The Terms of the Trust: Extrinsic Evidence of Settlor Intent

*By Fred Franke and Anna Katherine Moody**

Each edition of the Restatement of Trusts defined the phrase "the terms of the trust" exactly the same. It means the manifestation of the settlor's intent expressed in a manner that admits of its proof in judicial proceedings. This definition weds the language of the instrument to the evidentiary rules governing Trust contests. This article explores the extent to which extrinsic evidence of settlor intent is admissible and consequently a consideration for those puzzling out the meaning of a trust.

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INTRODUCTION

> The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.
>
> – Sandra Day O'Connor[1]

Questions about the meaning of a trust arise in a variety of ways. Perhaps a trustee is puzzling out how to apply the written text of the trust to an unexpected or novel circumstance. In other cases, beneficiaries may question their interest in the trust or, as is sometimes the case, whether the trustee is acting properly.

Answers to these questions depend on the terms of the trust. The terms of the trust embody the settlor's intent: "The phrase 'terms of the trust' means the manifestation of the intention of the settlor with respect to the trust provisions *expressed in a manner that admits of its proof in judicial proceedings*."[2] Accordingly, it is not the language alone, but the language of the trust in its contextual circumstance, that comprises the terms of the trust:

> The phrase "the terms of the trust" is used in a broad sense in this Restatement, as in many statutes and cases. It includes any manifestations of the settlor's intention at the time of the creation of the trust, whether expressed by written or spoken words or by conduct, to the extent the intention as expressed in the manner that permits proof of the manifestation of intent in judicial proceedings. The terms of the trust may appear clearly from written or spoken words, or they may be provided by statute, supplied by rules of construction, or determined by interpretation of the words or conduct of the settlor in the light of all of the circumstances surrounding the creation of the trust.
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> Among the circumstances that may be of importance in determining the terms of the trust, either in the absence of a

[1] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (O'Connor, J.). The case turned on whether nicotine is a "drug" and thereby susceptible to regulation by the federal Food and Drug Administration. The court held that it was not a drug within the context of either the statute granting the FDA regulatory authority over drugs, or other federal statutes unrelated to the FDA regulatory authority.

[2] RESTATEMENT (THIRD) OF TRUSTS § 4 (2003) (emphasis added). Each Restatement of Trusts uses this definition. *See id.*; RESTATEMENT (SECOND) OF TRUSTS § 4 (1959); RESTATEMENT (FIRST) OF TRUSTS § 4 (1935).

> written instrument declaring those terms or in matters about which a written instrument is silent or ambiguous, are the following: (1) the situations of the settlor, the beneficiaries, and the trustee, including such factors as age, legal and practical competence, personal and financial circumstances, and the relationships of these persons and these factors to each other; (2) the value and character of the trust property; (3) the purposes for which the trust is created; (4) relevant business and financial practices at the time; (5) the circumstances under which the trust is to be administered; (6) the formality or informality, the skill or lack of skill, and the care or lack of care with which any instrument containing the manifestation in question was drawn.[3]

Whether, and to what degree, extrinsic evidence may be used to determine settlor intent will depend on the evidentiary rules and other rules of construction in each jurisdiction. In the absence of statutory provisions, common law provides the basis for these evidentiary rules.[4] Additionally, the Uniform Trust Code (UTC) addresses some of these issues, so jurisdictions adopting a version of it will have modified their common law to a certain degree.

Under the common law generally, there are three potential barriers to the introduction of extrinsic evidence – the plain meaning rule (including its twin, the parol evidence rule), the dead man's statute, and the hearsay rule.

I. The Plain Meaning Rule

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
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> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."[5]

[3] Restatement (Third) of Trusts § 4 cmt. a.

[4] Nevertheless, state-by-state distinctions exist. *See infra* Appendix.

[5] Lewis Carroll, Through the Looking-Glass 124 (London, MacMillan & Co. 1872).

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The ordinary standard, or 'plain meaning,' is simply the meaning of the people who did *not* write the document.

The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document.[6]

A. The Plain Meaning Rule in General

The plain meaning rule excludes evidence of settlor intent when interpreting a will or testamentary trust. Instead, the interpretation must rely on the "plain meaning" of the words in the document:

> [The plain meaning] rule, which hereafter we will call the 'no-extrinsic-evidence-rule,' prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'[7]

An early Massachusetts case, *Mahoney v. Grainger*,[8] illustrates this prohibition. In *Mahoney*, the decedent told her lawyer that she wanted to leave the residue of her estate to her first cousins to share equally. She characterized these first cousins as her nearest relatives. The residuary clause was thereupon drafted to provide the residue to the decedent's heirs-at-law living at her death.[9] Her cousins, however, were not her heirs-at-law under Massachusetts law because she was survived by a maternal aunt:

> A will duly executed and allowed by the court must under the statute of wills be accepted as the final expression of the intent of the person executing it. The fact that it was not in conformity with the instructions given to the draftsman who prepared it or that he made a mistake does not authorize a court to reform or alter it or remold it by amendments. The will must be construed as it came from the hands of the testatrix. . . .When the instrument has been proved and allowed as a will oral testimony as to the meaning and purpose of a testator in using language must be rigidly excluded.[10]

[6] 9 John Henry Wigmore, Evidence in Trials at Common Law § 2462 (1981).

[7] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 521 (1982) (citing 4 George E. Palmer, The Law of Restitution, § 20.1, at 158 (1978)).

[8] Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933).

[9] *Id.* at 86.

[10] *Id*. at 87 (citations omitted).

The plain meaning rule is not merely a relic from the past in some jurisdictions. In a modern Maryland case, for example, the court refused to consider extrinsic evidence from the scrivener (and from a legatee who would testify against his pecuniary interest) that the phrase "personal property" was meant by the testator to only include tangible personal property and was not meant to include corporate stocks, bonds and bank accounts.[11] The court held that the phrase "personal property" has a plain, established meaning and that extrinsic evidence could not be introduced to contradict that meaning. The Maryland court's ruling rendered meaningless a "pour-over" provision in the will directing the residue to an *inter vivos* trust.[12]

Because the plain meaning rule often excludes consideration of evidence of the testator's intent, the Restatement (Third) of Property: Wills and Other Donative Transfers distinguishes between a testator's *actual* intent and his *attributed* intent:

> The donor's intention is sometimes referred to in this Restatement as the donor's *actual* intention, in order to contrast it with the intention that is *attributed* to the donor by an applicable constructional preference or rule of construction.[13]

The plain meaning rule requires that a testator's donative intent be found strictly from the language used in a will regardless of the certainty derived from extrinsic evidence that such language misstates the testator's actual intent. Generally testamentary trusts, but not inter vivos trusts, follow the plain meaning rule governing wills.[14]

Why evidence of actual intent must be precluded is murky. Modern justifications of the rule include (1) a fear of evidence fabrication, (2) the possibility of fraud, (3) a concern that a decedent had relied on the language used, and (4) that such extrinsic evidence is unattested and therefore violates the will statutes.[15]

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11 *See* Emmert v. Hearn, 522 A.2d 377, 382 (Md. 1987).

12 *Id.*

13 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2 cmt. a (2003).

14 *Id.* § 12.1 cmt. c ("The reformation doctrine for donative documents other than wills is well established. Equity has long recognized that deeds of gifts, inter vivos trusts, life-insurance contracts, and other donative documents can be reformed [using extrinsic evidence] . . . ."); Shriners Hosp. for Crippled Children v. Md. Nat'l Bank, 312 A.2d 546, 555-56 (Md. 1973) ("[T]he doctrine of (trust) reformation is ordinarily applicable only in cases . . . involving inter vivos trust instruments. Here we are confronted with a testamentary trust and . . . the general prohibition against reformation of a will would prevail.").

15 Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 815-817 (2001).

1. *The Plain Meaning Contrasted with the Parol Evidence Rule*

The plain meaning rule applicable for testamentary instruments is similar, but not identical, to the parol evidence rule. Although most often considered a rule of contract law, the parol evidence rule applies to trusts:

> If a deed of real or personal property, or a trust agreement involving a transfer of property to the trustee, or a declaration of trusts, purports to contain a complete statement as to the existence and terms of a trust, the parties will not be allowed to vary or contradict the instrument by the introduction of oral evidence. This is the parol evidence rule which applies to the creation of trusts, as well as to many other transactions.[16]

The parol evidence rule is not as stringent as the plain meaning rule: it only blocks the admission of evidence if the instrument was "adopted by the settlor as the complete expression of the settlor's intention."[17] Once reduced to a writing embodying the complete expression of such settlor intent, there is no need for any other evidence of such intent; all earlier expressions of intent have become integrated into the final document. This parallels the parol evidence rule of contract law which applies the doctrine only to "integrated agreements" and which provides that extrinsic evidence may not be used to contradict or vary the terms of an instrument in the absence of fraud, duress, undue influence, mistake or other grounds which permit reformation or recession.[18]

The parol evidence rule differs in purpose and consequence from the plain meaning rule:

> It is often stated as a rule applicable to the law of wills that evidence of statements of intention made by the testator is not admissible in the process of determining the meaning to be given to his will. [The plain meaning rule] – although its continued application under modern conditions of trial is not altogether approved by Thayer – is regarded by him as a rule of evidence rather than of substantive law. His supporting illustrations are taken from the cases dealing with wills rather than

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16 GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 51 (3d ed. 2000 & Supp. 2014) (footnote omitted); *see also* RESTATEMENT (THIRD) OF TRUSTS § 21 (2003). Although most of the cases applying the parol evidence rule involve *inter vivos* trusts, the rule applies to testamentary trusts as well. *See*, *e.g.*, Pickelner v. Adler, 229 S.W.3d 516 (Tex. 2007).

17 RESTATEMENT (THIRD) OF TRUSTS § 21 cmt. a.

18 *See id.* § 21 Reporter's Notes cmt. a. ("'[The parol evidence rule] is not a rule of evidence but a rule of substantive law . . . . It renders inoperative prior written agreements as well as prior oral agreements.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a.).

> contracts. Whether the old notions of policy behind this rule are sound or not, the rule is not part of, or an application of, the "parol evidence rule.". . . The "parol evidence rule" does not exclude proof of [statements of intent] on the issue of the meaning and interpretation of the words.[19]

Therefore, in theory, parol evidence will be excluded to alter the terms of a written agreement yet be admitted to explain the meaning of its terms if otherwise ambiguous.[20]

[19] Arthur Corbin, *The Parol Evidence Rule,* 53 YALE L.J. 603, 625 (1944). Professor Corbin argues in this article that the parol evidence rule is, in fact, a rule of substantive law and not a rule of evidence. Id. at 604-05 n.2. Thus, it does not preclude evidence of intent to prove the meaning of ambiguous language in the written contract. *Id.* Parol evidence, however, may not be used to alter the terms of a written contract if that contract was intended to be the complete expression of its terms. *See* Collar v. Mills, 125 P.2d 197, 201 (Okla. 1942). The plaintiffs in *Collar v. Mills*, in an effort to continue the property in trust, alleged that they were additional beneficiaries after the death of the named life beneficiaries: "[I]f we determine that plaintiffs are correct when they allege, that this property was left to defendant in trust we are immediately met with the well-known rule of law that if the beneficiaries of the trust are designated parol evidence is inadmissible to contradict or vary the designation." *Id.* at 199-201.

[20] Finding the line between what constitutes altering a trust, on the one hand, and explaining the meaning of its terms, on the other, can be a challenge. *Compare* Langbein & Waggoner, *supra* note 7, at 568 ("Hence,'[t]he parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration.'") (quoting George Palmer, *Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833, 833 (1967)), *with* Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule,* 71 FORDHAM L. REV. 799, 801 (2002) ("'The logic of this dichotomy is unassailable, so is its impracticality. The very same words offered as an additional term that are rejected because the court deems the writing to be a total integration, can be offered as an aid to interpretation of an ambiguous written term. Able courts look at both proffers of evidence as governed by the 'parol evidence rule.' Thus, the parol evidence rule and the plain meaning rule [as applied to contracts] are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined.") (footnote omitted).

2. *The Statute of Frauds as an Additional Bar to Extrinsic Evidence*

Most states have adopted a version of the statute of frauds, which would require that a trust of real property be in writing.[21] Some states have extended this requirement to govern trusts of personal property.[22]

> A properly signed memorandum . . . is sufficient to satisfy the requirements of a statute of frauds if, but only if, it indicates that a trust is intended and, together with the circumstances, provides a reasonable basis for identifying the trust property and the beneficiaries and purposes of the trust. . . .
>
> A writing may sufficiently identify these elements of the trust even though it requires resort to interpretation or leaves some reversionary beneficial interest(s) to be supplied by operation of law.[23]

The purpose of the statute of frauds is to protect those with legal title to property from challenges based on extrinsic evidence. Nothing precludes the trustee of an oral trust falling within the statute from administering the trust in accordance with its terms:

> The Statute of Frauds is intended to protect holders of legal title to lands against whom trust claims are made and who deny the existence of any trust or of the trust as described by the plaintiff. Strangers to the trust, therefore, cannot in any way attack the oral trust on the ground of the lack of a written statement of it. Although, collaterally, it might be of advantage to these third parties to have the oral trust declared unenforceable and the trustee an absolute owner, they will not be allowed to bring about that result. The trustee may refuse to rely on the Statute and may go on with his performance of the

[21] RESTATEMENT (THIRD) OF TRUSTS § 22 cmt. a. Many states enacted statutes based on section seven of an English statute enacted 1677 which provided "that 'all declarations or creations of trusts or confidences of any lands shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.'" *Id.* Other states have similar provisions based on other sections of the English statute and some states have no statute of frauds for trusts. *Id.*

[22] BOGERT, *supra* note 16, § 65 ("In Georgia all express trusts must be created or declared in writing, and hence oral trusts of personalty are unenforceable, and this is true also in Indiana, Louisiana and Oregon.") (footnote omitted). The Uniform Trust Code does not intend to alter existing statutes of frauds. Unif. Trust Code § 407 cmt. (2010) ("Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts be evidenced by a writing may wish to cite such provisions.").

[23] RESTATEMENT (THIRD) OF TRUSTS § 22 cmt. f. (2003) (citation omitted).

> oral trust, or he or his successors in the ownership of the alleged trust property may plead the Statute of Frauds.[24]

As with the statute of frauds generally, a trust beneficiary may enforce the trust based on part performance.[25] The part performance doctrine is extrinsic evidence of the "missing" terms of an oral trust: "the evidentiary function of the statutory formalities is fulfilled by the conduct of the parties."[26]

B. Common Law Exceptions or "Workarounds" to the Plain Meaning Rule

The plain meaning rule is not, however, absolute. At common law, there are at least two formal exceptions involving will or testamentary trust interpretation that permit extrinsic evidence – (1) the latent ambiguity exception,[27] and (2) evidence of the facts and circumstances of the testator's situation at the time of the execution of the will creating the trust.[28] Additionally, there are cases permitting extrinsic evidence to rebut the presumption that a document that complies with all the testamentary formality rules does not necessarily mean that the decedent had read and understood the will, thus permitting the document to be set aside.[29] Finally, there are evidentiary cases involving charitable bequests that would foretell a more modern, permissive approach to the admissibility of extrinsic evidence.[30] The plain meaning rule has been characterized as an historic relic with limited, recognized utility:

> Because of a growing distrust and dissatisfaction with the application of hidebound interpretive rules to testamentary documents, the law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the wills context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution, the use of will interpretation manuals has fallen from favor and the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined.[31]

1. *The Latent Ambiguity Exception*

In some jurisdictions, the exception permitting extrinsic evidence to clarify an ambiguity turns on whether the ambiguity is latent or patent. A latent ambiguity is one where the terms of the will appear clear and without ambiguity, but those terms yield more than one meaning once the extrinsic evidence is permitted.[32] An example of the latent ambiguity would be a bequest "'to my cousin John,' . . . if evidence extrinsic to the document reveals that the testator had no cousin named John when he executed the will but did then have a nephew named John and a cousin named James."[33] A patent ambiguity, on the other hand, is one arising from an apparent contradiction within the document itself or where a term that is used in the document could yield several meanings.[34] A patent ambiguity would be a bequest of "my money," raising the question as to whether the phrase was intended to apply only to the decedent's cash on hand or, more generally, to the decedent's assets.[35] As a general rule, latent ambiguities permit extrinsic evidence, whereas patent ambiguities do not.

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24 BOGERT, *supra* note 16, § 70 (footnote omitted). A trustee in bankruptcy, however, can assert the statute of frauds. *See* 11 U.S.C. § 558 (2013) ("The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and any other personal defenses.").

25 RESTATEMENT (THIRD) OF TRUSTS § 24 cmt. c. *Comment c* of the *Reporter's Notes on Section 24* states:

> This comment is consistent with Restatement Second, Trusts § 50 (entitled "Part Performance"), the black letter of which states: "Although a trust of an interest in land is orally declared and no memorandum is signed, the trust is enforceable if, with the consent of the trustee, the beneficiary as such enters into possession of the land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust."
>
> The doctrine of part performance, even as applied to trusts, is broader than the above statement indicates. In general, see Restatement Second, Contracts § 129, stating: "A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement."

RESTATEMENT (THIRD) OF TRUSTS § 24 Reporter's Notes cmt. c.

26 *Id.*

27 *See* Part I.B.1, *infra*.

28 *See* Part I.B.2, *infra*.

29 *See* Part I.B.3, *infra*.

30 *See* Part I.B.4, *infra*.

31 Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 66 (2005) (footnotes omitted).

32 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §11.1 cmt. c. (2003).

33 *Id.*

34 *See id.* cmt. b.

35 *See id.*

The "leading American decision"[36] establishing the availability of extrinsic evidence to remedy an ambiguity is *Patch v. White*.[37] In that case, the testator's will referred to property bequeathed to his brother that the testator "did not, and never did, own."[38] The language of the will, however, was not ambiguous in its description of the wrong property. It took extrinsic evidence to demonstrate that the decedent did not own the property identified in the will but, instead, owned other property that he had meant to leave to his brother.[39] The Court found, "[i]t is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence."[40]

A latent ambiguity, however, only exists where the extrinsic evidence is necessary to show the ambiguity. The Restatement (Third) of Property: Wills and Other Donative Transfers illustrates this distinction by expanding on its illustration of a will leaving a bequest "to my cousin John." If, in fact, the testator had a cousin John but actually meant to leave the bequest to his cousin James and the scrivener would testify that it was a scrivener's error that inserted "John" for "James," a latent ambiguity would not exist.[41] A latent ambiguity would only exist if there were never a cousin John to begin with, or the testator had two cousins named John.

When the Maryland court found in *Emmert v. Hearn* that "personal property" means both tangible and intangible personal property, thereby negating the pour-over residuary clause, it applied the latent ambiguity test by looking at the phrase separately and not in the broader context of whether such an interpretation may make other provisions irrelevant.[42] It applied the latent ambiguity test in its pure form and found no such ambiguity:

> That a latent ambiguity does not exist in the provisions of Roberts' will is equally clear. Such an ambiguity occurs when "the language of the will is plain and single, yet is found to apply equally to two or more subjects or objects." *Darden v. Bright*, 173 Md. 563, 569, 198 A. 431 (1938). Extrinsic evidence is generally admissible to resolve a latent ambiguity. *Monmonier v. Monmonier*, 258 Md. 387, 390, 266 A.2d 17 (1970); *Bradford v. Eutaw Savings Bank*, 186 Md. 127, 136, 46 A.2d 284 (1946); *Fersinger v. Martin*, [183 Md. 135, 138-39], 36 A.2d 716 (1944); *Darden v. Bright*, *supra*, 173 Md. at 569, 198 A. 431; *Cassilly v. Devenny*, 168 Md. 443, 449, 177 A. 919 (1935). Indeed a latent ambiguity is "not discoverable until extrinsic evidence is introduced to identify the beneficiaries or the property disposed of by will, when it is developed by such evidence, either that the description in the will is defective, or that it applies equally to two or more persons or things." 4 W. Bowe & D. Parker, *Page on the Law of Wills* § 32.7, p. 255 (rev. ed. 1961).[43]

A technical reading of the phrase "personal property" in *Emmert* may obviate the pour-over provision of the will, but that does not convert a patent ambiguity to a latent ambiguity. A Florida court, wrestling with the identical issue, permitted extrinsic evidence to interpret the phrase "personal property" in the will to mean only tangible personal property.[44] The Florida court acknowledged that the phrase has an established technical meaning: "Every lawyer learns that the term personal property includes both tangible and intangible property."[45] Nevertheless, the court saw an ambiguity because of the effect that the technical meaning would have on the other provisions of the will. It permitted the extrinsic evidence to narrow that unambiguous, technical meaning.[46] As for the Maryland approach, the Florida court stated, "Nothing is to be gained by the strained distinction of *Emmert* and we treat it as a minority view in conflict with the view expressed here."[47] Since this decision, Florida codified sweeping use of extrinsic evidence in will interpretation matters, completely untethered by whether an ambiguity exists.[48] This approach is advanced by the Restatement (Third) of Property: Wills and Other Donative Transfers.[49]

36 Langbein & Waggoner, *supra* note 7 at 530.

37 Patch v. White, 117 U.S. 210 (1886) (5-4 decision).

38 *Id.* at 213-14.

39 *Id.* at 214, 219-20.

40 *Id*. at 217.

41 *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 11.1 cmt. c. (2003).

42 Emmert v. Hearn, 522 A.2d 377, 380-82 (Md. 1987).

43 *Id.* at 381-82.

44 *In re* Estate of Walker, 609 So. 2d 623, 625 (Fla. Dist. Ct. App. 1992) (en banc).

45 *Id.* at 624.

46 *See id.* at 625.

47 *Id*.

48 Fla. Stat. Ann. § 732.615 (West 2010) (permitting a court to reform the terms of a will, "even if unambiguous," to conform to the testator's intent.). This parallels the UTC's treatment of testamentary and inter vivos trusts. *See* Unif. Trust Code § 415 (2010) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention . . . .").

49 *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 12.1 (2003).

2. *Common Law Exception to the Plain Meaning Rule for Surrounding Circumstances*

The second exception to the plain meaning rule – that evidence of the circumstances surrounding and informing the testator's situation is admissible if there is either a patent or latent ambiguity – has likewise been long-standing. The document is meant to be read in the context of the testator's circumstances:

> No such unqualified rule [the plain meaning rule] can stand in the face of the numerous cases admitting some extrinsic evidence where the indefiniteness, inaccuracy, or ambiguity was apparent on the face of the instrument. . . .
>
> According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of the testator and all the relevant facts and circumstances surrounding him at the time of the making of the will, for the purpose of explaining or resolving even a patent ambiguity.[50]

The surrounding circumstances exception to the plain meaning rule pays tribute to the importance of context. The document is meant to be understood as the testator understood it – against the backdrop of his or her occupation, property holdings, and relationships with family and others.[51] The purpose of this extrinsic evidence is to frame the settlor's point of view when he or she drafts the document:

> Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as "the board of foreign and the board of home missions;" and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention. "The law is not so unreasonable," says Mr. Wigram, "as to deny to the reader of an instrument the same light which the writer enjoyed." Wigram on Wills, 2d Amer. ed. 161.[52]

Thus, courts look to the particular circumstances of a decedent to ascertain the plain meaning of the words used:

> If we put ourselves, in the traditional place, behind the armchair of the testator as he contemplates the disposition he wished to be made to the objects of his bounty, we would be standing behind a man who was not unaware of the problems and methods of early, as contrasted to late, vesting of trust estates and one upon whom had been urged the desirability of continuing property in trust.[53]

This exception to the plain meaning rule that enables the courts to sit in a testator's "armchair" does not permit direct evidence of actual intent itself, but may yield a close approximation. In the case where the testator was "not unaware" of the consequences of early vesting, for example, the court addressed the meaning of the phrase, "upon the youngest living grandchild of [the testator's sister] . . . attaining the age of twenty-one years," in a testamentary trust.[54] The court concluded that the phrase could have one of two different interpretations – vesting either, when the sister's grandchildren then in being had all reached twenty-one years of age as of any point in time, or after all of the sister's children had died (thus closing the class) and the youngest grandchild reached twenty-one years of age.[55] The court opted for the second reading based on the extrinsic evidence of the testator's situation. The evidence was that early vesting had caused adverse tax issues in the testator's mother's estate and that he was therefore urged, upon receiving assets from his family, to continue those assets in trust. Examining the circumstances at the time of the execution of his will, in order to place the court in his "armchair" at the critical moment, required extensive extrinsic evidence in order to interpret what certain words in his testamentary trust meant.[56] The extrinsic evidence established his intent, although the language of the trust created a patent, not a latent, ambiguity.

50 R.T. Kimbrough, Annotation, *Admissibility of Extrinsic Evidence to Aid Interpretation of Will,* 94 A.L.R. 26, 57-58 (1935) (citations omitted).

51 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §10.2 cmt. d.

52 Gilmer v. Stone, 120 U.S. 586, 590, 595 (1887). Noting that many denominations had foreign and home missions; the decedent, however, probably meant the Presbyterian mission because of his connections with that church. *See id.*

53 Marty v. First Nat'l Bank of Balt., 120 A.2d 841, 845 (Md. 1956).

54 *Id.* at 843, 845.

55 *See id.* at 844.

56 *See id.* at 845-47.

3. *Other "Exceptions" to the Plain Meaning Rule*

Not rising to an exception to the plain meaning rule per se, there are cases that nevertheless permit direct extrinsic evidence of a testator's intent. Many of these cases revolve around the issue of testamentary capacity, which opens the door for extrinsic evidence to reflect on whether or not the disposition in the challenged will was "natural."[57] In one case, a will was challenged solely based on whether it properly followed the testamentary formalities and whether that document was, in fact, an expression of the testatrix's last wishes.[58] The testatrix was ill, facing surgery, and had executed two wills within two days of each other. The wills were dramatically different from each other. The second will was upheld despite the fact that the last name of a legatee had been crossed out and a new name substituted by hand in the will. The court based its ruling that the second will was valid on the parol evidence offered by witnesses to the will that the actual intent of the testatrix as expressed to them was reflected in the second will not in the first will.[59] Additionally, because the second will was more in line with the testatrix's older wills, this evidence likewise demonstrated that she would have wanted to have the provisions that were contained in the second will apply at her death.[60]

In another case, where the testatrix signed a document purporting to be her will when she was ill and under the influence of narcotics, the will challenge was based on whether the decedent knew the contents of the document that she had signed.[61] That, in turn, raised the issue of what she had attempted to accomplish with her will (what her intent was) and whether the signed document accomplished that intent. The court held that in these "unusual and exceptional" circumstances, extrinsic evidence of the draftsman's error could be used to support the contention that she had not read and understood her will before signing it; thus, it should not have been admitted to probate.[62]

4. *The Plain Meaning Rule May Not Be Applicable To Inter Vivos Trusts*

The restrictions imposed by the plain meaning rule on the introduction of extrinsic evidence of intent do not apply to inter vivos trusts: "If the meaning of the writing is uncertain or ambiguous, evidence of the

57 *See* 79 Am. Jur. 2d *Wills* § 102 (2013).

58 *See* Gage v. Hooper, 169 A. 925, 926 (Md. 1934).

59 *See id.* at 926-27.

60 *See id.* at 927.

61 *See* Lyon v. Townsend, 91 A. 704, 707, 711 (Md. 1914).

62 *Id.* at 713; *see also* V. Woerner, Annotation, *Effect of Mistake of Draftsmen (Other Than Testator) in Drawing Will*, 90 A.L.R. 2d 924, 936 (1963).

circumstances is admissible to determine its interpretation."[63] Such evidence is permitted to aid in the construction of the language of an inter vivos trust:

> Oral evidence will be received, however, to remove an ambiguity in the construction of the trust instrument by explanation of the meaning of the words therein, based on the situation of the parties and other facts. This principle [applies] . . . to private and charitable trusts.[64]

Indeed, in most jurisdictions a trust of personalty may be created wholly by parol evidence.[65] Because parol evidence can be used to interpret trusts that were created inter vivos, parol evidence may also be used to reform or modify such a trust.

As a general rule, inter vivos trusts, but not testamentary trusts, are reformable to comport with the "actual" intent of the settlor, which may be proved by extrinsic evidence:

> In trust law, a settlor's unilateral mistake is sufficient to reform an inter vivos trust, provided the settlor received no consideration for the creation of the trust. The same rule applies even after the death of the settlor, provided the reformation is necessary to carry out his intent. Courts have frequently corrected scriveners' errors by reforming unilateral mistakes in trust instruments. In addition, courts have corrected omissions resulting from scriveners' mistakes. Because a revocable inter vivos trust can imitate a will, in that the settlor can retain the equitable life interest and the power to alter or revoke the beneficiary designation, the differing result hinges on terminology. Significantly, a scrivener's error can serve as a basis to reform a pour over will. A court, however, generally will not reform a testamentary trust under similar circumstances, unless the will which contained the trust can be reformed. It seems arbitrary

63 Restatement (Second) of Trusts § 38 cmt. a. (1959).

64 Bogert, *supra* note 16. *See also id.* § 88 ("The courts have, however, distinguished between using oral evidence to supply a term entirely missing and offering oral testimony to clear up ambiguities, explain doubtful terms, and give a setting to the writing. If all of the essential elements of the writing are present, they may be clarified by non-documentary evidence.").

65 *See* Shaffer v. Lohr, 287 A.2d 42, 48 (Md. 1972) (noting that a joint bank account was regarded as an inter vivos trust because an expression of clear and unmistakable intent to create such a trust could be proved by parol evidence). Presumably, the *Shaffer* decision would be now impacted by Maryland's multiple account statute. Parol evidence can also be used to establish a resulting and constructive trust, including such trusts regarding land. *See* Jahnigen v. Smith, 795 A.2d 234, 240 (Md. Ct. Spec. App. 2002); Fasman v. Pottashnick, 51 A.2d 664, 666 (Md. 1947).

> for the law to hold that an inter vivos trust used as a receptacle for assets poured over from probate can be reformed, while a testamentary trust cannot. If will substitutes, including revocable trusts, can be reformed for scriveners' errors, then wills should also be able to be reformed under similar circumstances, especially when both kinds of instruments accomplish the same testamentary objectives.[66]

Cases hold that after the death of the settlor, the beneficiary could press for a modification of an inter vivos trust due to mistake to the same degree that the settlor could have brought such an action for modification of an irrevocable inter vivos trust.[67]

C. The Plain Meaning Rule Under the UTC

As noted, the plain meaning rule has been criticized as a barrier to applying a settlor's actual intent when interpreting a document.

The Restatement (Third) of Property: Wills and Other Donative Transfers "disapprove[s]" of the plain meaning rule.[68] Thus, section 12.1 ("Reforming Donative Documents to Correct Mistakes") permits extrinsic evidence of settlor intent "to conform the text [of the will or testamentary trust] to donor's intention" even if the text of the document is unambiguous:

> When a donative document is unambiguous, evidence suggesting that the terms of the document vary from intention is inherently suspect but possibly correct. The law deals with situations of inherently suspicious but possibly correct evidence in either of two ways. One is to exclude the evidence altogether, in effect denying a remedy in cases in which the evidence is genuine and persuasive. The other is to consider the evidence, but guard against giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof. In choosing between exclusion and high-safeguard allowance of extrinsic evidence, this Restatement adopts the latter. Only high-safeguard allowance of extrinsic evidence achieves the primary objective of giving effect to the donor's intention.[69]

The UTC follows a similar approach:

> SECTION 415. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[70]

Both approaches impose a "clear and convincing" standard to guard against fraudulent testimony.

It is clear from the comments under UTC section 415 that it is meant to abolish the plain meaning rule for testamentary trusts and accordingly make the proof issue the same for a testamentary trust as with an inter vivos trust. UTC section 415, however, does not stop there. It authorizes extrinsic evidence to reform a trust even if its terms are not ambiguous.

UTC section 415 accordingly makes a radical change to the proof of settlor intent for both inter vivos and testamentary trusts. On its face, however, UTC section 415 appears rather benign. Given the long history of courts embracing the plain meaning rule, it may be necessary to demonstrate that UTC section 415 was specifically meant to incorporate the approach of the Restatement (Third) of Property: Wills and Other Donative Transfers section 12.1 to counteract the rich case law that relied on the plain meaning rule to exclude extrinsic evidence in those circumstances.

II. The Dead Man's Statute

A. The Dead Man's Statute in General

Dead man's statutes have been widely disapproved by scholars and judges.[71] Indeed, most jurisdictions have abandoned the dead man's

66 Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 Cath. U. L. Rev. 1, 34-35 (1990) (footnotes omitted).

67 *See* Kiser v. Lucas, 185 A. 441, 446 (Md. 1936); Roos v. Roos, 203 A.2d 140, 142 (Del. Ch. 1964) (citing *Kiser* for the proposition that a declaration of trust may be amended to reflect the intent of the settlor after his or her death).

68 *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 12.1 cmt. d. (2003). No pretense is made that the reworking of the rule by the Restatement is based on case law development.

69 *Id.* § 12.1 cmt. b.

70 Unif. Trust Code § 415 (2010).

71 *See* John H. Langbein, *Substantial Compliance with the Wills Act,* 88 Harv. L. Rev. 489, 502 (1975) ("[T]he dead man statutes are widely condemned among commentators and practitioners. To Wigmore, 'the exclusion is an intolerable injustice,' since 'cross-examination and other safeguards for truth are a significant guarantee against false decision.' As long ago as 1938 the American Bar Association's Committee on the Improvement of the Law of Evidence voted disapproval of dead man statutes by the margin of forty-six to three, following a national survey of professional and judicial opinion.") (footnotes omitted).

statute.[72] Nevertheless, these statutes continue in some form in over one-third of U.S. jurisdictions.[73]

At early common law, an interested party – one with a stake in the outcome of the proceedings – was viewed as inherently untrustworthy and therefore was rendered incompetent to testify:

> The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough, were accepted in the 1700s as axioms of truth: Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.[74]

Dead man's statutes constitute part of these more general witness incompetency rules, one designed "to close the mouth of an interested survivor" in suits involving transactions with a decedent.[75]

B. The Impact of the Federal Rule of Evidence

After years of debate and study, the Warren Court promulgated Federal Rules of Evidence to govern all trials in the federal courts.[76] Those rules contained Rule 601, which generally eliminated the common law witness incompetency rules.[77] Justice Douglas, however, questioned whether the Court had authority to promulgate evidentiary rules that effectively alter the substantive outcome of a case solely based on its removal to the federal court. Based on this objection, the rules of evidence as promulgated by the federal courts were transmitted to Congress for consideration.[78] Congress revised Rule 601 to continue allowing witness disqualification if a dead man's statute was recognized as part of the relevant state law:

> The greatest controversy centered around [Rule 601's] rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest.[79]

Thus, in its final form, continued today but for stylistic changes, Federal Rule of Evidence 601 sweeps away the common law witness incompetency rules but for that imposed by the dead man's statutes:

> This general ground-clearing [of Federal Rule of Evidence 601] eliminates all grounds for incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds this abolished are religious belief, conviction of a crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.
>
> The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons.[80]

Those jurisdictions without a dead man's statute permit the historically-excluded testimony to be heard, with the fact finder charged with "determining the weight and creditability of a witness's testimony."[81]

Most states have adopted all or part of the Federal Rules of Evidence, including Rule 601 either in their original or revised form.[82] Ironically, several jurisdictions have used its version of Rule 601 to overturn existing dead man's statutes regardless of their carve-out, explicitly permitted by Congressional action. The Arkansas court, for example, held that its dead man's statute was repealed by its Rule 601: "[the dead

72 *See* Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75, 76-77 n.9 (2005-06). Mr. Wallis lists 32 states that have expressly rejected the dead man's statute. See Appendix, *infra*, for a more up-to-date and comprehensive list. The Appendix lists 30 jurisdictions as not recognizing or repealing the statute. The remaining jurisdictions either recognize it fully or with some degree of limitation.

73 *See infra* Appendix.

74 WIGMORE, *supra* note 6, § 576.

75 *See* Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Creditability: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 145 (1995).

76 *See* H.R. REP. No. 93-650, at 2-3 (1973).

77 *See id.* at 9.

78 *See id.* at 3-4.

79 *Id.* at 9.

80 Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 262 (U.S. 1973) (Advisory Comm. Note to Rule 601).

81 *See* Colquitt & Gamble *supra* note 75, at 175-76. Although Rule 601 swept away the broad categories of disqualified witnesses, that does not mean that anyone, including persons with no comprehension, may testify. *See id.* at 146 nn. 6-7. Federal Rule of Evidence 603 requires that a witness must be able to affirm that he or she will testify truthfully. *See* FED. R. EVID. 603.

82 *See infra* Appendix.

man's statute] was in fact expressly repealed by the Uniform Rules of Evidence."[83] Other jurisdictions have more straightforwardly repealed their statutes.[84]

C. The Application of the Dead Man's Statute Where Not Repealed

Those seeking to introduce extrinsic evidence of settlor intent must contend with the dead man's statutes in those jurisdictions that continue to retain such statutes. The extent to which such statutes impose a barrier to extrinsic evidence of settlor intent depends, to a large degree, on the nature of the specific statute and its interpretation.

Some jurisdictions take a traditional approach and apply the dead man's statute to exclude testimony of settlor intent from a party with a stake in the outcome of the case. For instance, Illinois is a state with broad, traditional prohibition on testimony and its courts enforce that broad prohibition.[85] Under the Illinois statute, "no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased [person] . . . or to any event which took place in the presence of the deceased [person]."[86] Beneficiaries and putative beneficiaries have sufficient interests in the estate to trigger the dead man's statute under Illinois law: In a case seeking to impose a constructive trust on a specific bequest, the putative beneficiary's testimony was not permitted.[87] The court held the dead man's statute was not merely to guard against the impairment of

83 Davis v. Hare, 561 S.W.2d 321, 322 (Ark. 1978).

84 Florida, for example, adopted Rule 601 in 1976, which mirrored the federal model. *See* FLA. STAT. ANN. § 90.601 (West 2011) ("Every person is competent to be a witness, except as otherwise provided by statute."). Florida's dead man's statute was then repealed in 2005. *See* FLA. STAT. ANN. § 90.602 (West 2011) (repealed 2005).

85 *See* 735 ILL. COMP. STAT. ANN. 5/8-201 (West Supp. 2014); Murphy v. Hook, 316 N.E.2d 146, 151 (Ill. App. Ct. 1974). In *Murphy*, a wrongful death action by an estate against a defendant motorist, neither the defendant motorist nor his spouse could testify to the facts of the accident under Illinois' dead man's statute. (They claimed that the decedent was on the wrong side of the road.) In that action, the estate relied exclusively on accident reconstruction experts and did not offer any testimony from the decedent's spouse-administrator who was in the car at the time of the accident. *See Murphy*, 316 N.E.2d at 149-51. Such testimony, if offered, would have constituted a waiver of the prohibition. *See* 735 ILL. COMP. STAT. ANN. 5/8-201(a). Another Illinois case, a suit in federal court applying the Illinois dead man's statute, dismissed a case for fraud against a deceased unlicensed business broker because the plaintiff would need to testify about the business dealings with the decedent in order to prevail. The federal judge observed: "While [the dismissal] may seem an inequitable result, courts have entered summary judgment where the plaintiff lacks sufficient proof to support his case after his own testimony has been inadmissible pursuant to the Dead Man's Act." Zang v. Alliance Fin. Servs. of Ill., 875 F Supp. 2d 865, 869, 873, 886 (N.D. Ill. 2012).

86 735 ILL. COMP. STAT. ANN. 5/8-201.

87 *See* Kamberos v. Magnuson, 510 N.E.2d 112, 114-15 (Ill. App. Ct. 1987).

the estate, but also to defend the legacies set out in the will.[88] It is a statute, however, meant to preclude only those with an actual stake in the outcome from testifying. Merely being a party to the action is not enough. In a dispute between the residuary beneficiaries of a trust and the intestate takers, the trustee of the trust was permitted to testify as to transfers of property to the trust regardless of being an essential, named party. The testimony of the trustee, although a formal party to the suit, was proper because she had no pecuniary stake in the outcome of the suit.[89]

Although imposing silence on those with a direct stake in the outcome of the proceeding, Illinois has a series of cases permitting the drafting lawyer to testify. Generally these decisions are based on the draftsperson not having a sufficient "interest" in the outcome of the case to pull him or her into the operation of the statute.[90] In one case, the attorney was permitted to testify as to the settlors' intent to transfer real property to a trust for the benefit of some, but not all, of their children and grandchildren. Although the attorney testified to preparing and overseeing the execution of the deeds, no deeds could be found. The disinherited heirs objected to the attorney's testimony on the basis that he had a definite interest in the outcome of the suit and that he had, in fact, notified his insurance carrier of a potential malpractice case against him. The court disagreed, noting that he had no direct interest in the suit and that there was no suit against him, thereby making the purported "interest" in the proceeding speculative.[91]

Before amendments to its statute, Colorado's dead man's statute was similar to that of Illinois.[92] A Colorado court likewise permitted the attorney to testify as a fact witness regardless of the operation of the

88 *See id.*; *See also In re* Estate of Fisher, No. 4-11-1125, 2012 WL 7041057, at *6 (Ill. App. Ct. Aug. 20, 2012) (applying the dead man's statute to defend an heir's bequest regardless of how the suit is structured).

89 Herron v. Underwood, 503 N.E.2d 1111, 1117-18 (Ill. App. Ct. 1987). Appellants argued that while the trustee may not have had a monetary stake in the outcome, she had a "definite emotional interest in seeing that her brother's 'new wife' did not get her hands on the estate." The court held that the disqualifying interest had to be of a pecuniary nature and that the emotional stake in the outcome merely went to the trustee's credibility.

90 *See*, *e.g.*, Michalski v. Chicago Title & Trust Co., 365 N.E.2d 654, 657 (Ill. App. Ct. 1977); Estate of Hurst v. Hurst, 769 N.E.2d 55, 63 (Ill. App. Ct. 2002) (permitting the attorney to testify where a related malpractice case was pending, noting that to be disqualified from testifying, "[t]he interest of the witness must be direct and be such that a pecuniary gain or loss will inure to the witness directly as the immediate result of the judgment.'); Ball v. Kotter, No. 08-CV-1613, 2012 WL 987223, at *8 (N.D. Ill. March 22, 2012) *aff'd*, 723 F.3d 813 (7th Cir. 2013).

91 *Michalski*, 365 N.E.2d at 655-57.

92 *See infra* note 95.

dead man's statute under the prior law because the attorney lacked a direct interest in the outcome of the suit.[93] It observed: "We are aware of only one instance in which an attorney, by reason of his services, was determined to have gained an interest in the outcome of the litigation to warrant disqualification of his testimony. This arises when the attorney has entered into a contingent fee agreement with his client."[94] Generally, however, the attorney may testify.[95]

Other jurisdictions have narrowed the scope of their dead man's statutes by applying them only to a limited category of cases – generally those that impact the size or obligations of the estate. The Maryland court, for example, narrows the scope of the application of its statute by making an exception to the general rule of the desirability of the inclusion of all possible evidence:

> The purpose of the Statute . . . is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement. *Ortel v. Gettig*, 207 Md. 594, 116 A.2d 145 (1955). This disability, while protecting the deceased's estate, can create a great injustice to the survivor. As was stated in C. McCormick, *Evidence*, § 65 (2d ed. 1972):
>
> > "Most commentators agree that the expedient of refusing [to] listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard."
>
> Faced with the uncertainty and injustice created by the Dead Man's Statute, the Maryland Courts have sought to construe strictly the Statute in an effort to disclose as much evidence as the rule will allow.[96]

In keeping with this general approach, the Maryland court has restricted the dead man's statute to situations that would "'tend to *increase or diminish the estate of a decedent by establishing or defeating a cause of action by or against the estate*.'"[97] The testimony of caveators and caveatees about statements made by the decedent, for example, is permitted because such testimony will not result in a judgment at law against the estate.[98] In an action challenging the appointment of an estate's personal representative on the basis of his status as a creditor to the decedent, the court held that the creditor could testify to his dealings with the decedent to establish that he was such a creditor. The court reasoned that, while the testimony was proper in a proceeding as to the correctness of his appointment, he would nevertheless encounter great evidentiary challenges when he thereafter tried to establish his claim for the purpose of asserting it against the estate.[99]

Similarly, the Tennessee dead man's statute is interpreted narrowly because of policy considerations:

> This statute cannot be extended by the courts to cases not within its terms upon the idea they fall within the evil which was intended to be guarded against. As an exception, it must be strictly construed as against the exclusion of the testimony and in favor of it admission.[100]

As with Maryland, Tennessee holds that the operation of its statute does "not apply to cases where the transaction about which the testimony was offered did not increase or diminish the decedent's estate but concerned only the manner in which the assets will be distributed."[101] Accordingly, in a latent ambiguity case, testimony by a party was permitted to clarify what the decedent meant by a phrase in her will.[102]

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93 *See* David v. Powder Mountain Ranch, 656 P.2d 716, 718 (Colo. App. 1982).

94 *Id.*; *see also* Lee v. Leibold, 79 P.2d 1049, 1051-52 (Colo. 1938) (excluding the testimony of an attorney, who represented a claimant on a contingent fee basis in a contractual dispute against an estate).

95 In its 2012 revision, Colorado went from a traditional common law model to an approach permitting an interested party to testify as long the testimony "is corroborated by material evidence of an independent and trustworthy nature." COLO. REV. STAT. ANN § 13-90-102 (West 2014). Then, in 2013, it struck the requirement that the testimony had to be "independent" and defined "corroborated" as evidence that does not need to "support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth." 2013 Colo. Sess. Laws 767. The 2013 revisions explicitly permit the testimony of the scrivener. *See id.*

96 Reddy v. Mody, 388 A.2d 555, 560 (Md. Ct. Spec. App. 1978).

97 Soothcage's Estate v. King, 176 A.2d 221, 226 (Md. 1961) (quoting, as "a correct statement of the law of Maryland," Riley v. Lukens Dredging & Contracting Corp., 4 F. Supp. 144, 147 (D. Md. 1933) (Chestnut, J.).

98 *See* Griffith v. Benzinger, 125 A. 512, 520 (Md. 1924).

99 *See Soothcage's Estate*, 176 A.2d at 222, 226.

100 Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228, 230-31 (Tenn. Ct. App. 1976).

101 Cantrell v. Estate of Cantrell, 19 S.W.3d 842, 846 (Tenn. Ct. App. 1999) (upholding the exclusion of testimony because the widow claimed a year of support payments in addition to the elective share).

102 *See* Horadam v. Stewart, No. M2007-00046-COA-R3-C7, 2008 WL 4491744, at *7 (Tenn. Ct. App. Oct. 6, 2008).

Other states have modified dead man's statutes to permit otherwise disqualified testimony as long as it is corroborated independently. Virginia, for example, takes this approach, which

> is designed to prevent a litigant from having the benefit of his own testimony when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the decedent or incapacitated person. The statute substitutes a requirement that testimony be corroborated in place of the harsher common law rule which disqualified the surviving witnesses for interest.[103]

The corroboration must be from a disinterested party who is not financially interested in the outcome of the case.[104] Thus, the spouse who "will share in the inheritance" of a party could not be the corroborating witness.[105]

III. The Hearsay Rule

A. The History of the State of Mind/Intent Exception to the Hearsay Rule

Most jurisdictions have adopted Federal Rule of Evidence 803(3), or a version of it, which sets out an exception to the hearsay rule to permit declarations of intention.[106] In its current form, Federal Rule of Evidence 803(3) excepts from the general prohibition against hearsay

> statement[s] of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.[107]

103 Diehl v. Butts, 499 S.E.2d 833, 837-38 (Va. 1998) (holding that a confidential relationship increases the degree of corroboration needed).

104 *See* Stephens v. Caruthers, 97 F. Supp. 2d 698, 705 (E.D. Va. 2000).

105 *See id.* at 707. Interestingly, Maryland, with an arguably stricter exclusionary rule, would permit a spouse to testify regardless of the interest. See Marx v. Marx, 96 A. 544, 547-48 (Md. 1916).

106 *See infra* Appendix.

107 Fed. R. Evid. 803(3). Rule 803(3) was rewritten in 2011 from the original 1975 version for stylistic, not substantive, reasons. *See* Symposium, *The Restyled Rules of Federal Evidence*, 53 Wm. & Mary L. Rev. 1435, 1440, 1462 (2012). In its original form the exception covered "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1926, 1939 (1975).

This is a true exception: it permits a third party to testify as to what the declarant said about his or her plan or intention, including in the case of testamentary documents, a memory or belief about what the declarant intended by a then-existing document.

Federal Rule of Evidence 803(3) is informed by two early United States Supreme Court cases, neither relating to wills or trusts. Those cases, however, explain why Rule 803(3) has its tortured syntax ("but not including . . . unless it relates to"). The first case, *Mutual Life Insurance Co. of New York v. Hillmon*, established a broad exception to permit hearsay as to statements made by a decedent as to something that person planned to do in the future to prove, or tend to prove, that the person did exactly what he or she said that he or she would do.[108] *Hillmon* was an insurance fraud case where a woman claimed her husband died in a certain remote location thereby entitling her to the death benefits from several policies. The insurance company acknowledged that someone had, in fact, died in that remote location, but that it was not Mr. Hillmon but a Mr. Walter. As evidence, the insurance company wanted to introduce letters from Mr. Walter saying he planned to go to that remote location.[109] The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location[110] – a very broad exception to the hearsay rule.[111] The second case, *Shepard v. United States*, involved a murder trial where the defendant, Dr. Shepard, was charged with poisoning his wife.[112] The evidence sought to be used was the testimony of the deceased wife who said that she had some liquor from a bottle immediately before she became ill that tasted odd, and further, that "Dr. Shepard has poisoned me."[113] The court held the statement to be inadmissible: "Declarations, of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if this distinction were ignored."[114]

108 *See* Mutual Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285, 296, 299-300 (1892).

109 *See id.* at 285-87.

110 *See id.* at 299-300.

111 In some instances, the proponent wants to introduce forward-looking hearsay to prove someone other than the declarant did something. This raises thorny due process issues. *See* Lynn McLain, *"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker – and the Role of the Due Process Clause*, 32 Cardozo L. Rev. 373, 379, 383 (2010).

112 Shepard v. United States, 290 U.S. 96, 97 (1933).

113 *Id.* at 98.

114 *Id.* at 105-06. (Nor did the statements qualify as a dying declaration under the facts of the case. *Id.* at 99-102.)

The *Hillmon* situation involved a forward-looking statement of intent: Mr. Walter said he was going somewhere, so he probably went there after making the statement. Rule 803(3) carves out these forward-looking statements of intent as a general hearsay rule exception, not just an exception because the statement relates to a testamentary instrument. This exception, of course, applies equally to showing testator or settlor intent.[115]

Rule 803(3) appears to permit, however, backward-looking declarations of intent if these declarations relate to the terms of the declarant's will. This is at variance to the Shepard-type prohibition which may well disallow the hearsay exception as to a testator's statements. Backward-looking statements related to the declarant's will were carved out based on expediency:

> The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of the declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic.[116]

B. Modern Application of the Hearsay Rule

A Maryland case illustrates the backward looking element of 803(3) and how statements by a testatrix after execution of a will may be admissible to show how she meant the will to be interpreted. *National Society of Daughters of American Revolution v. Goodman* involved whether a restricted gift to the Daughters of the American Revolution (DAR) for the purpose of funding its nursing home facility lapsed because the DAR, in fact, did not maintain a nursing home.[117] The decedent had prepared a will leaving part of her estate to Gallaudet University and part of her estate to the DAR for the nursing home. After execution, the attorney contacted the DAR to discuss the gift and learned that the DAR did not maintain a nursing home. He thereupon contacted his client who said that she did not intend any gift to go to the DAR in that situation but all to Gallaudet University. The attorney prepared a new will, but his client died before she was able to execute the new will.[118] Nevertheless, the testimony was permitted as a backward looking declaration of what she intended by her original will.[119]

Another Maryland case followed suit. In *YIVO Institute for Jewish Research v. Zalenski*, the decedent left a bequest in his will to a charity and then he later made a gift to the same institution.[120] The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will. Such testimony was admitted.[121]

South Carolina, on the other hand, takes the opposite view, holding that a later statement related to funding a bequest was not admissible because it did not show the testatrix's intent when she executed her will. In *In Estate of Gill v. Clemson University Foundation*, the testatrix left a $100,000 bequest to the Clemson University Foundation to fund a scholarship for "academically deserving football players."[122] Later, she designated the scholarship fund as the payee of a $100,000 IRA. Clemson saw this as two $100,000 gifts, whereas the estate contended the IRA designation was how the testatrix funded her one bequest to the school.[123] The court excluded testimony of what the testatrix told her advisors when setting up the IRA designation because it was "not made at the time of the Will to show her belief at that time" and therefore violated Rule 803(3).[124]

Conclusion

The phrase "terms of the trust" is defined as the manifestation of the settlor intent "expressed in a manner that admits of its proof in judicial proceedings."[125] Under the UTC, extrinsic evidence of settlor intent may be used regardless of whether the language in the instrument is ambiguous.[126] Indeed, such evidence may be introduced even to contra-

115 *See In re* Sayewich's Estate, 413 A.2d 581, 584 (N.H. 1980); Engle v. Siegel, 377 A.2d 892, 894, 896 (N.J. 1977). Both cases permitted the scriveners to testify as to what the testators wished to accomplish in their wills as long as the testimony did not contradict the terms of the wills. *See In re Sayewich's Estate*, 413 A.2d at 584; *Engle*, 377 A.2d at 894, 896.

116 Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 306 (U.S. 1973) (Advisory Comm. Note to Rule 803).

117 *See* Nat'l Soc'y of Daughters of Am. Revolution v. Goodman, 736 A.2d 1205, 1209-10 (Md. App. 1999).

118 *Id.* at 1207-08.

119 *Id.* at 1209-10.

120 *See* YIVO Inst. for Jewish Research v. Zalenski, 874 A.2d 411, 414-15 (Md. 2005).

121 *Id.* at 422-23.

122 *See* In Estate of Gill v. Clemson Univ. Foundation, 725 S.E.2d 516, 519 (S.C. Ct. App. 2012).

123 *See id.*

124 *Id.* at 521.

125 Restatement (Third) of Trusts § 4 (2003); *see also* Restatement (Second) of Trusts § 4 (1959); Restatement (First) of Trusts § 4 (1935).

126 Unif. Trust Code § 415 (2010).

dict the otherwise unambiguous language of the trust instrument.[127] Thus, under the UTC, the only barriers to enhancing the terms of the trust with extrinsic material are either the dead man's statute, where it still exists, or the hearsay rule, to the extent that rule precludes such extrinsic evidence.

In jurisdictions that have not adopted the UTC, to the extent a general rule may be said to exist, different evidentiary rules may apply for testamentary trusts and inter vivos trusts. There is no logical reason for this difference. Nevertheless, these differences can be outcome-determinative in a particular case.

For attorneys charged with drafting trusts, the goal ought to be to capture settlor intent within the four corners of the instrument regardless of the extrinsic evidence rules. This can be an elusive goal. Language, even supposedly precise language, can prove slippery.

There is a long line of cases involving beneficiaries and trustees arguing over the proper exercise of discretionary distributions.[128] These arguments may be reduced, if not avoided, by spelling out settlor intent beyond the use of generic phrases:

> One of the most difficult tasks trustees face is how to exercise broad (and generic) discretion in the administration of trusts, whether the trust is fully discretionary, with no standards whatsoever, or discretionary subject to an ascertainable standard. To the extent that the settlor's intent is expressed in the trust, it is much easier for the trustee to carry out that intent. For example, if the primary purpose of passing property in trust, rather than outright, is to gain tax and asset protection advantages, and separating the control over the property from the beneficial enjoyment of the property (more than necessary to obtain tax and asset protection benefits) is not a primary motivation behind using a trust, then the trust can be drafted to make the intent clear, so that the trustee can act more liberally than might be the case where control *is* a key issue.[129]

Another approach would be to set forth settlor intent in a side "letter of wishes." Such a document, although precatory, would offer practical guidance to the fiduciary:

> As attorneys, we habitually draft discretionary trusts offering no real guidance to the trustees in the exercise of their discretion with respect to distributions to beneficiaries. And despite

127 *Id.*

128 *See* 76 Am. Jur.2d *Trusts* § 550 (2005).

129 Benjamin H. Pruett, *Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective*, 35 ACTEC J. 331, 341 (2010).

> the obvious shortcomings of this approach and the causal treatment of this critical element of a trust, we continue the practice. Instead, I believe we should strongly encourage each settlor to provide a non-binding written expression of the manner in which she would like to see the trustee exercise his discretion, so that the administration of her trust will have a good chance of reflecting the manner in which the settlor herself would have administered it.[130]

Whether contained in the trust instrument, or as a side letter of wishes directed to the trustee, these statements of settlor intent are usually precatory guidance, not mandatory instructions. The fiduciary must still exercise discretion.[131]

In any event, the drafting attorney should memorialize the settlor's intent. Whether this should be within the instrument itself, in a side letter, in the files of the drafting attorney, or in all three places will depend on the degree of the client's concern.

Drafting in anticipation of later disputes is not a new phenomenon. A well-respected trial lawyer, for example, described the steps he took to immunize a will from later contest in a situation where such a dispute was likely:

> These steps were taken to assist in preserving the will: All discussions with the testatrix were had in the absence of the favored beneficiary, the son. After the initial conference with the testatrix, she was requested to write me a letter in her own handwriting, setting forth in detail the disposition she wished to make of her estate and the reasons that motivated her desire to provide more favorably for her son than for her daughters. Upon receipt of this letter, a draft of the will was prepared and forwarded to her under a covering letter in which she was required to give close and careful consideration to the inequality of the disposition as between her children and the reasons sup-

130 Alexander A. Bove, Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?*, 35 ACTEC J. 38, 44 (2009).

131 There can be tension between flexible powers intentionally drafted into the instrument as a hedge against an unforeseeable future and general statements of settlor intent meant as non-binding guidance. A very public dispute illustrating this tension involved Leona Helmsly's charitable trust. *See* Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 Chi.-Kent L. Rev. 977, 1014 (2010). The trust itself permitted the trustees broad discretion to make charitable gifts. Ms. Helmsly's "mission statement", on the other hand, set her priorities to assisting indigent people and, of course, dogs. The Surrogate's Court for New York County upheld the broad powers clause but not the narrow mission statement. *See id.* at 1014-15. Given Ms. Helmsly's known love for dogs, one questions whether she would have approved of the result.

> porting such action. She was requested again to transmit her final decision in her own handwriting. This was done, and thereupon the will was placed in final form. Four persons were then selected in whose presence this will was to be reviewed, explained, discussed and executed. Two of those were to be used as attesting witnesses in keeping with the legal requirements of the laws of our state. The other two were not to sign as attesting witnesses and would be used only in the event of a contest. These four persons were carefully selected as to age and other qualifications as witnesses. Upon completion of the execution, each witness recorded the discussions that took place, and particularly the statements of the testatrix, for future reference in the event of a contest. When the testatrix died, the daughters were disappointed – one was embittered, and there was talk of a contest. She employed a reliable attorney, and in the course of his investigation, there was revealed to him a part of the somewhat elaborate steps that had been taken to discourage the filing of a contest. The daughter's attorney advised against a contest, and the will was probated.[132]

Elaborate or unusual, precautions could, in themselves, raise issues. Presumably no drafting attorney would use the elaborate procedure set out by Mr. Jaworski in every case. Why did the lawyer believe unusual steps were required in one particular case?

A best practice would be to memorialize settlor intent in sufficient detail to be clear to the trustees and to do so in a way that will be admissible if a contest arises. In those jurisdictions continuing to treat testamentary trusts and inter vivos trusts differently, the drafting attorney should consider using an inter vivos trust to heighten the possibility of the voice of the settlor being heard.

[132] *See* Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92 (1958) (offering practical advice on minimizing potential will contests). James R. Walker, Esq. of Denver, Colorado directed the authors to this article.

APPENDIX
A SUMMARY OF THE ADMISSIBILITY OF EXTRINSIC EVIDENCE OF SETTLOR INTENT*

Alabama	
	Dead Man's Statute: Not Recognized. *See* ALA. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); *id.* (Advisory Comm. Notes) ("This rule supersedes any inconsistent statutory grounds of incompetency. Chief among these is Alabama's Dead Man's Statute. Ala. Code 1976, § 12-21-163. Superseding the Dead Man's Statute means that survivors will be allowed to testify, if their testimony otherwise complies with the rules of evidence, and that the unavailability of the deceased person will be merely a factor for the jury to consider in determining the weight to give the survivor's testimony. *See Beddingfield v. Central Bank of Alabama, N.A.*, 440 So.2d 1051, 1052 (Ala. 1983) (recognizing the significant body of scholarly criticism of the Dead Man's Statute)").
	Hearsay Exception: Recognized. *See* ALA. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Azar v. Azar*, 80 So.2d 277, 280 (Ala. 1955) ("We have shown that the provisions of the will are plain, explicit and unambiguous. Under such circumstances there is no room for construction through the aid of extrinsic evidence. Parol evidence is never admissible to obtain a construction of a will which is not warranted by or will defeat its express terms. We must take the terms which the testator used in the will and parol evidence is never admissible to show terms the testator intended to use and did not use."). In Alabama, extrinsic evidence is not admissible in the case of a patent ambiguity but is, however, admissible where a latent ambiguity exists. *See McCollum v. Atkins*, 912 So.2d 1146, 1148 (Ala. Civ. App. 2005). Note that ALA. CODE § 19-3B-415 (2007) abolishes the plain meaning rule for testamentary trusts.
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* ALA. CODE § 19-3B-415 (2007) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."); *id.*, Ala. cmt. ("This provision is a change in the common law of Alabama, which provided that the terms of a trust could only be reformed in cases where the terms were ambiguous, regardless of the settlor's intent.").
Alaska	
	Dead Man's Statute: Not Recognized. *See* ALASKA R. EVID. 601.
	Hearsay Exception: Recognized. *See* ALASKA R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Vukmir v. Vukmir*, 74 P.3d 918, 920 (Alaska 2003) (noting that courts generally rule extrinsic evidence inadmissible when testator intent is clear on the face of the will).

* This summary was greatly improved by comments from ACTEC Fellows who are members of the State Laws Committee, for which the authors are deeply appreciative.

	Plain Meaning Rule (Trusts): While Alaska still recognizes the plain meaning rule as applied to wills, it has departed from the plain meaning rule in other areas of law; however, no cases deal with an *inter vivos* trust. *See Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767, 771 (Alaska 1982) (departing from the plain meaning rule in contract interpretation to admit extrinsic evidence of whether or not an ambiguity in the contract terms exists); *cf. Estate of Smith v. Spinelli*, 216 P.3d 524, 530 (Alaska 2009) (noting that a deed is only open to one reasonable interpretation, the court need not go further).
Arizona	
	Dead Man's Statute: Recognized with Limitation. *See* ARIZ. REV. STAT. ANN. § 12-2251 (2003); *Troutman v. Valley National Bank*, 826 P.2d 810, 812 (Ariz. Ct. App. 1992) (noting that the application of the dead man's statute is within the discretion of the trial court).
	Hearsay Exception: Recognized. *See* ARIZ. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See In re Estate of Pouser*, 975 P.2d 704, 708-09 (Ariz. 1999) (allowing extrinsic evidence to be admitted only where the will contained a latent ambiguity). Note that ARIZ. REV. STAT. ANN. § 14-10415 (2013) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* ARIZ. REV. STAT. ANN. § 14-10415 (2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Arkansas	
	Dead Man's Statute: Not Recognized. *See* ARK. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); *Davis v. Hare*, 561 S.W.2d 321, 322 (Ark. 1978) (noting that the dead man's statute was repealed by the adoption of the Uniform Rules of Evidence).
	Hearsay Exception: Recognized. *See* ARK. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Carmody v. Betts*, 289 S.W.3d 174, 178 (Ark. Ct. App. 2008) (noting that extrinsic evidence may only be considered if the terms of the will are ambiguous). Note that ARK. CODE ANN. § 28-73-415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts). *See* ARK. CODE ANN. § 28-73-415 ("A court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
California	

	Dead Man's Statute: Not Recognized. *See* CAL. EVID. CODE § 1261 (West 1995); *id.* (Law Revision Comm'n Comments). ("[T]he dead man statute is not continued in the Evidence Code. Under the Evidence Code, the positions of the parties are balanced by throwing more light, not less, on the actual facts. Repeal of the dead man statute permits the claimant to testify without restriction. To balance this advantage, section 1261 permits hearsay evidence of the decedent's statements to be admitted. Certain safeguards – i.e., personal knowledge, recent perception, and circumstantial evidence of trustworthiness – are included in the section to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination.").
	Hearsay Exception: Recognized. *See* CAL. EVID. CODE §§ 1250-51 (West 1995); *id.* § 1250, Assembly Comm. on Judiciary cmt. ("[I]n *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921), a testatrix, after the execution of a will, declared, in effect, that the will had been made at an aunt's request; this statement was held to be inadmissible hearsay 'because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it.' (*citing Ellis v. Stephens*, 198 P. 403, 415 (1921)"); *Whitlow v. Durst*, 127 P.2d 530, 530 (Cal. 1942) ("When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving.").
	Plain Meaning Rule (Wills): *See* CAL. PROB. CODE § 6111.5 (West 2009) ("Extrinsic evidence is admissible to determine whether a document constitutes a will . . . or to determine the meaning of a will or portion of a will if the meaning is unclear."); *In re Estate of Flint*, 102 Cal. Rptr. 345, 351 (Cal. Ct. App. 1972) ("Extrinsic evidence is admissible not only to resolve a latent ambiguity in a will, but also to show that a latent ambiguity exists.").
	Plain Meaning Rule (Trusts): *See Safai v. Safai*, 78 Cal. Rptr.3d 759, 767-68 (Cal. Ct. App. 2008) ("In ascertaining the trustor's intent, we look first to the terms of the trust, though extrinsic evidence is admissible to ascertain the meaning of the trust and the intent of the trustor.").
Colorado	
	Dead Man's Statute: Recognized with Limitation. *See* COLO. REV. STAT. ANN. § 13-90-102 (West 2014) (disqualifying parties and persons in interest with parties from testifying as to oral statements of the decedent, unless such statements were corroborated by material evidence of a trustworthy nature). For a definition of "corroborated by material evidence," see 2013 Colo. Sess. Laws 767.
	Hearsay Exception: Recognized. *See* COLO. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See* COLO. REV. STAT. ANN. § 15-11-806 (West 2011) ("The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement."); *see also id.* § 15-11-807.

	Plain Meaning Rule (Trusts): *See* COLO. REV. STAT. ANN. § 15-11-806 ("The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.") *see also id.* § 15-11-807.
Connecticut	
	Dead Man's Statute: Not Recognized. *See* CONN. GEN. STAT. ANN. § 52-145 (West 2012). Note that CONN. GEN. STAT. ANN. § 52-172 (West 2013) allows what Connecticut courts have called the "dead man's statute," which is an exception to hearsay that permits the admission into evidence of declarations, testimony and memorandums of a decedent. *See*, *e.g.*, *Dinan v. Marchand*, 903 A.2d 201, 211-212 (Conn. 2006).
	Hearsay Exception: Recognized. *See* CONN. CODE OF EVID. §§ 8-3; 8-6 (2014).
	Plain Meaning Rule (Wills): *See McFarland v. Chase Manhattan Bank*, 337 A.2d 1, 6 (Conn. Super. Ct. 1973); RALPH H. FOLSOM, PROBATE LITIG. IN CONN. § 6:9 (2d ed. 2014) ("Extrinsic evidence is generally not admissible to vary, contradict, or add to the terms of a Will, Codicil, or trust instrument, or to show an intention that is not found in the words used. There must be a latent ambiguity in the document to justify admission of extrinsic or parol evidence."). *But see Erickson v. Erickson*, 716 A.2d 92, 98 (Conn. 1998) (admitting extrinsic evidence in order to clarify a scrivener's error where the will contained no latent ambiguity).
	Plain Meaning Rule (Trusts): *See Palozie v. Palozie*, 927 A.2d 903, 911 (Conn. 2007) ("If, however, the trust instrument 'is an incomplete expression of the settlor's intention or if the meaning of the writing is ambiguous or otherwise uncertain, evidence of the circumstances and other indications of the transferor's intent are admissible to complete the terms of the writing or to clarify or ascertain its meaning . . . .'" (citation omitted)).
Delaware	
	Dead Man's Statute: Not Recognized. *See* DEL. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules.").
	Hearsay Exception: Recognized. *See* DEL. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Bird v. Wilmington Society of Fine Arts*, 43 A.2d 476, 484 (Del. 1945) ("Courts may, and usually do, admit certain extrinsic testimony to ascertain if any ambiguity exists in the language of the Will, and to determine that ambiguity.").
	Plain Meaning Rule (Trusts): *See Otto v. Gore*, 45 A.3d 120, 136 (Del. 2012) ("Where a provision of the trust instrument is clear and unambiguous, the court will not consider extrinsic evidence to vary or contradict the ordinary meaning of the provision."). However, the *Otto* court also noted that extrinsic evidence may be admissible to determine whether or not a trust has been formed. *See id.* at 131; *accord Wilmington Trust Co. v. Annan*, 531 A.2d 1209, 1213 (Del. Ch. 1987).
Florida	

	Dead Man's Statute: Not Recognized. *See* FLA. STAT. ANN. § 90.601 (West 2011) ("Every person is competent to be a witness, except as otherwise provided by statute."); *id.* (Law Revision Council Note – 1976) ("This section, which is substantially qualified by other provisions in this Act, makes it clear that grounds for disqualification of a witness must be based upon statute. Included among the grounds abolished by this Act are religious belief, conviction of a crime, and connection with litigation as a party or interested person or being the spouse of a party or interested person.").
	Hearsay Exception: Recognized. *See* FLA. STAT. ANN. § 90.803(b)(1) (West 2013); *id.* (Law Revision Council Note – 1976) ("Existing Florida law is apparently in accord with the rule admitting statements of memory or belief relating to the execution, revocation, identification, or terms of a declarant's will to prove the fact remembered or believed. In *Marshall v. Hewett,* 156 Fla. 645, 24 So.2d 1 (1945), the testimony of the draftsman of a will concerning the verbal instructions given him by the testator was admissible for the purpose of making clear the desires and intent of the testator. See CALIF. EVID. CODE § 1260").
	Plain Meaning Rule (Wills): *See* FLA. STAT. ANN. § 732.615 (West 2010) (Permitting a court to reform a will, even if it appears "unambiguous", to conform to testator intent). *But see In re Riggs*, 643 So. 2d 1132, 1134 (Fla. Dist. Ct. App. 1994) ("When the terms of the will, are themselves, clear and unambiguous, there is no reason to engage in construction."). Extrinsic evidence is permissible in cases of both patent and latent ambiguities. *See First Union National Bank of Florida, N.A. v. Frumkin*, 659 So. 2d 463, 464 (Fla. Dist. Ct. App. 1994); *Perkins v. O'Donald*, 82 So. 401, 404-05 (Fla. 1919). Note that FLA. STAT. ANN. § 736.0415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* FLA. STAT. ANN. § 736.0415 (West 2010) ("Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.").
Georgia	
	Dead Man's Statute: Not Recognized. *See* GA. CODE ANN. § 24-6-601 (2013) ("Except as otherwise provided in this chapter, every person is competent to be a witness.").
	Hearsay Exception: Recognized. *See* GA. CODE ANN. § 24-8-803(3) (2013).
	Plain Meaning Rule (Wills): *See* GA. CODE ANN. § 53-4-56 (2011) (Extrinsic evidence is admissible if there are either patent or latent ambiguities.). *Contra Chattowah Open Land Trust, Inc. v. Jones*, 636 S.E.2d 523, 526 (Ga. 2006) (explaining that when a will is plain and unambiguous, no outside evidence is admissible). Note that GA. CODE ANN. § 53-12-60(a) (2011) abolishes the plain meaning rule for testamentary trusts. *See id.*

	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and *inter vivos* trusts. *See* GA. CODE ANN. § 53-12-60(a) (2013) ("If it is proved by clear and convincing evidence that the trust provisions were affected by a mistake of fact or law, whether in expression or inducement, the court may reform the trust provisions, even if unambiguous, to conform the provisions to the settlor's intention.").
Hawaii	
	Dead Man's Statute: Not Recognized. *See* HAW. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); *id.* editor's notes ("The rule embodies the intent expressed in the Advisory Committee's Note to Fed. R. Evid. 601 to abolish 'religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person' as bases for disqualification of a witness. Proper grounds for witness disqualification are set forth in Rules 602 and 603.1."); *Hew v. Aruda*, 462 P.2d 476, 479 (Haw. 1969) ("Although not adopted in Hawaii, the so-called 'dead man's statute' as it operated in other jurisdictions totally disqualified as a witness the survivor of a transaction with a decedent when the survivor's testimony was offered against the decedent's estate.").
	Hearsay Exception: Recognized. *See* HAW. R. EVID. 803(b)(3).
	Plain Meaning Rule (Wills): There is no common law distinction in Hawaii between patent and latent ambiguities. *See In re Ikuta's Estate*, 639 P.2d 400, 402 (Haw. 1981).
	Plain Meaning Rule (Trusts): *See Graham v. Washington University*, 569 P.2d 896, 900 (Haw. 1977) (concluding that the trial court was incorrect to exclude extrinsic evidence because the trust language was indeed ambiguous); *In re Dowsett's Estate,* 38 Haw. 407, 409-410 (1949). ("While it is true as contended by the remainderman that this intent must be gathered if possible from the trust instrument itself, nevertheless it is equally true that extrinsic evidence with respect to the circumstances surrounding the creation of the trust and the settlor's conception of any ambiguous words, employed by him in the trust instrument, may be received and considered for the purpose of aiding the court in construing the instrument to determine his intent.").
Idaho	
	Dead Man's Statute: Recognized with Limitation. *See* IDAHO CODE ANN. § 9-202 (2010) (barring testimony of interested parties "to any communication or agreement, not in writing, occurring before the death of such deceased person"); IDAHO. R. EVID. 601(b) ("Claim Against Estate. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person as to any communication or agreement, not in writing, occurring before the death of such deceased person.").
	Hearsay Exception: Recognized. *See* IDAHO. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Hintze v. Black*, 873 P.2d 909, 912 (Idaho Ct. App. 1994) ("If the language of the will is clear and unambiguous, this intent is derived from the will itself. However, if the meaning of a term is ambiguous, the court can look to extrinsic evidence to determine intent.").
	Plain Meaning Rule (Trusts): *See In re Trust Established by Turner*, 782 P.2d 36, 38 (Idaho Ct. App. 1989) (applying the plain meaning rule to trusts as it has long been applied to wills).

Illinois	
	Dead Man's Statute: Recognized. *See* 735 ILL. COMP. STAT. ANN. 5/8-201 (West 2014); *Brown, Udell & Pomerantz Ltd. v. Ryan*, 861 N.E.2d 258, 262-63 (Ill. App. Ct. 2006); *Gunn v. Sobucki*, 837 N.E.2d 865, 870-71 (Ill. 2005).
	Hearsay Exception: Recognized. *See* ILL. R. EVID. 803(3)(A). PLAIN MEANING RULE (WILLS): *See Trabue v. Gillham*, 97 N.E.2d 341, 342-43 (Ill. 1951) (allowing extrinsic evidence in both instances of latent and patent ambiguities); 18 ROBERT S. HUNTER, ILL. PRAC., EST. PLAN. & ADMIN. § 145:3 (4th ed. 2007) ("Prior to 1962, the rule in Illinois was that extrinsic evidence, while admissible to clarify a latent ambiguity, could not be admitted to clarify a patent ambiguity. That rule was changed, making extrinsic evidence admissible to aid in determining the testator's intent whether the ambiguity was latent or patent. *Weir v. Leafgreen*, 186 N.E.2d 293, 296 (Ill. 1962).").
	Plain Meaning Rule (Wills): *See Trabue v. Gillham*, 97 N.E.2d 341, 342-43 (Ill. 1951) (allowing extrinsic evidence in both instances of latent and patent ambiguities); 18 ROBERT S. HUNTER, ILL. PRAC., EST. PLAN. & ADMIN. § 143:3 (4th ed. 2007) ("Prior to 1962, the rule in Illinois was that extrinsic evidence, while admissible to clarify a latent ambiguity, could not be admitted to clarify a patent ambiguity. That rule was changed, making extrinsic evidence admissible to aid in determining the testator's intent whether the ambiguity was latent or patent. *Weir v. Leafgreen*, 186 N.E.2d 293, 296 (Ill. 1962).").
	Plain Meaning Rule (Trusts): *See Koulogeorge v. Campbell*, 983 N.E.2d 1066, 1074 (Ill. App. Ct. 2012) ("The settlor's intent is to be determined solely by reference to the plain language of the trust itself and extrinsic evidence may be admitted to aid interpretation only if the document is ambiguous, and the settlor's intent cannot be ascertained.") (citations omitted); *Stein v. Scott*, 625 N.E.2d 713, 716 (Ill. App. Ct. 1993); *Peck v. Froehlich*, 853 N.E.2d 927, 932-34 (Ill. App. Ct. 2006).
Indiana	
	Dead Man's Statute: Recognized. *See* IND. CODE ANN. § 34-45-2-4 (West 2011).
	Hearsay Exception: Recognized. *See* IND. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See In re Estate of Meyer*, 668 N.E.2d 263, 265 (Ind. Ct. App. 1996); *In re Estate of Grimm*, 705 N.E.2d 483, 498 (Ind. Ct. App. 1999) (noting that a court will look to the four corners of a will in determining testator intent and should enforce express terms of will if no ambiguity exists); *Stoner v. Custer*, 251 N.E.2d 668, 670 (Ind. 1969) ("Where the meaning of a will is plain the court is limited to its interpretation within the four corners of the instrument. However, where there is an ambiguity . . . the court is permitted to consider the circumstances surrounding the testator at the time of execution.").
	Plain Meaning Rule (Trusts): *See University of Southern Indiana Foundation v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006) ("[W]here a trust is capable of clear and unambiguous construction, under this doctrine, the court must give effect to the trust's clear meaning without resort to extrinsic evidence."); *State v. Hammans*, 870 N.E.2d 1071, 1079 (Ind. Ct. App. 2007).

Iowa	
	Dead Man's Statute: Not Recognized. *See* IOWA CODE ANN. § 622.3 (West 2014); *id.* § 622.4 (repealed 1983).
	Hearsay Exception: Recognized. *See* IOWA R. EVID. 5.803.
	Plain Meaning Rule (Wills): *See Bankers Trust Co. v. Allen*, 135 N.W.2d 607, 610, 611 (1965) (noting that where language is unambiguous, the will's meaning must be determined from its language, and also noting that if a will contains a latent ambiguity, extrinsic evidence is admissible).
	Plain Meaning Rule (Trusts): *See Dunn v. Dunn*, 258 N.W. 695, 698 (1935) (applying the plain meaning rule as used in contract law in general to trust instruments).
Kansas	
	Dead Man's Statute: Not Recognized. *See* KAN. STAT. ANN. § 60-407 (West 2013).
	Hearsay Exception: Recognized. *See* KAN. STAT. ANN. § 60-460 (West 2013) ("Recitals in documents affecting property. Evidence of a statement relevant to a material matter, contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated [is admissible], if the judge finds that (1) the matter stated would be relevant upon an issue as to an interest in the property and (2) the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.").
	Plain Meaning Rule (Wills): *See In re Estate of Mildrexter*, 971 P.2d 758, 760 (Kan. Ct. App. 1999) ("If the testator's intent can be ascertained, neither rules of construction nor extrinsic evidence should be allowed to vary the clear intent expressed on the face of the instrument."). Note that KAN. STAT. ANN. § 58a-415 (West 2013) abolishes the plain meaning rule for testamentary trusts.
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* KAN. STAT. ANN. § 58a-415 (West 2014). ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Kentucky	
	Dead Man's Statute: Repealed. *See* KY. REV. STAT. ANN. § 412.210 (repealed 1992).
	Hearsay Exception: Recognized. *See* KY. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Dils v. Richey*, 431 S.W.2d 497, 498 (Ky. 1968) ("Since the will is unambiguous no construction is called for, hence extrinsic evidence may not be introduced as an aid to construction."); 2 KY. PRAC. PROB., PRAC. & PROC. § 1106 (2013) (noting that while the traditional distinction is that extrinsic evidence is admissible where there is a latent ambiguity, but not a patent ambiguity, such distinction may no longer be appropriate).
	Plain Meaning Rule (Trusts): *See Department of Revenue v. Kentucky Trust Co.*, 313 S.W.2d 401, 404 (Ky. Ct. App. 1958) (applying the same rules of construction for wills to the construction of trust instruments).

Louisiana	
	Dead Man's Statute: Recognized. *See* LA. REV. STAT. ANN. § 13:3721 (2006) (excluding oral testimony about a decedent's debts unless action is brought within one year of death).
	Hearsay Exception: Recognized. *See* LA. CODE EVID. ANN. art. 803(3) (2014).
	Plain Meaning Rule (Wills): *See* LA. CIV. CODE ANN. art. 1611(A) (2008) ("The intent of the testator controls the interpretation of his testament. If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. The following rules for interpretation apply only when the testator's intent cannot be ascertained from the language of the testament. In applying these rules, the court may be aided by any competent evidence."); *Pittman v. Magic City Memorial Co.*, 985 So.2d 156, 159 (La. Ct. App. 2008) ("When a will is free from ambiguity, the will must be carried out according to its written terms, without reference to information outside the will.").
	Plain Meaning Rule (Trusts): *See Thomas v. Kneipp*, 986 So.2d 175, 186 (La. Ct. App. 2008) ("Parol or extrinsic evidence may be admitted to aid in construing a trust instrument only if the instrument is ambiguous or uncertain, and only to explain, and not to contradict, the instrument.") (citing *Lelong v. Succession of Lelong*, 164 So.2d 671, 674 (La. Ct. App. 1964)).
Maine	
	Dead Man's Statute: Repealed. *See* ME. REV. STAT. Ann. tit. 16, § 1 (repealed 1977); *Kirk v. Marquis*, 391 A.2d 335, 336 (Me. 1978) (noting that the repeal of the dead man's statute, a statement that the decedent would "take care of" the claimant is admissible as a state of mind exception to the hearsay rule).
	Hearsay Exception: Recognized. *See* ME. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See In re Estate of Silsby*, 914 A.2d 703, 706 (Me. 2006) (recognizing that the court must first look to the four corners of the will, and, if the testator's intent is ambiguous, the court may then consider extrinsic evidence). Note that ME. REV. STAT. ANN. tit. 18-B, § 415 (2012) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* ME. REV. STAT. ANN. tit. 18-B, § 415 (2012) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Maryland	
	Dead Man's Statute: Recognized. *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (West 2014); *Ebert v. Ritchey*, 458 A.2d 891, 895 (Md. Ct. Spec. App. 1983); *Mason v. Poulson*, 40 Md. 355, 362 (Md. 1874).
	Hearsay Exception: Recognized. *See* MD. RULE 5-803(b)(3).

	Plain Meaning Rule (Wills): *See First National Bank of Maryland v. White*, 211 A.2d 328, 333 (Md. 1965) ("It is a fundamental principle that where the language of a will is plain and unambiguous, no extrinsic evidence is admissible to show that the testator's intention was different from that which the will discloses."). Maryland allows extrinsic evidence if a will contains a latent ambiguity. *See Monmonier v. Monmonier*, 266 A.2d 17, 19 (Md. 1970). As discussed below, the Maryland Trust Act now permits extrinsic evidence to show settlor intent in testamentary trusts.
	Plain Meaning Rule (Trusts): *See Jahnigen v. Smith*, 795 A.2d 234, 240 (Md. Ct. Spec. App. 2002); *Shriners Hospital for Crippled Children v. Maryland National Bank*, 312 A.2d 546, 553-54 (Md. 1973); *Fasman v. Pattashnick*, 51 A.2d 664, 666 (Md. 1947) (admitting parol evidence to establish the existence of constructive trusts). Effective January 1, 2015, the Maryland Trust Act adopts UTC section 415 to permit reformation to conform the terms of a trust, even if unambiguous, to reflect settlor intent. MD. CODE ANN., EST. & TRUSTS § 14.5-413 (West 2015). This provision applies to testamentary and inter vivos trusts.
Massachusetts	
	Dead Man's Statute: Not Recognized. *See* MASS. GEN. LAWS ANN. ch. 233, § 65 (West 2014) ("a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant.").
	Hearsay Exception: Recognized. *See* MA. R. EVID. § 803(3)(B)(iii).
	Plain Meaning Rule (Wills): *See Putnam v. Putnam*, 316 N.E.2d 729, 734 (Mass. 1974) ("If a will is not ambiguous, extrinsic evidence to explain its terms is inadmissible . . . . If, however, there is an ambiguity in a will, such as a conflict of terms, extrinsic evidence may be resorted to in order to show the circumstances known to the testator under which he viewed that ambiguous language."). Extrinsic evidence will be admissible where either a patent or latent ambiguity exists. *See Flannery v. McNamara*, 738 N.E.2d 739, 742 (Mass. 2000) (noting that the will in issue was not ambiguous, as it contained neither patent nor latent ambiguities). Note that MASS. GEN. LAWS ANN. ch. 203E, § 415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* MASS. GEN. LAWS ANN. ch. 203E, § 415 (West 2014) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Michigan	
	Dead Man's Statute: Recognized with Limitation. *See* MICH. COMP. LAWS ANN. § 600.2166 (West 2014) (permitting testimony from an interested witness, if such testimony is corroborated by some other material evidence). Although the statute remains intact, courts have held that the general powers of Rule 601 trump the dead man's statute. *See Turbyfill v. International Harvester Co.*, 486 F.Supp. 232, 236 (E.D. Mich. 1980); *James v. Dixon*, 291 N.W.2d 106, 108 (Mich. Ct. App. 1980).
	Hearsay Exception: Recognized. *See* MICH. R. EVID. 803(3).

	Plain Meaning Rule (Wills): *See In re Estate of Raymond*, 761 N.W.2d 1, 4 (Mich. 2009) ("If there is no ambiguity, the Court is to enforce the will as written. However, if the intent of the testator cannot be gleaned solely by reference to the will because there is an ambiguity, the Court may discern the intent of the testator through extrinsic sources.") (footnotes omitted). Note that MICH. COMP. LAWS. ANN., § 700.7415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* MICH. COMP. LAWS. ANN. § 700.7415 ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Minnesota	
	Dead Man's Statute: Not Recognized. *See* MINN. R. EVID. 601 ("Except as provided by these rules, the competency of a witness to give testimony shall be determined in accordance with law."). The earlier dead man's statute was repealed, apparently in response to a suggestion from the Court of Appeals. *See generally In re Lea's Estate*, 222 N.W.2d 92 (Minn. 1974); MINN. STAT. ANN. § 595.04 (Repealed 1987).
	Hearsay Exception: Recognized. *See* MINN. R. EVID. 803(3); *see id.* (Comm. Comment – 1989) ("The rule does not permit evidence of a declarant's present state of mind to be admitted to establish the declarant's previous actions, unless dealing with the execution, revocation, identification, or terms of declarant's will. *Cf. Troseth v. Troseth*, 224 Minn. 35, 28 N.W.2d 65 (1947). (Present state of mind used to prove previous intent in effectuating gift.)").
	Plain Meaning Rule (Wills): *See In re Trusts A & B of Devine*, 672 N.W.2d 912, 917 (Minn. Ct. App. 2001) ("Extrinsic evidence of the meaning of a will is admissible only when the text of the will is ambiguous.").
	Plain Meaning Rule (Trusts): *See In re Stisser Trust*, 818 N.W.2d 495, 502 (Minn. 2012) ("When the trust agreement is unambiguous, we will ascertain the grantor's intent from the language of the agreement, without resort to extrinsic evidence.").
Mississippi	
	Dead Man's Statute: Repealed. *See* MISS. CODE ANN. § 13-1-7 (repealed 1991).
	Hearsay Exception: Recognized. *See* MISS. R. EVID. 803(3); *id*. cmt. 3. ("One exemption from the exclusion is for statements of memory or belief which relate to the execution, revocation, identification, or terms of a declarant's will. There is no particular logical reason for this. Rather, the basis for allowing such statements is founded on necessity and expediency.").
	Plain Meaning Rule (Wills): *Estate of Blount v. Papps*, 611 So.2d 862, 866 (Miss. 1992) ("In determining the testator's intent, in the absence of ambiguity, this Court is limited to the 'four corners' of the will itself."). Note that MISS. CODE ANN. § 91-8-415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*

	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* Miss. Code Ann. § 91-8-415 ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Missouri	
	Dead Man's Statute: Not Recognized. *See* Mo. Ann. Stat. § 491.010 (West 2011); *See Estate of Oden v. Oden*, 905 S.W.2d 914, 918 (Mo. Ct. App. 1995) (noting that the 1985 amendment to the statute abandoned the historic dead man's statute, which "operated to disable interested witnesses from testifying about transactions with deceased persons").
	Hearsay Exception: Recognized. *See Ryterski v. Wilson*, 740 S.W.2d 374 (Mo. Ct. App. 1987) (discussing past cases of will contests where declarations of decedent held to be admissible under the "state of mind" hearsay exception).
	Plain Meaning Rule (Wills): *See Krechter v. Grofe*, 66 S.W. 358, 359 (Mo. 1901); *Naylor v. Koeppe*, 686 S.W.2d 47, 49 (Mo. Ct. App. 1985). In the case of a latent ambiguity, extrinsic evidence is admissible, including declarations made by the testator of his intent are inadmissible. In the case of a patent ambiguity, extrinsic evidence is admissible but shall not include declarations made by the testator of his intent. *See Schupbach v. Schupbach*, 760 S.W.2d 918, 923 (Mo. Ct. App. 1988). Note that Mo. Ann. Stat. § 456.4-415 (West 2007) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* Mo. Ann. Stat. §456.4-415 ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Montana	
	Dead Man's Statute: Not Recognized. *See* Mont. R. Evid. 601; *id.* cmt. a. ("The ground of incompetency found in section 93-701-3, R.C.M. 1947 [superseded], not covered by these rules is commonly known as the Dead Man's Statute. Therefore, this rule has the effect of abolishing the Dead Man's Statute in Montana." (brackets in original)).
	Hearsay Exception: Not Recognized. *See* Mont. R. Evid. 803(3); *id.* cmt. 3. ("This exception is identical to Federal and Uniform Rules (1974) Rule 803(3) except the phrase 'unless it relates to the execution, revocation, identification, or terms of the declarant's will,' found at the end of the exception in those rules, is deleted from the exception.").
	Plain Meaning Rule (Wills): *See In re Estate of Lindgren*, 885 P.2d 1280, 1282 (Mont. 1994) ("If the wording of the will is clear and unambiguous, the court shall not consider extrinsic evidence of the circumstances surrounding the execution of the will"). Note that Mon. Code Ann. §72-38-415 (West 2013) abolishes the plain meaning rule for testamentary trusts. *See id.*

	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* Mon. Code Ann. §72-38-415 (West 2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Nebraska	
	Dead Man's Statute: Repealed. *See* Neb. Rev. Stat. Ann. § 25-1202 (repealed 1975).
	Hearsay Exception: Recognized. *See* Neb. Rev. Stat. Ann. § 27-803(2) (LexisNexis 2013).
	Plain Meaning Rule (Wills): Extrinsic evidence permitted only in the instance of a latent ambiguity. *See In re Estate of Mousel*, 715 N.W.2d 490, 494 (Neb. 2006) ("Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain."). Note that Neb. Rev. Stat. Ann. § 30-3841 (LexisNexis 2010) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* Neb. Rev. Stat. Ann. § 30-3841 (LexisNexis 2010) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Nevada	
	Dead Man's Statute: Not Recognized. *See* Nev. Rev. Stat. Ann. § 48.075 (West 2004).
	Hearsay Exception: Recognized. *See* Nev. Rev. Stat. Ann. § 51.105(2) (West 2008).
	Plain Meaning Rule (Wills): *See In re Estate of Jones*, 296 P.2d 295, 296 (Nev. 1956) ("The question before us is not what the testatrix actually intended or what she meant to write. Rather it is confined to a determination of the meaning of the words used by her."). The Court in *Jones* noted that extrinsic evidence cannot be used to clarify a patent ambiguity. To the extent that two provisions contradict one another, they both must fail. *Id.* at 297. *See also Frei v. Goodsell*, 305 P.3d 70, 73-74 (Nev. 2013).
	Plain Meaning Rule (Trusts): *See In re Estate of Walter*, 343 P.2d 572, 574 (Nev. 1959) (regarding testamentary trusts). The *Walters'* case notes that the plain meaning rule applies when dealing with express provisions of a will; however, in the case where there is no express provision, but the failure to make a provision, "'[T]he intention of the grantor need not have been expressed by specific words, but may be derived from the entire instrument as a whole, from its general scheme, or from informal language used, by necessary implication, i.e., implication not based on conjecture, but so strong that a contrary intention cannot be supposed to have existed in his mind.'" *Id.* at 574 (quoting *Brock v. Hall*, 198 P.2d 69, 72 (Cal. Dist. Ct. App. 1948), *aff'd*, 206 P.2d 360.).

New Hampshire	
	Dead Man's Statute: Repealed. *See* N.H. REV. STAT. ANN. § 516:25 (repealed 1994). In the limited circumstances of endorsees or assignees of negotiable paper, however, a restriction remains. *See* N.H. Rev. Stat. Ann. § 516:26 (2013).
	Hearsay Exception: Recognized. *See* N.H. R. EVID. 803(3); *id.*, Reporter's Notes ("Rule 803(3) does, however, allow statements of 'then existing state of mind' to show previous conduct which 'relates to the execution, application, identification, or terms of declarant's will.' RSA 516:25 and the case law under it allow such statements by deceased persons in other types of actions in addition to probate proceedings. See generally, *In re Estate of Sayewich*, 120 N.H. 237, 413 A.2d 581 (1980).").
	Plain Meaning Rule (Wills): *See In re Estate of Sayewich*, 413 A.2d 581, 584 (N.H. 1980) ("Extrinsic evidence may be received, however, to supplement or sustain the terms of the will, and to ascertain the testator's intent where the language used is ambiguous."). New Hampshire requires a latent ambiguity in order for extrinsic evidence to be admissible. *Brown v. Brown*, 43 N.H. 17, 17 (1861) ("Where there is no latent ambiguity in a devise, parol evidence of the intention of the testator is inadmissible."). Note that N.H. REV. STAT. ANN. § 564-B:4-415 (2013) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* N.H. REV. STAT. ANN. § 564-B:4-415 (2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
New Jersey	
	Dead Man's Statute: Recognized with Limitation. *See* N.J. STAT. ANN. §2A:81-2 (West 2014) (limiting interested persons' testimony to instances where there is clear and convincing proof).
	Hearsay Exception: Recognized. *See* N.J. R. EVID. 803(c)(3); *id.* cmt. c. 3. ("Then existing mental, emotional, or physical condition. Rule 803(c)(3) follows *Fed.R.Evid.* 803(3) almost verbatim, adding the good faith requirement contained in *N.J.Evid.R.* 63(12). This rule replaces paragraph (a) of *N.J.Evid.R.* 63(12), first adding the term 'physical condition' and, consistent with New Jersey law, the provision respecting declarant's will. *See Engle v. Siegel*, 74 N.J. 287, 293-294 (1977); *Wilson v. Flowers*, 58 N.J. 250, 261-264 (1971); *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962); N.J.S.A. 3B:3-33 (permitting proof of the testator's intent by way of extrinsic "relevant circumstances."). The phrase "relevant circumstances" has been construed as including testator's statements of intent. *See*, *e.g.*, Engle *v. Siegel*, 74 N.J. at 291,

	Plain Meaning Rule (Wills): *See In re Estate of Payne*, 895 A.2d 428, 434 (N.J. 2006) ("The trial court is not 'limited simply to searching out the probable meaning intended by the words and phrases in the will.' *Engle v. Siegel,* 74 N.J. 287, 291, 377 A.2d 892 (1977). Extrinsic evidence may 'furnish [ ] information regarding the circumstances surrounding the testator [and] should be admitted to aid in ascertaining [the testator's] probable intent under the will.' *Wilson v. Flowers,* 58 N.J. 250, 260, 277 A.2d 199 (1971). To be sure, the testator's own expressions of his or her intent are highly relevant. *Id.* at 262-63, 277 A.2d 199. Once the evidence establishes the probable intent of the testator, 'the court may not refuse to effectuate that intent by indulging in a merely literal reading of the instrument.' *Id.* at 260, 277 A.2d 199." (brackets in original)).
	Plain Meaning Rule (Trusts): *See In re Voorhes' Trust*, 225 A.2d 710, 713-714 (N.J. Super. App. Div. 1967) ("The current view of probable intent requires that a trust or will be construed in a manner consonant with what the donor would have done had she envisioned the unexpected problem. This entails viewing the document as a whole in order to see if it evinces a 'dominant plan and purpose' when read in the light of the surrounding circumstances, ascribing to the settlor those impulses 'common to human nature' and considering the competent extrinsic evidence as to the settlor's intent.").
New Mexico	
	Dead Man's Statute: Not Recognized. *See* N.M. R. EVID §11-601 ("Every person is competent to be a witness unless these rules provide otherwise.").
	Hearsay Exception: Recognized. *See* N.M. R. EVID §11-803(3).
	Plain Meaning Rule (Wills): *See In re Estate of Frietze*, 966 P.2d 183, 185 (N.M. Ct. App. 1998) ("If a will is unambiguous, extrinsic evidence may not be accepted to determine the intent of the testator. Whether a will is ambiguous is a question of law."). Note that N.M. STAT. ANN. §46A-4-415 (West's 2013) abolishes the plain meaning rule for testamentary trusts.
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and *inter vivos* trusts. *See* N.M. STAT. ANN. § 46A-4-415 (West 2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
New York	
	Dead Man's Statute: Recognized with Exceptions. *See* N.Y.C.P.L.R. 4519 (McKinney 2014) (excepting: (1) where the executor, survivor, etc. is testifying on his own behalf; (2) where testimony of deceased is offered regarding the same communication or transaction; (3) where the party in interest is a stockholder or officer or an interested banking corporation; (4) where the testimony relates to costs being awarded to or against the interested party; and (5) where the testimony regards facts of a vehicle accident where the proceeding, hearing, defense or cause of action involves a claim of negligence).

	Hearsay Exception: Recognized. *See In re Estate of Rosasco*, No. 4050/2006, 2011 WL 1467632 at *5 (N.Y. Sur. Ct. April 5, 2011) ("Decedent's declarations to [great-niece] that: (1) if she were to contact her lawyer about making a new will, proponent would 'hurt me,' (2) if [great-niece] were to contact the lawyer on decedent's behalf, proponent's 'going to hurt you,' and (3) regardless of the terms of her will, proponent would 'find a way to steal' the assets of her estate, are not considered for their truth or falsity. Rather, these statements fall within the state of mind exception to the hearsay rule (*see* PRINCE ON EVIDENCE § 8–106)."). However, New York courts have modified the hearsay exception in some instances.
	Plain Meaning Rule (Wills): *See In re Estate of Scale*, 830 N.Y.S.2d 618, 620 (N.Y. App. Div. 2007) ("the best indicator of testator's intent is found in the clear and unambiguous language of the will itself and, thus, where no ambiguity exists, '[e]xtrinsic evidence is inadmissible to vary the terms of a will.'"); *In re Fabbri*, 140 N.E. 2d 269, 273-74, 2 N.Y. 2d 236, 243-4 (N.Y. 1957) ("The law takes into consideration the relative inadequacy of words as a vehicle for communicating intent and seeks the purpose of the testator by means of a more thorough and realistic approach. . . . [B]y reading the language in light of the rest of the instrument, the circumstances surrounding its formulation and the inferences supplied by common experience (in this case the presumption against intestacy), the court seeks to minimize the possibility that testator's true purpose will be frustrated by an unwarranted dependence on an ill-chosen word or phrase."); *see also* 39 N.Y. JUR.2d *Decedents' Estates* § 678 (2014).
	Plain Meaning Rule (Trusts): *See Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990) ("It is only where the court determines the words of the trust instrument to be ambiguous that it may properly resort to extrinsic evidence.").
North Carolina	
	Dead Man's Statute: Recognized. *See* N.C. R. EVID. 601(c).
	Hearsay Exception: Recognized. *See* N.C. R. EVID. 803(3); *id.* cmt. 3. ("In North Carolina, when the issue is one of undue influence or fraud with respect to the execution of a will, the declarations of a testator are admitted only as corroborative evidence and are not alone sufficient to establish the previous conduct of another person by means of which the alleged fraud was perpetrated or the undue influence exerted. BRANDIS ON NORTH CAROLINA EVIDENCE § 163, at 647-48. Exception (3) would change this result and permit such declarations to be admitted as substantive proof.").
	Plain Meaning Rule (Wills): *See Wachovia Bank & Trust Co. v. Wolfe*, 91 S.E.2d 246, 250 (N.C. 1956) (recognizing the "four corners" of the will must be first looked to in understanding testator intent). North Carolina deems extrinsic evidence admissible in the case of latent ambiguities, but generally not in the case patent ambiguities. *Id*. Some courts have later allowed extrinsic evidence in the case of patent ambiguities if such evidence is limited to the circumstances attendant when the will was made. *See*, *e.g.*, *Wooten v. Hobbs*, 86 S.E. 811, 813 (N.C. 1915). Note that N.C. GEN. STAT. § 36C-4-415 (2013) abolishes the plain meaning rule for testamentary trusts. *See id.*

	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* N.C. GEN. STAT. § 36C-4-415 (2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
North Dakota	
	Dead Man's Statute: Not Recognized. *See* N.D. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules."); *id.* (Explanatory Note) ("Neither this rule nor any of the rules of this code contain a 'Dead Man's' statute. This represents a departure from former North Dakota law. The former 'Dead Man's' statute, § 31-01-03, NDCC, and by reference § 31-01-04 and § 31-01-05, NDCC, are superseded by adoption of these rules.").
	Hearsay Exception: Recognized. *See* N.D. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See In re Estate of Ostby*, 479 N.W.2d 866, 871 (N.D. 1992) ("Unless a duly executed will is ambiguous, the testamentary intent is derived from the will itself, not from extrinsic evidence."). Extrinsic evidence can be allowed in if either a patent or latent ambiguity exists. *See In re Kahoutek's Estate*, 166 N.W. 816, 818 (N.D. 1918) ("We are satisfied that the will does not permit of the construction contended for by respondents. There is, in fact, no imperfect description in the will, nor is there either a patent or a latent ambiguity."). Note that N.D. CENT. CODE § 59-12-15 (2010) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* N.D. CENT. CODE § 59-12-15 (2010) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Ohio	
	Dead Man's Statute: Not Recognized. See OHIO EVID. R. 601. Rule 601 has been held to abrogate Ohio's Dead Man's Statute. *See Johnson v. Porter,* 471 N.E.2d 484, 487 (Ohio 1984).
	Hearsay Exception: Recognized. *See* OHIO EVID. R. 803(3); *id.* (Staff Notes) ("Where the statement is by a testator concerning the execution, revocation, identification or terms of a will, such statement though constituting a belief about a past event is admissible. The declaration in this specific instance is highly trustworthy since it relates so closely to the testator-declarant's affairs, and the general prohibition against statements of belief about past events is unnecessary.").

	Plain Meaning Rule (Wills): *See Belardo v. Belardo,* 930 N.E. 2d 862, 867 (Ohio Ct. App. 2010) (Noting that testator intent must be gathered from the words contained in the will, and only when the language is unclear may extrinsic evidence be considered); *Oliver v. Bank One, Dayton N.A.*, 573 N.E.2d 55, 58 (Ohio 1991) ("The court may consider extrinsic evidence to determine the testator's intention only when the language used in the will creates doubt as to the meaning of the will."). Note that OHIO REV. CODE ANN. § 5804.15 (West 2013) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* OHIO REV. CODE ANN. § 5804.15 (West 2013) ("The court may reform the terms of a trust, even if they are unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."); *id.* § 5804.11 (B) ("A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified, but not to remove or replace the trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. A spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the trust. In determining what constitutes a material purpose of a trust, a court may but is not required to consider extrinsic evidence indicating a settlor's intent at the time the instrument was executed.").
Oklahoma	
	Dead Man's Statute: Not Recognized. *See* OKLA. STAT. ANN. tit. 12, § 2601 (West 2009) ("Every person is competent to be a witness except as otherwise provided in this Code.").
	Hearsay Exception: Recognized. *See* OKLA. STAT. ANN. tit. 12, § 2803(3) (West 2009).
	Plain Meaning Rule (Wills): *See In re Estate of Sharp,* 512 P.2d 160, 165 (Okla. 1973) (concluding seemingly clear language was in fact a latent ambiguity, and permitting certain extrinsic evidence). *But see In re Estate of Glomset,* 547 P.2d 951, 953 (Okla. 1976) ("[I]f there are no uncertainties appearing on the face of the will, extrinsic evidence is not admissible.").
Oregon	
	Dead Man's Statute: Not Recognized. *See* OR. REV. STAT. ANN. § 40.310 (West 2014); *id.* (1981 Conference Comm. Commentary). ("Oregon Rule of Evidence 601 states the general principle of competency of witnesses. At common law, a person might be disqualified from testifying because of criminal conviction, interest in the outcome, marital relationship, sex, race or religion. For over a century these common law rules of incompetency have been revised piecemeal by statute, so that today most of the former grounds for excluding a witness from testifying have been converted into mere grounds for impeachment of credibility. Oregon Rule of Evidence 601 confirms this trend. Rule 601—and Rules 602 to 606-1 which it incorporates by reference—effectively remove all the old common law disqualifications." (citation omitted)).

	Hearsay Exception: Recognized. *See* OR. REV. STAT. § 40.460(3) (West 2014); *id.* (1981 Conference Comm. Commentary) ("The carving out, from the exclusion for statements of memory or belief, of statements relating to the declarant's will represents an ad hoc judgment appealing to expediency rather than logic. There is ample recognition in statute and case law of the need for and practical value of this kind of evidence." (citations omitted)).
	Plain Meaning Rule (Wills): *See Kidder v. Olsen*, 31 P.3d 1139 (Or. Ct. App. 2001) ("while the general rule is that a will speaks for itself . . . extrinsic evidence is admissible to reveal a latent ambiguity in the words of the testator and a court will construe the will in light of the extrinsic evidence.") (internal quotations omitted). Note that OR. REV. STAT. ANN. § 130.220 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* OR. REV. STAT. ANN. § 130.220 (West 2014) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if the person requesting reformation proves by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Pennsylvania	
	Dead Man's Statute: Recognized. *See* 42 PA. CONS. STAT. ANN. § 5930 (West 2013); S. Michael Yeager, *The Pennsylvania Dead Man's Statute*, 18 WIDENER L. REV. 53, 54 (2012) ("The Dead Man's Statute in Pennsylvania consists of a single sentence containing more than three hundred words, constructed as a triple negative, delineating when a surviving or remaining party to a 'thing or contract in action' may or may not testify, and is a part of the substantive law of the Commonwealth. It 'applies to civil proceedings before any tribunal in the Commonwealth.'") (quoting 42 PA. CON. STAT. ANN. § 5930 (West 2000)). There are, however, several restricted situations as well. *See* 42 PA. CONS. STAT. ANN. § 5933 (West 2013); 20 PA. CONS. STAT. ANN. § 2209 (West 2014).
	Hearsay Exception: Recognized. *See* PA. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See* 20 PA. CONS. STAT. ANN. § 7740.5 (West 2014) ("The court may reform a trust instrument, even if unambiguous, to conform to the settlor's probable intention if it is proved by clear and convincing evidence that the settlor's intent as expressed in the trust instrument was affected by a mistake of fact or law, whether in expression or inducement."). The Pennsylvania Code defines a trust instrument to include a will. *See* 20 PA. CONS. STAT. ANN. § 7703 (West 2014).
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for testamentary and inter vivos trusts. *See* 20 PA. CONS. STAT. ANN. § 7740.5 ("The court may reform a trust instrument, even if unambiguous, to conform to the settlor's probable intention if it is proved by clear and convincing evidence that the settlor's intent as expressed in the trust instrument was affected by a mistake of fact or law, whether in expression or inducement.").
Rhode Island	
	Dead Man's Statute: Not Recognized. *See* R.I. GEN. LAWS § 9-17-12 (2012) ("No person shall be disqualified from testifying in any civil action or proceeding by reason of his or her being interested therein or being a party thereto.").
	Hearsay Exception: *See* R.I. R. Evid. 803(3).

	Plain Meaning Rule (Wills): *See Lazarus v. Sherman*, 10 A.3d 456, 462 (R.I. 2011) (noting that the consideration of extrinsic evidence is improper if the testator's intent can be determined from the four corners of the will).
	Plain Meaning Rule (Trusts): *See id.* (applying the same rules of construction for wills to the construction of trusts). *See also Steinhof v. Murphy*, 991 A.2d 1028, 1033-34 (R.I. 2010) (involving a nontestamentary trust).
South Carolina	
	Dead Man's Statute: Recognized. *See* S.C. CODE ANN. § 19-11-20 (2013).
	Hearsay Exception: Recognized. *See* S.C. R. EVID. 803(3).
	Plain Meaning Rule (Wills): Extrinsic evidence permitted in the instance of a latent ambiguity. *See Kemp v. Rawlings*, 594 S.E.2d 845, 849 (S.C. 2004) ("A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction."); *Estate of Gill v. Clemson University Foundation*, 725 S.E.2d 516, 520 (S.C. Ct. App. 2012). Note that S.C. CODE ANN. § 62-7-415 (2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* S.C. CODE ANN. § 62-7-415 (2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
South Dakota	
	Dead Man's Statute: Not Recognized. *See* S.D. CODIFIED LAWS § 19-14-1 (2004) ("Every person is competent to be a witness except as otherwise provided in chapters 19-9 to 19-18, inclusive."); *id.* § 19-16-34 ("any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.").
	Hearsay Exception: Recognized. *See* S.D. CODIFIED LAWS § 19-16-7.
	Plain Meaning Rule (Wills): *See In re Estate of Seefeldt*, 720 N.W.2d 647, 649 (S.D. 2006) (noting that when the testator's intent is clear from the will language, such intent controls).
	Plain Meaning Rule (Trusts): *See In re Estate of Stevenson*, 605 N.W.2d 818, 821 (S.D. 2000) (applying the plain meaning rule as recognized in will construction to trust instruments); *Luke v. Stevenson*, 696 N.W.2d 553, 557 (S.D. 2005); *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 813 N.W.2d 111, 117 (S.D. 2012).
Tennessee	
	Dead Man's Statute: Recognized. *See* TENN. CODE ANN. § 24-1-203 (2000).
	Hearsay Exception: Recognized. *See* TENN. R. EVID. 803(3).

	Plain Meaning Rule (Wills): *See In re Estate of Eden*, 99 S.W.3d 82, 93 (Tenn. Ct. App. 1995) (recognizing that testator's intention must be understood from four corners of the will, unless ambiguous). Parol evidence will be admitted in the case of latent ambiguities, but not in the cause of patent ambiguities. *See Estate of Burchfiel v. First United Methodist Church of Sevierville*, 933 S.W.2d 481, 482 (Tenn. Ct. App. 1996). Note that TENN. CODE ANN. § 35-15-415 (2007) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* TENN. CODE ANN. § 35-15-415 (2007) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Texas	
	Dead Man's Statute: Recognized with Limitation. *See* TEX. R. EVID. 601(b) (permitting testimony from an interested witness, yet requiring such testimony to be corroborated).
	Hearsay Exception: Recognized. *See* TEX. R. EVID. 803(3); *Griffin v. Robertson*, 592 S.W.2d 31, 33 (Tex. App. 1979) (ruling that the trial court properly admitted evidence related to decedent's intent), *abrogated on other grounds by Stauffer v. Henderson*, 801 S.W.2d 858, 862 (Tex. 1990).
	Plain Meaning Rule (Wills): *See San Antonio Area Foundation v. Lang*, 35 S.W.3d 636, 339 (Tex. 2000) ("Determining a testatrix's intent from the four corners of a will requires a careful examination of the words used. If the will is unambiguous, a court should not go beyond specific terms in search of the testatrix's intent."); *Rogers v. Ardella Veigel Inter Vivos Trust No. 2*, 162 S.W.3d 281, 286 (Tex. App. 2005).
	Plain Meaning Rule (Trusts): *See Soefje v. Jones*, 270 S.W.3d 617, 628 (Tex. App. 2008) ("If the words in the trust are unambiguous, we do not go beyond them to find the grantor's intent."); *Eckels v. Davis*, 111 S.W.3d 687, 694 (Tex. App. 2003).
Utah	
	Dead Man's Statute: Not Recognized. *See* UTAH R. EVID. 601; *id.* (Advisory Comm. Note) ("Rule 601 departs from the federal rule by adding two paragraphs to treat the problem of litigation involving deceased persons. The rule supersedes the Utah 'Dead Man' statute, Utah Code Ann. § 78-24-2 (1953), which is no longer operable."). Utah's version of 601 generally makes statements by a decedent admissible. For actions against a decedent's estate, the declaration must have been made when the decedent's recollection was clear and not under circumstances indicating untrustworthiness. *See* UTAH R. EVID. 601.
	Hearsay Exception: Recognized. *See* UTAH R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See Estate of Ashton v. Ashton*, 804 P.2d 540, 542 (Utah Ct. App. 1990) (recognizing that intent does not need be ascertained from the document alone, but also in light of the conditions and circumstances surrounding its execution). Note that UTAH CODE ANN. § 75-7-415 (West 1993) abolishes the plain meaning rule for testamentary trusts.

	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* UTAH CODE ANN. § 75-7-415 (West 1993) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Vermont	
	Dead Man's Statute: Recognized with Exceptions. *See* VT. STAT. ANN. tit. 12, § 1602 (West 2013).
	Hearsay Exception: Recognized. *See* VT. R. EVID. 803(3); *id.* (Reporter's Notes) ("No Vermont cases on the pragmatically grounded exception for a testator's statement concerning his will have been found. *Trask v. Walker's Estate*, 100 Vt. 51, 134 A. 853, 858 (1926), allowing testimony of a decedent's statement that she had given property to her daughter and executrix, in fact involves a declaration against interest.").
	Plain Meaning Rule (Wills): *See Eckstein v. Estate of Dunn*, 816 A.2d 494, 498-99 (Vt. 2002) (noting that in ascertaining intent, the court must look to the four corners of the will and may consider extrinsic evidence when an ambiguity exists). Note that VT. STAT. ANN. tit. 14A, § 415 (West 2013) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* VT. STAT. ANN. tit. 14A, § 415 (West 2013) ("[The] court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Virginia	
	Dead Man's Statute: Recognized with Limitation. *See* VA. CODE ANN. § 8.01-397 (2007) (permitting testimony from an interested witness, yet requiring such testimony to be corroborated).
	Hearsay Exception: Recognized. *See* VA. R. EVID. 2:803(3).
	Plain Meaning Rule (Wills): *See Gaymon v. Gaymon,* 519 S.E.2d 142, 144 ("Extrinsic evidence may be considered only if the language of the will is ambiguous, that is, susceptible to more than one interpretation."). Note that VA. CODE ANN. § 64.2-733 (2012) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts). *See* VA. CODE ANN. § 64.2-733 (2012) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Washington	
	Dead Man's Statute: Recognized. *See* WASH. REV. CODE ANN. § 5.60.030 (West 2014).
	Hearsay Exception: Recognized. *See* WASH. R. EVID. 803(a)(3).

	Plain Meaning Rule (Wills): Extrinsic evidence permitted only in the instance of patent ambiguities, latent ambiguities, or equivocation. *See In re Riemcke's Estate*, 497 P.2d 1319, 1322 (Wash. 1972) ("Extrinsic evidence will not be admitted in the construction of unambiguous wills."); *In re Estate of Bergau,* 693 P.2d 703, 706 (Wash. 1985).
	Plain Meaning Rule (Trusts): *See Templeton v. Peoples National Bank of Washington*, 722 P.2d 63, 65-66 (Wash. 1986) ("'Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation; if the intention may be gathered from its language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction.'") (citing 90 C.J.S. *Trusts* § 161, at 18-19 (1955)).
West Virginia	
	Dead Man's Statute: Not Recognized. *See State Farm Fire & Casualty Co. v. Prinz*, 743 S.E.2d 907, 918 (W. Va. 2013) (invalidating the dead man's statute).
	Hearsay Exception: Recognized. *See* W. VA. R. EVID. 803(3).
	Plain Meaning Rule (Wills): Extrinsic evidence permitted only in the instance of latent ambiguities. *See Hobbs v. Brenneman*, 118 S.E. 546, 549 (W. Va. 1923). Note that W. VA. CODE ANN. § 44D-4-415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See McClintock v. Loisseau*, 8 S.E. 612, 614-15 (W. Va. 1888) (allowing extrinsic evidence to establish the existence of a resulting trust). *See* W. VA. CODE ANN. § 44D-4-415 (West 2014) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the grantor's intention if it is proved by preponderance of the evidence that both the grantor's intent and the terms of the trust instrument were affected by a mistake of fact or law, whether in expression or inducement.").
Wisconsin	
	Dead Man's Statute: Recognized. *See* WIS. STAT. ANN. § 885.16 (West 2013). The dead man's statute further applies to communications with an agent of an adverse party, if the agent is deceased. *See* WIS. STAT. ANN. § 885.17 (West 2013).
	Hearsay Exception: Recognized. *See* WIS. STAT. ANN. § 908.03(3) (West 2014); *id.* (Judicial Council Comm. Note – 1974) ("Carved out of the above-mentioned exclusion is the special situation of a testator's declarations with respect to execution, revocation, identification, or terms of declarant's will. The special circumstances of necessity and trustworthiness are discussed in McCormick § 296. The admissibility of such declarations in cases involving lost wills or genuineness of signature is acknowledged in Wisconsin. *Will of Oswald*, 172 Wis. 345, 349, 178 N.W. 462, 464 (1920); *Estate of Johnson*, 170 Wis. 436, 453, 175 N.W. 917, 924 (1920); *Gavitt v. Moulton*, 119 Wis. 35, 50, 96 N.W. 395, 400 (1903); *In re Valentine's Will*, 93 Wis. 45, 53, 67 N.W. 12, 14 (1896). However, in *Estate of Melville*, 234 Wis. 327, 331, 291 N.W. 382, 383 (1940), the doctrine may have been extended to revocation of a will. Thus, this rule expands the application of the doctrine in Wisconsin but not in a fashion that is inconsistent with the cited cases.").

	Plain Meaning Rule (Wills): *See In re Bowler's Trust*, 201 N.W.2d 573, 579 (Wis. 1972) ("If the intent is clear no extrinsic evidence is necessary."). Note that WIS. STAT. ANN. § 701.0415 (West 2014) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* WIS. STAT. ANN. § 701.0415 (West 2014) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").
Wyoming	
	Dead Man's Statute: Recognized with Limitation. *See* WYO. STAT. ANN. § 1-12-102 (West 2013) (permitting testimony from an interested witness, yet requiring such testimony to be corroborated).
	Hearsay Exception: Recognized. *See* WYO. R. EVID. 803(3).
	Plain Meaning Rule (Wills): *See* WYO. STAT. ANN. § 2-6-105 (West 2013) ("The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article apply unless a contrary intention is indicated by the will."). Note that WYO. STAT. ANN. § 4-10-416 (West 2013) abolishes the plain meaning rule for testamentary trusts. *See id.*
	Plain Meaning Rule (Trusts): Extrinsic evidence permitted for both testamentary and inter vivos trusts. *See* WYO. STAT. ANN. § 4-10-416 (West 2013) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.").