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# THE SECRET LIFE OF TESTAMENTARY SCHEMES

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## ABSTRACT

*The role of testamentary schemes within the legal framework for ascertaining donative intent in wills has long been undertheorized. Courts frequently refer to these schemes when interpreting wills but have neglected to position them as either an element of a will's plain language or as a form of extrinsic evidence. This Article reveals that testamentary schemes enable a probate court to declare a will's language plain even when the will suffers from significant omissions in its dispositive provisions. As a device that ensures a certain elasticity in the interpretation of wills, testamentary schemes have enabled wills to retain their vitality when the passage of time has rendered their provisions obscure or obsolete.*

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## I. INTRODUCTION

Throughout his illustrious career on the federal bench, Judge Learned Hand touched only rarely on the law of wills. One of the aphorisms he coined in a statutory interpretation case, though, figures prominently in the law of will interpretation. In rejecting a literal interpretation of a statute that would

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have had the effect of eviscerating its purpose,<sup>1</sup> Hand wrote, “[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”<sup>2</sup> He “refused to be bound by the letter, when it frustrates the patent purpose of the whole statute.”<sup>3</sup>

Clarity of meaning is held in high regard by probate courts and would seem to be inconsistent with using sympathy and imagination to “discover” it. Judge Hand, however, was not endorsing the invention of meaning where it does not exist.<sup>4</sup> His primary objection was to reading words in isolation and ignoring the reason why the draftsman chose them.<sup>5</sup> He implored courts to seek out the “patent purpose” of legislation.<sup>6</sup> Using this purpose as a lens, courts can more readily discern the plain meaning of a document and avoid a more complicated and less precise interpretative process.<sup>7</sup>

The modern approach to will interpretation reflects Hand’s wisdom. It grants wide discretion to probate courts to interpret the words of a will in light of their testamentary purpose<sup>8</sup> and to reform those words where they are not quite up to the task of promoting that purpose.<sup>9</sup> The first task in this heuristic approach is to identify the testamentary purpose in the explicit language of the will read in the light of the circumstances under which the will was written.<sup>10</sup> Testamentary schemes provide courts greater insight into the meaning of the language of the wills that courts examine and may help them avert a finding that a will’s meaning is ambiguous. Courts can, in this manner, achieve a more streamlined and efficient resolution to questions of testamentary interpretation.

The primary problem with this approach is that testamentary schemes have never been regularized in the law of will interpretation. Their use may appear not to be in keeping with that law’s fairly rigid doctrinal framework.

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1. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff’d sub nom. Markham v. Cabell*, 326 U.S. 404 (1945).

2. *Id.*

3. *Id.*

4. *See id.*

5. *Id.*

6. *Id.*

7. *See id.*

8. *In re Murray*, 921 N.Y.S.2d 161, 166 (App. Div. 2011).

9. *See generally* *Read v. Legg*, 493 A.2d 1013, 1017 (D.C. 1985).

10. *Guar. Tr. Co. of N.Y. v. Stevens*, 146 A.2d 97, 102 (N.J. 1958).

This Article aims to place the testamentary scheme firmly within the traditional doctrinal framework of will interpretation by defining its role with a clarity previously unexplored in either primary or secondary authorities on will interpretation. The following discussion explores the what, where, and how of testamentary schemes. Part II discusses the origins of testamentary schemes and distinguishes them from concepts with which they are easily confused. Part III discusses the areas of probate law within which testamentary schemes figure prominently and the primary policy goals they serve. Part IV laments the “secret life” of testamentary schemes and defines with particularity their proper role within the traditional process of will interpretation.

## II. THE WHAT: TESTAMENTARY SCHEMES IN WILLS LAW

The law of wills emphasizes above all the importance of determining and carrying out the intention of testators.<sup>11</sup> Throughout legal history, this objective has been pursued in various ways. The law of will interpretation has evolved gradually and nearly imperceptibly from a set of inflexible rules to an almost organic, contemporary approach of interpretation that examines each will on its own terms in the light of the circumstances surrounding its execution.<sup>12</sup> Professor John Wigmore, the noted evidence scholar, described this evolution in legal interpretation generally as “a progress from a stiff and superstitious formalism to a flexible rationalism.”<sup>13</sup>

British barrister Francis Vaughan Hawkins captured the formalism of the pre-nineteenth-century approach to will interpretation in his voluminous

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11. See, e.g., *Bird v. Wilmington Soc’y of Fine Arts*, 43 A.2d 476, 480 (Del. 1945); *Read*, 493 A.2d at 1016 (citing *Wyman v. Roesner*, 439 A.2d 516, 520 (D.C. 1981)); *Castruccio v. Estate of Castruccio*, 196 A.3d 912, 918 (Md. Ct. Spec. App. 2018) (quoting *Walters v. Walters*, 3 H. & J. 201, 205 (Md. 1811)), *cert. denied*, 463 Md. 149 (2019); *Sutherland v. Flaherty*, 298 N.E.2d 869, 871 (Mass. App. Ct. 1973); *Strauss v. Van Beuren*, 378 A.2d 1057, 1058 (R.I. 1977); *Schreiner v. Riemcke* (*In re Estate of Riemcke*), 497 P.2d 1319, 1323 (Wash. 1972); *Farmers Merchs. Bank v. Farmers Merchs. Bank*, 216 S.E.2d 769, 772 (W.V. 1975).

12. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010); *In re Maloney Tr.*, 377 N.W.2d 791, 797 (Mich. 1985); *Epworth Children’s Home v. Beasley*, 616 S.E.2d 710, 715 (S.C. 2005).

13. See *Hembree v. Quinn* (*In re Estate of Russell*), 444 P.2d 353, 359 (Cal. 1968) (quoting 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2461, at 187 (3d ed. 1940), *reprinted in* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 417, 421–22 (6th ed. 2000)).

1863 treatise.<sup>14</sup> Considered rigid and restrictive today,<sup>15</sup> *A Concise Treatise on the Construction of Wills* receives no attention from courts or scholars and indeed could justifiably be dismissed as a complete anachronism, given the latitude courts currently employ in will-interpretation matters.

Hawkins's treatise begins with four grand propositions.<sup>16</sup> The first three are not the least bit controversial: one must find the intention of the testator in the meaning of the words used in the will;<sup>17</sup> "the words used must be *capable of bearing* the meaning sought to be put upon them";<sup>18</sup> and technical terms are given their technical meaning, unless there is an intention expressed in the will to the contrary.<sup>19</sup> The fourth proposition, however, is a marked departure from the first three:

Prop. IV. Notwithstanding the last two Propositions—the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of *ambiguous* words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity.<sup>20</sup>

Proposition IV might seem astonishing at first blush, asserting as it does that literal meanings, clear words, and the position of words in a will might at times be deemed subordinate to rather than indicative of intention.<sup>21</sup> It would be fair to ask whether Proposition IV goes beyond the "flexible rationalism" noted by Professor Wigmore and now embodied in the contemporary framework of will interpretation and construction.<sup>22</sup>

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14. FRANCES VAUGHAN HAWKINS, A CONCISE TREATISE ON THE CONSTRUCTION OF WILLS (1863) [hereinafter HAWKINS, CONCISE TREATISE]. The 1872 version of Hawkins's work includes references to the decisions of U.S. courts. FRANCES VAUGHAN HAWKINS, A CONCISE TREATISE ON THE CONSTRUCTION OF WILLS (John Sword ed., 1st ed. 1872) [hereinafter HAWKINS, WITH NOTES].

15. Michael Hancher, Comment, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 514 (1982).

16. See HAWKINS, WITH NOTES, *supra* note 14, at 1.

17. *Id.*

18. *Id.* at 2.

19. *Id.* at 3.

20. *Id.* at 4.

21. *Id.*

22. See WIGMORE, *supra* note 13, § 2461, at 187.

Any discussion of the contemporary role of intent in wills law must begin with the understanding that a testator's intention has absolutely no relevance if the words used in the will are not susceptible of that meaning.<sup>23</sup> In other words, the intent that matters is what is meant by what is said and not by what the testator meant to say but did not say.<sup>24</sup> Even Judge Hand recognized this truism when he remarked, "[I]t is the court's duty to find out the legal effect of documents and to construe the language of the testator, without regard to his unexpressed intent."<sup>25</sup>

The classic formulation of the interpretative process in wills law is linear.<sup>26</sup> A probate court initially looks for testamentary intent in the will's plain language.<sup>27</sup> As is well known, this principle is more fraught in its application than its seeming simplicity might suggest, as even a cursory examination of will-construction cases will attest.<sup>28</sup> Part of the trouble lies in the corollaries to this principle. The plain language of a will, it seems, may not be plain in any fixed sense but instead be plain depending upon what lens one uses to read it. Contemporary doctrine holds that a court may always consider the circumstances surrounding the execution of the will when interpreting its words;<sup>29</sup> moreover, the reading of the will must be

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23. *Bankers Tr. Co. v. Allen*, 135 N.W.2d 607, 610–11 (Iowa 1965).

24. *Id.* at 610.

25. *Boal v. Metro. Museum of Art*, 292 F. 303, 304 (S.D.N.Y. 1923), *rev'd*, 298 F. 894 (2d Cir. 1924).

26. *See, e.g., In re Estate of Holbrook*, 166 A.3d 595, 599 (Vt. 2017).

27. *Id.*

28. *See, e.g., id.*

29. *See, e.g., Hembree v. Quinn (In re Estate of Russell)*, 444 P.2d 353, 360 (Cal. 1968) ("[W]e think it is self-evident that in the interpretation of a will, a court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made . . ."); *In re Estate of McGahee*, 550 So. 2d 83, 86 (Fla. Dist. Ct. App. 1989) ("Whether or not the will is ambiguous on its face, the court is required to receive and consider evidence of the circumstances surrounding its execution in determining testamentary intent."); *Hobbs v. Winfield*, 805 S.E.2d 74, 76 (Ga. 2017); *Legare v. Legare*, 490 S.E.2d 369, 371 (Ga. 1997) (citation omitted) ("Proof of the situation and circumstances of a testator and his family, of his property and legatees, and the like, is always admissible to aid in the construction of a will."); *Breckheimer v. Kraft*, 273 N.E.2d 468, 470–71 (Ill. App. Ct. 1971); *Bowler v. Benoit (In re Will of Bruce)*, 79 N.Y.S.3d 10, 11 (App. Div. 2018); *Weisner v. Ginsberg*, 80 N.Y.S.3d 5, 6 (App. Div. 2018); *Strauss v. Van Beuren*, 378 A.2d 1057, 1058 (R.I. 1977). A Montana court's description of its interpretative method suggests the whole will and the circumstances surrounding its execution are not considered unless the meaning of the will is not plain. *See In re Estate of Ayers*, 161 P.3d 833, 835 (Mont. 2007).

“sympathetic”<sup>30</sup> and “liberally interpret[ed].”<sup>31</sup> The court will determine the intention “by the language used in the will, the scheme of distribution, the circumstances surrounding the will’s execution and the existing facts.”<sup>32</sup> The court must not only give each provision meaning and effect but strive to do so in the light of what is contained in the entire will.<sup>33</sup>

Where the court finds the language not plain but instead ambiguous, it introduces extrinsic evidence to resolve the ambiguity.<sup>34</sup> If the ambiguity cannot be thereby resolved, the court resorts to rules of construction, rules that embody the presumed intent of a reasonable testator.<sup>35</sup> Extrinsic evidence is thus “properly admissible,” as Hawkins notes, to resolve ambiguous language at stage two of the process, but it would not be admissible, or even necessary, to admit extrinsic evidence at stage one.<sup>36</sup> Hawkins’s suggestion that extrinsic evidence might be introduced at this point to *control* the meaning of plain language and even to cut against the literal meaning of the words appears to be a departure from the traditional framework.<sup>37</sup>

The best explanation for Proposition IV’s seeming departure from well-settled interpretative norms is that it contains a primordial understanding of what we now call the testamentary scheme.<sup>38</sup> Given that the search for plain language in wills is seldom as trouble free as it might sound, a court may always consider the circumstances surrounding the execution of the will in its effort to establish the testator’s intention.<sup>39</sup> Indeed, estates-and-trusts scholars have challenged the notion that wills ever contain language that is truly plain.<sup>40</sup> Any language, they claim, “is so colored

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30. *In re Fabbri’s Will*, 140 N.E.2d 269, 271 (N.Y. 1957).

31. *Holubar v. Brown (In re Estate of Etmund)*, 900 N.W.2d 536, 542 (Neb. 2017).

32. *In re Estate of Thompson*, 511 N.W.2d 374, 377 (Iowa 1994); *see also Shaw v. Shaw*, 276 S.W.2d 699, 703 (Ark. 1955).

33. *Thompson*, 511 N.W.2d at 377.

34. *In re Estate of Holbrook*, 166 A.3d 595, 599 (Vt. 2017).

35. Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 70 (2005).

36. HAWKINS, *CONCISE TREATISE*, *supra* note 14, at 5.

37. *Id.*

38. *See* 96 C.J.S. *Wills* § 906 (2011).

39. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 (AM. LAW. INST. 2003).

40. *See In re Fabbri’s Will*, 140 N.E.2d 269, 273 (N.Y. 1957) (“The law takes into consideration the relative inadequacy of words as a vehicle for communicating intent . . .”).

by the circumstances surrounding its formulation that evidence regarding the [testator's] intention is always relevant."<sup>41</sup> The use of the term *facts and circumstances* adds elasticity to the interpretive process, but a definition of this term has been elusive.<sup>42</sup> These circumstances might include the testator's occupation, the property owned at the time of will execution, and the relationships the testator had with family members or others.<sup>43</sup> Included with testators' property and the objects of their bounty might be the mechanism that they chose for the disposal of their property.<sup>44</sup> "[T]he inherent danger of fraud" in allowing this class of evidence to range too widely inspired one court to describe it as necessarily narrow.<sup>45</sup>

In gathering evidence of the facts and circumstances surrounding the execution of the will, a court is endeavoring to place itself as nearly as possible within the situation of the testator when the will was executed.<sup>46</sup> Knowing the testator's situation can bring even the meaning of "clear and unequivocal" language into sharp focus<sup>47</sup> and, in Hawkins's parlance, control the sense of clear words. The words of a will become especially clear if the court can discern why the testator's purpose used those words in the first place.<sup>48</sup> Testamentary purposes are not themselves facts or circumstances; they are instead the logic behind testators' choices to include the particular dispositive provisions that they do.<sup>49</sup> Probate courts today call the testator's

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41. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. b.

42. *Id.* § 10.2 cmt. d.

43. *Id.*; *see, e.g.*, *McFarland v. Chase Manhattan Bank, N.A.*, 337 A.2d 1, 6 (Conn. Super. 1973) (listing "the relations between the testator and a legatee at time of execution" as a surrounding circumstance to be considered), *aff'd*, 362 A.2d 834 (Conn. 1975) (per curiam).

44. *Ezell v. Head*, 27 S.E. 720, 722 (Ga. 1896); *see also Rosa v. Palmer*, 411 A.2d 12, 13 (Conn. 1979).

45. *Delay v. Estate of Bergau (In re Estate of Bergau)*, 684 P.2d 734, 737–38 (Wash. Ct. App. 1984), *rev'd*, 693 P.2d 703 (Wash. 1985).

46. *Estate of Kuhn v. Kuhn*, 491 P.2d 937, 939 (Kan. 1971); *Hays v. Johnson*, 189 N.W.2d 475, 477 (Neb. 1971); *Stewart v. Selder*, 473 S.W.2d 3, 7 (Tex. 1971).

47. *Schauf v. Thomas*, 498 P.2d 256, 262 (Kan. 1972); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. d ("[W]hen the fact tends to illuminate the meaning of the text employed, it is proper to show . . . [what] a [testator] knew or believed . . .").

48. *Schauf*, 498 P.2d at 262 ("[T]he court must . . . from a consideration of that situation . . . determine as best it can the purpose of the testator . . .").

49. *See Christy v. Tett (In re Tr. of Cross)*, 551 N.W.2d 344, 346 (Iowa Ct. App. 1996); *see also Pamela Champine, Expertise and Instinct in the Assessment of*

testamentary purpose the will's testamentary scheme or "scheme of distribution."<sup>50</sup> Like the situation of the testator, the testamentary scheme is not considered extrinsic to the will; thus, it does not run afoul of the rule barring extrinsic evidence in the absence of an ambiguity.

#### A. Plan or Purpose?

The term *testamentary scheme* appears frequently in the contemporary jurisprudence of wills but is not itself a legal classification one can find in an encyclopedia, a legal dictionary, the index of a treatise, or a digest. Not itself a legal doctrine then, it is instead an aid in the application of interpretative principles by probate courts. Professor Mark Glover's recent discussion of the different faces of testamentary intent<sup>51</sup> explains that a testamentary scheme is susceptible of more than one meaning.<sup>52</sup> One may equate it with the testamentary character of an instrument<sup>53</sup> that is often "manifest on the face of a formal will" but may surface only after more careful examination of an unattested will.<sup>54</sup> The second meaning of *testamentary scheme* likens it to the purpose behind a will's dispositive provisions.<sup>55</sup> It is with the second meaning of *testamentary scheme* that we are concerned in this Article.

There is scant mention of testamentary schemes in case law prior to 1900. A survey of the cases reveals the term is used differently in those older decisions from the way it is used in jurisprudence today. First, in the older cases, the term arises in the arguments of litigants in will contests rather than in will-construction proceedings.<sup>56</sup> In these contests, litigants seek to block the admission of the will to probate and have the estate distributed in intestacy.<sup>57</sup> The primary argument made by the plaintiffs in these contests is

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*Testamentary Capacity*, 51 VILL. L. REV. 25, 36 (2006).

50. See, e.g., *Roll v. Newhall*, 888 N.W.2d 422, 426 (Iowa 2016); *Christy*, 551 N.W.2d at 346.

51. See generally Mark Glover, *A Taxonomy of the Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016).

52. *Id.* at 569.

53. *Succession of Acheé*, 229 So. 3d 5, 9–10 (La. Ct. App. 2017) (distinguishing between testamentary and precatory provisions).

54. *In re Will of Smith*, 528 A.2d 918, 920 (N.J. 1987).

55. Glover, *supra* note 51, at 573–74 nn.27–28.

56. See, e.g., *Newsom v. Tucker*, 36 Ga. 71, 74 (1867).

57. See, e.g., *id.*



that the testator's purpose was to benefit certain individuals in ways that were undermined by the defendant's undue influence or by subsequent, unanticipated events.<sup>58</sup> Some of these arguments also posit that certain particulars of the testator's scheme were left out of the will altogether.<sup>59</sup> The thrust of these arguments is that either the testator had a purpose to give certain individuals certain properties that is at odds with the contents of the will or that only parts of the scheme made it into the will.<sup>60</sup> This is not the sort of proceeding anticipated by either Hawkins's Proposition IV or by a will-construction matter today, and even in these older cases, the plaintiffs had little success.<sup>61</sup>

Where a judge rather than a litigant employs the term *testamentary scheme* in these early cases, it is referring to the testator's specific dispositive provisions or plan.<sup>62</sup> By contrast, where a court employs the term *testamentary plan*, it assumes the meaning that modern courts give to *testamentary scheme*,<sup>63</sup> that is, the purpose behind the plan. In short, the early decisions used the terms *scheme* and *plan* in a manner opposite to the way they are used today.<sup>64</sup>

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58. See, e.g., *id.* (discussing objections to the admission to probate of a will that bequeathed enslaved persons later freed by the Emancipation Proclamation); cf. *Shea v. Lomme*, No. CV084008580, 2009 WL 659060, at \*7 (Conn. Super. Ct. Feb. 10, 2009) (discussing a change in zoning regulations that caused the devise of real estate with instructions that it be subdivided to lapse into illegality).

59. See, e.g., *Harris v. Pue*, 39 Md. 535, 541 (1874) (arguing about a bequest alleged to be omitted from the will).

60. See, e.g., *Frierson v. Beall*, 7 Ga. 438, 440 (1849).

61. HAWKINS, WITH NOTES, *supra* note 14, at 4.

62. See, e.g., *Ezell v. Head*, 27 S.E. 720, 722–23 (Ga. 1896) (finding the “scheme of equalization” explicit in a will rendered impracticable by the Emancipation Proclamation); *Wikle v. Wooley*, 7 S.E. 210, 211 (Ga. 1888) (holding unanticipated events rendered carrying out the scheme impracticable); *Fairchild v. Edson*, 48 N.E. 541, 545 (N.Y. 1897) (discussing a new scheme to devote the estate to religion and charity); *People v. Simonson*, 27 N.E. 380, 381 (N.Y. 1891) (noting the explicit direction of reserving the residuary estate to the founding of a benevolent institution); *Appeal of Wetter*, 12 A. 260, 261 (Pa. 1888) (finding an explicit “scheme” to postpone legacies until after remarriage or the death of the surviving spouse).

63. See, e.g., *In re Denton*, 33 N.E. 482, 483 (N.Y. 1893) (describing the testamentary plan as “seek[ing] to preserve the estate in the family of the testator”).

64. See, e.g., *Ezell*, 27 S.E. at 722–23; *Wikle*, 7 S.E. at 211; *Fairchild*, 48 N.E. at 545; *Simonson*, 27 N.E. at 381; *Wetter*, 12 A. at 261. But see *Denton*, 33 N.E. at 483.

The word *scheme*, in many contexts, denotes something that has not been executed or finalized.<sup>65</sup> A scheme can range from a set of not-yet-articulated intentions to the roughing out of a project, such as when we refer to a schematic of complex electronic circuitry or an artist's preparatory schematic for a monumental painting.<sup>66</sup> A scheme can also be a system or pattern discernible in a finished project or a map or diagram that helps us understand the thought process that went into making it.<sup>67</sup> This latter usage is consonant with the meaning of *scheme* in the law of wills, where the second meaning of *testamentary scheme*, as Professor Glover points out, means the will's overall intent that we discern by reading its dispositive provisions as a whole instead of in isolation.<sup>68</sup> This overall testamentary intent has also been called "the intention of the testator as gathered from the entire instrument."<sup>69</sup>

Indeterminacy in the meaning of *testamentary scheme* in the legal literature is compounded by the frequent use of other, less precise terms to indicate it. Perhaps due to the influence of the older cases described above, *testamentary plan* is one culprit. In *Jewett v. Commissioner*, for example, the remainder of a testamentary trust was to be divided into equal shares with one distributed to each surviving child and one to each living representative of a predeceased child.<sup>70</sup> The Court remarked, "[U]nder the testamentary plan, if petitioner survived his mother, he would receive one share of the corpus of the trust; if he predeceased his mother, that share would be distributed to his issue."<sup>71</sup> Here, the Court is applying the explicit terms of the will to alternative hypothetical situations to disclose the purpose the testator wanted to promote by means of the explicit dispositive provisions she used.<sup>72</sup> By labeling the scheme a *testamentary plan*, the Court missed an opportunity to distinguish them.<sup>73</sup> *Jewett*, admittedly, is a tax case and not a

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65. See *Scheme*, THE CONCISE OXFORD DICTIONARY 1079 (Richard E. Allen ed., 8th ed. 1990).

66. *Id.*

67. *Id.*

68. Compare Glover, *supra* note 51, at 573, with *Scheme*, *supra* note 65.

69. *Atkinson v. Kettler*, 372 S.W.2d 704, 710 (Tex. Civ. App. 1963), *aff'd sub nom. Kettler v. Atkinson*, 383 S.W.2d 557 (Tex. 1964).

70. *Jewett v. Comm'r*, 455 U.S. 305, 306 (1982).

71. *Id.*

72. See *id.*

73. See *id.*

probate case; nonetheless, probate courts have been guilty of the same imprecision.<sup>74</sup>

*Jewett* reveals that the bigger problem with describing a testamentary scheme as a testamentary plan is that the two are not synonymous.<sup>75</sup> It is true that outside the wills context, *plan* and *scheme* are interchangeable. They can both refer to the taking of steps to effect a certain objective. Inside the wills context, *plan* and *scheme* are not so interchangeable. Individuals may plan to make a will in the future by listing the provisions they want it to contain but never effectuate a testamentary scheme that becomes the focus of a will-construction matter. The central figure in *In re Will of Smith*, for example, handed her attorney a piece of notebook paper listing the provisions she wanted her will to contain and said, “[T]his is my will, this is the way I want my estate to go.”<sup>76</sup> Even though the list was in her handwriting and signed by her at the end, the circumstances did not suggest she intended it to be her will, even provisionally: “The court determined that Mrs. Smith intended the challenged writing to be used as the basis for the preparation of a will, and not as a will itself.”<sup>77</sup> In effect, Smith had testamentary plans because she had written down her plan of distribution, but whatever scheme was the driver of that plan became irrelevant once the court ruled that her plan had never been finalized.<sup>78</sup>

The most common definition of *testamentary plan* in the jurisprudence is a summary of a will’s dispositive provisions.<sup>79</sup> One iteration (from a New York case) claims to capture the contours of the testamentary plan of most testators:

Experience has shown that in the great majority of wills, the preliminary legacies are given to charities, distant relatives, and friends of the testator. The residue is usually given to the spouse for life or absolutely or to the children or to the dependent and nearer relatives either outright or in trust.<sup>80</sup>

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74. See *id.*; Glover, *supra* note 51, at 574 (citing *Snide v. Johnson (In re Snide)*, 418 N.E.2d 656, 657 (N.Y. 1981) (citations omitted)).

75. See *Jewett*, 455 U.S. at 306–09, 318–19.

76. *In re Will of Smith*, 528 A.2d 918, 919 (N.J. 1987).

77. *Id.*

78. See *id.* at 920.

79. See, e.g., 96 C.J.S. *Wills* § 904 (2011).

80. *In re Byrnes’ Estate*, 267 N.Y.S. 627, 631 (Sur. Ct. 1933); see also Note, *Salvaging a Will After the Widow Renounces*, 61 HARV. L. REV. 850, 851 (1948).

Judge James Foley here is describing how wills often follow the same template.<sup>81</sup> He is not referring, as did the *Jewett* court, to what testamentary purpose might be inferred from that template.<sup>82</sup>

In addition to describing a scheme as a plan, courts sometimes describe a plan as a scheme.<sup>83</sup> One court remarked:

The testator created the following three alternative testamentary schemes. First, he provided for successive life estates in his children, their children, and their grandchildren; second, he provided in the saving clause a time for final distribution and vesting of the property in the event of a possible violation of the rule against perpetuities under the first scheme; and third, he provided for alternate beneficiaries in the event all of the named beneficiaries predeceased him.<sup>84</sup>

This use of *plan* is also salient in cases where a spouse's election to take a forced share creates "substantial distortion of the intended dispositions of the testator."<sup>85</sup> When a spouse elects against a will, the testator's estate is diminished, and the bequests to the other legatees suffer a "loss by subtraction."<sup>86</sup> That result is felt to be inequitable because most testators do not expect the surviving spouse to elect against the will, and the testator's "express or implied purpose" will be defeated thereby.<sup>87</sup> A court hearing such a matter struggles to give the bequests to the other legatees "full force and effect so far as any estate remains from which they may be paid"<sup>88</sup> and,

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81. See *Byrnes*, 267 N.Y.S. at 631.

82. Compare *Jewett v. Comm'r*, 455 U.S. 305, 306 (1982), with *Byrnes*, 267 N.Y.S. at 631.

83. See, e.g., *Norton v. Ga. R.R. Bank & Tr.*, 322 S.E.2d 870, 875 (Ga. 1984).

84. *Id.*

85. MD. CODE ANN., EST. & TRUSTS § 3-208(b)(3) (West 2019); see also *In re McRae*, 146 N.W. 265, 266–67 (Mich. 1914); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 126 (2d ed. 1953); Elias Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 514 (1970); Note, *Abatement of Legacies on Election of Statutory Share by Surviving Spouse*, 43 YALE L.J. 655, 658 (1934) (citing *In re Disston's Estate*, 101 A. 804, 806 (Pa. 1917)).

86. *Dowell v. Dowell*, 9 A.2d 593, 594 (Md. 1939).

87. Andrew W. Tanick & Pamela L. Johnson, *Probate Reform: The New Minnesota Elective Share Statutes*, 70 MINN. L. REV. 241, 248–49 (1985).

88. *Adams v. Legroo*, 89 A. 63, 64 (Me. 1913); see also *In re Devine's Estate*, 263 N.Y.S. 670, 675 (Sur. Ct. 1933) (describing the task of the court as "preserv[ing] so far as is possible the testamentary scheme and the relative equities of the beneficiaries").

in so doing, keep the testamentary plan intact to the extent possible.<sup>89</sup> The doctrines of sequestration and contribution are aids in this task. They enable a court to earmark the property governed by the renounced provision or provisions for the benefit of the disappointed beneficiaries and require all beneficiaries to share the burden equally, unless it can discern “an obvious intention to the contrary deduced from the manifest purpose of the testator in the disposition of his bounty.”<sup>90</sup> The testator’s presumed purpose, though, is that the testamentary plan be altered as little as possible if the surviving family members invoke their statutory rights.<sup>91</sup> The modern jurisprudential trend tracks this presumed purpose insofar as it looks to nonprobate assets first and strives to leave charitable gifts undisturbed.<sup>92</sup> Pretermitted-child cases follow a similar pattern: the court will distribute what remains as closely as possible to the “plan” of the dispositive provisions, which means roughly in proportion to the original bequests.<sup>93</sup>

A good example of a court’s making a clear distinction between a testamentary plan and a testamentary scheme is *Tooahnippah v. Hickel*, the sole U.S. Supreme Court case that mentions a testamentary scheme.<sup>94</sup> Congress vested the Executive Branch with the power to scrutinize and overturn testamentary dispositions of Indian allotments when they lack a

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89. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2019); *Estate of Ziegenbein v. Hastings Coll.*, 519 N.W.2d 5, 9 (Neb. Ct. App. 1994); *In re Wurmbrand’s Estate*, 86 N.Y.S.2d 705, 707 (Sur. Ct. 1949) (declaring that the recovery must be “in proportion to and out of the parts devised and bequeathed to them by such will”), *aff’d sub nom.* *Fish v. Feldzman (In re Wurmbrand’s Estate)*, 90 N.Y.S.2d 686 (App. Div. 1949) (mem.).

90. *Legroo*, 89 A. at 64; *see also* KY. REV. STAT. § 394.480(1) (West 2019) (saying that when the surviving spouse takes an election, the other devisees will contribute proportionally to the election “unless the will otherwise directs, or it is necessarily to be inferred therefrom that the testator intended the same to fall on such devisee”); UNIF. PROBATE CODE §§ 2-301(b), 2-302(d), 3-902 (UNIF. LAW COMM’N amended 2010).

91. *See Legroo*, 89 A. at 64.

92. *In re Byrnes’ Estate*, 267 N.Y.S. 627, 630 (Sur. Ct. 1933); *see, e.g.*, FLA. STAT. ANN. §§ 732.2075, 733.805 (West 2019); *see also* Richard W. Effland, *The Elective Share*, in REPORT OF THE COMMISSIONS STUDY AND RECOMMENDATIONS CONCERNING MAINE PROBATE LAW 74, 75 (1978) (“The elective share should disrupt the estate plan as little as possible.”).

93. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(c) (“In abating the interests of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.”).

94. *Tooahnippah v. Hickel*, 397 U.S. 598, 610 (1970).

rational basis.<sup>95</sup> The Secretary of the Interior's job, then, is to consider the primary purpose behind any such testamentary plan.<sup>96</sup> In this case, the Court determined the scheme was rational: the testator had benefited his niece to the exclusion of his daughter because he wanted to favor a relative who had befriended him and omit one who had not.<sup>97</sup> The Court made explicit use of facts and circumstances (the testator's friendship with a relative) to explain that the dispositive provisions (gifts to the niece and none to the daughter) had a rational purpose (to favor the niece over the daughter).<sup>98</sup>

Another example is *Kelley v. Neilson*.<sup>99</sup> There the testator devised real estate to her son for life and the remainder to her granddaughter.<sup>100</sup> At the time of the testator's death, the property was subject to an executory contract of sale to a third party.<sup>101</sup> The question was whether the executory contract caused the gift of the real estate to adeem.<sup>102</sup> In ruling that it did, the court relied on its assessment of the testator's testamentary scheme.<sup>103</sup> Although a contrary testamentary scheme can override the default rule of ademption,<sup>104</sup> here it did not because the testator's scheme, as reflected in the way the gift was structured, "was not to give this plaintiff the full economic value of the . . . property."<sup>105</sup> Had it been decided that the gift did not adeem, the plaintiff would have received "an unjust windfall" that would have run contrary to the testator's purpose.<sup>106</sup>

Note that in neither *Toohnippah* nor *Kelley* does the court equate a testamentary scheme with a mere precatory statement of motives for

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95. *Id.* at 609–10.

96. *See id.* at 617 (Harlan, J., concurring).

97. *Id.* at 598, 600, 610 (majority opinion); *see Ducheneaux v. Sec'y of the Interior of the U.S.*, 837 F.2d 340, 345 (8th Cir. 1988) (finding a rational testamentary scheme behind an express disinheritance of a spouse where the couple had been separated for nine years at the time of the testator's death).

98. *Hickel*, 397 U.S. at 610.

99. *See Kelley v. Neilson*, 745 N.E.2d 952, 960–61 (Mass. 2001).

100. *Id.* at 958.

101. *Id.* at 955–56.

102. *See id.* at 956–57.

103. *Id.* at 960–61.

104. *Id.* at 957.

105. *Id.* at 960.

106. *Id.* Note that under the Uniform Probate Code, a specific devisee has a right to any balance of the purchase price left unpaid at the death of the testator. UNIF. PROB. CODE § 2-606(a)(1) (UNIF. LAW COMM'N amended 2010).

executing a particular plan of distribution.<sup>107</sup> A testamentary scheme forms part of a testator's enforceable intention, whereas precatory language expresses merely what the testator desires.<sup>108</sup> In short, a testamentary scheme is a mandate and precatory language is not. As a practical matter, however, it can be a hair-splitting exercise to decipher whether language expressing purposes and motives is an expression of a desire or a mandate. It is advisable to leave this language out of wills, lest a court determine it does not reflect a settled intention and cannot be employed to interpret the will's dispositive provisions. The fact that the language appears in an executed will is not necessarily sufficient to transform precatory into mandatory language. For example, the words "I want to treat my children equally," appearing in a validly executed will without any accompanying dispositive provisions, would result in the testator dying intestate. Similarly, a mistake regarding whether a conveyance has already been made cannot be transformed into a testamentary mandate:

[W]here the testator in his will recites erroneously that he has conveyed certain of his real estate by deed to a certain named person, it does not show an intention to dispose of the property by will, but merely the testator's opinion as to the legal effect of some pre-existing instrument.<sup>109</sup>

Of even greater concern is the danger that this language will breed an expensive will contest that could invalidate the will altogether.<sup>110</sup> In the typical case then, it is enough to allow the explicit testamentary plan to convey an implicit testamentary purpose.<sup>111</sup>

The difficulty in identifying a testamentary scheme, then, is that it is usually not explicitly described in the will but will be revealed by examining the dispositive provisions in light of the facts and circumstances attending the execution of the will. Though it is not necessary in every case to engage in this exercise, as we will see in Part III, the need to do so increases with the complexity of the estate plan.

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107. See generally *id.*; *Tooahnippah v. Hickel*, 397 U.S. 598, 600 (1970).

108. See Richard F. Storrow, *Wills and Survival*, 34 QUINNIPIAC L. REV. 447, 479–81 (2016) [hereinafter Storrow, *Survival*].

109. *In re Estate of Ayers*, 161 P.3d 833, 836 (Mont. 2007) (internal quotation marks omitted) (citation omitted).

110. See, e.g., *Lipper v. Weslow*, 369 S.W.2d 698, 700–01 (Tex. Civ. App. 1963) (quoting a will that contained a long explanation of reasons for disinheriting relatives).

111. See, e.g., *Ayers*, 161 P.3d at 836; *Lipper*, 369 S.W.2d at 700–01.

### B. *The Dominant Purpose*

Part II.A established that a testamentary plan consists of a will's dispositive provisions and that a testamentary scheme is the testator's purpose for choosing those provisions. Using the word *purpose* to define *scheme*, however, will not sufficiently strengthen an interpretative framework in need of greater rigor.

Probate courts not only make imprecise distinctions between *scheme* and *purpose* but are inconsistent in the way they refer to testamentary schemes. Some of this imprecision is owing to the method that courts employ to uncover the testamentary scheme of a will, otherwise known as the "four corners doctrine." Courts have often emphasized that the doctrine is a rule barring the admission of extrinsic evidence when interpreting documents that are not ambiguous.<sup>112</sup> But the real point of the four corners doctrine as a rule of will interpretation is that a probate court should not read the will's provisions in isolation but instead should consider them in the light of the language of the entire will<sup>113</sup> with a view to harmonizing them.<sup>114</sup> The rule itself states: "The intent of the testator must be 'gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed.'"<sup>115</sup> In doing so, a court seeks "to discover whether [the will] discloses an underlying intent which should be considered in finding the meaning to be accorded to the particular language under construction."<sup>116</sup> This underlying intent is sometimes described as the will's general intention,

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112. *In re Estate of Romanowski*, 771 N.E.2d 966, 972 (Ill. App. Ct. 2002); *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006); *Estate of Catherine L. Deuser*, 14 QUINNIPIAC PROB. L. J. 363, 368–69 (2000).

113. 96 C.J.S. *Wills* § 904 (2011); *Vito v. Grueff*, 160 A.3d 592, 605 (Md. 2017). *But see In re Conner's Estate*, 178 A. 15, 18 (Pa. 1935) ("Where a testator uses language that is plain and certain, which does not conflict with any other part of the will, there is no necessity to consider the entire instrument." (quoting *In re Sheldrake's Estate*, 162 A. 823, 824 (Pa. 1932))).

114. *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) ("We look to the instrument's language, considering its provisions as a whole and attempting to harmonize them so as to give effect to the will's overall intent."); *see also Gutierrez v. Stewart Title Co.*, 550 S.W.3d 304, 313 (Tex. Ct. App. 2018).

115. *In re BNY Mellon*, 2 N.Y.S.3d 757, 766 (Sur. Ct. 2014) (quoting *In re Fabbri's Will*, 140 N.E.2d 269, 271 (N.Y. 1957)).

116. *Estate of Catherine L. Deuser*, *supra* note 112, at 369 (quoting *Dei Cas v. Mayfield*, 508 A.2d 435, 437 (Conn. 1986)).



its general scheme, or its primary intention.<sup>117</sup> Courts must subordinate their interpretation of specific words or phrases in the will to this general intention,<sup>118</sup> which, after all, is nothing other than the will's testamentary scheme.<sup>119</sup>

Various other terms are used by courts as stand-ins for *testamentary scheme*. One of them is *dominant plan*.<sup>120</sup> The term *plan* is unfortunate because, as discussed above,<sup>121</sup> it applies equally to testamentary plans made but never executed and to dispositive provisions that have been finalized with will formalities. A more precise term is *dominant purpose*.<sup>122</sup> In *Jewett*, discussed above,<sup>123</sup> whether the express contingencies were part of a scheme that had some dominant purpose was not discussed. By contrast, in *Allen v. Trust Co. of Georgia*, the court determined the settlor's establishment of a spendthrift trust benefiting his children had the dominant purpose of providing support for them,<sup>124</sup> rather than some other purpose (e.g., rewarding them for their loyalty or thrift).<sup>125</sup>

Understanding a testamentary scheme to be a will's dominant purpose helps us understand that a testamentary scheme is not a plan but rather an objective; it is the objective behind the testator's choice of particular dispositive provisions. One reason why courts often fail to distinguish a will's plan from a will's purpose is that testamentary plans and purposes are associated not only with ascertaining a particular testator's testamentary

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117. 96 C.J.S. *Wills* § 906.

118. *Id.* §§ 904, 906 (“[T]he former must give way to the latter . . .”); *Hollingsworth v. Blaine* (*In re Hollingsworth's Estate*), 99 P.2d 599, 601 (Cal. Dist. Ct. App. 1940); *Pitman v. Colo. Nat'l Bank* (*In re Paulsen's Estate*), 158 P.2d 186, 191 (Colo. 1945) (“All subordinate provisions bend in construction as the testator's main purpose . . .”); *Grimm v. Kruse* (*In re Estate of Grimm*), 705 N.E.2d 483, 496 (Ind. Ct. App. 1999) (“[A] lawful general intent expressed in a will must be given effect at the expense of any particular intent.”); *In re Estate of McCabe*, 703 N.Y.S.2d 559, 561 (App. Div. 2000) (“If a reading of the will evinces a dominant plan of distribution, the various provisions must be interpreted in light of that purpose.”); *Bloom v. Selfon*, 555 A.2d 75, 78 (Pa. 1989); *Hill's Adm'rs v. Hill*, 103 S.E. 605, 607 (Va. 1920); 80 AM. JUR. 2D *Wills* § 989 (2013).

119. 96 C.J.S. *Wills* § 906.

120. *See Weisner v. Ginsberg*, 80 N.Y.S.3d 5 (App. Div. 2018).

121. *See supra* Part II.

122. *See, e.g., In re Murray*, 921 N.Y.S.2d 161, 166 (App. Div. 2011).

123. *See supra* notes 72–76 and accompanying text.

124. *Allen v. Tr. Co.*, 326 U.S. 630, 637 (1946).

125. *See id.*

intent but also with the preliminary matter of convincing the court that the document it is examining is, in fact, a will.

Procedurally, the testator must comply with the execution requirements for wills to prevent any mistake about whether the document was prepared for a testamentary reason.<sup>126</sup> One could easily speak in this context of a will's testamentary plan or purpose. Either term would capture the need for the manner of a will's execution to be such as to convey to the courts that a testator understood the task at hand as the execution of a will. Referring to a testamentary purpose in this context would appear to have to do more with concerns about due execution and general testamentary intent than with the specific scheme of a given testator.<sup>127</sup> Thus, in *Wilson v. Polite*, the court remarked that the document must evince a completed testamentary purpose via the placement of the testator's signature at the end.<sup>128</sup> This use of *purpose* is meant merely to answer whether a particular document is a will at all.<sup>129</sup> Relatedly, the document must be testamentary in nature:

The mere fact that a document has been executed with all the formalities required of a will does not alone entitle it to probate as a will valid to pass property. It must appear to seek to accomplish some one or more of the purposes of the testator. It may be a post-obit disposition of the property of the testator. It may appoint a testamentary guardian. It may name only an executor. All of these are testamentary objects, purposes to be posthumously accomplished. It must reflect an intent by the maker to perform some testamentary function.<sup>130</sup>

This substantive feature requires the "language used by the decedent to express his testamentary purpose,"<sup>131</sup> that is, the decedent's purpose to write a will.<sup>132</sup> Words that designate the document as a will or words making dispositive provisions would qualify.<sup>133</sup> In short, a will must be executed with formalities and contain language that advances at least one of several,

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126. *Wilson v. Polite*, 218 So. 2d 843, 849 (Miss. 1969).

127. *See, e.g., Nat'l State Bank v. Stewart*, 39 A.2d 435, 437 (N.J. 1944).

128. *Polite*, 218 So. 2d at 853 (citing *Jones v. King (In re Estate of King)*, 203 So. 2d 581, 583-84 (Miss. 1967)).

129. *See id.* at 854.

130. *In re Hefner's Will*, 122 N.Y.S.2d 252, 253 (Sur. Ct. 1953).

131. *In re Stasis's Estate*, 307 A.2d 241, 243 (Pa. 1973).

132. *See id.*

133. *See, e.g., In re Kimmel's Estate*, 123 A. 405 (Pa. 1924).

recognized testamentary aims.<sup>134</sup> A court might describe either the procedural or the substantive component of will validity as having to do with testamentary plans or purposes, compounding the imprecision of terminology that makes the doctrinal framework so loose in this realm.

Defining a will's scheme as its dominant purpose would provide much needed doctrinal tightening in this area. Courts already use *purpose* by itself as a substitute for *testamentary scheme*, as when a court describes reading a will's four corners to seek the purpose of that particular testator.<sup>135</sup> A will's dominant purpose would not be confused with a mere purpose to write a will but would be more readily understood as what the testator wants to achieve through the will. This would leave the word *purpose*, when used alone, to relate to concerns about due execution and general testamentary intent rather than with the specific scheme of a given testator.<sup>136</sup>

### III. THE WHERE: TESTAMENTARY SCHEMES IN ACTION

Testamentary schemes arise primarily in matters of testamentary interpretation. As has been established, a testamentary scheme is a feature of a testator's intent that the will rarely makes explicit.<sup>137</sup> By way of illustration, several examples of the areas of probate law in which courts invoke testamentary schemes with some frequency are explored in this Part.

#### *A. Omissions*

Complex testamentary trust provisions are a fertile breeding ground for uncertainty in the disposition of estates. They gradually distribute the testator's property across successive generations until it, ultimately, goes outright to persons far removed from the circumstances in which the will was written. This manner of distribution exposes the testamentary provisions to changes in circumstances for which the provisions may be ill-adapted, leaving trustees to look to the courts to resolve questions that those provisions do not answer. The predictions of many testators are simply unequal to the unexpected events that befall families. With each passing generation, the risk of uncertainty increases. The passage of time allows for the evolution of circumstances that the will simply does not anticipate. This is particularly true of wills that create more than one trust and where those trusts eventually serve families of vastly different compositions, as where the

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134. *In re Weiss' Estate*, 279 A.2d 189, 192 (Pa. 1971).

135. *Rossi v. Rossi*, 448 S.W.2d 162, 165 (Tex. Civ. App. 1969).

136. *See, e.g., Nat'l State Bank v. Stewart*, 39 A.2d 435, 437 (N.J. 1944).

137. *See supra* Part II.

testator's will creates trusts for two children for their lives, with the remainder to their issue, and one child dies leaving many descendants, while the other dies not having had any children. Does the remainder of the second child's trust pass to the beneficiaries of the first child's trust, or does it pass to the testator's heirs?

The case of *In re Fabbri's Will*,<sup>138</sup> the case most cited by New York courts on the function of testamentary schemes, followed this pattern.<sup>139</sup> Alessandro Fabbri's will divided his residuary estate into two trusts, one for his brother Ernesto for his life and the other for Ernesto's wife Edith for her life.<sup>140</sup> The remainder of Ernesto's trust was designated for three of Alessandro's sisters or their surviving issue.<sup>141</sup> The remainder of Edith's trust was designated for the grandchildren of Edith that Alessandro indicated he would eventually choose and record in writing.<sup>142</sup> Alessandro, however, did not do so.<sup>143</sup> A reading of the entire will convinced the court that, despite the missing subsequent writing, Alessandro had made an unconditional gift of the remainder to Edith's grandchildren because this was his testamentary purpose.<sup>144</sup> The court based its conclusion on a study of Alessandro's testamentary plan, the facts and circumstances attending the execution of the will, and what all of this evidence suggested about his testamentary scheme. The plan was to give his wealth to certain members of a family that consisted of two brothers, four sisters, and their families.<sup>145</sup> Ernesto and his wife Edith were particularly favored in this plan.<sup>146</sup> From this, the court inferred, "It is no more than natural to assume that their progeny were held in high favor by Alessandro . . . ."<sup>147</sup> In this light, the plan to designate which grandchildren would take the remainder of Edith's trust reads less as a failure to designate a taker than it does as a reservation of the right to favor certain takers, if desired, by means of an apportionment "reserved for future

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138. *In re Fabbri's Will*, 140 N.E.2d 269 (N.Y. 1957).

139. *Id.* at 270.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 271-72.

145. *Id.* at 271-73.

146. *Id.* at 272.

147. *Id.*

determination.”<sup>148</sup> The court inferred this dominant purpose from the instrument itself rather than from any evidence extrinsic to it.<sup>149</sup>

The more recent case of *In re BNY Mellon* was similar. The will divided the residuary estate into two trusts, one for each of the decedent’s two children: Arthur and Jane.<sup>150</sup> As Arthur and his wife were childless, the remainders of these trusts benefited Arthur’s wife and the issue of Jane in provisions that gave each issue of Jane a final distribution of principal at the age of 65.<sup>151</sup> That much was clear. The will, however, did not address what should happen if a taker of the remainder under Arthur’s trust should die before the age of 65 or predecease either Arthur or Jane without issue.<sup>152</sup> It also did not address what should happen if a remainder taker, under either trust, were to die before age 65 without leaving issue.<sup>153</sup> The court resolved the first dilemma by describing the language of the will as evidencing a scheme to treat Arthur and Jane equally and identically.<sup>154</sup> Thus, provisions in Jane’s trust that addressed the possibility that one or more of her issue might die before age 65 were read into Arthur’s trust.<sup>155</sup> The court resolved the second issue similarly by concluding that the share of a child predeceasing Jane without issue should be subject to the provision governing the share of a child who died after Jane but under age 65.<sup>156</sup>

Note that in neither *Fabbri* nor in *BNY Mellon* was ambiguous language the problem. The problem was, as the *BNY Mellon* court put it, a lack of “clear direction.”<sup>157</sup> Lacking extrinsic evidence of intent, the court merely grasped at what “appeared” to be the testator’s intent to treat his children the same through essentially identical trusts.<sup>158</sup> The testamentary scheme helped fill a gap in the language of a will that provided “no direction” about what the provisions meant in light of the changes in the family that had occurred.<sup>159</sup> The testamentary scheme cured the lack of direction by

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148. *Id.*

149. *See id.* at 273.

150. *In re BNY Mellon*, 2 N.Y.S.3d 757, 761 (Sur. Ct. 2014).

151. *Id.* at 761–62.

152. *Id.* at 766.

153. *Id.* at 770.

154. *Id.* at 766.

155. *Id.*

156. *Id.* at 770.

157. *Id.* at 768.

158. *Id.* at 769.

159. *Id.* (emphasis added).

giving the court latitude to “excise, modify or transpose . . . to harmonize”<sup>160</sup> or “add inadvertently omitted words.”<sup>161</sup>

### B. Gifts by Implication

Gifts by implication are somewhat of an aberration in the law of wills. After all, the rules of interpretation both forbid reading in meanings the testator’s words cannot sustain and absolutely prohibit carrying out intentions the testator may have had but never put into words. To imply a gift into a will cuts directly against these seemingly hard and fast rules; nonetheless, the law of wills has developed an elasticity, holding that if the departure from the rules does not happen too often and is allowed only where there is the highest degree of proof, i.e., beyond a reasonable doubt, then the rules can indeed be bent so as to permit what are known as gifts by implication.

As this example suggests, gifts by implication usually involve wills that do not cover all contingencies, as where a will bestows the testator’s residuary estate in a certain manner, such as “if my mother survives me,” but neglects to state what should happen to the residuary if she does not.<sup>162</sup> In these cases, an explicit intent is simply missing. Extrinsic evidence is rarely available to fill the interpretative gap, and rules of construction do not address it.<sup>163</sup> The presumption against intestacy is often used as a makeweight in this context, but since omission cases are not truly cases of ambiguity, there is nothing upon which that presumption can operate.<sup>164</sup>

Take, for example, *McKinney v. Mosteller*, involving a testator whose spouse and children predeceased him.<sup>165</sup> The testator’s will offered two alternatives, one if his spouse predeceased him and the other if she did not.<sup>166</sup> Under the first alternative, the testator devised certain tracts of real property to friends and did not mention the residue of his estate.<sup>167</sup> Under the second

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160. *Id.* at 766 (internal quotation marks omitted).

161. *Id.* at 770.

162. *See In re Bieley*, 695 N.E.2d 1119, 1120 (N.Y. 1998).

163. *Id.* at 1123.

164. *McKinney v. Mosteller*, 365 S.E.2d 612, 614 (N.C. 1988) (affirming the purpose of gifts by implication is not merely to avoid intestacy); Richard F. Storrow, *What’s Wrong with Partial Intestacy?*, 100 MARQ. L. REV. 1387, 1404 (2017) [hereinafter Storrow, *What’s Wrong?*].

165. *McKinney*, 365 S.E.2d at 613.

166. *Id.*

167. *Id.*

alternative, the testator settled his estate into a trust for the life of his spouse and the remainder to the same friends.<sup>168</sup> The court could discern a testamentary scheme going back through several of the testator's prior wills to provide for his spouse for her life and his son for his life but to dispose of his estate with finality on institutions and persons unrelated to him.<sup>169</sup> The will did not reflect this same scheme with regard to the first alternative.<sup>170</sup> The remainder beneficiaries argued that a gift by implication of the residue to them should be read into the provision governing the disposition of the estate should the testator's wife predecease him.<sup>171</sup> They were successful in the intermediate court of appeals but could not persuade the Supreme Court of North Carolina.<sup>172</sup> Succinctly put, the will bestowed the ultimate residuary upon the petitioners only in an explicit set of circumstances that did not and could not occur, namely, the survival of the spouse followed by the end of her life estate.<sup>173</sup> Although extrinsic evidence might have suggested the testator meant to include a similar bequest if the spouse did not survive the testator, the four corners of the will did not.<sup>174</sup> The petitioners simply could not carry the heavy burden of proof required to establish a gift by implication.<sup>175</sup>

*McKinney* hews to a rigid set of interpretative principles, but the majority of gift by implication cases contain analysis that is considerably looser. Consider *In re Bellows*.<sup>176</sup> In this case, the testator's will bequeathed the residue of her estate to a trust, the income from which was to be shared by her husband and children for his life.<sup>177</sup> At the death of the husband, the remainder was to be divided into as many shares as the testator had children surviving at that time and placed into trusts giving each surviving child a life estate with the remainder to go outright to the child's issue, if any, or to the surviving siblings.<sup>178</sup> Oddly, the testator never specified what should become of the remainder interest of the last child to die if that child died leaving no

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168. *Id.*

169. *Id.*

170. *Id.* at 614.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 614–15.

175. *Id.*

176. *In re Bellows*, 480 N.Y.S.2d 925, 926 (App. Div. 1984), *aff'd*, 483 N.E.2d 130 (N.Y. 1985).

177. *Id.*

178. *Id.* at 926–27.

children, an eventuality that did occur.<sup>179</sup> The two competing positions were for distribution to the testator's grandchildren—the issue of the siblings who had predeceased the last child to die—or intestacy.<sup>180</sup> The court declared that a gift by implication in favor of the testator's grandchildren was supported by the testator's purpose “that the bulk of her estate enure to the benefit of her children or their lineal descendants”<sup>181</sup> and not to have any of her estate distributed in intestacy.<sup>182</sup> Not only were the testamentary trust's terms indicative of this purpose but another provision of the will made clear that the husband's life income would be reduced if he remarried or undertook to support his other relatives.<sup>183</sup>

The court in *Bellows* had difficulty with the requirement that the evidence in support of a gift by implication must be beyond a reasonable doubt.<sup>184</sup> It first stated that the facts “raise a firm presumption” of the gift and later said it “is more than sufficiently clear” that they do.<sup>185</sup> The court ultimately declared “no contrary intent can be supposed,” but its final conclusion was considerably diluted by the following tepid analysis: “It was obviously not her intent that any interest of such persons be defeated by the demise of her children ‘as it were, in the wrong order.’”<sup>186</sup> This conclusion does not meet the stringent standard.<sup>187</sup> If the gift were truly beyond a reasonable doubt, it would have been obvious that the testator's intention *was* to provide a gift to her grandchildren, a statement the court makes earlier in the decision.<sup>188</sup>

In sum, gifts by implication would not exist without testamentary schemes.<sup>189</sup> But what makes this doctrine seem internally inconsistent is that evidence of a gift by implication must be beyond a reasonable doubt.<sup>190</sup> Testamentary schemes, however, tend not to take on this quality of evidence;

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179. *Id.* at 927.

180. *Id.*

181. *Id.* at 931.

182. *See id.*

183. *Id.* at 929, 931.

184. *See id.* at 932.

185. *Id.* at 929, 932.

186. *Id.*

187. *See id.*

188. *Id.* at 930.

189. *See* discussion *supra* Part III.B.

190. *See* discussion *supra* Part III.B.



instead, they may be established by clear and convincing evidence.<sup>191</sup> In practice, though, gifts by implication can be declared without convincingly being beyond a reasonable doubt. This is probably because testamentary schemes do not need this degree of support. It would thus be possible for the law of will interpretation to do without gifts by implication and instead allow testamentary schemes to do the work of supplying omissions in wills.

### *C. Invalid Provisions*

It is hornbook law that the testator's intent should be carried out unless it is illegal or violates public policy.<sup>192</sup> When dispositive provisions in wills and public policy are in conflict, public policy prevails.<sup>193</sup> When they are not, the dispositive provisions will stand.<sup>194</sup> Identifying the testator's testamentary scheme can be critical to this determination.<sup>195</sup> Consider a Georgia statute governing illegal wills: "If a will is illegal in part, the part that is legal may be sustained; but if the whole will so constitutes one testamentary scheme that the legal portion alone cannot give effect to the testator's intention, the whole will shall fail."<sup>196</sup> References to testamentary schemes also appear in judicial interpretations of wills that contain invalid provisions, as found in the following general statement of law: "Where one provision of a will is invalid because it violates the rule against perpetuities and the testamentary scheme of the testators [sic] can be determined and carried out regardless of the void provision, that provision will be stricken out and the testamentary plan given effect."<sup>197</sup>

The jurisprudential work performed here is part of an effort to maintain the will's integrity when one or more provisions are invalid. An unreasonable restraint on alienation, for example, might be so intertwined with the dispositive provisions to which it is connected that the entire gift is undermined. The test of whether an invalid restraint is so "inseparably

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191. See, e.g., *Bellows*, 480 N.Y.S.2d at 929–31.

192. *Norton v. Ga. R.R. Bank & Tr.*, 322 S.E.2d 870, 872 (Ga. 1984); *Berry v. Union Nat'l Bank*, 262 S.E.2d 766, 769 (W. Va. 1980).

193. See *Norton*, 322 S.E.2d at 875.

194. *Id.*

195. See *id.*

196. GA. CODE ANN. § 53-4-57 (West 2019).

197. *Marsh v. Marsh (In re Dees' Estate)*, 308 P.2d 90, 95 (Kan. 1957) (quoting *Blake-Curtis v. Blake*, 89 P.2d 15, 15 (Kan. 1939)); see also *In re Dawe*, 81 N.Y.S.3d 727, 729 (Sur. Ct. 2018) (quoting *Smith v. Chesebrough*, 68 N.E. 625, 626 (N.Y. 1903)); 61 AM. JUR. 2D *Perpetuities, Etc.* § 75 (2012); 96 C.J.S. *Wills* § 962 (2011).

attached”<sup>198</sup> to the testamentary plan as to carry the gift down with it is difficult to articulate. Courts, faced with such a task, will sometimes declare the restraint to be “incidental” or a “mere detail” without a great deal of elaboration.<sup>199</sup>

In short, in the interpretation of wills that contain invalid provisions, a will may be deemed to represent one, unified scheme or, in the alternative, more than one scheme pursued separately from one another. Hence, a testamentary scheme may reveal a hierarchy of priorities consisting of primary and ancillary purposes. A court has a choice between two directions in these cases. When the valid part and the invalid part are one, unified scheme, which is “inseparable and dependent upon the general testamentary scheme,” they will fall together.<sup>200</sup> This approach is otherwise known as *infectious invalidity*.<sup>201</sup> By contrast, the valid portion may be upheld if doing so “would not defeat the primary or dominant purpose of the testator.”<sup>202</sup> More specifically, in the partial invalidity cases, a court undertakes to ascertain “whether the conveyer, if he had known of this partial invalidity, would have preferred that (a) all the balance of the attempted disposition take effect . . . or that (c) all the balance of the attempted disposition fail.”<sup>203</sup> This is a question that the dispositive provisions alone will not answer and makes the court’s resort to the will’s testamentary scheme necessary.<sup>204</sup>

In *Berry v. Union National Bank*, a testamentary trust to support the educational expenses of the testator’s descendants violated the rule against perpetuities.<sup>205</sup> Under the common law, the typical perpetuities problem can be cured by expunging the offending provision and leaving the balance of the conveyance intact.<sup>206</sup> In *Berry*, the court invoked the doctrine of

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198. 21 WILLIAM M. MCKINNEY & BURDETT A. RICH, *RULING CASE LAW* § 64, at 329 (1918).

199. *See, e.g.,* *Manierre v. Welling*, 78 A. 507, 523 (R.I. 1911).

200. *Atkinson v. Kettler*, 372 S.W.2d 704, 715 (Tex. Civ. App. 1963), *aff’d sub nom. Kettler v. Atkinson*, 383 S.W.2d 557 (Tex. 1964); 61 AM. JUR. 2D *Perpetuities, Etc.* §§ 77, 83–84.

201. *Perotti v. First Bank (In re Estate of Freeman)*, 404 P.2d 222, 229 (Kan. 1965).

202. *Atkinson*, 372 S.W.2d at 715; *see also* *Drach v. Ely*, 703 P.2d 746, 749 (Kan. 1985) (“A provision of a will which is invalid as a violation of the rule may be stricken out by the court to allow the testamentary plan to be given effect.”); MCKINNEY & RICH, *supra* note 198, § 64, at 329.

203. RESTATEMENT (FIRST) OF PROP. § 402 (1944).

204. *See id.*

205. *Berry v. Union Nat’l Bank*, 262 S.E.2d 766, 768 (W. Va. 1980).

206. Examples of striking out invalid provisions may be found at JESSE DUKEMINIER

equitable modification, enabling it to reform instruments that violate the rule in conformity with the testator's intent.<sup>207</sup> Doing so requires the court to distinguish between the testator's particular intent to violate the rule and the general intent, i.e., dominant purpose, in executing the will.<sup>208</sup> The particular intent behind a provision that violates the rule cannot be given effect but can be reformed in a manner consistent with the testator's nonviolative general intent, as long as the particular intent is not a "critical aspect" of the general intent.<sup>209</sup> Another way of expressing this is to say there must be no "overriding intention" to violate the rule.<sup>210</sup> The will in *Berry* is one of the rare ones that announces its testamentary scheme:

I believe it was the desire of my husband that such funds as I might have at my death should be used to help such persons (who are later defined in this section) obtain educations. This is the only expression I ever heard him make relative to the disposition of such funds.<sup>211</sup>

The court correctly determined that (1) this testamentary scheme did not violate the rule and that (2) the particular intent was not a critical aspect of the testamentary scheme, and in fact the will could be modified to bring the trust provision within the permissible scope of the rule.<sup>212</sup> The idea that a testamentary provision that otherwise violates the rule against perpetuities can be reformed in the foregoing manner is a feature of the Uniform Statutory Rule Against Perpetuities, allowing reform of a disposition "in the manner that most closely approximates the transferor's manifested plan of distribution."<sup>213</sup> Before these statutory reforms came into vogue, savings clauses were the mechanism of choice for avoiding a rule against perpetuities problem.<sup>214</sup>

In *In re Edwards' Will*, the court discerned that a series of limitations, some of which violated the rule against perpetuities, formed "such an integrated testamentary scheme that they cannot be separated from one

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ET AL., PROPERTY 292 (7th ed. 2010).

207. *Berry*, 262 S.E.2d at 770–71.

208. *Id.*

209. *Id.* at 771.

210. *Norton v. Ga. R.R. Bank & Tr.*, 322 S.E.2d 870, 875 (Ga. 1984).

211. *Berry*, 262 S.E.2d at 771.

212. *Id.*

213. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3 (UNIF. LAW COMM'N 2014).

214. *See, e.g., Norton*, 322 S.E.2d at 873.

another without defeating the organic plan of the testator.”<sup>215</sup> Because of the will’s discernible scheme, the court declared invalid the life estates upon which the invalid future interests were based, even though this was a departure from the general rule that the invalidity of future interests does not affect the validity of the underlying present possessory estates.<sup>216</sup> The court colorfully remarked that striking down the invalid future interests had the effect of “emasculating” the testator’s plan of distribution in its entirety<sup>217</sup> because the future interests had been crafted with the “principal purpose of supporting remainders which might not vest [until] a time beyond that allowed by law” instead of “benefit[ing] those who were to enjoy them.”<sup>218</sup>

By contrast, in *Blake-Curtis v. Blake*,<sup>219</sup> the court found the primary testamentary plan to sell a ranch and distribute the proceeds survived a void restraint on alienation in the will. The court remarked, “[T]he thing to be preserved is the testamentary scheme or plan of the testator. If taking out the void clause destroys this plan, then the entire will must fail. If the void clause can be taken out and the testamentary plan followed then that should be done.”<sup>220</sup> The limitation was, in essence, subordinate in importance to the primary testamentary scheme.<sup>221</sup>

Similarly, in *Manierre v. Welling*,<sup>222</sup> the testator wanted her adjoining tracts of land distributed among her children in order for their families to build country homes in proximity to one another and thereby continue in their “affectionate relations.”<sup>223</sup> In furtherance of this desire, she restrained the devisees from conveying the property to anyone who was not one of her descendants.<sup>224</sup> The idea appeared to be that if her family members were not

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215. *In re Edwards’ Will*, 180 A.2d 590, 591 (Pa. 1962) (quoting *In re Quigley’s Estate*, 198 A. 85, 88 (Pa. 1938)).

216. *Quigley’s Estate*, 198 A. at 88 (“The general doctrine is definitely opposed to this position. Ordinarily the validity of prior limitations is not affected or disturbed by reason of ultimate ones which transgress the rule against perpetuities.”).

217. *Edwards*, 180 A.2d at 592 (quoting *Quigley’s Estate*, 198 A. at 89).

218. *Id.* at 593; see also *In re Loomam’s Estate*, 261 N.Y.S. 576, 579 (Sur. Ct. 1932) (holding that upholding otherwise-valid life estates “would do such violence to the testator’s testamentary scheme”).

219. *Blake-Curtis v. Blake*, 89 P.2d 15, 22–23 (Kan. 1939).

220. *Id.* at 24.

221. See *id.*

222. *Manierre v. Welling*, 78 A. 507 (R.I. 1911).

223. *Id.* at 508.

224. See *id.* at 509.

restrained from transferring their land except to each other, then it would be less likely that they would continue in their affectionate relations, at least insofar as those relations would be dependent upon their vacationing in close proximity to one another.<sup>225</sup> The court ruled the restraint on alienation was incidental to the testator's dominant scheme of giving a parcel suitable for a country home to each of her children.<sup>226</sup> The restraint seemed more in the character of a "generating motive"<sup>227</sup> for distributing her property in that manner rather than in any way essential to the scheme.<sup>228</sup>

#### IV. THE HOW: TESTAMENTARY SCHEMES MADE PLAIN

As established above, testamentary schemes are of supreme importance to the law of will interpretation. Courts employ this concept to imbue even plain language with texture and depth and to fill in gaps in the language where the scheme plainly requires it. Schemes not only serve to embellish a court's understanding of a testator's intention but they also occupy a dominant position in the hierarchy of intention, permitting them to override any specific intent suggested by dispositive provisions viewed in isolation. Moreover, testamentary schemes give courts great power to modify wills: "Where a general testamentary scheme may be established, it is the court's duty to afford such purpose force and effect. [C]ourts may add, excise, modify or transpose language or provisions of the instrument to harmonize it with and to effectuate the testator's intent."<sup>229</sup>

With this power comes great responsibility, but the interpretive place of testamentary schemes has never been adequately defined in a manner that conveys their importance or allows courts to employ them consistently. They have not been definitively aligned with either the plain language of the will or with the need to construe a will. In the West Key Number System, cases mentioning testamentary schemes fall under both of these headings.<sup>230</sup> Courts and scholars have confused testamentary schemes with the

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225. *See id.* at 508.

226. *Id.* at 523.

227. *Colo. Nat'l Bank v. Comm'r*, 305 U.S. 23, 26 (1938).

228. *Manierre*, 78 A. at 523.

229. *In re BNY Mellon*, 2 N.Y.S.3d 757, 766 (Sur. Ct. 2014) (internal quotation marks omitted).

230. WESTLAW EDGE, [https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=Iecbf41931a965259522013be48748e12&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=Iecbf41931a965259522013be48748e12&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)) (last visited Nov. 26, 2019) (subscription required).

dispositive provisions they reflect or have thought of them as a tool for backing away from constructional devices such as statutory revocation, antilapse, or the various statutory protections of the family in probate matters.<sup>231</sup> Courts routinely feel compelled to bolster their use of testamentary schemes with inappropriate and unnecessary references to the presumption against intestacy and gifts by implication.<sup>232</sup>

The collective confusion about how to employ testamentary schemes in will-interpretation matters may indicate an ambivalence toward them, as if they do not possess adequate heft to be considered a stand-alone interpretative tool.<sup>233</sup> It is not my intention here to question the integrity of using testamentary schemes in this manner. The question of whether a court may go too far in its interpretation of a will based on its sense of the unarticulated purpose the testator was pursuing is a question for another day. Instead, I seek to define with particularity when the search for a will's scheme or purpose should take place, what purposes it may serve, and its limitations.

To place testamentary schemes within the traditional doctrinal framework of will interpretation requires a close look at their use and function. The three-stage will-interpretation framework described above contemplates that no extrinsic evidence will be used to interpret the will at stage one.<sup>234</sup> Extrinsic evidence is introduced only to resolve ambiguities in the will's terms at stage two.<sup>235</sup> If the ambiguity cannot thereby be resolved, the court employs rules of construction at stage three.<sup>236</sup> We know a testator's testamentary scheme is a matter of actual intention, but we do not know whether it should be used at stage one or stage two.<sup>237</sup>

A closer look reveals that testamentary schemes belong in stage one of the interpretative process.<sup>238</sup> The court at this stage is merely trying to determine whether the language the testator employed is plain.<sup>239</sup>

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231. See Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L.J. 98, 110, 140 (2019).

232. See *id.* at 153–54.

233. See *id.* at 145.

234. See *supra* Part II.

235. See *supra* Part II.

236. See *supra* Part II.

237. See *supra* Part II.

238. See *supra* Part II.

239. See *supra* Part II.

Testamentary language might be plain in the abstract but might be made plainer when certain particulars of the situation are considered.<sup>240</sup> The Supreme Court of Iowa has listed what these particulars are: the court will determine the intention by “(a) all of the language . . . [used in] the will, (b) the scheme of distribution, (c) the surrounding circumstances at the time of the will’s execution[,] and (d) the existing facts.”<sup>241</sup> Since this is what a court does at stage one of the process, none of what is listed here is considered extrinsic to the will.<sup>242</sup> Indeed, the testamentary plan and scheme and the other relevant facts and circumstances are all intrinsic to the creation of meaning in the first instance.<sup>243</sup>

Based on Parts II and III, and in the spirit of Francis Vaughan Hawkins’s *A Concise Treatise on the Construction of Wills*, I make three propositions: (1) a testamentary scheme is a dominant purpose that is intrinsic to the will; (2) a testamentary scheme is best used to bring plain language into sharper focus or to fill omissions in dispositive provisions; and (3) if a testamentary scheme can do either, evidentiary presumptions are irrelevant.

Recall the discussion of *Fabbri* above. The court there was faced with a choice between two analytical directions. It could have read the failure to name the takers of the remainder as a fatal omission or, as it did, as a reservation of the right to adjust the percentages of the remainder within the class of takers already named.<sup>244</sup> The court avoided any artificial use of the presumption against intestacy to address the problem<sup>245</sup> but, more importantly, did not declare the testamentary language ambiguous.<sup>246</sup> In truth, the court may not even have had that option: “It is a general rule that extrinsic evidence is not admissible to fill up a total blank on the face of a will, or to determine the person or property intended by the testator, where there is a total failure to designate any.”<sup>247</sup> Nonetheless, a court might be

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240. See *supra* Part II.

241. Roll v. Newhall, 888 N.W.2d 422, 426 (Iowa 2016).

242. See *id.*

243. See *id.* (citing *In re Estate of Roberts*, 171 N.W.2d 269, 271–72 (Iowa 1969)).

244. *In re Fabbri’s Will*, 140 N.E.2d 269, 271 (N.Y. 1957).

245. I have theorized elsewhere that presumption “plays the limited role of helping courts construe wills that contain an ambiguous bequest of the residue that cannot be resolved with the aid of extrinsic evidence.” Storrow, *What’s Wrong?*, *supra* note 164, at 1390.

246. See *Fabbri*, 140 N.E.2d at 272.

247. *Holcomb v. Newton*, 226 S.W.2d 670, 672 (Tex. Civ. App. 1950).

tempted to declare a provision ambiguous where partial intestacy might otherwise result.<sup>248</sup> Doing so, however, would have been administratively inefficient: the court would likely have considered the very same intrinsic evidence to resolve the ambiguity as it did to determine the language plain. Thus, consideration of the testamentary scheme afforded the advantage of streamlining the interpretation of Alessandro Fabbri's will.

What is impressive about *Fabbri* is that the court did not stop with concluding the gift to be complete but subject to revision.<sup>249</sup> It placed the reservation firmly within the testator's testamentary scheme in the following fashion:

The reservation is understandable when viewed in conjunction with the membership of the Clark family at the time of the making of the will. When the will was written Teresa Clark had but one child and he was then under two years of age. Under ordinary circumstances this class could be expected to increase during testator's lifetime. It was entirely possible that over the years some of the grandnephews and grandnieces might assume different places in the affection of the testator. Aware of this possibility, testator desired to allow their personal relationships to develop while at the same time preserving the inheritance for the grandnephews and grandnieces as a class.<sup>250</sup>

The court is using not only the language of the will but also the facts and circumstances surrounding it to describe the purpose behind the testator's distributive plan.<sup>251</sup> Circling back, the dominant purpose, then, makes the gift to Teresa Clark's issue that much clearer.<sup>252</sup> The entire analysis took place at stage one, no evidence extrinsic to the will was necessary, and rules of construction were rendered superfluous.<sup>253</sup>

Many cases express the sense that a testamentary scheme is something that springs unbidden from the printed word, a "natural impression conveyed to the mind on reading the will as a whole."<sup>254</sup> This sense is erroneous, as in the many cases that suggest the plain language test may get

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248. Storrow, *What's Wrong?*, *supra* note 164, at 1402.

249. *See Fabbri*, 140 N.E.2d at 272.

250. *Id.*

251. *See id.*

252. *Id.*

253. *See id.*

254. Succession of Laborde, 251 So. 3d 461, 464 (La. Ct. App. 2018).



in the way of ascertaining the scheme.<sup>255</sup> After all, if the scheme is so plain, wherein lies the danger that provisions read in isolation will somehow obscure it, as in the cases holding that a “particular or isolated” devise might conflict with or distort the scheme?<sup>256</sup> The *Fabbri* court’s painstaking analysis of both the testamentary plan and the facts and circumstances surrounding the will’s execution belie any impression that a will’s testamentary scheme will always be open and obvious.<sup>257</sup> At times, it will successfully be ascertained from the dispositive provisions alone, as in *Hill’s Administrators v. Hill*, where the provisions made an “arrangement for the children of my deceased son in order that they may share equally with my living sons.”<sup>258</sup> At other times, the discernment of the scheme will require more effort, as in *In re Charlton’s Estate*, where the court resorted to a holistic approach that included an examination of the will itself, its general scope, its logical implications, and its necessary inferences.<sup>259</sup> That methodical inquiry enabled the court to ascertain that the testator’s testamentary scheme was to preserve his collection of artifacts, to enlarge the museum where it was housed, and to fortify it for the benefit of the local citizenry.<sup>260</sup>

An approach to will interpretation that marries depth of analysis with judicial economy, as does the inclusion of testamentary schemes at stage one of the interpretation of a will, has many advantages to it. One could, though, raise the objection that the *Fabbri* court went too far. After all, wills are ambulatory, that is, subject to revocation or amendment at any time before the death of the testator.<sup>261</sup> As such, Alessandro could have used more definitive language to demonstrate the fixity of his intention and altered the will later if it was then his intention to do so. Moreover, it is not at all clear

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255. *Curry v. Guar. Loan & Tr. Co.*, 208 S.W.2d 465, 466 (Ark. 1948) (“[W]e may not look to a clause or a sentence thereof standing alone, but we should ascertain the intention of the testator from the language used as it appears from consideration of the entire instrument.” (internal quotation marks omitted)).

256. *Frost v. Dixon*, 49 S.E.2d 664, 666 (Ga. 1948); *Moore v. Smith*, 19 N.E.2d 223, 224 (Ill. App. Ct. 1939); *In re Miller’s Estate*, 186 A. 99, 101 (Pa. 1936); *In re Conner’s Estate*, 178 A. 15, 19 (Pa. 1935); *In re Parkin’s Will*, 43 A.2d 595, 596 (Pa. Super. Ct. 1945); *Hill’s Adm’rs v. Hill*, 103 S.E. 605, 607 (Va. 1920).

257. *See Fabbri*, 140 N.E.2d at 272.

258. *Hill*, 103 S.E. at 608.

259. *See Smacy v. Barry County (In re Estate of Charlton)*, 157 N.W.2d 821, 826 (Mich. Ct. App. 1968).

260. *Id.* at 826–27.

261. *Am. Comm. for Weizmann Inst. of Sci. v. Dunn*, 883 N.E.2d 996, 1002 (N.Y. 2008).

that Alessandro's future writing would have been enforceable if it was not executed with will formalities.<sup>262</sup> These points are valid, but they commit the infraction, so frowned upon in contemporary jurisprudence, of reading the provision in question in isolation. Such a technical and doctrinally based interpretation is out of keeping with the sympathy and imagination courts should bring to their exercises in will interpretation.

The advantages afforded by the *Fabbri* court's approach are underscored when studied in contrast to *Estate of Anselmo*.<sup>263</sup> The will in that case appointed the testator's stepson as the executor and bequeathed the entirety of the estate to him "[i]n the event that [the testator's] wife, Marie, and [the testator] die simultaneously or we die within 60 days of each other."<sup>264</sup> If Marie survived the testator, she was to be the executor and the beneficiary of the entire estate.<sup>265</sup> Marie predeceased the testator by more than 60 days, an eventuality the will did not explicitly cover.<sup>266</sup> The court also noted that the will failed to mention the testator's heirs at law.<sup>267</sup> Citing *Fabbri*, the court appeared poised to base its interpretation of the will on its testamentary purpose but never actually made mention of either a purpose or a scheme.<sup>268</sup> Instead, the court determined the testator "clearly" wanted his estate to go to his stepson under the circumstances and invoked the presumption against intestacy to "bolster" its conclusion.<sup>269</sup>

Why the *Fabbri* court made its interpretative conclusions at stage one but the *Anselmo* court felt compelled to invoke a presumption normally irrelevant until stage three<sup>270</sup> could be explained by the divergent facts of these cases. In *Fabbri*, there was plain language that needed clarification as

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262. See *id.* If not a valid codicil, the writing would not satisfy either the test for incorporation by reference or the test for acts of independent significance. See *In re Estate of Robbes*, 211 N.Y.S.2d 830, 832 (Sur. Ct. 1960); Storrow, *Survival*, *supra* note 108, at 487 ("The concern is that the testator may be altering his estate plan (beyond revocation) without the required formalities.").

263. See *In re Estate of Anselmo*, 817 N.Y.S.2d 892 (Sur. Ct. 2006).

264. *Id.* at 893.

265. *Id.* at 894.

266. *Id.*

267. *Id.* at 895.

268. *Id.* at 894 (citing *In re Fabbri's Will*, 140 N.E.2d 269 (N.Y. 1957)).

269. *Id.* at 895.

270. See Storrow, *What's Wrong?*, *supra* note 164, at 1402, 1404 (explaining how the presumption against intestacy enters the analysis once the court determines an ambiguity cannot be resolved by extrinsic evidence).

an unconditional gift.<sup>271</sup> In *Anselmo*, by contrast, language was missing from the will and had to be read into it.<sup>272</sup> It is understandable that a court would sense a greater urgency to support its analysis in the latter case given the worry that it might be criticized as supplying a provision that the testator did not.<sup>273</sup> One court stated:

Courts can and have gone to great lengths to spell out a testator's apparent intention where his purpose would be scuttled by awkward expression, unskilled wording or inept phraseology. Great latitude seems to prevail where courts strive to clarify a testator's evident design. Language may be made subordinate to meaning but courts should not mistake construction for recomposition.<sup>274</sup>

I would argue that relying solely upon the testamentary scheme would work just as well in *Anselmo* as in *Fabbri*, and that the failure to place enough weight upon it is what weakens *Anselmo*.<sup>275</sup> After all, we need only look to Proposition IV of Hawkins's treatise to understand that the *Anselmo* court would have been well within its purview to ground its conclusions at stage one and "supply the place of *express* words, in cases of difficulty."<sup>276</sup>

Most of the foregoing discussion has focused on the secret life of testamentary schemes: not only must they be uncovered but they are misunderstood. Albeit rare, a will may, of course, expressly state a testamentary scheme as was the case in *Berry*<sup>277</sup> or as we see in *Vito v. Grueff*, where the testator's will intended to "benefit his four children equally."<sup>278</sup> In these cases, if the meaning is plain, the testamentary scheme will more obviously be a matter of the will's plain language and can be used to imbue the dispositive provisions with greater clarity.<sup>279</sup> The court will refer back to

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271. *Fabbri*, 140 N.E.2d at 270.

272. *Anselmo*, 817 N.Y.S.2d at 894.

273. See *Fabbri*, 140 N.E.2d at 274 (admonishing courts not to "refabricat[e]" wills); *In re Falvey's Will*, 224 N.Y.S.2d 899, 905 (App. Div. 1962) (warning against "judicial draftsmanship"), *aff'd*, 186 N.E.2d 563 (N.Y. 1962).

274. *In re Astor's Will*, 162 N.Y.S.2d 46, 52–53 (Sur. Ct. 1957), *aff'd*, 172 N.Y.S.2d 780, 782 (App. Div. 1958).

275. Compare *In re Estate of Anselmo*, 817 N.Y.S.2d 892 (Sur. Ct. 2006), with *Fabbri*, 140 N.E.2d 269.

276. See HAWKINS, CONCISE TREATISE, *supra* note 14, at 5.

277. See *supra* note 208 and accompanying text.

278. See, e.g., *Vito v. Grueff*, 160 A.3d 592, 608 (Md. 2017) (containing an irrevocable trust that expressly stated the settlor's intent to benefit his four children equally).

279. See *id.*

the scheme to resolve any difficulty experienced with the individual dispositive provisions.<sup>280</sup> Likewise, if a will does not announce a testamentary scheme but its provisions are plain, the matter is at an end.<sup>281</sup> Thus, a testamentary scheme, announced in the will or not, has a dual function. It is not only a facet of the testator's intention but also an interpretative tool for finding it. On the one hand, it is not needed to ascertain the testator's intention unless a better understanding is required because of some difficulty in interpretation. On the other hand, the scheme is always present even behind "plain and unambiguous" provisions that the court needs no assistance to interpret.

Readily discernible testamentary schemes carried out by harmonious provisions will make their way easily through probate. The jurisprudence of testamentary schemes, if we can call it that, will almost by definition be the "hard cases" involving difficult language that requires clarification by piecing together the scheme from a host of disparate elements. Two final examples will serve to illustrate this point. In *Childs v. Hutson*, what appeared to be plain language permitting a life tenant to consume the property during her lifetime was deemed to be limited to dispositions that would net a monetary sum for the benefit of other beneficiaries under the will.<sup>282</sup> Similarly, in *In re Perlman*, which cites Hand's aphorism, the testator's surviving spouse argued for a technical interpretation of the will that would have prevented the testator's daughter from benefiting from the testator's primary asset, an Individual Retirement Account (IRA).<sup>283</sup> The stepmother claimed that the IRA's beneficiary form named a testamentary trust as its primary beneficiary but that the testator died having set up a living trust and directing his entire estate to it,<sup>284</sup> with the result that there was no

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280. *Russell v. Johnston*, 327 N.W.2d 226, 229 (Iowa 1982) (citing *Porter v. Porter*, 286 N.W.2d 649 (Iowa 1979) (noting the "substance and intent," not the words, should control)); *In re Conner's Estate*, 178 A. 15, 18–19 (Pa. 1935) ("If it is not 'plain and certain' . . . then . . . '[t]he intent of a testator is to be gathered from his entire will, rather than from the terms of any particular devise, which, regarded alone, might be inconsistent with his testamentary scheme as a whole.'" (quoting *Dean v. Winton*, 24 A. 664, 665 (Pa. 1892))).

281. See *In re Fabbri's Will*, 140 N.E.2d 269, 274 (N.Y. 1957) ("There are cases where the language employed is so clear and unmistakable as to convey only one meaning even when read in its proper setting.").

282. *Childs v. Hutson*, 545 A.2d 43, 45–46 (Md. 1988).

283. *In re Perlman*, 57 N.Y.S.3d 54, 57 (App. Div. 2017).

284. *Id.*

testamentary trust into which the IRA could pour.<sup>285</sup> As a court should in these cases, the *Perlman* court rejected the stepmother's argument, since all of the relevant documents and circumstances indicated the testator intended for his daughter to receive 66 percent of his estate instead of the less-than-half share she would take under the applicable intestacy law.<sup>286</sup>

## V. CONCLUSION

Wills law is replete with solicitude for the testator's testamentary intention. Probate courts are charged with the difficult task of ascertaining it and setting it in motion to distribute the property a testator has left behind.<sup>287</sup> Their tools for doing so have evolved through the years, with no less illustrious a jurist than Judge Hand urging a "sympathetic and imaginative" reading of the last will and testament.<sup>288</sup>

A test for meaning based on sympathy and imagination sounds more suited to a creative enterprise than to the work of a probate court interpreting a will. Nevertheless, Hand understood that intent is revealed not only by the words used to express it but by the purpose those words were chosen to carry out. His admonition has become an essential guidepost for ascertaining intent in the context of wills. The testamentary scheme or dominant purpose of a will is now frequently invoked as a central consideration in this important endeavor.

As a device that ensures a certain elasticity in the interpretation of wills, testamentary schemes have enabled wills to retain their vitality when the passage of time has rendered their provisions obsolete or obscure. It is regrettable that they lead secret lives. Their existence is clouded by the imprecision of the language used to refer to them, and their function remains nebulous even after a close examination of the role of facts and circumstances and the four corners doctrine in will interpretation. This imprecision is difficult to fathom, given that a testator's testamentary scheme forms not just a piece of the intent puzzle but the overriding one if problems arise at stage one of the interpretative process.

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285. *Id.*

286. *Id.*

287. *See In re Fabbri's Will*, 140 N.E.2d 269, 274 (N.Y. 1957) ("[I]t is the court's duty to employ . . . every means at its disposal to ferret out and effectuate the actual intent of the testator.").

288. *See Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd sub nom. Markham v. Cabell*, 326 U.S. 404 (1945).

This Article seeks to remedy this anomaly. It defines *testamentary scheme* as the dominant purpose behind a set of dispositive provisions. It explores the primary areas of wills law where testamentary schemes play a central role in will interpretation, including wills with complex trust provisions that contain omissions resulting from unanticipated circumstances or partial invalidity. Finally, this Article situates testamentary schemes explicitly within stage one of wills law's contemporary interpretative framework. It is time for testamentary schemes to be recognized as the essential interpretative tool they are, so probate courts, practitioners, and scholars may use them in the quest to achieve more just results in individual cases.