 S.W. & T.R. 75, 164 Eng. Rep. 1200 (P. 1862).

mistake from wills of real or personal property may not be added.[54] For example, in *In re Horrocks*,[55] the Probate Divorce and Admiralty Division, which had succeeded to the jurisdiction of the ecclesiastical courts, refused to add the word "and," which had been omitted because of a typographical error, even though without the word, the gift was void for uncertainty.

American courts also refuse to add words or limitations, because under the typical statutes, the courts can admit nothing to probate that is not in the instrument.[56] Thus, in cases of mistake by omission, extrinsic evidence of the testator's intention is inadmissible to show what property he meant to dispose of or the beneficiary to whom he meant it to pass.[57] Likewise, there is no authority for the imposition of a constructive trust in the case of mistake by omission.[58]

Relief through construction may be available for mistakes of omission in two situations. Generally, these are situations where the court needs only to look to the instrument to find the error and the testator's intention. First, when an express reference to a missing portion of the will clearly indicates that the testator intended to include language making a certain disposition of property, the courts will often infer an intent to make the omitted disposition.[59] The factors determining whether relief will be granted are the nature of the mistake, the finding of intent to make a disposition in the instrument, and the particularity with which the details of the disposition are shown in the will.[60]

Second, even where no express reference is made to the mistakenly omitted provision, the courts will often grant relief where the terms of a missing provision are clear from the context and the omission of the provision appears to have been the product of a mistake in the expression.[61] *Shea v. Lyons*[62] provides an example of this approach. In that case, the testator devised his farm to his widow, Catherine, for her life, and upon her death to his son, Earl, for his life, and provided that in the

54. 1 W. PAGE, WILLS § 13.7, at 673 (Bowe-Parker rev. ed. 1960).

55. [1939] P. 198.

56. *See* Estate of De Moulin, 101 Cal. App. 2d 221, 225 P.2d 303 (1950) (failure to name or describe beneficiary of residue); *In re* Estate of Wirsig, 128 Neb. 297, 258 N.W. 467 (1935) (failure to name or describe beneficiary in first clause of will). In both cases extrinsic evidence was held inadmissable. *But see* Baker v. Grossglauser, 250 S.W. 377 (Mo. 1923), *discussed in* text accompanying footnote 77 *infra*.

57. Cassilly v. Devenny, 168 Md. 443, 177 A. 919 (1935); McCoy v. Bradbury, 290 Mo. 650, 235 S.W. 1047 (1921); *In re* Estate of Wirsig, 128 Neb. 297, 258 N.W. 467 (1935). *See generally* 4 W. PAGE, *supra* note 54, § 32.9, at 266. *But see* text accompanying note 92 *infra*.

58. Gray, *Striking Words Out of a Will*, 26 HARV. L. REV. 212, 214 (1913).

59. Connor v. Gardner, 230 Ill. 258, 82 N.E. 640 (1907). Although there was no devise of real estate to testator's children, the court found an intention to devise "manifest from the general testamentary scheme as gathered from the words of the will." *See generally* Henderson, *Mistake and Fraud in Wills*, 47 B.U.L. REV. 303, 367 (1967).

60. Henderson, *supra* note 59, at 368.

61. Estate of Karkeet, 56 Cal. 2d 277, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Spathariotis v. Estate of Spathas, 156 Colo. 131, 398 P.2d 39 (1964); Shea v. Lyons, 47 Ill. App. 2d 187, 198 N.E.2d 151 (1964). *See generally* Henderson, *supra* note 59, at 368.

62. 47 Ill. App. 2d 187, 198 N.E.2d 151 (1964).

event neither Earl nor Earl's children survived Catherine, the farm should go to the testator's sisters and the descendants of any deceased sisters. From this, the court inferred that the testator's intent was that in the event Earl survived Catherine and died without children, the remainder should go, upon his death, to the testator's sisters and the descendants of any deceased sisters.

The Missouri case of *Baker v. Grossglauser*[63] implies that Missouri courts will follow the relatively modern trend that these cases reflect. In *Baker,* a partition suit, it was contended that a provision that at the life tenant's death, "I give devise and bequeath to her three children from her first husband to be equal parts,"[64] was insufficient to pass realty in fee simple. Rejecting this contention, the supreme court noted that it was presumed that the testator intended to dispose of the remainder, rather than die intestate as to that portion of his estate. As a result, it concluded that through a probable error of the scrivener the words "my estate," or words of similar import, were omitted after the word "bequeath" in the quoted clause and that they should be inferred.

C. *Mistakes of Inclusion*

Courts are more willing to grant relief for mistakes of inclusion than for mistakes of omission. If the mistake is only to part of the contents of the will, as where one bequest is included by mistake, the courts usually will apply the doctrine of partial invalidity[65] and reject only the mistakenly included provision. However, some doubt exists whether this doctrine applies in Missouri.[66] If the mistake is to the entire contents or to an important provision, however, the entire will must be denied probate.[67]

The difficult problem in obtaining relief for mistakes of inclusion is establishing that the contents are not as the testator intended them.

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63. 250 S.W. 377 (Mo. 1923); *see* Buschmeyer v. Eikermann, 378 S.W.2d 46 (Mo. 1964); Mercantile Trust Co. v. Sowell, 359 S.W.2d 719 (Mo. 1962); Ussher v. Mercantile Trust Co., 328 S.W.2d 699 (Mo. 1959).

64. 250 S.W. at 378.

65. The doctrine of partial invalidity allows the court to probate a will minus a single provision that was included by mistake. T. ATKINSON, WILLS § 61 (2d ed. 1953).

66. The possibility that a court will invalidate the entire will upon finding mistake as to one provision arises from the Missouri case of McCarthy v. Fidelity Nat'l Bank & Trust Co., 325 Mo. 727, 30 S.W.2d 19 (1930), which construed section 525, RSMo 1919 (now section 473.083, RSMo 1969). The court said that under this statute, issue must be joined as to whether a writing is the will of the testator *in its entirety,* and that the issue in a will contest for fraud or undue influence is whether there is a will or no will. Thus, a mistake in one provision of a will might invalidate the entire will. The following language from Hines v. Hines, 243 Mo. 480, 147 S.W. 774 (1912), reinforces this reasoning: "When a will is contested, the contest acts upon the interests of every party concerned therein, and, if it is adjudged to be no will as to the plaintiff, then it cannot be valid as to any one named in the will as devisee or legatee." *Id.* at 496, 147 S.W. at 776.

67. Bradford v. Blossom, 207 Mo. 177, 105 S.W. 289 (1907). The testatrix wished to give a life estate to her children with remainder over to their children, but instead the will created an elaborate spendthrift trust giving discretion to the trustee as to the amount to pay over. The will was denied probate. *See generally* 1 W. PAGE, *supra* note 54, § 13.4, at 665-66.

This problem is the result of the rule laid down in the English case of *Guardhouse v. Blackburn*.[68] The rule states that

> the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be *conclusive* evidence that he approved as well as knew the contents thereof.[69]

For a time, the courts inaccurately interpreted this statement as a rule of law, sometimes speaking of it as a conclusive presumption.[70] In *Idle v. Moody*,[71] the Missouri Supreme Court considered the rule. The testatrix intended to make only a specific gift in a codicil, but by mistake the scrivener also inserted a general residuary clause. The testatrix had an opportunity to have it read to her. In holding the codicil valid, the court seemed to accept the *Guardhouse* presumption.

Both English and American courts have retreated from the *Guardhouse* rule. These courts now view such evidence as giving rise only to a *rebuttable* presumption that the testator approved the contents. Thus, instead of an insurmountable conclusive presumption, the rule poses a problem of proof and evidence.[72]

Although American courts will strike out an entire provision of a will, they have not gone as far as the English cases, which deny probate to a single word or part of a provision.[73] For example, in *Morrell v. Morrell*,[74] the testator directed his solicitor to give all his shares in a company to a legatee, but the solicitor by mistake inserted "forty" before "shares." The probate court struck the word "forty" from the will in four places, so that the legatee took all the shares as the testator intended.

Without explicitly recognizing the English method of striking out a word or phrase, the American courts often reach the same result by nullifying the effect of the word or phrase via construction.[75] Wherever possible in light of the surrounding circumstances, a court will cure a mistake in expression by construction of the terms of the will.[76] The Missouri Supreme Court in *Paris v. Erisman*[77] transposed words in the will so as to reflect the testator's intent. This case indicates that the court might

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68. L. R. 1 P. & D. 109 (1866).
69. *Id.* at 116 (emphasis added).
70. T. ATKINSON, *supra* note 65, § 58, at 275.
71. 344 Mo. 594, 127 S.W.2d 660 (1939).
72. 1 W. PAGE, *supra* note 54 § 13.4, at 666; Warren, *Fraud, Undue Influence and Mistake in Wills*, 41 HARV. L. REV. 309, 324 (1928).
73. T. ATKINSON, *supra* note 65, § 158, at 277; 1 W. PAGE, *supra* note 56, § 13.7, at 675.
74. 7 P.D. 68 (1882).
75. T. ATKINSON, *supra* note 65, § 58, at 277; G. THOMPSON, WILLS § 137, at 216 (3d ed. 1947).
76. 1 W. PAGE, *supra* note 54, § 13.9, at 679.
77. 300 S.W. 487 (1927). The will devised 80 acres to the testator's wife. The testator conveyed 3 of the 80 acres to a son and asked the scrivener to prepare a codicil to reflect this sale. The codicil, as executed, purported to revoke the devise of the 80 acres, "having sold the same to my son." The court construed this language as revoking the devise to the wife only as to the three acres sold to the son.

also use construction to nullify the effect of a word and effecuate the testator's intention.

In *Wiechert v. Wiechert*,[78] the Missouri Supreme Court accomplished by construction the striking out of a word or phrase. The will purported to devise "5 acres, more or less, off the north side of the south half of the north west quarter" of a certain section, township, and range. The testator did not own the five acres described, but owned another five-acre tract that adjoined his home place and was otherwise undisposed of by the will. In holding that the will disposed of the five-acre tract adjacent to testator's home place, the court rejected the erroneous description "south half of the northwest quarter" in accordance with the ancient principle of *falsa demonstratio non nocet*,[79] whereby a false part of the description can be rejected if the true part describes the subject or object with reasonable certainty.[80]

D. *Misdescription*

Misdescription involves both the omission of an intended designation and the inclusion of an unintended designation. Such mistakes occur in two different ways. First, although the testator had in mind the proper designation, through a clerical error the description does not appear in the instrument as he intended. Second, although the testator intended that the will should read as it did, he was in error as to the proper designation of the property or the beneficiary. In both cases, the will is usually admitted to probate, and the question is one of construction.[81]

In most cases of misdescription resulting from clerical error, construction renders the mistake inoperative. Such misdescription creates a latent ambiguity; therefore, extrinsic evidence of the testator's intent is admissible to resolve the ambiguity.[82] The court construes the will as passing the property actually intended to the beneficiary actually intended.[83]

Missouri courts follow the above approach in cases of misdescription of real estate.[84] For example, in *Creasy v. Alverson*,[85] the will purported to devise a portion of the northeast quarter of section 33, township 60, range 6, located in Marion County. The testator did not own that

78. 317 Mo. 118, 294 S.W. 721 (1927).

79. "Mere false description does not vitiate, if there be sufficient certainty as to the object." H. BROOM, LEGAL MAXIMS 426 (10th ed. 1939).

80. *See* Patch v. White, 117 U.S. 210 (1886) (leading case); text accompanying notes 82-86 *infra*.

81. T. ATKINSON, *supra* note 65, § 60, at 282.

82. Annot., 90 A.L.R.2d 924, 952 (1963). The Missouri decisions make no distinction between patent and latent ambiguity. Latent ambiguity is said to exist whenever a description meant to apply to a single person or object turns out, upon the examination of surrounding facts, either to apply equally to two or more persons or objects or, in the alternative, to apply to no person or object whatever. An ambiguity is patent whenever it appears on the face of the instrument without the necessity of examining surrounding circumstances.

83. *Id.*

84. *See* Myher v. Myher, 224 Mo. 631, 123 S.W. 806 (1909); Thomson v. Thomson, 115 Mo. 56, 21 S.W. 1085 (1893); Riggs v. Myers, 20 Mo. 239 (1855); Annot., 94 A.L.R. 26, 131 (1935).

85. 43 Mo. 13 (1868).

land, which actually was located in another county, but he did own a corresponding portion of the northeast quarter of section 33 in township 59, range 6, in Marion County. By construction, the court avoided the error of the draftsman in inserting the wrong numbers. Similarly, in *Mudd v. Cunningham*,[86] the Missouri Supreme Court affirmed the trial court's admission of extrinsic evidence to resolve the ambiguity caused by the scrivener's mistaken insertion of "northeast" instead of "northwest" in a devise to the testator's wife and daughter.

Missouri courts follow the same approach where a clerical error results in misdescription of a beneficiary.[87] In *Willard v. Darrah*[88] the testator made a devise to "my well beloved nephews, John and William Willard." Although the testator was survived by two grandnephews named John and William Willard and two grandsons named John and William Willard, he had no nephews bearing those names. The court admitted extrinsic evidence that the grandsons were intimate with testator, that the grandnephews were strangers to him and that the scrivener had mistakenly written "nephews" instead of "grandchildren." In *Bond v. Riley*[89] the court found latent ambiguity and allowed extrinsic evidence to show that testator wanted his grandson to take under the will and that the scrivener understood the grandson's name—actually Boyd Bond—to be William Newton Bond.

The second type of misdescription arises when the testator intended that the will should read as it did, but was mistaken as the proper designation of the property or beneficiary. As in cases of clerical error, Missouri courts admit extrinsic evidence to resolve ambiguities and correct inaccuracies that the misdescription creates. In *Stuesse v. Stuesse*,[90] a will devised certain sections of realty upon an improper land survey. The court held that where there is an inaccurate description of real property or where there is a latent ambiguity with respect thereto, extrinsic evidence is competent to resolve the ambiguity and identify the property designated. In *American Cancer Society, Inc. v. Damon Runyon Memorial Fund for Cancer Research, Inc.*,[91] this rule was applied to a bequest to a nonexistent charity. The testatrix made a bequest "to the Damon Runyon Memorial Fund for Cancer Research, St. Joseph, Missouri Chapter." Although the Damon Runyon Fund had no St. Joseph Chapter, there was a Buchanan County [St. Joseph] Chapter of the American Cancer Society, Missouri Division, that she might have confused. The court admitted extrinsic evidence to resolve the ambiguity, but held that the bequest, lapsed, because, apparently, the testator intended to benefit neither the Damon Runyon Fund nor the American Cancer Society.

86. 181 S.W. 386 (Mo. 1915).

87. *See* Bishop v. Broyles, 324 Mo. 69, 22 S.W.2d 790 (1929); Gordon v. Burris, 141 Mo. 602, 43 S.W. 642 (1897); Hockensmith v. Slusher, 26 Mo. 237 (1858); Riggs v. Myers, 20 Mo. 239 (1858) (dictum); *In re* Aiken, 5 S.W.2d 662 (St. L. Mo. App. 1928); *see* Annots., 90 A.L.R.2d 924, 955 (1963), 94 A.L.R. 26, 79 (1935).

88. 168 Mo. 660, 68 S.W. 1023 (1902).

89. 317 Mo. 594, 296 S.W. 401 (1927).

90. 377 S.W.2d 389 (1964), *discussed in* Fratcher, *Trusts and Succession in Missouri*, 30 Mo. L. REV. 82, 92-93 (1965).

91. 409 S.W.2d 222 (1966).

Although Missouri courts allow the use of extrinsic evidence to clear up nearly any ambiguity, they limit the admissibility of the testator's statements. His statements are only admissible where the will's description fits two persons equally, or where it is partially correct and partially incorrect and the correct part is equivocal.[92] In *Willard v. Darrah*,[93] where the testator's designation of beneficiaries applied equally to his grandnephews named John and William Willard and to his grandsons named John and William Willard, the court allowed evidence of the testator's declarations of intention to benefit his grandsons. In *Bond v. Riley*,[94] where the devise was to the testator's grandson, "William N. Bond," and there was no such person, the court admitted the testator's declarations that "he wanted his grandson," Boyd C. Bond, to take.[95]

IV. Mistakes as to the Legal Effect

When the testator merely misconceives the legal effect of the language used in the will, the majority of courts refuse to invalidate the will or any part thereof.[96] This is true even if incorrect legal advice caused the misconception.[97] The rationale is that if one could contest a will on the ground that the testator had imperfect knowledge of the legal consequences of the provisions of his will and a jury could concern itself with the subjective subtleties involved in determining the testator's conception of the law, "half the wills in the country" might be upset.[98]

In *Buck v. St. Louis Union Trust Co.*,[99] the Missouri Supreme Court reiterated the general rule: "[While a testator] should have a reasonable understanding as to how he desires his will to take effect, it is not necessary that he should have that knowledge of its scope and bearing possessed by his legal adviser."[100] *Elam v. Phariss*[101] involved a contest of a testatrix's will devising land to her husband for life and providing that he should appropriate from the income a certain sum annually to purchase a home for testatrix's daughter when a specified amount was aggregated. The bequest to the daughter could not be charged to the husband's life estate, because the husband was entitled by curtesy to a life estate in the realty of his wife. Because the testatrix apparently knew what the will con-

92. Bond v. Riley, 317 Mo. 594, 608, 296 S.W. 401, 407 (1927).
93. 168 Mo. 660, 68 S.W. 1023 (1902).
94. 317 Mo. 594, 296 S.W. 401 (1927); *see* McCoy v. Bradbury, 290 Mo. 650, 235 S.W. 1047 (1921).
95. Both of these Missouri decisions followed the precedent of the famous English case, Doe d. Gord v. Needs, 150 Eng. Rep. 698 (1836). The will contained a legacy to a "George Gord, the son of John Gord," and another to "George Gord, the son of George Gord," and also a devise to "George Gord, the son of Gord." It was held that it was permissible to show testator's declaration as to which George was the intended beneficiary of the devise.
96. Elam v. Phariss, 289 Mo. 209, 232 S.W. 693 (1921); Buck v. St. Louis Union Trust Co., 267 Mo. 644, 185 S.W. 208 (1916); Estate of Beech, [1923] P. 46; T. Atkinson, *supra* note 65, § 58, at 277.
97. Elam v. Phariss, 289 Mo. 209, 232 S.W. 693 (1921).
98. *In re* Cotter, 180 Misc. 399, 40 N.Y.S.2d 93 (Sur. Ct. 1943).
99. 267 Mo. 644, 185 S.W. 208 (1916).
100. *Id.* at 649, 185 S.W. at 209; *accord,* Kischman v. Scott, 166 Mo. 214, 65 S.W. 1031 (1901); Couch v. Gentry, 113 Mo. 248, 20 S.W. 890 (1892).
101. 289 Mo. 209, 232 S.W. 693 (1921).

tained, the court refused to invalidate the will, even though the attorney who drafted the will had erroneously advised the testatrix that such a bequest was valid. Thus, this case not only reinforces the general rule, but applies it to errors caused by incorrect legal advice as well.

A few cases hold to the contrary.[102] Moreover, even Missouri courts hold that failure of the words in the will to effectuate the intent communicated by the testator to the draftsman invalidates the will where the testator executed the will without knowing what words were in it.[103] In *Bradford v. Blossom*,[104] the testatrix instructed her confidential adviser to have her will drawn so as to give a beneficial life interest to her children and the remainder in fee to their children. The adviser's lawyer drafted an instrument setting up an elaborate spendthrift trust with the children as beneficiaries and with the trustee having discretion over the amount of the principal to be given to the grandchildren after the deaths of their parents. The testatrix signed the instrument, believing that it provided as she had directed. There was no evidence that the instrument was read or explained to the testatrix, nor that she had read it or had any knowledge of its contents. Therefore, the court held that the instrument was not the testatrix's will. Similarly, in *Cowan v. Shaver*[105] the draftsman inserted language that would not have effectuated the testator's intent. Without knowing the language contained in the instrument, the testator signed it, under the belief that it was written as he directed. The Missouri Supreme Court held that the instrument was not the testator's will.

V. Mistakes as to the Instrument

Mistake as to the instrument occurs when the testator intends to execute his will but by mistake signs the wrong document. This usually occurs when two persons intend to execute mutual wills, but in a common execution ceremony, each executes the other's will by mistake.[106] English courts,[107] American courts,[108] and commentators[109] agree that "[p]robate will be denied when the testator through mistake executed the wrong

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102. *See, e.g., In re* Kempthorne, 188 Iowa 70, 175 N.W. 857 (1920). In that case the scrivener did not understand that the testator's daughter was divorced, and included a clause that operated for her ex-husband's benefit. The court stated that such circumstances afforded a substantial obstacle to the probate of the will.

103. *See* Bradford v. Blossom, 207 Mo. 177, 105 S.W. 289 (1907); Cowan v. Shaver, 197 Mo. 203, 95 S.W. 200 (1906). *See also* 1 W. Page, *supra* note 54, § 13.6, at 672.

104. 207 Mo. 177, 105 S.W. 289 (1907).

105. 197 Mo. 203, 95 S.W. 200 (1906).

106. *See, e.g.*, Nelson v. McDonald, 61 Hun. 406, 61 N.Y.S. 273 (Sup. Ct. 1891); *In re* Bacon, 165 Misc. 259, 300 N.Y.S. 920 (Sur. Ct. 1937); Alter's Appeal, 67 Pa. 341, 5 Am. Rep. 433 (1871).

107. *In re* Meyer, [1908] P. 353; Goods of Hunt, L.R. 3 P. & D. 250 (1875).

108. Sansona v. Laria, 88 Conn. 136, 90 A. 28 (1914); Waite v. Frisbie, 45 Minn. 361, 47 N.W. 1069 (1891); Nelson v. McDonald, 61 Hun. 406, 16 N.Y.S. 273 (Sup. Ct. 1891); Baker v. Baker, 102 Wis. 226, 78 N.W. 453 (1899).

109. T. Atkinson, *supra* note 65, § 58, at 273; 1 W. Page, Wills § 13.3, at 665 (Bowe-Parker rev. ed. 1960).

document as his will."[110] Although there is no Missouri case exactly in point, *Bradford v. Blossom*[111] arguably stands for the proposition of denying probate to a mistakenly executed instrument.[112] In that case, the testatrix instructed her adviser to have her will drawn with certain dispositions of her property. Without her knowledge, the adviser's lawyer drafted an instrument providing for entirely different dispositions. The testatrix executed the instrument without reading it or having it explained to her. The court held that the instrument was not the testatrix's will.

The rationale for denying probate to both the document mistakenly signed and the intended will is that the requisite testamentary intent is satisfied by nothing less than the testator's intent that the instrument he signed is to govern the disposition of his property at his death.[113]

Two British Commonwealth nations take a minority position.[114] Both New Zealand and Canadian courts have allowed probate of mutual wills mistakenly executed by the wrong parties. In *Guardian Trust Co. v. Inwood*,[115] two sisters inadvertently signed each other's wills at a common execution ceremony. The New Zealand court allowed probate of the unsigned will of one testatrix, stating that she intended that the document should operate as her will and that to deny probate would be a "very technical basis for rejection."[116] The *Inwood* decision has been followed twice by Canadian courts.[117]

The minority approach seems more reasonable than the majority approach, which frustrates the testator's intent because he misplaced his signature. The error should be easy to prove. Further, in the case of a common execution ceremony, the many witnesses to the erroneous execution would render slight the chance of fraud.

VI. Conclusion

Relief will be given for mistake in the inducement only in the rare case where both the mistake and what the testator would have done but for the mistake appear on the face of the will or where a remedy is created by statute.

Mistakes in the expression will not be remedied by reformation except in one state; however, courts often accomplish the same results via construction. Because of the exclusion of extrinsic evidence, relief is available for omission only where the courts need but look to the instrument itself to find the error and what the testator actually intended. When a provision is mistakenly included, on the other hand, extrinsic evidence

110. T. Atkinson, *supra* note 65, § 58, at 273.
111. 207 Mo. 177, 105 S.W. 289 (1907).
112. 1 W. Page, *supra* note 109, § 13.3, at 665 n.l.
113. 57 Am. Jur. Wills § 379, at 274 (1948).
114. *See In re* Duck, Vancouver Registry #51005/53 (B.C. Sup. Ct., April 9, 1953); *In re* Brander, [1952] 4 D.L.R. 688 (B.C. Sup. Ct.); Guardian Trust Co. v. Inwood, [1946] N.Z.L.R. 614 (Ct. App.). *See generally* Kennedy, *Wills—Mistake—Husband and Wife Executing Wills Drawn for Each Other*, 31 Can. B. Rev. 444 (1953).
115. [1946] N.Z.L.R. 614 (Ct. App.).
116. *Id.* at 623.
117. *See In re* Duck, Vancouver Registry #51005/53 (B.C. Sup. Ct., April 9, 1953); *In re* Brander, [1952] 4 D.L.R. 688 (B.C. Sup. Ct.).

is admissible to construe any ambiguities. If the mistake is to the entire contents or an important provision, the entire will may be denied probate. But, if the error is the mistaken inclusion of a single provision of a will, the court will probate the will without the provision. Although American courts will not deny probate to a single word or part of a provision, they will often reach the same result via construction. When property or a beneficiary is misdescribed in the will, extrinsic evidence may be admitted. Ambiguity must be found in order to allow the admission of extrinsic evidence to ascertain the testator's intent.

When the testator misconceives the legal effect of the language used in the will or incorrect legal advice caused his misconception, the majority of courts will not reject the will or any part thereof. However, Missouri courts may hold the will invalid where the testator has not read the will.

The majority of courts state that where the testator through mistake executes the wrong document as his will, probate will be denied. A preferable minority position has received little recognition.

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