SHAPE UP OR SHIP OUT: ACCOUNTABILITY TO THIRD PARTIES FOR PATENT AMBIGUITIES IN TESTAMENTARY DOCUMENTS

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I. INTRODUCTION

The attorney’s preparation of a testamentary document (hereinafter sometimes referred to as a will or revocable trust) should clearly and accurately reflect the client’s last wishes. Although these testamentary documents should reflect the client’s intent, they often fall short of accomplishing that goal. There are numerous examples of will and trust construction cases that exhaust tremendous resources in an effort to ascertain the client’s wishes or intent. Many of these cases involve the construction of patent and/or latent ambiguities which should have been resolved by appropriate

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1 In this article, references to the term ‘testamentary’ document are intended to include a valid will and/or valid revocable trust. A will becomes effective upon the testator’s death. A revocable trust becomes irrevocable upon the settlor’s death. This article’s focus is limited to the disposition of the preparer’s property at his or her death through these testamentary documents. See Black’s Law Dictionary 1513 (Bryan A. Garner ed., 8th ed., West 2004). Other testamentary documents, such as life estate deeds, are beyond the scope of this article.


3 Except for a few jurisdictions, the preparation of a revocable trust generally is not monitored by statutory formalities. See e.g. Fla. Stat. Ann. § 689.075 (West 1994 & Supp. 2004). Throughout this article all references to trusts are limited to a trust in which the settlor retains the right to revoke and has a retained interest for his or her life. Thus, the completed transfer of the beneficial interest takes place upon the settlor’s death. Dobris, supra n. 2, at 512.

4 See e.g. Auric v. Contl. Cas. Co., 331 N.W. 325, 329 (Wis. 1983) (stating it was a “constitutional right to make a will and have it carried out according to the testator’s intention”).

5 See Dobris, supra n. 2, at 302; see also Blodget v. Delaney, 201 F.2d 589, 593 (1st Cir. 1953) (finding that “the extent of a beneficiary’s interest is determined by the intention of the testator ascertained by reading his language with reference to the circumstances surrounding its use”); Dauphin Deposit Trust Co. v. McGinnis, 324 F.2d 458, 462 (3d Cir. 1963) (stating that “[the] intention of the testator must be ascertained from a consideration of the entire will, including the language used, the scheme of distribution, and the attendant circumstances”); Scott T. Jarboe, Student Author, Interpreting a Testator’s Intent From the Language of Her Will: A Descriptive Linguistics Approach, 80 Wash. U. L. Q. 1365, 1366 n. 6 (2002) (stating that “the determination of the testator’s intent is the ‘pole star’ of judicial interpretation”).

6 Dobris, supra n. 2, at 302 (pointing out that sometimes what the client expects and what occurs are markedly different). This difference may result from the natural course of events or from attorney malpractice. This article addresses the latter instance and what may be done to protect client expectations and the interests of third parties.

7 See infra pt. IV.B. (providing examples of will construction cases); see also Hebden v. Keim, 75 A.2d 126, 128 (Md. 1950) (finding that it was not the testatrix’s intention to give the sum of $8,000 to her brother’s estate if he predeceased her, and therefore, demonstrating that costs of litigation could easily exceed the $8,000 harm to the beneficiary).

8 See e.g. Havman v. Thomas, 44 Md. 30, 49 (App. 1876) (stating that “patent ambiguities appear[ing] on the face of the writing itself, as a general rule, cannot be explained or removed by extrinsic evidence. In such a case, the court’s [function is to] ascertain the meaning of the words actually employed, not the secret intention of the party”); Maguire v. Maguire, 34 So. 443, 446 (La. 1903) (holding that when interpreting wills, the intent of the testator guides the court, the construction of a will must not put into the mouth of the testator that which he refrained from saying); In re Wainwright’s Estate, 101 A.2d 724, 725 (Pa. 1954) (stating that “where a testator fails to [provide] for a contingency which actually happens, courts do not have authority to insert a
drafting. This article’s scope is limited to patent ambiguities caused by the attorney’s negligence and their detrimental impact on third parties. In these situations, the patent ambiguity is easily identified and the claim of negligence is clear. A patent ambiguity is obvious from the face of the will and is easily discovered prior to the testator’s death. For example, a patent ambiguity exists where two different provisions of a will dispose of the same plot of land to different devisees. The attorney’s close reading of the will should have discovered this error. The attorney’s failure to correct the patent ambiguity prior to the testator’s death has detrimental consequences for the third party harmed. Extrinsic evidence is generally not admissible to resolve a patent ambiguity, because courts are unwilling to add to or detract from the written words of the will.

The Rules of Professional Conduct require competent representation of the estate-planning attorney (hereinafter “Ethical Rule”). The existence of a patent ambiguity in a testamentary document suggests that the estate-planning attorney has in some way failed to render competent legal services. Although a violation of this Ethical Rule does not give rise to a malpractice action, a patent ambiguity reflects so poorly on the attorney’s standard of care that a permitted inference of negligence should be drawn.

When the testamentary document includes a patent ambiguity, a malpractice action brought by the estate is of little consequence because the estate is rarely lessened in value by the negligence. Instead, provision into the will and supply the omission under the assumption that it was the intention of the testator”).

A latent ambiguity is discovered when the personal representative attempts to carry out the provisions of the will or trust. See Scheurer v. Tomberlin, 240 So. 2d 172, 176 (Fla. App. 1st Dist. 1970) (finding the absence of actual grandchildren in the face of a bequest for the benefit of “presently living grandchildren” was a latent ambiguity in the will. Extrinsic evidence, including the relation of the parties was admissible to show the persons to whom decedent intended).


11. This author believes that attorneys should also be accountable to third parties in the case of some latent ambiguities, but that issue will be addressed in a subsequent article.


14. Model R. Prof. Conduct 1.1 (ABA 2004). This rule requires that a “lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Id.

15. The term ‘estate-planning attorney’ is used throughout this article to mean the attorney responsible for preparing the will or revocable trust. The reference in no way suggests a specialization or expertise in the estates and trust field and excludes non-lawyers. If a non-lawyer prepares the testamentary document, it is unclear as to what duties and responsibilities attach. See Angela M. Vallario, Living Trusts and the Unauthorized Practice of Law: A Good Thing Gone Bad, 59 Md. L. Rev. 595, 620-22 (2000) (discussing the standard of care and problems associated with non-lawyers engaging in this service).


17. The standard of care in drafting wills varies among jurisdictions. A majority of jurisdictions apply one of three standards: An objective standard, community standard or subjective standard. See e.g. Wright v. Williams, 121 Cal. Rptr. 194, 199 (2d Dist. 1975) (discussing that the objective standard requires the attorney to use reasonable prudence and skill); Transamerica Ins. Co. v. Keown, 451 F. Supp. 397, 401 (D.N.J. 1978) (stating that the community standard compares an attorney’s conduct to that of other attorneys practicing in the same or a similar community); Palmer v. Nissen, 256 F. Supp. 497, 501 (D. Me. 1966). The subjective standard is based on the premise that if an attorney acts on his or her own best-founded belief, he or she will not be liable.

18. See pt. III.B.1 (discussing the permitted inference of negligence due to the existence of a patent ambiguity).

third parties who lose their inheritances due to a patent defect should have legal recourse to be made whole. In this instance, compensatory damages should be used as the appropriate remedy in which what would have been received but for the error is compared to what was received. Yet, current law does not provide a remedy because an attorney’s duty to his or her client to draft a testamentary document free from patent ambiguities does not automatically extend to third parties at the client’s death. In order to provide an adequate remedy to third parties when a testamentary provision fails because of a patent ambiguity, changes in the law are warranted. The attorney’s duty to draft testamentary documents free from patent ambiguities must automatically extend to third parties and extrinsic evidence must be admissible for the third party to prove harm. These changes will provide third parties with both recourse to pursue their claim and a remedy.

This article first describes patent ambiguities and the rule of construction relating to the admissibility of extrinsic evidence in ascertaining a testator’s intent. Secondly, the article addresses the attorney’s duty of care owed to clients in the preparation of testamentary documents. Thirdly, the article analyzes and critiques the existing methods used by third parties bringing a cause of action against the negligent drafter. Finally, this article addresses alternatives and concludes that the only way to adequately police and deter patent errors from occurring is to allow the malpractice action to proceed and allow for the admission of extrinsic evidence so the third parties are able to establish harm.

unsuccesfully argued for the recovery of their costs of litigating a will construction case).

21. See Dan B. Dobbs, Law of Remedies 3 (2d ed., West 1993); see also Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1951) (explaining that “[a] fundamental principle of the law of damages is that a person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with loss sustained in consequence of defendant's act which gives rise to action”); Phillips v. Chesson, 8 S.E.2d 343, 347 (N.C. 1950) (determining that the “objective of any proceeding to rectify a wrongful injury resulting in loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money”).

22. See infra pt. IV.B. (discussing approaches for accountability to third parties).

23. The term ‘testator’ is used generically throughout this article to describe a male or female person who prepares a will, and also the client signing the testamentary document. In the case of a revocable trust the person creating the trust is referred to as “settlor.”