DEADLY INTENTIONS: POSTHUMOUSLY MODIFYING UNAMBIGUOUS WILLS TO PROTECT THE ACTUAL INTENTIONS OF TEXAS'S TESTATORS

Comment

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I. HYPOTHETICAL: THE JOHNSONS' UNPROTECTED INTENTIONS

Joe-Bob was a typical Texas resident: independent, hardworking, and financially responsible.[1] Like many Texans, Joe-Bob came from humble beginnings. He was born in a small West Texas town, where his mother passed away while giving birth. Joe-Bob was his parents' first and only child. His father, Jimmy-Dale Johnson, worked as a small-time cotton farmer. He bought a ten-acre farm as a modest means to provide for his son. At an early age, Joe-Bob's father taught him the values of hard work, a modest and respectable living, and frugality.

Soon after Joe-Bob married Annabel, his father died intestate, leaving Joe-Bob to inherit the cotton farm via intestacy. Joe-Bob and Annabel worked hard farming cotton and saved every penny they made. Because he lost his mother at birth, Joe-Bob and Annabel decided not to have children. However, the Johnsons actively participated in the community, especially with the local Boys' and Girls' Club, the Future Farmers of America chapter, and the public school district.

The Johnsons eventually sold the cotton farm and purchased a modest West Texas ranch. Here, Joe-Bob ran cattle and farmed several small plots. Not long after Joe-Bob acquired the ranch, the wind industry moved in. Subsequently, Joe-Bob secured a lucrative deal to put windmills on his land. The venture turned out quite profitable for the Johnsons. With the profits from the windmills, Joe-Bob bought more land, expanded his cattle

1. The author created this hypothetical.

operation, and installed more windmills. Before they knew it, the Johnsons were millionaires. However, their newfound wealth did not come without problems. At this point, the Johnsons had no idea that their estate would eventually be tangled in legal problems. In fact, until this point, the Johnsons never had a will. As small-town Texans from humble beginnings, the Johnsons knew nothing about Texas estate planning law.

The Johnsons hired Christopher J. Williams, a local attorney, to provide legal advice. Naturally, drafting wills was first on Mr. Williams' agenda. However, neither Joe-Bob nor Annabel maintained close relationships with any of their extended family. Thus, the Johnsons were not sure how they wanted to distribute their assets. During the first meeting, Joe-Bob maintained that if he died first he wanted everything to go to Annabel. Mr. Williams asked if Joe-Bob had an alternate beneficiary to account for different situations (for example, if both Joe-Bob and Annabel died), but Joe-Bob did not have a second option. Accordingly, Mr. Williams drafted initial wills bestowing all of Joe-Bob's assets of the estate to Annabel, and all of Annabel's assets to Joe-Bob. Mr. Williams finalized the wills and left the Johnsons with a final word of caution; he strongly suggested a follow-up in the next few years to execute new wills addressing scenarios that the initial wills failed to address.

Mr. Williams' concerns worried Annabel. If the Johnsons both died, everything would go to beneficiaries who they did not explicitly consider. Over the years, the Johnsons had a change of heart. As their fortune grew and the Johnsons aged, they began considering the positive impact their estate could have on the community.

The Johnsons lived in a rural community where poverty was prevalent, schools were underfunded, and, for many, hardship was a reality. The Johnsons decided they would give back to their community. Ultimately, they decided to bequeath legacies to the local Boys and Girls Club, the Future Farmers of America chapter, and the public school district. In addition, they wanted to make sure their estate took care of their loyal ranch-hand, Phillip T. Angus, whenever it came time for the Johnsons to make their worldly exits. Over the years Mr. Angus had grown to become a part of the family. To show their appreciation for a lifetime of work, loyalty, and friendship the Johnsons decided to devise half of their ranch's real property to Mr. Angus. In addition, they bequeathed all of their personal property essential to the ranch (saddles, tractors, tools, etc.) to equip Mr. Angus with the resources necessary to keep the ranch operational (if he so chose).

After the Johnsons wrote a letter to Mr. Angus informing him of their intentions, they made the news regarding their intended destiny for the estate public to the community. Due to the Johnsons' local status, the news quickly became the talk of the town. The locals were excited that three under-funded local entities would receive substantial assistance. Moreover, everyone around town knew the Angus family; the community was ecstatic that Mr.

Angus would be a substantial beneficiary, allowing him to maintain employment and take care of his family—potentially for generations. Everyone knew Mr. Angus was the closest thing to family the Johnsons had. However, no one in the community knew the Johnsons had yet to execute new wills formalizing their intentions.

Inevitably, Mr. Williams caught wind of the news and promptly contacted the Johnsons to explain the magnitude of their decision. He emphasized the importance that the Johnsons execute new wills ensuring their estate would be distributed as they intended. They planned on executing new wills, but ultimately felt that their estate should be administered how they wanted, regardless of any legal documents. Nonetheless, heeding Mr. William's concerns, Annabel sat down and wrote out their intentions.

One afternoon, the Johnsons were riding their top-tier roping horses near a small county road. As luck would have it, a cotton module truck transporting a fresh module of cotton to the local cotton gin sustained a massive tire blowout. Tragically, Joe-Bob and Annabel both died on impact. At this point, their wills essentially stated that Joe-Bob's assets would go to Annabel, and Annabel's assets died would go to Joe-Bob. Unfortunately, the Johnson's never made it back to Mr. Williams' office to execute new wills; thus, they died without wills that accurately represented their intentions regarding the distribution of their estate.

The news of the tragedy devastated the community, but perhaps more significant than the devastation the community felt was the potentially devastating impact being considered at a small office located in a very old red-brick building on Main Street. In that office, Christopher J. Williams sat silently, head in hands. He knew the community's devastation had only just begun. If only he could have convinced Joe-Bob and Annabel to make it to his office earlier.

Unfortunately, situations like the Johnsons' are all too common. The problem stems from the dated manner that traditional statutes use to protect testators' intentions.[2] In the Johnsons' situation, plenty of external evidence exists to show that the Johnsons' current wills did not accurately reflect their intentions. However, the traditional approach would not allow a court to consider the widely available external evidence demonstrating the Johnsons' intentions.[3] In 2015, the Eighty-Fourth Texas Legislature passed a new law, Texas Estates Code § 255.451.[4] Section 255.451 allows courts to consider extrinsic evidence in particular situations.[5] However, Texas's new law does not protect testators' intentions in situations like the Johnsons.[6]

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2. *See infra* Part II.B.
3. *See infra* Part II.B.
4. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).
5. *See id.*
6. *See id.*

II. INTRODUCTION

Estate codes are beginning to move in a new direction when it comes to modifying and reforming unambiguous wills.[7] Traditionally, at common law, courts would not modify unambiguous wills.[8] Courts would allow interested parties to introduce extrinsic evidence to modify wills only if the wills were facially ambiguous or if the executors could not execute them due to a hidden ambiguity.[9] However, if neither ambiguity existed, then courts would not modify wills—even if strong evidence existed to show that wills were inconsistent with the testators' actual intentions.[10] Accordingly, strong disagreements have arisen from situations involving courts' refusal to modify wills that are both executable and unambiguous, but nonetheless are seemingly inconsistent with the testators' intentions.[11] Legislative and judicial solutions vary by jurisdiction when cases call for courts to decide whether to enforce unambiguous wills or modify wills in accord with compelling evidence that challenges the wills' reliability.[12] The question of how to properly protect the testators' actual intentions remains controversial.[13]

In response to the controversy, and in an effort to protect testators' intentions, some courts and legislatures have created avenues to challenge disputed wills, even when the wills are unambiguous.[14] That is, some courts and legislatures have created rules allowing parties to introduce extrinsic evidence to challenge, modify, and reform unambiguous wills when compelling evidence suggests that the plain language of the wills are inconsistent with the actual intentions of the testators.[15]

As proponents of the modern trend point out, many jurisdictions already allow for extrinsic evidence to be introduced when challenging an unambiguous trust, yet do not allow extrinsic evidence to be introduced when challenging an unambiguous will.[16] The theory behind the modern trend is that the testators' estates should be executed in accordance with the testators'

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7. *See* Robert J. Morrill & Katherine R. Dorval, *Defective Wills and Trusts: Why Treat Them Differently?*, MASS. LAWS. WKLY., Sept. 19, 2013.

8. *See* Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 814 (2001).

9. *See infra* Part II.C.2.

10. *See* Cornelison, *supra* note 8.

11. *See id.*

12. *See id.*

13. *See* Morrill & Dorval, *supra* note 7.

14. *E.g.*, *In re* Estate of Duke, 352 P.3d 865, 866 (Cal. 2015).

15. *Id.*

16. *See* Morrill & Dorval, *supra* note 7.

wishes.[17] The hope is that enacting and implementing modernized laws will protect the testators' estates from being executed against the testators' wishes simply due to scriveners' errors (mistakes made by a person who drafted the will), or other unfortunate—and often unforeseeable—circumstances.[18] While proponents of the modern trend are concerned with protecting the intent of testators in general, many commentators are primarily concerned with jurisdictions' reluctance to permit the reformation of unambiguous wills containing mistakes.[19]

Some jurisdictions have enacted laws that narrowly account for this specific concern.[20] In 2015, Texas enacted legislation speaking directly to the reformation of unambiguous wills that contain scriveners' errors.[21] Under Texas Estates Code § 255.451, courts may modify or reform unambiguous wills when a representative provides clear and convincing extrinsic evidence that a scrivener's error resulted in terms of a will that inaccurately represent a testator's intentions.[22]

The topic of posthumously modifying unambiguous wills is currently extremely controversial for several reasons.[23] First, allowing courts to modify unambiguous wills breaks a long-standing tradition: the plain meaning rule.[24] The plain meaning rule, which does not allow courts to modify unambiguous wills, has a historic stronghold in common law.[25] Many commentators resent the idea of eliminating the plain meaning rule because such a monumental change runs the risk of creating unnecessary hardships for clients, practitioners, and courts.[26] Opponents to the modern trend are concerned that elimination of the plain meaning rule will result in less practical efficiency and diminish practitioners' ability to guarantee testators unchallengeable wills.[27] Proponents of the modern trend argue that testators deserve their estates to be distributed as they desired and intended, regardless of whether the drafter of a will makes a mistake.[28] Consequently, the best way to go about protecting testators' intentions remains a point of contention.[29]

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17. *See Will Construction and Extrinsic Evidence*, THIS MATTER, http://thismatter.com/money/wills-estates-trusts/will-construction-extrinsic-evidence.htm [https://perma.cc/J2S7-6CQW] (last visited Oct. 18, 2015).
18. *See id.*
19. *See* Morrill & Dorval, *supra* note 7.
20. *See, e.g.*, TEX. EST. CODE ANN. § 255.451 (West 2015).
21. *See id.*
22. *See id.*
23. *See* THIS MATTER, *supra* note 17.
24. *See id.*
25. *See id.*
26. *See* Morrill & Dorval, *supra* note 7.
27. *See* Cornelison, *supra* note 8.
28. *See* THIS MATTER, *supra* note 17.
29. *See* Cornelison, *supra* note 8.

A. Roadmap

This comment proposes that Texas amend Texas Estates Code § 255.451 by changing some of the language and adding subsection (a)(4) and subsection (c).[30] It asserts that public policy is best served by advancing a modernized law governing Texas courts' ability to modify unambiguous wills.[31] This comment begins with a discussion on the historical background on unambiguous wills and a general overview of the different types of ambiguities associated with wills.[32] Following the background material, this comment briefly discusses a California Supreme Court case that revolutionized how courts handle unambiguous wills.[33] Next, this comment introduces Texas's newly codified statute, Texas Estates Code § 255.451, and summarizes the statute that overruled the Texas Supreme Court decision. [34] It then provides analysis regarding the ramifications of section 255.451, and discusses the problems with Texas's new statutory language.[35]

The remainder of this comment focuses on comparing Texas's new approach regarding extrinsic evidence and the reformation of unambiguous wills to other approaches; including those advanced by the Restatement, the Uniform Probate Code, and several other jurisdictions.[36] Ultimately, this comment will suggest that Texas amend Texas Estates Code § 255.451 by changing some of the language and adding two subsections: subsection (a)(4) and subsection (c).[37] Before concluding, the comment discusses how the amendment would affect the Johnson family hypothetical.[38] Finally, this comment will conclude by discussing how the amendment would provide clarity for practitioners, eliminate the complex distinctions between types of ambiguities, and most effectively address the significant public policy interest in protecting testators' intentions; providing courts with an avenue to ensure testators' estates are distributed as intended.[39]

B. The Plain Meaning Rule Versus the Modern Trend

The plain meaning rule bars the admission of extrinsic evidence to contest the plain meaning of the language in a will.[40] Ultimately, it denies

30. *See infra* Part V.A.
31. *See infra* Part VI.
32. *See infra* Part II.A–B.
33. *See infra* Part III.
34. *See infra* Part IV.A.1–2.
35. *See infra* Part IV.A.
36. *See infra* Part IV.A–F.
37. *See infra* Part V.A.
38. *See infra* Part V.B.
39. *See infra* Part VI.
40. *See* Cornelison, *supra* note 8.

courts the ability to modify or reform unambiguous wills.[41] At common law, courts in the United States adopted the plain meaning rule from the English legal system.[42] The English courts' justification for using the plain meaning rule is outdated and mostly irrelevant in today's modern society.[43] The modern justification for the plain meaning rule is to provide surety to testators by ensuring the language of testators' wills are not modified after they die.[44] Moreover, advocates of the plain meaning rule argue that it protects wills from undue influences and unreliable or fraudulent evidence.[45]

Conversely, advocates for the modern trend argue that requiring petitioners to meet a clear and convincing standard when challenging unambiguous wills can effectively protect testators' intentions from unreliable and fraudulent evidence.[46] Numerous jurisdictions have adopted modernized approaches.[47] The modern trend is continuing to move further away from the traditional plain meaning approach.[48]

C. Types of Ambiguities in Wills

Ambiguities arise in wills when the intentions of particular terms are unclear.[49] When a will contains ambiguous language, it is often contested.[50] In general, courts aim to execute wills in a manner reflecting the intent of the testator.[51] Traditionally, when courts determine a will is unambiguous, they apply the plain meaning rule.[52] However, a more complex situation arises when a court finds the terms of a will to be ambiguous.[53] Because the testator's intent is unclear, courts often admit extrinsic evidence to ascertain the testator's intentions.[54] The law varies by jurisdiction, but the court's determinations regarding whether a will contains an ambiguity, and if so,

41. *See id.*
42. *See id.*
43. *See id.*
44. *See* THIS MATTER, *supra* note 17.
45. *See id.*
46. *See* Morrill & Dorval, *supra* note 7.
47. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (Amended 2010) (allowing courts to modify unambiguous wills if evidence proves any mistake of fact or law at the time the will was executed); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1(2003) (allowing courts to admit extrinsic evidence and modify unambiguous donative documents); FLA. STAT. ANN. § 732.615 (West 2011) (allowing courts to modify wills due to mistakes of fact or law).
48. *See* THIS MATTER, *supra* note 17.
49. *See id.*
50. *See id.*
51. *See id.*
52. *See* Cornelison, *supra* note 8.
53. *See id.*
54. *See id.*

which type, are often dispositive.[55] The most obvious ambiguity found in a will is a patent ambiguity.

1. Patent Ambiguities

Patent ambiguities occur when a will is ambiguous on its face.[56] A will is ambiguous on its face when the will leaves out obvious information that is necessary to ascertain for the will to be executed.[57] For instance, a patent ambiguity arises if a will states that the personal representative should distribute the testator's house to a nephew or niece.[58] Because the will does not clearly state whether the testator intended to devise the house to the nephew or niece, the will is facially ambiguous.[59] Likewise, a patent ambiguity arises when a will contains a clear contradiction.[60] For example, if a will devises the testator's property to his nephew, but then later devises the same property to his niece, then the will is patently ambiguous.[61] Here, the will contains contradictory terms because it devises the same property interest to two different people.[62] When a will contains a patent ambiguity, courts do not apply the plain meaning rule because the plain meaning of the will is unclear.[63] A patent ambiguity is rare, but often results from a scrivener's error.[64] Typically, the courts allow extrinsic evidence to prove the testator's intentions when a will contains a patent ambiguity.[65] While patent ambiguities are facially ambiguous, wills often contain other ambiguities, even when facially unambiguous.[66]

2. Latent Ambiguities

A latent ambiguity exists when a will is unambiguous on its face, but is not executable because it contains a hidden ambiguity.[67] In other words, even though the testator's intent may appear clear on the will's face, one can

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55. *See id*.
56. *See id*.
57. *See* THIS MATTER, *supra* note 17.
58. *See* Cornelison, *supra* note 8.
59. *See id*.
60. *See* THIS MATTER, *supra* note 17.
61. *See id*.
62. *See* Cornelison, *supra* note 8.
63. *See id*.
64. *See id*.
65. *See* Cornelison, *supra* note 8; TEX. EST. CODE ANN. § 255.451 (West) (stating "a court may order that the terms of the will be modified or reformed . . . if . . . the order is necessary to correct a scrivener's error in the terms of the will . . . to conform with the testator's intent").
66. *See* THIS MATTER, *supra* note 17.
67. *See* Cornelison, *supra* note 8.

reasonably interpret the intent of the testator in more than one way.[68] As a practical matter, a latent ambiguity generally results from overly generic language.[69] For example, a will may devise a testator's boat to a friend, Frank.[70] However, if the testator has two friends named Frank, then there are two people who reasonably match the description in the will.[71] Thus, the will is latently ambiguous because it is unclear which friend the testator wanted to give the boat to.[72] Accordingly, a court could not apply the plain meaning rule because the will is not executable.[73] Generally, when a will contains a latent ambiguity courts admit extrinsic evidence to clarify the testator's intent.[74] Pragmatically, extrinsic evidence is often necessary to discover a latent ambiguity in a will.[75] Ultimately, jurisdictions differ regarding the admissibility of extrinsic evidence to clarify a latently ambiguous will.[76]

3. Unambiguous Wills: No Apparent Ambiguities

A more controversial problem arises when a will is unambiguous, yet strong extrinsic evidence suggests the language of the will contains an error, or fails to accurately convey the testator's intent.[77] This significantly differs from wills containing patent or latent ambiguities because the clear meaning of unambiguous wills is often discernable and executable.[78] For example, consider the following situation: Joe's thirty-year-old will devises his house to his brother; yet Joe told everyone (and even documented) he intended his house to go to his twenty-one-year-old son.[79] Here, the will is clearly capable of being executed according to its terms: devising Joe's house to his brother.[80] But executing the will's terms would contradict Joe's clear intent, corroborated by evidence, to devise his house to his son.[81] Traditionally,

68. *See* THIS MATTER, *supra* note 17.
69. *See* Cornelison, *supra* note 8, at 820–21.
70. *See* THIS MATTER, *supra* note 17.
71. *See id*.
72. *See id*.
73. *See* Cornelison, *supra* note 8, at 820–21.
74. *See id*.
75. *See id*.
76. *See id*.
77. *See* Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 395 (2001).
78. *Compare* Cornelison, *supra* note 8, 819–21 (discussing how wills containing patent or latent ambiguities cannot be executed by simply applying the plain meaning rule), *with* Champine *supra* note 77, at 395 (discussing how unambiguous wills that contain errors can be executed by applying the clear meaning rule at the risk of executing wills that are not compatible with testators' intentions).
79. *See* Cornelison, *supra* note 8, at 821.
80. *See id*. at 823–25.
81. *See id*.

courts would apply the plain meaning rule, extrinsic evidence would be barred, and Joe's house would go to his brother.[82]

At common law, courts did not admit evidence disputing wills that did not appear to contain an ambiguity.[83] The common law rule barred extrinsic evidence from being admitted to contest an executable will even if extrinsic evidence indicated that the language of the will was a result of a mistake.[84] Ultimately, courts refused to reform unambiguous wills, regardless of the circumstances.[85] The policy behind the common law rule was to provide a bright-line rule that provided testators and practitioners with the security of knowing wills would be executed according to their terms.[86]

The modern trend regarding unambiguous wills differs from the common law approach.[87] The modern trend also asserts that the distinction between latently ambiguous and unambiguous wills is distorted.[88] Moreover, it finds the practice of distinguishing between types of ambiguities to be arbitrary.[89] As a result, the modern trend allows for extrinsic evidence to contest scriveners' errors and testators' intentions, even when wills are unambiguous.[90] Consequently, the modern trend affords courts the power to modify or reform wills when extrinsic evidence proves that the language of a will contains a scrivener's error or conflicts with the testator's intentions.[91]

The policy reasons behind the modern trend include ensuring the testator's intent is carried out, equity, and protecting testators' intentions from falling victim to simple mistakes.[92] Some jurisdictions still apply the common law rule; barring the admission of extrinsic evidence if the will appears unambiguous.[93] Others follow the modern trend which allows courts to reform or modify unambiguous wills when extrinsic evidence reveals a scrivener's error or confirms that the plain language of the will distributes assets in a different manner than the testator intended.[94] Many jurisdictions take a middle-ground approach, adhering to the common law rule while providing statutory exceptions to the rule.[95]

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82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.* at 823–24.
89. *See* THIS MATTER, *supra* note 17.
90. *See* Cornelison, *supra* note 8, at 823–24.
91. *See id.*
92. *See id.*
93. *See id.* at 824.
94. *Cf.* TEX. EST. CODE ANN. § 255.451 (West 2015) (stating "a court may order that the terms of the will be modified or reformed . . . if . . . the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent").
95. *See, e.g.*, *In re* Estate of Mildrexter, 971 P.2d 758, 760 (Kan. Ct. App. 1999) (applying the plain meaning rule).

III. IN RE ESTATE OF DUKE: A MODERN REVOLUTION IN POSTHUMOUSLY CHALLENGED WILLS

In the case of *In re Estate of Duke*, the California Supreme Court departed from years of established common law and case law by holding "that the categorical bar on reformation of unambiguous wills is not justified and that reformation is permissible if clear and convincing evidence establishes an error in the expression of the testator's intent and establishes the testator's actual specific intent at the time the will was drafted."[96] In *Duke*, the testator's will maintained that certain charities would receive his estate if he and his wife died at the same time.[97] As luck would have it, the testator did not die at the same time as his wife.[98] The lower courts (complying with California precedent) excluded extrinsic evidence regarding the testator's intent, found the will unambiguous, and accordingly found the testator died intestate—effectively granting his estate to his legal heirs.[99] The charities mentioned in the testator's will challenged the rulings of the lower courts, arguing that the will mistakenly failed to adequately account for the testator's intent at the time the will was drafted.[100]

The California Supreme Court acknowledged that California common law did not allow extrinsic evidence to correct an unambiguous will.[101] However, the court decided to change the case law in order to protect testators' intentions.[102] According to the California Supreme Court, no sound basis existed to continue the practice of banning the reformation of unambiguous wills in cases where clear and convincing extrinsic evidence shows the plain language of a will is incompatible with testators' intentions.[103] Consequently, the court overruled long-standing California precedent in favor of a modernized approach, allowing courts to admit extrinsic evidence to prove testators' intentions.[104] *Duke* revolutionized legal theories surrounding the admissibility of extrinsic evidence when interested parties challenge an unambiguous will.[105]

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96. *In re* Estate of Duke, 352 P.3d 863, 867 (Cal. 2015).
97. *Id.* at 865.
98. *Id.*
99. *Id.*
100. *Id.* at 879–81.
101. *Id.* at 867.
102. *Id.*
103. *See id.* at 872–74.
104. *Compare In re* Barnes' Estate, 407 P.2d 656 (1965) *abrogated by Duke*, 352 P.3d at 863 (holding that an unambiguous will cannot be modified by the courts even if extrinsic evidence exists that suggests the words of the will did not accurately reflect the testator's intentions), *with Duke*, 352 P3.d at 879–81 (holding that courts may modify a will if extrinsic evidence proves by clear and convincing evidence that the words of a will contradict the testator's intent).
105. *See* Michael Avanesian, *California Supreme Court Overrules 50 Year Precedent Regarding Unambiguous Wills*, CENT. DISTRICT INSIDER: CAL. BANKR. CT. NEWS (Aug. 6, 2015), http://www.

IV. A VARIETY OF PATHS: COMPARING TEXAS ESTATES CODE § 255.451 TO THE UNIFORM PROBATE CODE, THE THIRD RESTATEMENT OF PROPERTY, AND OTHER JURISDICTIONS

Because the United States is a nation of dual sovereignty, jurisdictions vary in regard to the admissibility of extrinsic evidence when interested parties challenge unambiguous wills.[106] Some states apply the plain meaning rule, barring the courts from considering extrinsic evidence when interested parties challenge unambiguous wills.[107] Conversely, some states follow the modern approach, allowing courts to admit extrinsic evidence, and reform unambiguous wills when evidence shows that the language of the wills contain mistakes or is incompatible with the testators' actual intentions.[108] Moreover, some states apply unique approaches which do not directly fall in line with the plain meaning rule or the modern approach.[109] For example, some states apply the plain meaning rule but also provide for modern exceptions allowing courts to admit extrinsic evidence and modify unambiguous wills in particular situations.[110]

A. Texas: Stepping Away from the Plain Meaning Rule

Following the traditional approach, Texas has historically applied the plain meaning rule and barred Texas courts from considering extrinsic evidence when interested parties petition unambiguous wills.[111] However, in 2015 the Eighty-Fourth Texas Legislature chose to slightly stray from the traditional approach and passed Texas Estates Code § 255.451.[112] The new statute codified an approach embracing the nature of the plain meaning rule, while also taking a step away from the plain meaning approach and allowing Texas courts to admit extrinsic evidence and reform unambiguous wills.[113]

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centraldistrictinsider.com/2015/08/06/california-supreme-court-overrules-50-year-precedent-regarding-unambiguous-wills/ [https://perma.cc/B3C3-ZWWV].

106. *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (discussing how the United States' system of dual sovereignty gives states jurisdictional power).

107. *See, e.g.*, Flannery v. McNamara, 738 N.E.2d 739, 740 (Mass. 2000) (barring the use of extrinsic evidence when considering challenges to unambiguous will).

108. *See, e.g.*, FLA. STAT. ANN. § 732.615 (West 2011) (allowing courts to consider extrinsic evidence when unambiguous wills are challenged in order to ascertain testators' intentions).

109. *See, e.g.*, TEX. EST. CODE ANN. § 255.451 (West 2015) (only allowing courts to admit extrinsic evidence to modify an unambiguous will when a personal representative alleges a scrivener's error).

110. *See, e.g.*, COLO. REV. STAT. ANN. § 15-11-806 (West 2010) (allowing courts to admit extrinsic evidence and modify an unambiguous will when petitioners prove a mistake of fact or law at the time the will was executed by clear and convincing evidence).

111. *See* San Antonio Area Found. v. Lang, 35 S.W.3d 636, 637–38 (Tex. 2000).

112. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).

113. *See id.*

1. Texas Estates Code § 255.451

In 2015 the Eighty-Fourth Texas Legislature passed Senate Bill 995, resulting in the addition of section 255.451 ("Circumstances Under Which Will May Be Modified or Reformed") to the Texas Estates Code.[114] As of September 1, 2015, section 255.451 is valid law in Texas.[115] The new provision in section 255.451 states:

> (a) On the petition of a personal representative, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:
> (1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;
> (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or
> (3) the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent.
> (b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.[116]

Taking a step toward the modern trend, section 255.451 permits Texas courts to now consider extrinsic evidence (in certain circumstances) when determining testators' intentions, even if the language in a testator's will is unambiguous.[117] The statute allows Texas courts to admit extrinsic evidence (surrounding the testator's intentions at the time the will was executed), and modify an unambiguous will if a personal representative petitions by alleging that the will contains a scrivener's error.[118] Moreover, section 255.451 overruled the Supreme Court of Texas's holding in *San Antonio Area Foundation v. Lang*.[119]

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114. *See id.*

115. *See id.*; TEX. S.B. 995, 84th Leg. R.S. (West 2015) (codified Sept. 1, 2015 as TEX. EST. CODE ANN. § 255.451).

116. EST. § 255.451.

117. *See id.*

118. *See id.*

119. *See id.*; *see* San Antonio Area Found. v. Lang, 35 S.W.3d 636, 637 (Tex. 2000) (holding that extrinsic evidence is not admissible to modify unambiguous wills).

2. San Antonio Area Foundation v. Lang*: Texas Common Law Overruled by Texas Estates Code § 255.451*

In *San Antonio Area Foundation v. Lang*, the Supreme Court of Texas held "that extrinsic evidence is not admissible to construe an unambiguous will provision[.]"[120] *Lang* involved a dispute regarding the entitlement to the testatrix's interests in particular property assets associated with real property.[121] At the time Ruth Lang (the testatrix) executed her will, she "owned a one-quarter interest in a real estate lien note and accompanying net-profit agreement from a . . . sale of part of the Prue Road property."[122] However, some time after Lang executed her will, the Lang family sold more of the Prue Road property.[123] From the proceeds of the sale, the testatrix "acquired a twenty-five percent interest in two additional notes[.]"[124] When the lawsuit arose, the testatrix's interest in the assets associated with the Prue Road property was worth about $120,000.[125]

In her will, the testatrix devised half of her real property associated with the Prue Road property to her nephew and the other half to her niece.[126] The will also contained a residuary clause devising "the residuary of [the testatrix's] estate to the San Antonio Area Foundation[.]"[127] A dispute regarding entitlement to the testatrix's interest in the assets associated with the Prue Road Property arose between the Foundation and the testatrix's niece and nephew.[128] The petitioners presented the issue of "whether extrinsic evidence [was] admissible to construe the term 'real property'" to the Texas Supreme Court.[129]

The Foundation argued "the term "real property" [was] unambiguous and therefore extrinsic evidence [was] not necessary to [properly] construe the will."[130] In support, the Foundation pointed to section 58(c) of the Probate Code, which distinguished real property from personal property.[131] Conversely, the testatrix's niece and nephew argued "that the phrase 'real property in . . . Prue Road' [was] ambiguous and therefore extrinsic evidence [was] necessary to [properly] construe [the testatrix's] will" in a light most

120. *Lang*, 35 S.W.3d at 637–38.
121. *Id.* at 637.
122. *Id.* at 638.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *See id.* at 636.
129. *Id.* at 637.
130. *See id.* at 639.
131. *See id.;* TEX. PROB. CODE § 58(c) (West 2003), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10, eff. Jan. 1, 2014 (distinguishing real property from personal property).

compatible with the testatrix's intent.[132] In other words, the petitioners argued the will was latently ambiguous.[133] Moreover, they claimed the extrinsic evidence revealed that the testatrix considered the interests associated with the property to be part of the property; and therefore, she intended for the interests in the assets associated with the Prue Road Property to be devised to her niece and nephew.[134]

The Texas Supreme Court determined the term "real property" was unambiguous because section 3(dd) of the Probate Code provided a legal definition for the term "real property."[135] In addition, the Court pointed to section 58(c) of the Probate Code, which distinguishes real property from personal property.[136] The Court determined the testatrix's interests in the assets associated with the Prue Road Property fell under the definition of personal property in Probate Code § 58(c)—not the definition of real property found in Probate Code § 3(dd).[137] Consequently, because the testatrix's interests in the assets were personal property, the interests passed to the Foundation under the will's residuary clause.[138] Because the statute defines the legal term "real property," the Court held that the term was unambiguous and, therefore, extrinsic evidence was not admissible to show the testatrix's intent was incompatible with the language of her will.[139] Because the will was unambiguous, the Court barred the extrinsic evidence maintaining that only the words in the will could determine the testatrix's intent.[140]

Section 255.451 overruled *Lang*'s holding and allows Texas courts to admit extrinsic evidence to determine testators' intentions in particular circumstances.[141] Nonetheless, it is unlikely the outcome in *Lang* would have changed if section 255.451 controlled.[142] The petitioners in *Lang* did not argue the testatrix's will inaccurately reflected her intentions due to a scrivener's error, section 255.451 would not permit a court to admit the

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132. *Lang*, 35 S.W.3d at 639.

133. *See* Cornelison, *supra* note 8, at 821.

134. *See Lang*, 35 S.W.3d at 639.

135. *See id.* at 642–43; PROB. § 3(dd), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10(a), eff. Jan. 1, 2014 (defined real property).

136. *Lang*, 35 S.W.3d at 639. *See also* PROB. § 58(c), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10, eff. Jan. 1, 2014 (distinguished real property from personal property).

137. *See Lang*, 35 S.W.3d at 640; PROB. § 58(c), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10, eff. Jan. 1, 2014 (distinguished real property from personal property). *See also* PROB. § 3(dd), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10(a), eff. Jan. 1, 2014 (defined real property).

138. *See Lang*, 35 S.W.3d at 641; *see* PROB. § 3(dd), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10(a), eff. Jan. 1, 2014.

139. *See Lang*, 35 S.W.3d at 640, 642–43; PROB. § 3(dd), *repealed by* Acts 2009, 81st Leg., ch. 680, § 10(a), eff. Jan. 1,2014.

140. *See Lang*, 35 S.W.3d at 640–41.

141. *See* TEX. EST. CODE ANN. § 255.451 (West 2015) (overruling *Lang* by allowing courts to admit extrinsic evidence and modify unambiguous wills); *Lang*, 35 S.W.3d at 640–41.

142. *See* EST. § 255.451; *Lang*, 35 S.W.3d at 640–41.

petitioners' extrinsic evidence.[143] Moreover, section 255.451 only allows a personal representative to contest an unambiguous will.[144] Insofar as the will in *Lang* was unambiguous, section 255.451 would bar the petitioners from challenging the will because they were not the testatrix's personal representatives.[145] Under section 255.451, the petitioners in *Lang* would only prevail if the testatrix's personal representative contested her will and proved by clear and convincing evidence that it was incompatible with the testatrix's intent due to a scrivener's error.[146]

Lang highlights the difficulty of differentiating latently ambiguous terms from unambiguous terms.[147] In *Lang*, the Court decided whether interests in assets associated with real property were "real property" or "personal property."[148] On its face, the law does not clearly state whether interests in assets associated with the Prue Road Property refer to personal property or real property.[149] Because the will did define what type of property the interests in the assets were, the terms facially appear as latently ambiguous.[150] Nonetheless, the court determined the terms as unambiguous because they fell under the Probate Code's definition of personal property.[151] Because the law surrounding the admissibility of extrinsic evidence differs depending on whether the court finds the terms as latently ambiguous or unambiguous, the determinations are often dispositive.[152]

3. Evaluating Texas Estates Code § 255.451

Section 255.451 materially modified conventional Texas common law by granting courts the power to admit outside evidence and modify or reform unambiguous wills.[153] Significantly, section 255.451 changed the long-standing legal precedent in Texas; it effectively overruled the Texas Supreme Court holding in *Lang*.[154] However, Texas's statute does not provide a

143. *See* EST. § 255.451; *Lang*, 35 S.W.3d at 640–41.
144. *See* EST. § 255.451.
145. *See id.*
146. *See id.*; *Lang*, 35 S.W.3d at 640–41.
147. *See Lang*, 35 S.W.3d at 640–41.
148. *Id.*
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See* TEX. EST. CODE ANN. § 255.451 (West 2015); Gerry W. Beyer, *2015 Texas Estate Planning Legislative Update* (Aug. 2, 2015), http://ssrn.com/abstract=2638914 [https://perma.cc/B2G3-TH4U] (discussing Texas's major change to the Estates Code allowing courts to modify and reform unambiguous wills).
154. *Compare* EST. § 255.451 (granting Texas courts the power to modify and reform an unambiguous will when determining the language of the will is incompatible with the testator's intent by a showing of clear and convincing extrinsic evidence), *with Lang*, 35 S.W.3d at 637–38 (holding "that extrinsic evidence is not admissible to construe an unambiguous will provision"). *See* Beyer, *supra* note

blanket rule permitting Texas courts to consider all evidence when unambiguous wills are contested.[155] Rather, section 255.451 only allows Texas courts to admit extrinsic evidence for the narrow purpose of determining whether the terms of a will accurately reflect the testator's intent when a personal representative alleges a scrivener's error.[156] The key language in section 255.451 is "to correct a scrivener's error in the terms of the will[.]"[157] Although section 255.451 provides exceptions to the plain meaning rule, its ambiguous language leaves some questions unanswered.[158]

For instance, it does not define what constitutes a scrivener's error.[159] Texas Estates Code § 22 provides definitions for statutory terms used in the Code.[160] However, section 22 does not define what constitutes a "scrivener's error."[161] The statutory language is "to correct a scrivener's error in the terms of the will[.]"[162] This seems to suggest that the court can only amend an unambiguous will when the drafter legitimately writes the wrong words.[163] To be frank, the narrow protection provided by the statute's language is insufficient.[164] As is, it appears that if a drafter provided a client with incorrect legal advice that resulted in the will inaccurately reflecting the client's intentions, the estate would not have a legal remedy to correct the advisor's mistake of law.[165] Presumably, a counselor's mistake of law would not constitute a "scrivener's error in the terms of the will[.]"[166] Thus, if a mistake of fact influenced a client's will, section 255.451 would not provide the estate with a legal remedy.[167]

For example, imagine the situation where Frank intended on giving his house to his daughter. In fact, Frank told his daughter and all of his friends and family that she would receive the house upon his death. But one day Frank's son told him that his sister did not want the house. If Frank then formulated a will devising the house to his son, a mistake of fact influenced

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153 (discussing Texas's major change to the Estates Code allowing courts to modify and reform unambiguous wills).

155. *See* EST. § 255.451.

156. *See id.*

157. *Id.*

158. *See* Jeramie Fortenberry, *Changing a Florida Last Will and Testament in Probate Court*, FLA. PROB. ATT'Y (May 3, 2012), http://www.floridaprobatesolutions.com/changing-florida-testament-probate-court/ [http://perma.cc/6CKG-TGA9] (discussing how FLA. STAT. ANN. § 732.615 allows courts to protect testators' intentions in a variety of circumstances while using the clear and convincing standard as a safeguard against fraud).

159. *See id.*

160. *See* TEX. EST. CODE ANN. § 22 (West 2014).

161. *See id.*

162. *Id.* § 255.451(a)(3).

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See* Fortenberry, *supra* note 158.

Frank's will.[168] Under section 255.451, Frank's estate would not have the ability to modify the will, even if clear and convincing evidence proved Frank only devised the house to his son due to a mistake of fact.[169] Amending the statute to account for all mistakes would eliminate these types of inequitable results.[170] In addition, on its face, the statute's scope regarding what constitutes a "scrivener's error in the terms of the will" is unclear.[171]

That is, it is unclear whether admissible evidence is limited to basic scrivener errors, such as punctuation or incorrect terms, or whether the provision extends to missing terms the testator intended for the will to include.[172] Removing the provision limiting the types of errors that permit courts to review evidence and challenge intent would eliminate the confusion.[173] If Texas courts could consider all evidence, on a case-by-case basis, the determinations would be more informed, leaving judges in better positions to protect testators' intentions.[174] At the end of the day, protecting testators' intentions and ensuring their assets are divided in the manner they intended is the paramount policy consideration at play.[175] Further, section 255.451 presents a unique issue by only permits personal representatives to petition unambiguous wills.[176]

Texas Estates Code § 22.031 defines "'personal representative' to include (1) an executor and independent executor; (2) an administrator, independent administrator, and temporary administrator; and (3) a successor to an executor or administrator."[177] By limiting who can petition unambiguous wills to personal representatives, section 255.451 bars most persons of interest from challenging unambiguous wills in Texas.[178] Barring persons of interests effectively eliminates parties with potentially valid claims from asking Texas courts to provide remedial relief.[179] Furthermore, this section's provision limiting who can petition unambiguous wills to personal representatives becomes more troubling when read in light of Texas Estates Code § 255.455.[180] The section states:

168. *See id*.
169. *See id*.
170. *See infra* Parts VI–VII.
171. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).
172. *See id*.
173. *See* Fortenberry, *supra* note 158.
174. *See id*.
175. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805, cmt. b (2008).
176. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).
177. *Id.*
178. *See id*. § 255.451.
179. *See id*.
180. *See id*. § 255.455.

> This subchapter does not create or imply a duty for a personal representative to:
> (1) petition a court for modification or reformation of a will, to be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or to be prohibited from performing acts that are required by the terms of the will;
> (2) inform devisees about the availability of relief under this subchapter; or
> (3) review the will or other evidence to determine whether any action should be taken under this subchapter
> (4) A personal representative is not liable for failing to file a petition under Section 255.451.[181]

While section 255.451 limits who can petition unambiguous wills to personal representatives, section 255.455 proceeds to indemnify personal representatives from any duty to follow through and ensure scriveners' errors are corrected.[182] Section 255.455 undermines the protections section 255.451 affords by explicitly granting personal representatives (the only people allowed to petition unambiguous wills) the right to ignore section 255.451's protections.[183] As it stands, section 255.455 allows a personal representative to do nothing about a known scrivener's error, while section 255.451 simultaneously prevents anyone else from petitioning the will, even if it contains a mistake.[184] Further, section 255.451 does not a provide remedy for situations involving changes in circumstances.[185]

For example, section 255.451 does not provide equitable relief for situations involving wills that do not contain a scrivener's error, but nonetheless fail to accurately account for testators' actual intentions.[186] In life, circumstances often change.[187] Like the traditional plain meaning approach, section 255.451 does not protect a testator's intentions when he changes his mind after creating a will, but fails to execute a new will prior to death.[188] In these situations, section 255.451 does not allow Texas courts to consider outside evidence, regardless of the quantity or quality of available

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181. *Id.*

182. *See id.* §§ 255.451, 255.455.

183. *See id.* §§ 255.451, 255.455 (Section 255.451 only permits personal representatives to petition the court for the reformation of wills while section 255.455 indemnifies them from liability when failing to petition).

184. *See id.* §§ 255.455 (b), 255.451(a)–(b) (only permitting personal representatives to petition the court for the reformation of wills).

185. *See id.* § 255.451.

186. *See id.*; Fortenberry, *supra* note 158.

187. *See Changing Your Mind: Changing, Adding to, Revoking Your Will or Trust*, A.B.A., http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_9.authcheckdam.pdf [https://perma.cc/3K6R-GH3M] (last visited Feb. 4, 2016).

188. *See* EST. § 255.451.

evidence.[189] While it is true that it is difficult to determine a deceased person's intentions, the modern trend implies that courts should at least consider evidence suggesting a change in circumstances, even when the will is unambiguous.[190] Advocates of the plain meaning rule argue the admission of extrinsic evidence subjects the testator's estate to fraudulent claims.[191] But proponents of the modern trend assert that courts can protect the testator's estate by requiring that the clear and convincing standard be met before modifying the terms of a will.[192] In addition, proponents argue that cross-examination is the appropriate forum for uncovering the reliability of extrinsic evidence.[193]

While the policy behind sections 255.451 and 255.455 does prevent some fraudulent petitions, the limitations pose normative questions involving opportunity costs.[194] Are testators intentions better protected by limiting petitions to personal representatives (who are indemnified from incurring any liability for failing to act), or by allowing other potentially interested parties to petition wills, using the clear and convincing standard as a protective shield?[195] Further, are testators' estates best protected by limiting the reformation of unambiguous wills to "correct a scrivener's error in the terms of the will[,]" or by allowing courts to modify wills to correct mistakes of law and fact?[196] Ultimately, section 255.451 fails to protect testators' intentions from changing circumstances and passive personal representatives.[197] The Restatement's approach addresses some of these concerns.[198]

B. The Third Restatement of Property: Abandoning the Plain Meaning Rule

In 2003, The Third Restatement of Property adopted section 12.1.[199] The Restatement took a significant step away from the traditional plain meaning approach.[200] While abandoning the traditional plain meaning approach, the Restatement did not adopt the modern approach in its

189. *See id*.
190. *See* Jacqueline Real-Salas, *Court Decision May Open the Door to Reformed Wills*, LAW OFFS. OF JACQUELINE REAL-SALAS L. BLOG (Nov. 4, 2015, 11:01 AM), http://blog.realsalaslaw.com/2015/11/court-decision-may-open-the-door-to-reformed-wills.html [https://perma.cc/Y36D-U2L2].
191. *See* Morrill & Dorval, *supra* note 7.
192. *See id*.
193. *See* Cornelison, *supra* note 8, at 815.
194. *See* Fortenberry, *supra* note 158.
195. *See id*.
196. *See id*.
197. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).
198. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003).
199. *Id.*
200. *See id*.

entirety.[201] Rather, it limited when unambiguous wills could be reformed to specific situations.[202]

1. Restatement (Third) of Property § 12.1

The Third Restatement of Property § 12.1 states:

> 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. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.[203]

Section 12.1 uses the term "donative document."[204] To be clear, in most instances, a will is a donative document.[205] Accordingly, section 12.1 applies to petitions contesting unambiguous wills.[206] It explicitly abandons the plain meaning rule by allowing courts to admit extrinsic evidence and modify unambiguous wills when a petitioner provides a clear and convincing showing of a mistake of fact or law.[207] The Restatement adopted section 12.1 to protect testators' estates from falling victim to a mistake of fact or law.[208] Although it abandons the plain meaning rule, section 12.1 is designed to protect petitioned wills from the concerns raised by opponents to the modern approach.[209] To avoid the dangers of "fraudulent or mistaken evidence [it imposes] an above-normal standard of proof[,]" this approach allows interested parties to admit extrinsic evidence, but requires the evidence to meet a clear and convincing standard before permitting courts to reform a will and correct the mistake.[210] Nonetheless, the plain language of section 12.1 begs the question: what constitutes a mistake?[211]

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201. *See id.*
202. *See id.*
203. *Id.*
204. *Id.*
205. *See id.* at cmt. c.
206. *See id.*
207. *Id.* § 12.1.
208. *See id.* at cmt. b.
209. *See id.*
210. *See id.*
211. *See id.*

According to the Restatement, a mistake consists of "a mistake of fact or law, whether in expression or inducement[.]"[212] The comments of section 12.1 detail when mistakes of expression and inducement arise.[213] It states:

> A mistake of expression arises when a donative document includes a term that misstates the donor's intention. . .fails to include a term that was intended to be included. . .or includes a term that was not intended to be included. . .A mistake in the inducement arises when a donative document includes a term that was intended to be included or fails to include a term that was not intended to be included, but the intention to include or not to include the term was the product of a mistake of fact or law[.][214]

Under the Restatement, extrinsic evidence is only admissible when the petitioner alleges one of the following: the will does not include terms that were intended to be included; the will includes terms that were not intended to be included; or the will contains terms that were only included due to a mistake of fact or law.[215] This provides more avenues for courts to protect the testators' intentions.[216] However, the Restatement also creates new concerns while leaving some old concerns unresolved.[217]

First, section 12.1 does not define who has standing to petition an unambiguous will.[218] It is unclear whether only a personal representative or any party in interest can petition a will.[219] For that matter, the Restatement is unclear whether it limits anyone at all from petitioning an unambiguous will (as long as the petitioner alleges a mistake of fact or law).[220] Moreover, the Restatement fails to provide a remedy to protect testators' intentions when testators change their intent after creating a will, yet fail to execute a new will before death.[221] Unquestionably, the Restatement intentionally excludes remedial options for this type of situation.[222] The policy behind the intentional exclusion coincides with the concerns of the opponents of the modern trend: to protect testators' intentions from falling victim to fraudulent evidence that contradicts the terms of testators' wills.[223]

However, the comments below section 12.1 explicitly reinforce the Restatement's faith in the protection provided by the clear and convincing

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212. *See id.*
213. *Id.* at cmt. i.
214. *Id.*
215. *See id.*
216. *See id.* at cmt. i.
217. *Id.* § 12.1.
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.* at cmt. h, illus. 2.
222. *See id.* at cmt. h.
223. *Id.* § 12.1.

standard.[224] It is unclear why section 12.1 does not allow admittance of extrinsic evidence to show the testator changed his intentions while holding the evidence to the same high standard (clear and convincing) as evidence revealing a mistake of law or fact.[225] Requiring judges to distinguish between whether wills inaccurately reflect testators' original intentions, or whether testators' changed their intentions without executing a new will, distracts judges from focusing on the most important policy: protecting testators' actual intentions.[226] Furthermore, this approach seems to incentivize petitioners with legitimate evidence (showing the terms of the will do not reflect the testator's actual intentions) to dishonestly allege that, due to a mistake, the will inaccurately reflected the testator's actual intentions.[227] Pragmatically, while section 12.1 aims to prevent fraudulent claims, the limitations arguably incentivize them.[228] Eliminating the Restatement's requirement that petitioners allege a mistake of fact or law would allow judges to focus all of their attention on ascertaining testators' actual intentions.[229]

2. Restatement (Third) of Property § 12.1 Compared to Texas Estates Code § 255.451

Section 12.1 of the Third Restatement is comparable to Texas Estates Code § 255.451.[230] Both protect testators' intentions from falling victim to mistakes made while drafting a will.[231] Moreover, neither permits courts to

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224. *See id.* at cmt. h.

225. *Id.* § 12.1.

226. *Compare id.* § 12.1 (only allowing courts to modify unambiguous wills if extrinsic evidence shows the terms of a will is incompatible with the testator's intentions at the time the will was executed due to a mistake of law or fact), *with* FLA. STAT. ANN. § 732.615 (West 2011) (allowing any interested party to contest an unambiguous will by alleging the terms of the will are incompatible with the testator's intentions for any reason at the time of the testator's death).

227. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANS. § 12.1 (2003).

228. *See id.*

229. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (requiring courts to focus on determining if the testator's intentions were incompatible with the will's terms due to a mistake of fact or law at the time the will was executed), *with* FLA. STAT. ANN. § 732.615 (West 2011) (allowing courts to solely focus on the testator's actual intentions at the time of death with determining whether the testator's will is incompatible with the testator's actual intentions).

230. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing extrinsic evidence to be admitted to contest the compatibility of a testator's intent with the terms of the testator's unambiguous will when the petitioner alleges mistake of fact or law), *with* TEX. EST. CODE ANN. § 255.451(a)(3) (West 2015) (allowing courts to admit extrinsic evidence and modify unambiguous wills when a personal representative alleges a scrivener's error caused the terms of an unambiguous will to be incompatible with the testator's intent).

231. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANS. § 12.1 (2003), (allowing extrinsic evidence to be admitted to contest the compatibility of a testator's intent with the terms of the testator's unambiguous will when the petitioner alleges mistake of fact or law), *with* EST. § 255.451(a)(3)

admit extrinsic evidence or reform unambiguous wills when a petitioner alleges a testator changed his mind after executing a will, but failed to execute a new will before death.[232] Additionally, both approaches require courts to find the evidence satisfies the high standard of clear and convincing before courts may modify or reform an unambiguous will.[233] However, the Restatement uses more detailed language, which results in a broader range of application than Texas's statute.[234]

The Restatement takes a broader approach than Texas's approach in multiple ways.[235] First, while Texas's approach only allows a personal representative to petition an unambiguous will, the Restatement seems to provide no limitations on who can petition an unambiguous will.[236] Second, Texas's statute provides that when petitioning an unambiguous will, the extrinsic evidence must show the testator's intentions are incompatible with the will's terms due to a scrivener's error.[237] The statute does not define a

(allowing courts to modify or reform an unambiguous will only when a personal representative alleges a scrivener's error caused the terms of an unambiguous will to be incompatible with the testator's intent).

232. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003), (allowing extrinsic evidence to be admitted to contest the compatibility of a testator's intent with the terms of the testator's unambiguous will when the petitioner alleges mistake of fact or law), *with* EST. § 255.451(a)(3) (allowing courts to modify or reform an unambiguous will only when a personal representative alleges a scrivener's error). *But see* FLA. STAT. ANN. § 732.615.

233. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (requiring extrinsic evidence showing a mistake of law or fact to meet a clear and convincing standard before a court may modify an unambiguous will), *with* EST. § 255.451(a)(3) (requiring a personal representative petitioning an unambiguous will to introduce clear and convincing evidence demonstrating a scrivener's error before a court may modify or reform an unambiguous will).

234. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing courts to modify unambiguous wills contested posthumously when a petitioner alleges the terms of the will are incompatible with the testator's intentions due to any mistake of law or fact arising from a mistake of expression or inducement when the will was executed), *and* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. i (2003) (explaining how mistakes of expression and mistakes of inducement arise when a will is being executed), *with* EST. § 255.451(a)(3) (allowing courts to modify or reform an unambiguous will only when a personal representative alleges a scrivener's error).

235. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003), (allowing extrinsic evidence to be admitted to contest the compatibility of a testator's intent with the terms of the testator's unambiguous will when the petitioner alleges mistake of fact or law), *with* EST. § 255.451(a)(3) (allowing courts to modify or reform an unambiguous will only when a personal representative alleges a scrivener's error).

236. *Compare* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (does not explicitly limit who may petition an unambiguous will as long as the petitioner alleges the terms of the will are incompatible with the testator's intentions due to any mistake of law or fact), *with* EST. § 255.451(a)(3) (limiting who may petition an unambiguous will solely to a personal representative alleging a scrivener's error).

237. *Compare* EST. § 255.451(a)(3) (only allowing Texas courts to modify or reform an unambiguous will if a personal representative contests the will by alleging a scrivener's), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing courts to modify an unambiguous will if the petitioner alleges the will contains a mistake due to any mistake of fact or law at that occurred when the will was executed).

scrivener's error.[238] Meanwhile, the Restatement provides more detail regarding the types of mistakes that can result in courts reforming or modifying unambiguous wills.[239] The Restatement does not explicitly require the mistake be a scrivener's error.[240] The Restatement presumably allows modification (or reformation) of an unambiguous will when the testator or the drafter makes a mistake while executing a will.[241] Several years after the Restatement added section 12.1, the Uniform Probate Code added an analogous provision.[242]

C. The Uniform Probate Code: Continuing Down the Modern Path

In 2008, the Uniform Probate Code added section 2-805.[243] The provision followed the Restatement's foundation by advancing a modernized approach to the admissibility of extrinsic evidence for the purposes of reforming unambiguous wills.[244] The change represents a significant shift in the legal community's ideologies regarding normative solutions to protecting and advancing important public policy interests.[245] Namely, the change represents a shift in how legal scholars think the law should protect testators' intentions.[246] This modernized approach advances the belief that the high standard of clear and convincing evidence (rather than the plain meaning rule) is an effective safeguard to prevent fraud and abuse.[247] Using the clear

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238. *See* EST. § 255.451(a)(3) (providing no definition detailing what constitutes a scrivener's error). *But cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. i (2003) (detailing how mistakes of expression and mistakes in inducement arise).

239. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing petitioners to contest unambiguous wills by alleging "a mistake of fact or law, whether in expression or inducement."); *see* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. i (2003) (explaining how mistakes of expression and mistakes in inducement arise).

240. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003). The Restatement does not explicitly state whether a mistake of law or fact must stem from the testator or the drafter in order for courts to admit extrinsic evidence when an unambiguous will is challenged. *See id.*

241. *See id.*

242. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008).

243. *See id.*

244. *Compare* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to admit extrinsic evidence and modify unambiguous instruments when the petitioner makes a clear and convincing showing that the terms of the instrument are incompatible with the transferor's intentions due to a mistake of fact or law), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing courts to admit extrinsic evidence and modify unambiguous donative documents when the petitioner makes a clear and convincing showing that the terms of the document are incompatible with the donor's intent due to a mistake of law or fact).

245. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 cmt. b (2003) (explaining how the Restatement chooses to embrace the standard of clear and convincing evidence rather than an outright exclusion on outside evidence in order to protect the testator's intentions).

246. *See id.*

247. *See* John H. Langbein, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 568 (1982).

and convincing standard, rather than a complete bar on extrinsic evidence, allows judges to more effectively discern and protect testators' intentions.[248]

1. The Uniform Probate Code § 2-805

Section 2-805 of the Uniform Probate Code states:

> The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.[249]

Section 2-805 of the Uniform Probate Code is akin to the Restatement's approach.[250] It focuses on protecting testators' estates from falling victim to a mistake made at time of the will execution.[251] Further, the approach focuses on the testator's actual intent at will execution.[252] As the modern approach continues to spread, more jurisdictions are adopting provisions like the Uniform Probate Code's.[253] In fact, Utah, North Dakota, and Colorado adopted the exact language of Uniform Probate Code § 2-805.[254] In addition, New Mexico and Washington have both codified comparable statutes.[255]

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248. *See id*.

249. UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008).

250. *Compare* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805, (allowing courts to admit extrinsic evidence and modify unambiguous instruments when the petitioner makes a clear and convincing showing that the terms of the instrument are incompatible with the transferor's intentions due to a mistake of fact or law), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing courts to admit extrinsic evidence and modify unambiguous donative documents when the petitioner makes a clear and convincing showing that the terms of the document are incompatible with the donor's intent due to a mistake of law or fact).

251. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (requiring judges to determine whether there was a mistake of law or fact at the time the will was executed).

252. *See id.* (requiring courts to focus on the intent of the testator at the time the will was executed in order to ascertain whether the term of the will are compatible with the testator's intent).

253. *See* UTAH CODE ANN. § 75-2-805 (West 2010). *See* N.D. CENT. CODE ANN. § 30.1-10-05 (West 2009); COLO. REV. STAT. ANN. § 15-11-806 (West 2010); N.M. STAT. ANN. § 45-2-805 (West 2012) (similar to and inspired by Uniform Probate Code § 2-805), WASH. REV. CODE ANN. § 11.96A.125 (West 2012) (similar to Uniform Probate Code § 2-805); UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to admit extrinsic evidence and modify unambiguous instruments). *Accord* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1 (2003) (allowing courts to admit extrinsic evidence and modify unambiguous donative documents when the petitioner makes a clear and convincing showing that the terms of the document are incompatible with the donor's intent due to a mistake of law or fact).

254. *See* UTAH CODE ANN. § 75-2-805 (West 2010); N.D. CENT. CODE § 30.1-10-05 (West 2009); COLO. REV. STAT. ANN. § 15-11-806 (West 2010); UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008).

255. *See* N.M. STAT. ANN. § 45-2-805 (West 2012) (similar to, and inspired by Uniform Probate Code § 2-805); WASH. REV. CODE ANN. § 11.96A.125 (West 2012) (similar to Uniform Probate Code § 2-805).

Notably, in the infamous case of *In re* Estate of Duke, Chief Justice Cantil-Sakauye of the Supreme Court of California cited section 2-805 as persuasive authority for overruling the traditional common-law rule in California.[256]

2. The Uniform Probate Code § 2-805 Compared to Texas Estates Code § 255.451

As Uniform Probate Code § 2-805 is akin to the Restatement's section 12.1, it is also comparable to Texas Estates Code § 255.451.[257] The Uniform Probate Code and the new Texas statute both allow courts to modify or reform unambiguous wills if clear and convincing extrinsic evidence show particular mistakes.[258] The Texas statute differs from the Uniform Probate Code in similar respects to how it differs from the Restatement.[259] Texas requires a personal representative to petition an unambiguous will.[260] The Uniform Probate Code does not.[261] In addition, Texas requires the petitioner (a personal representative) to allege a scrivener's error to contest an unambiguous will.[262] Meanwhile, the Uniform Probate Code only requires a petitioner to allege a mistake of fact or law.[263] Ultimately, both, Texas

256. *See In re* Estate of Duke, 61 Cal. 4th 871, 352 P.3d 863, 879–81 (2015) (holding that courts may modify a will if extrinsic evidence proves by clear and convincing evidence that the words of a will contradict the testator's intent, citing Uniform Probate Code § 2-805 as persuasive authority); UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to admit extrinsic evidence and modify unambiguous wills when clear and convincing evidence demonstrates that a mistake in fact or law at the time a will is executed caused an incompatibility between the terms of a will and the testator's actual intentions).

257. *Compare* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) allowing courts to admit extrinsic evidence and modify unambiguous wills when clear and convincing evidence demonstrates that a mistake in fact or law at the time a will is executed caused an incompatibility between the terms of a will and the testator's actual intentions), *and* RESTATEMENT (THIRD) OF PROP. WILLS AND DONATIVE TRANSFERS § 12.1 (2003), *with* TEX. EST. CODE ANN. § 255.451(a)(3) (West 2015) (requiring a personal representative petitioning an unambiguous will to introduce clear and convincing evidence demonstrating a scrivener's error before a court may modify or reform an unambiguous will).

258. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to admit extrinsic evidence and modify unambiguous instruments). *But see* EST. § 255.451(a)(3) (only allowing courts to modify or reform an unambiguous will when it a scrivener's error).

259. *See* discussion *supra* Part IV.B.2.

260. *Compare* EST. § 255.451(a)(3) (allowing only a personal representative to petition an unambiguous will), *with* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (does not provide explicit limitations on who can petition an unambiguous will).

261. *Compare* EST. § 255.451(a)(3) (allowing only a personal representative to petition an unambiguous will), *with* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (does not provide explicit limitations on who can petition an unambiguous will).

262. *See id.* § 255.451(a)(3) (only allows for court to modify or reform unambiguous wills if evidence proves the terms of the will do not accurately represent the testator's intentions because the scrivener made an error when drafting the will).

263. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to modify unambiguous wills if evidence proves any mistake of fact or law at the time the will was executed). *But cf. id.* § 255.451(a)(3) (only allows for court to modify or reform unambiguous wills if evidence proves the scrivener made an error when drafting the will).

Estates Code § 255.451 and Uniform Probate Code § 2-805, demonstrate the shift in the status quo (moving away from the plain meaning rule).[264] However, not all jurisdictions have departed from the traditional application of the plain meaning rule.[265]

D. Massachusetts Common Law: A Traditional Approach

Massachusetts's common law maintains a traditional approach to contested unambiguous wills.[266] Ultimately, in Massachusetts, unambiguous wills cannot be reformed because the plain meaning rule governs.[267] Massachusetts's application of the plain meaning rule is well demonstrated in the famous case of *Flannery v. McNamara*.[268]

1. Flannery v. McNamara: *Applying the Plain Meaning Rule*

In *Flannery v. McNamara*, Judge Ireland held extrinsic evidence is not admissible to explain the terms of an unambiguous will.[269] In *McNamara*, the petitioners brought suit seeking a reformation of the decedent's will.[270] The petitioners argued they were the rightful beneficiaries to the decedent's property.[271] However, the testator's unambiguous will named his wife as the sole beneficiary.[272] The testator's wife died two years before the testator.[273] Because the will's only named beneficiary predeceased the testator, the testator died intestate.[274] Accordingly, his estate was distributed to his intestate heirs: his first cousins once removed.[275] The heirs were discovered through a genealogical search.[276]

The petitioners alleged they enjoyed a close relationship with the testator spanning nearly five decades, during which the testator allegedly told the petitioners, on several occasions, that when he died they would be the

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264. *See, e.g.*, *id.* (allowing courts to admit extrinsic evidence and modify or reform unambiguous wills).

265. *See, e.g.*, Flannery v. McNamara, 738 N.E.2d 739, 740 (Mass. 2000) (upholding the traditional common law approach by enforcing the plain meaning rule).

266. *Compare* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to admit extrinsic evidence and modify unambiguous instruments), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1(2003) (allowing courts to admit extrinsic evidence and modify unambiguous donative documents).

267. *See* Flannery v. McNamara, 738 N.E.2d at 740.

268. *See id.*

269. *See id.* at 745.

270. *See id.* at 740.

271. *See id.*

272. *See id.* at 741.

273. *See id.*

274. *See id.* at 742.

275. *See id.* at 741.

276. *See id.*

beneficiaries of his property.[277] They argued the language of the will should be reformed because it mistakenly failed to include an additional clause (that presumably would have named them beneficiaries of the testator's property) that the testator intended the will to include.[278] The case presented the court with a question regarding how Massachusetts's common law ascertains the intention of the testator.[279]

According to Judge Ireland, the court must ascertain the testator's intention considering the whole instrument, giving appropriate weight to the will's words, "in light of the circumstances known to the testator at the time of [the will's] execution[.]"[280] The petitioners argued that the court should consider the testator's alleged statements (extrinsic evidence) when deciding how to construe the will in a manner most compatible with the testator's intent.[281] However, Massachusetts's common-law precedent did not allow extrinsic evidence, even when used to bring light to the terms of the will, if the testator's intent can be ascertained from the will's unambiguous words.[282] In other words, in Massachusetts, extrinsic evidence is not admissible to make the terms of a will ambiguous when the terms of the will are facially unambiguous.[283] Massachusetts's approach is in line with the plain meaning rule because it bars extrinsic evidence from being admitted to explain the terms of an unambiguous will.[284]

2. Massachusetts's Common Law Compared to Texas Estates Code § 255.451

Massachusetts's approach differs from Texas Estates Code § 255.451.[285] Both states start from the traditional legal theory established by the plain meaning rule maintaining that extrinsic evidence is not generally admissible to challenge an unambiguous will.[286] However, Texas's statute steps away from the plain meaning rule and admits extrinsic evidence to challenge unambiguous wills in particular situations.[287] Massachusetts remains closer

277. *See id*.
278. *See id*.
279. *See id*. at 742.
280. *See id*. at 741–42.
281. *See id*.
282. *See id*.
283. *See id*.
284. *See id*.
285. *Compare id.* at 740 (upholding the plain meaning rule), *with* TEX. EST. CODE ANN. § 255.451(a)(3) (West 2015) (allowing courts to admit extrinsic evidence and modify or reform wills in particular circumstances).
286. *Compare McNamara*, 738 N.E.2d at 740 (upholding the plain meaning rule), *with* San Antonio Area Found. v. Lang, 35 S.W.3d 636, 640–41 (Tex. 2000) (finding the will to be unambiguous and accordingly applying the plain meaning rule).
287. *See* EST. § 255.451(a)(3).

to the traditional plain meaning rule and bans the admission of any extrinsic evidence when unambiguous wills are contested, even if the evidence shows a mistake.[288]

Further, Texas's approach differs from Massachusetts's in regard to the method used to determine whether a will is ambiguous.[289] Texas strictly focuses on whether the terms are ambiguous, Massachusetts considers the entire instrument, "in light of the circumstances known to the testator at the time of [the will's] execution[.]"[290] Conversely, Texas focuses on whether the words are facially ambiguous.[291] When determining whether a will is ambiguous, Kansas's courts apply a test similar to Massachusetts.[292]

E. Kansas's Take on the Plain Meaning Rule

Embracing the traditional plain meaning rule, Kansas's common law maintains extrinsic evidence is inadmissible to challenge the testator's intent if the will is unambiguous.[293] The case of *In re Estate of Mildrexter* demonstrates Kansas's common law.[294]

1. The Case of In re Estate of Mildrexter

In the case of *In re Estate of Mildrexter*, the Court of Appeals of Kansas held that a will is unambiguous if "the intention of the testator can be gathered from the four corners of the instrument itself."[295] *Mildrexter* involved a dispute over the meaning of the term "personal property."[296] Here, the testatrix specifically bequeathed a number of personal items to her sister.[297] The will also contained a provision requesting the testatrix's personal property not specifically bequeathed be auctioned to family members.[298] The proceeds of the auction were to go to the testatrix's surviving siblings.[299] Her "estate also contained substantial amounts of government bonds, certificates

288. *See McNamara*, 738 N.E.2d at 740.
289. *See* EST. § 255.451(a)(3).
290. *See McNamara*, 738 N.E.2d at 740; *Lang*, 35 S.W.3d at 640–41.
291. *Compare Lang*, 35 S.W.3d at 640–41 (looking to the terms of the will to establish whether the will is ambiguous), *with McNamara*, 738 N.E.2d at 740 (determining whether a will is ambiguous by looking to the entire instrument and considering the terms while giving weight to the testator's circumstances at the time the will was executed).
292. *See In re* Estate of Mildrexter, 971 P.2d 758, 760 (Kan. Ct. App. 1999).
293. *See id.*
294. *See id.*
295. *See id.*
296. *See id.*
297. *See id.* at 759–60.
298. *See id.*
299. *See id.*

of deposit, and stocks."[300] In her will, she "authorized her executors to sell all of the balance of her real and personal property. . .with the proceeds to pass under the residuary clause. . .to the Frank and Marie Mildrexter Foundation Trust[.]"[301] The residuary clause directed all property, including real property and personal property, to the Frank and Marie Mildrexter Foundation Trust.[302] On appeal, the petitioner, the testatrix's only surviving sibling, argued "the term 'personal property' referred to in . . . [the testatrix's] will should be interpreted to include all property except real estate[.]"[303]

In deciding whether the term, personal property, was ambiguous, the Court of Appeals of Kansas applied a unique test, similar to the one applied in *McNamara*.[304] According to the court, "The critical test in determining whether a will is ambiguous is whether the intention of the testator can be gathered from the four corners of the instrument itself. If so, ambiguity does not exist."[305] Kansas's approach to determining an ambiguity focuses on whether the testator's intent can be determined from the four corners of the will.[306] While the test is similar to the one applied in *McNamara*, Massachusetts takes it a step further by considering the words "in light of the circumstances known to the testator at the time of [the will's] execution[.]"[307] Traditionally, rather than focusing on whether the testator's intent is discernible within the will, courts focus on whether the terms of a will are clear and executable when determining whether a will is ambiguous.[308]

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300. *Id.*
301. *Id.*
302. *See id.*
303. *Id.*
304. *See id.* at 760.
305. *Id.*
306. *See Id.*
307. *Compare Mildrexter*, 971 P.2d at 760 (looking to ascertain the intent of the testator from the terms of the will), *with* Flannery v. McNamara, 738 N.E.2d 739, 740 (Mass. 2000) (determining whether a will is ambiguous by looking to the entire instrument and considering the terms while giving weight to the testator's circumstances at the time the will was executed).
308. *See* Cornelison, *supra* note 8. *See, e.g.*, San Antonio Area Found. v. Lang, 35 S.W.3d 636, 640–41 (Tex. 2000) (looking to the terms of the will to establish whether the will is ambiguous).

2. Kansas Common Law Compared to Texas Estates Code § 255.451: Determining the Testator's Intent

Kansas and Texas differ when evaluating ambiguities in wills.[309] Texas determines if a will is ambiguous by looking to the terms of the will.[310] If the terms are clear, then the will is unambiguous under Texas law.[311] Conversely, Kansas focuses on whether the testator's intentions are clearly ascertainable from the terms of the will.[312] In other words, while Texas courts focus on whether the actual terms are ambiguous, Kansas's courts focus on whether the testator's intent is ambiguous.[313] The difference between how Texas and Kansas determine whether wills are ambiguous is primarily academic.[314] Pragmatically, the differing approaches are likely to yield similar results more often than not.[315] The two states also differ in regard to admitting extrinsic evidence.[316]

When Kansas's courts determine a will is unambiguous, extrinsic evidence is barred.[317] In Texas, even if the court finds the terms of the will are unambiguous, courts may still allow outside evidence that shows the drafter made a mistake.[318] The key difference between Kansas's approach and Texas's approach is that Kansas does not allow courts to modify unambiguous wills, while Texas does (in particular circumstances). In this regard, Kansas's approach mirrors both the plain meaning rule and Massachusetts's approach.[319] Arguably, Kansas's approach still aims to protect testators' intentions by focusing on whether testators' intentions are

309. *Compare Mildrexter*, 971 P.2d at 760 (holding extrinsic evidence is not admissible to challenge unambiguous wills, unambiguous wills cannot be modified or reformed, and whether a will is ambiguous is determined by focusing on whether the intent of the testator is clear from the terms of the will), *with* TEX. EST. CODE ANN. § 255.451 (West 2015) (statutorily establishing that upon the petition of a personal representative, courts may modify or reform unambiguous terms in wills—to protect estates from scriveners' errors—if extrinsic evidence is available that establishes by clear and convincing evidence that the testator's intent was contrary to the terms of the will).

310. *See Lang*, 35 S.W.3d at 640–41.

311. *See id.*

312. *See Mildrexter*, 971 P.2d at 760.

313. *Compare id.* (discussing that whether a will is ambiguous is determined by focusing on whether the intent of the testator is clear from the terms of the will), *with Lang*, 35 S.W.3d at 640–41 (looking to the terms of the will to establish whether the will is ambiguous).

314. *Compare Mildrexter*, 971 P.2d at 760 (discussing that whether a will is ambiguous is determined by focusing on whether the intent of the testator is clear from the terms of the will), *with Lang*, 35 S.W.3d at 640–41 (looking to the terms of the will to establish whether the will is ambiguous).

315. *Compare Mildrexter*, 971 P.2d at 760 (discussing that whether a will is ambiguous is determined by focusing on whether the intent of the testator is clear from the terms of the will), *with Lang*, 35 S.W.3d at 640–41 (looking to the terms of the will to establish whether the will is ambiguous).

316. *See Mildrexter*, 971 P.2d at 760; TEX. EST. CODE ANN. § 255.451 (West 2015) (permitting Texas courts to admit extrinsic evidence and modify unambiguous wills in particular circumstances).

317. *See Mildrexter*, 971 P.2d at 760.

318. *See* EST. § 255.451.

319. *See Mildrexter*, 971 P.2d at 760; Flannery v. McNamara, 738 N.E.2d 739, 740 (Mass. 2000).

clear from the terms of the will, rather than simply focusing on whether the terms, themselves, are clear.[320]

F. Florida: Embracing the Modern Approach

Florida embraces the modern approach.[321] Florida Statute § 732.615 aims to protect testators' intentions by allowing judges to admit extrinsic evidence and reform the terms of wills.[322] Moreover, the statute addresses the concerns raised by opponents of the plain meaning rule.[323]

1. Florida Statute § 732.615

In 2011, Florida enacted a broad statute explicitly allowing courts to admit extrinsic evidence of a testator's intent to contest unambiguous wills.[324] The statute states:

> Upon the application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will.[325]

The policy behind Florida's statute explicitly focuses on protecting the intent of a testator.[326] This approach yields several advantages.[327] First, it allows courts to review whether a will inaccurately represents a testator's intentions due to a mistake.[328] Courts are permitted to review any petition alleging that a will fails to reflect the testator's intentions due to a mistake.[329] Second, the statute allows Florida courts to focus on understanding the testator's actual intent, rather than focusing on whether a will contains an ambiguity.[330]

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320. *See Mildrexter*, 971 P.2d at 760.
321. *See* FLA. STAT. ANN. § 732.615 (West 2011); Morril & Dorval, *supra* note 6.
322. *See* Fortenberry, *supra* note 158.
323. *See id.*
324. *See* FLA. STAT. ANN. § 732.615.
325. *Id.*
326. *See id.*
327. *See id.*; Fortenberry, *supra* note 158.
328. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
329. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
330. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.

As a result, judges have the ability to look for testators' intentions without being required to determine the type of ambiguity a will contains.[331] Because the Florida statute does not require judges to identify types of ambiguities, judges do not use bright-line rules that fail to account for mistakes.[332] In effect, Florida's statute avoids problems involving the distorted distinction between latently ambiguous and unambiguous wills.[333] Further, section 732.615 permits courts to review all available evidence, regardless of whether a will is ambiguous.[334]

While Florida's approach provides courts with broad authority to review extrinsic evidence, the statute does not require courts to admit the evidence.[335] Rather, it grants courts wide discretion to determine on a case-by-case basis whether extrinsic evidence is needed for the court to understand the true intent of the testator.[336] Consequently, it gives courts discretionary authority to determine the reliability of the evidence.[337] The idea presumes that judges have enough intelligence to determine whether specific extrinsic evidence is fraudulent or insightful.[338]

Additionally, section 732.615 does not place strict limitations on who may petition a will.[339] Instead, it allows "any interested person" to petition for the reformation of a will.[340] Accordingly, judges, rather than bright-line rules, resolve disagreements involving the suitability of a petitioner.[341] As a result, this statute does not bar potential beneficiaries from challenging the compatibility between a will's terms and a testator's intentions.[342]

And finally, the statute requires courts to impose the clear and convincing standard.[343] This high standard protects testators' wills from fraudulent evidence and dishonest claims.[344] It serves as a catch all, requiring petitioners to make a significant showing of a mistake before courts can modify the terms of a testator's will.[345] Nevertheless, in spite of the benefits Florida's broadened approach affords, it does not account for all situations.[346]

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331. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
332. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
333. *See* FLA. STAT. ANN. § 732.615.
334. *See id*.
335. *See id*.; Fortenberry, *supra* note 158.
336. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
337. *See* Fortenberry, *supra* note 158.
338. *See* FLA. STAT. ANN. § 732.615; Fortenberry, *supra* note 158.
339. *See* FLA. STAT. ANN. § 732.615.
340. *See id*.
341. *See id*.
342. *See id*.
343. *See id*.
344. *See id*.
345. *See id*.
346. *See* Fortenberry, *supra* note 158.

Specifically, section 732.615 does not permit courts to reform a will due to evidence showing a change in circumstances. For instance, imagine the situation involving a testator who changes his mind but fails to execute a new will.[347] Even if the testator documented his new intentions, Florida would not permit courts to reform the will.[348] Under section 732.615, courts can only reform a will if evidence shows the will is incompatible with the testator's original intent due to a mistake.[349] But Florida law permits courts to review a broader range of mistakes than Texas's narrow limitation.[350]

2. Florida's Approach Compared to Texas: Aiming to Protect the Testator by Broadening Judicial Discretion

Florida Statute § 732.615 is significantly broader than Texas Estates Code § 255.451.[351] For instance, Texas only permits "personal representatives" to petition unambiguous wills.[352] Conversely, Florida allows for "any interested person" to petition a will.[353] Furthermore, when a will is unambiguous, Texas only admits extrinsic evidence for the narrow purpose of demonstrating that the language of the will inaccurately reflects the testator's intent due to a scrivener's error.[354] In contrast, Florida's statute allows courts to admit extrinsic when it shows a testator's intent is not reflected due to any mistake.[355] Although Texas and Florida have both moved toward the modern trend, their specific approaches are distinctively unique.[356] Texas's method comprises a narrow focus on protecting

347. *See supra* Part. I.

348. *See* FLA. STAT. ANN. § 732.615.

349. *See id*.

350. *Compare* FLA. STAT. ANN.§ 732.615 (allowing courts to modify wills due to mistakes of fact or law), *with* TEX. EST. CODE ANN. § 255.451 (West 2015) (allowing courts to modify an unambiguous will only if a personal representative proves a scrivener's error distorted the testator's intentions).

351. *Compare* EST. § 255.451 (statutorily establishing that upon the petition of a personal representative, courts may modify or reform unambiguous terms in wills—to protect estates from scriveners' errors—if extrinsic evidence is available that establishes by clear and convincing evidence that the testator's intent was contrary to the terms of the will), *with* FLA. STAT. ANN.§ 732.615 (establishing that upon the petition of any interested person courts may reform a will through the admission of extrinsic evidence that establishes by clear and convincing evidence that the will is not compatible with the true intent of the testator).

352. *See* EST. § 255.451.

353. *Compare* EST. § 255.451(only allowing a personal representative to petition a will), *with* FLA. STAT. ANN. § 732.615 (allowing any interested person to petition a will).

354. *See* EST. § 255.451(a)(3).

355. *Compare* EST. § 255.451 (West 2015) (only allowing extrinsic evidence to be admitted for the narrow purpose of demonstrating the terms of an unambiguous will differ from the testator's intent as a result of a scrivener's error), *with* FLA. STAT. ANN. § 732.615 (permitting courts to allow the admission of extrinsic evidence to demonstrate the testator's intent differs from the terms of the will).

356. EST. § 255.451; FLA. STAT. ANN. § 732.615.

unambiguous wills from scriveners' errors.[357] Conversely, Florida's approach encourages courts to focus on whether the original intent of a testator is compatible with his will.[358] Ultimately, the Texas Legislature should amend Texas Estates Code § 255.451 to account for a wider range of circumstances.[359]

V. PATH TO PROTECTING TESTATORS' INTENTIONS

Texas Estates Code § 255.451 simply fails to adequately protect testators' intentions.[360] The protection of testators' intentions constitutes the most important public policy issue to consider when determining the laws that should govern posthumously challenged wills.[361] As a general notion, after we die, we want our assets to go where we intend them to go.[362] In an ideal world, everyone would annually review and update their wills.[363] Nonetheless, it is simply unrealistic to expect that because the majority of Texans do not possess law degrees.[364] Accordingly, Texas law should provide more protection for the everyday Texan.[365] Texas should amend section 255.451 to better protect the interest of its citizens by providing adequate remedies for realistically possible situations.[366] Texas needs a rule designed to more effectively protect testators' estates by ensuring that courts have the ability to entertain petitions by all interested parties and consider all evidence surrounding testators' intentions.[367]

357. *Compare* FLA. STAT. ANN. § 732.615 (allowing courts to modify wills due to mistakes of fact or law), *with* EST. § 255.451.

358. *Compare* EST. § 255.451 (only allowing extrinsic evidence to be admitted for the narrow purpose of demonstrating the terms of an unambiguous will differ from the testator's intent as a result of a scrivener's error), *with* FLA. STAT. ANN. § 732.615 (permitting courts to allow the admission of extrinsic evidence to demonstrate the testator's intent differs from the terms of the will).

359. *See infra* Parts V–VI.

360. *See* EST. § 255.451(a)(3).

361. *See* Fortenberry, *supra* note 158. UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 cmt. b (2008) (discussing the equity interest in protecting testators' intentions).

362. *See supra* Part I.

363. *See* A.B.A., *supra* note 187.

364. *See Twenty-seven Percent of Texans Hold College Degrees*, HUFF POST COLLEGE (July 26, 2010, 8:53AM) http://www.huffingtonpost.com/2010/07/26/twenty-seven-percent-of-t_n_657493.html [https://perma.cc/RM92-W2KS].

365. *See infra* Part V.A.

366. *See infra* Part V.A.

367. *See infra* Part V.A.

A. Proposal: Amending Texas Estates Code § 255.451 to Protect the Actual Intentions of Texas's Testators

Texas's legislature should amend section 255.451 by replacing some of the language and adding subsections (a)(4) and (c).[368] As the outdated approach of the plain meaning rule slowly dies out, Texas needs to modernize its laws governing posthumous modifications of wills to protect testators' intentions.[369] Accordingly, Texas should amend section 255.451 to read as follows:

> (a) On the petition of ~~a personal representative~~ any interested person or organization, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:
> (1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;
> (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; ~~or~~
> (3) the order is necessary to correct ~~a scrivener's error~~ a mistake of fact or law, whether in expression or inducement, in the terms of the will, even if unambiguous, to conform with the testator's actual intent~~.~~; or
> (4) the order is necessary to account for a change in circumstances.
> (b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.
> (c) An order described in Subsection (a)(4) may be issued if the testator's change in intent is established by clear and convincing evidence.[370]

Amending section 255.451 would allow Texas courts to protect the testators' intentions in a wider variety of circumstances.[371] Moreover, it would protect testators' estates in situations like the Johnsons.[372] If Texas rejects the formerly proposed amendment, then it should adopt the following alternative amendment:

> (a) On the petition of ~~a personal representative~~ any interested person or organization, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to

368. *See* TEX. EST. CODE ANN. § 255.451 (West 2015). The legislature should amend the statute because the language is ambiguous and the protection afforded is narrow. *See id.*

369. *See* Cornelison, *supra* note 8.

370. *See* EST. § 255.451.

371. *See infra* Part VI.

372. *See supra* Part I.

> perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:
> (1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;
> (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or
> (3) the order is necessary to correct ~~a scrivener's error~~ a mistake of fact or law, whether in expression or inducement, in the terms of the will, even if unambiguous, to conform with the testator's actual intent.
> (b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.[373]

The only substantive difference to the alternative amendment is that it does not add subsection (a)(4) or subsection (c).[374] Adopting one of the proposed amendments would advance Texas public policy interests and protect Texas's testators by replacing ambiguous statutory language and providing all interested parties with the ability to contest wills that contain mistakes.[375]

B. Hypothetical: How Amending Texas Estates Code § 255.451 Would Affect the Johnsons

If Texas amended section 255.451, it would dramatically affect situations like the Johnsons'.[376] Under the current version of Texas Estates Code § 255.451, the Johnsons' estate would go to their intestate heirs.[377] This result would directly contrast the Johnsons' actual intentions.[378] Under current law, the Johnsons' personal representative would have to successfully petition the court and claim the will did not reflect the Johnsons' intentions due to a scrivener's error in order for their personal representative to administer their estate as they intended.[379] But, in the Johnsons' situation, no scrivener's error existed.[380] Unfortunately, the Johnsons' unexpectedly died before executing new wills to reflect their actual intentions.[381] Even though Annabel wrote out their intentions, and the entire local community knew their

373. *See* EST. § 255.451.
374. *See id.*
375. *See supra* Part I.
376. *See supra* Part I.
377. *See supra* Part I.
378. *See supra* Part I.
379. *See supra* Part I.
380. *See supra* Part I.
381. *See supra* Part I.

intentions, Texas courts could not admit the extrinsic evidence and the estate would simply pass to the their intestate heirs.[382]

If the Johnsons' jurisdiction, was controlled by the proposed amendment, then any interested person or organization could challenge the compatibility of the Johnsons' will's terms and their actual intentions.[383] Moreover, Texas courts could then allow extrinsic evidence, specifically Annabel's written intentions, the letter to Mr. Angus, and evidence provided by Mr. Williams and the community, to ascertain the Johnsons' actual intentions and modify their wills accordingly.[384] The amendment would produce the best results for the Johnsons' by allowing Texas courts to protect the Johnsons' intentions most effectively and ensure that their estate is distributed accordingly.[385]

VI. CONCLUSION

Amending Texas Estates Code § 255.451 will clear up the ambiguous language and provide testators' estates with a broader range of remedial relief.[386] The amendment aims to improve section 255.451 by providing the benefits of approaches like the Restatement, the Uniform Probate Code, and Florida Statute § 732.615 while adding further protection to account for changes in circumstances.[387] The approach the amendment advances relies on two foundational premises: (1) qualified-neutral judges are in the best position to objectively evaluate and weigh outside evidence, and (2) the high burden imposed by the clear and convincing standard is the best available method to shield fraudulent claims while still protecting testators' intentions.[388] The amendment addresses the concerns associated with section 255.451 in several ways.[389]

First, the amendment would remove the ambiguous term coined as "a scrivener's error" in section 255.451.[390] Instead of limiting Texas courts' ability to modify unambiguous wills only to situations "correct[ing] a

382. *See supra* Part I.

383. *See supra* Part I.

384. *See supra* Part I.

385. *See supra* Part I.

386. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).

387. *See* UNIF. PROB. CODE: REFORMATION TO CORRECT MISTAKES § 2-805 (2008) (allowing courts to modify unambiguous wills if evidence proves any mistake of fact or law at the time the will was executed); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 12.1(2003); FLA. STAT. ANN. § 732.615 (West 2011) (allowing courts to modify wills due to mistakes of fact or law). *But see* EST. § 255.451(a)(3).

388. *See supra* Part V.A.

389. *See supra* Part IV.A.3.

390. *See* EST. § 255.451. Section 255.451 uses the term "scrivener's error[,]" which is restrictive and ambiguous. *See id.* The amendment proposes the removal of the term to replace it with terms that comprise more potential petitioners. *See id.*

scrivener's error in the terms of the will[,]" the amendment proposes that the statue expands Texas court's subject-matter jurisdiction.[391] That is, the statute expands Texas courts' ability to modify unambiguous wills under subsection (a)(3) to any situation necessary to correct a mistake of fact or law.[392] Following the Restatement, the Uniform Probate Code, and Florida Statute § 732.615, the amendment to subsection (a)(3) provides broader protection to the testators' intentions by allowing Texas courts to provide remedial relief to a larger variety of mistakes that result in wills inaccurately reflecting testators' intentions.[393] In addition to replacing the language in subsection (a)(3), the amendment also proposes a change to the severely limiting language in subsection (a).[394]

As is, section 255.451 subsection (a) only permits Texas courts to modify or reform wills "[o]n the petition of a personal representative[.]"[395] The proposed amendment insists on removing the limitation and replacing it with language that allows Texas courts to modify or reform the terms of a will "[o]n the petition of any interested person or organization."[396] The amended version of subsection (a) aims to protect testators' estates by allowing any interested party to petition the compatibility of a will's terms with the testator's actual intentions.[397] The current subsection (a) imposes a limitation that goes against public policy because it denies legitimately interested parties from seeking remedial relief in Texas courts.[398] Section 255.455 furthers the concern by explicitly indemnifying personal representatives from any duty to petition a court or inform interested parties about the relief available under section 255.451, even if the personal representative knows a will contains a scrivener's error that makes the terms incompatible with the testator's intentions.[399]

The obvious problem stems from the statute's limitation, which only allows personal representatives to point out a scrivener's error while section 255.455 maintains that personal representatives have no obligation to do anything about known scriveners' errors.[400] Accordingly, the statute allows for consciously known scriveners' errors, in some situations, to be

391. *See supra* Part V.A.
392. *See supra* Part V.A.
393. *See supra* Part V.A.
394. *See supra* Part V.A.
395. *See* EST. § 255.451.
396. *See supra* Part V.A.
397. *See supra* Part V.A.
398. *See* EST. § 255.451 (limiting who may petition a will solely to personal representatives).
399. *See* EST. § 255.455. The statute explicitly states, "[a] personal representative is not liable for failing to file a petition under Section 255.451." *Id.*
400. *See* EST. §§ 255.451, 255.455 (indemnifying personal representatives from obligations to take action to correct a known scrivener's error).

uncontestable and irremediable.[401] Accordingly, the proposed amendment allows for any interested person or organization to petition the court to reform a will.[402] This approach provides interested parties with the ability to protect the testators' intentions from mistakes, while maintaining the protection afforded to personal representatives through section 255.455.[403] Next, the proposed amendment adds subsection (a)(4) and subsection (c) to account for changes in circumstances.[404] Subsection (a)(4) is an ambitious provision designed to account for situations like the Johnsons'.[405] Ultimately, the provision takes a progressive approach to solving a problem that legislatures have left unaddressed, and often irremediable, in most jurisdictions.[406] It aims to provide a practical solution to a potentially realistic issue.[407]

The conception of the provision starts from a layman's point of view, resulting in the following foundational premise: people want their possessions to be distributed according to their wishes, not always their wills.[408] When a person goes through the trouble to generate a will, we presume they intended for their possessions to be distributed according to their wills, not through intestacy.[409] Situations involving out-of-date wills and unforeseen circumstances are intuitively realistic.[410] From a normative standpoint, Texas law should attempt to provide a solution, outside of intestacy, that allows courts to at least review the evidence.[411] Subsection (c) aims to ensure that a court only honors a change in circumstances when the testator documented his change of intent via writing, or signing a printed document.[412] The statute requires the testator to date the document upon creation.[413] If Texas is reluctant to embrace the ambitious approach advanced by the additions of subsection (a)(4) and subsection (3), then Texas should

401. *See* EST. §§ 255.451, 255.455 (indemnifying personal representatives from obligations to take action to correct a known scrivener's error).

402. *See supra* Part V.A.

403. *See supra* Part V.A.

404. *See supra* Part V.A.

405. *See supra* Part V.A.

406. *See* EST. § 255.451. *See generally* Flannery v. McNamara, 738 N.E.2d 739, 740 (Mass. 2000) (upholding the plain meaning rule and refusing to modify unambiguous wills); *In re* Estate of Mildrexter, 971 P.2d 758, 760 (Kan. Ct. App. 1999) (holding that courts may not modify unambiguous wills); COLO. REV. STAT. ANN. § 15-11-806 (West 2010) (only allowing courts to modify an unambiguous will when petitioners prove a mistake of fact or law at the time the will was executed by clear and convincing evidence).

407. *See supra* Part V.A.

408. *See supra* Part I.

409. *See* Rebecca Berlin, *Why You Need a Will*, ALLLAW, http://www.alllaw.com/articles/wills_and_trusts/article2.asp [https://perma.cc/P8NF-6FUQ] (last visited Feb. 4, 2016).

410. *See* Dan Prebish, *Why Your Will May Be Out of Date*, FORBES (Apr. 28, 2015), http://www.forbes.com/sites/nextavenue/2015/04/28/why-your-will-may-be-out-of-date/#6cc2da295794 [https://perma.cc/VXE5-CCCQ].

411. *See supra* Part V.A.

412. *See supra* Part V.A.

413. *See supra* Part V.A.

adopt the alternative amendment, which does not include the additions of subsection (a)(4) and subsection (3).[414]

Significantly, the proposed amendment does not change any terms in subsection (a)(3).[415] The clear and convincing standard provides a fundamental element to ensure the effectiveness of the modern approach.[416] The high standard of clear and convincing evidence ensures that courts have the ability to determine that outside evidence substantially shows the terms of a will are do not reflect the testator's actual intentions before modifying the will.[417]

Ultimately, the proposed amendment to section 255.451 provides a more effective legal path to protecting testators' intentions by providing remedial relief to interested parties, allowing courts to correct mistakes, and account for realistic changes in circumstances.[418] It disposes of the need for courts to focus on distinguishing between types of ambiguities, which are often close calls, and in many instances, dispositive to a case.[419] In addition, it entrusts judges with discretion to discern whether evidence is fraudulent or insightful, while providing all potentially interested parties with access to Texas's courts.[420] Adopting one of the proposed amendments would advance Texas's public policy interests and protect Texas's testators by replacing ambiguous statutory language and providing all interested parties with the ability to contest wills that contain mistakes.[421]

414. *See supra* Part V.A.
415. *See supra* Part V.A.
416. *See* Fortenberry, *supra* note 158.
417. *See supra* Part V.A.
418. *See supra* Part V.A.
419. *See supra* Part V.A.
420. *See supra* Part V.A.
421. *See supra* Part V.A.