Extrinsic Evidence in Will and Trust Cases: Plain Meaning, Dead Man's Statute, and Hearsay Exceptions[1]

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.

1.0 The Plain Meaning Rule

The starting point for will interpretation is the plain meaning rule. As discussed below, this rule also applies to testamentary trusts but not to inter vivos trusts under the common law. Also as discussed below, after the enactment of the Maryland Trust Act, the plain meaning rule no longer applies to any trusts, whether testamentary or inter vivos.

1.1 The Plain Meaning Rule

The interpretation of words, and particularly the written word, is a slippery business:

> "The ordinary standard, or 'plain meaning,' is simply the meaning of the people who did *not* write the document.
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> 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."[2]

1.2 The Plain Meaning Rule in General

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

> That rule (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."[3]

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[1] Some of this material has been derived from other material previously published by Franke, Sessions & Beckett LLC or its predecessor, the Law Office of Frederick R. Franke, Jr. LLC.

[2] 9 Wigmore, "Evidence" § 2462 (Chadbourn rev. 1981). Similarly, Judge Learned Hand wrote: "There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words… and, although their words are by far the most decisive evidence of what they would have done (in applying those words to a particular situation), they are no means final." *Guiseppi v. Walling*, 144 F.2d 608, 624 (1944).

[3] John H. Langbein & Lawrence W. Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction

An early Massachusetts case, *Mahoney v. Grainger*,[4] 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. 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.[5]

The plain meaning rule is not merely a relic from the past. In a modern Maryland Court of Appeals case, *Emmert v. Hearn*, 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.[6] 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. The *Emmert* Court holding, in failing to take into account that its interpretation would defeat any gift over to the revocable trust, seems at odds with *LeRoy v. Kirk*.[7] In that case, a bequest of "all my personal property" was held to include only tangible personal property, in part, because otherwise there would be no property left for the other legatees. The inflexible application of the plain meaning rule in *Emmert* was characterized by a Florida court "as a minority view" of Will interpretation.[8]

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:

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in American Law?", 130 U. Pa. L. Rev. 521 (1982) (quoting, in part, from G. Palmer, THE LAW OF RESTITUTION, § 20.1, at 158 (1978).

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

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

[6] *Emmert v. Hearn*, 309 Md. 19 (1987).

[7] *LeRoy v. Kirk*, 262 Md. 276 (1971).

[8] *In re Estate of Walker*, 609 So. 2d 623, 624-5 (Fla. 1992) ("Further, the interpretation of the trial court is consistent with what appears to be a majority view, where the term personal property is considered in the context of other provisions in the will. Here, those additional factors could be its inclusion in a paragraph with a devise of realty, the subsequent residuary provision, or both.").

> 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.[9]

The plain meaning rule requires that a testator's donative intent is 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.[10]

Why evidence of actual intent must be precluded is murky. Modern justifications of the rule include: a fear of evidence fabrication, the possibility of fraud, a concern that a decedent had relied on the language used, and because such extrinsic evidence is unattested, it therefore violates the will statutes.[11]

1.2.1 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 express 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.[12]

The parol evidence rule is not as stringent as the plain meaning rule. It only blocks admission of evidence if the instrument was "adopted by the settlor as the complete expression of the settlor's intention."[13] 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

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[9] Restatement (Third) of Property (wills and other donative transfers) § 10.2, cmt. a (2003).

[10] Id. At § 10.1 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 Hospital for Crippled Children v. Maryland Nat'l Bank*, 312 A.2d 546, 555 (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.")

[11] 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, 815-18 (2001).

[12] George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, "The Law of Trusts and Trustees," § 51 (2012). 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. *Pickelner v. Adler*, 229 S.W.3d 516 (2007).

[13] Restatement (Third) of Trusts § 21, cmt.a (2003).

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.[14]

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. This rule (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 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 them (statements of intent) on the issue of the meaning and interpretation of the words.[15]

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.[16]

1.2.2 The Statute of Frauds as an Additional Bar to Extrinsic Evidence

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[14] Restatement (Third) of Trusts § 21, cmt.a (2003). See Reporter's Notes on § 21 which sets out the relevant sections of, and comments from, the Restatement (Second) of Contracts, including from the comments: "It (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."

[15] Arthur L. Corbin, *The Parol Evidence Rule*, 53 Yale L. J. 603, 624 (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. Thus, it does not preclude evidence of intent to prove the meaning of ambiguous language in the written contract. 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) (A case where plaintiffs alleged that they were additional beneficiaries after the death of the named life beneficiaries in an effort to continue the property in trust: "[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.")

[16] 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 John H. Langbein and Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 568 (1982) ("Hence,'[t]he parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration.'") (Internal citation omitted.) and Peter Linzer, *A Comfort of Certainty: Plain Meaning & the Parol Evidence Rule*, 71 Fordham L. Rev. 799, 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.").

Most states have adopted a version of the Statute of Frauds which would require that a trust of real property be in writing.[17] Some states have extended this requirement to govern trusts of personal property.[18]

Generally, a 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."[19]

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 oral trust, or he or his successors in the ownership of the alleged trust property may plead the Statute of Frauds.[20]

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[17] Restatement (Third) of Trusts, § 22 cmt. (2003) (Many states enacted statutes based on Section Seven of the English statute of 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." Other states have similar provisions based on other sections of the English statute and some a few states have no statute of frauds for trusts.)

[18] George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, "The Law of Trusts and Trustees," § 65 (2013) ("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."). The Uniform Trust code does not intend to alter existing statutes of frauds. U.T.C. § 407 cmt. ("Evidence of Oral Trust") ("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 (in its adoption of § 407).")

[19] Restatement (Third) of Trusts § 22 cmt. subsection (1) (2003).

[20] George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, "The Law of Trusts and Trustees," § 70 (2013). A trustee in bankruptcy, however, can assert the statute of frauds. 11 U.S.C.A. § 558 ("The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitations, statutes of frauds, and any other personal defenses.").

As with statutes of fraud generally, a trust beneficiary may enforce the trust based on part performance.[21] 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."[22]

1.3 Even With the Plain Meaning Rule Under the Common Law, There Were Exceptions or "Workarounds" Around the Rule

The plain meaning rule is not, however, absolute. At common law, there are at least two formal exceptions involving will and/or testamentary trust interpretation that permit extrinsic evidence: (1) the latent ambiguity exception, and (2) evidence of the facts and circumstances of the testator's situation at the time of the execution of the will. Additionally, there are evidentiary cases involving charitable bequests that would foretell a more modern, permissive approach to the admissibility of extrinsic evidence. 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.[23]

1.3.1 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

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[21] Restatement (Third) of Trusts § 24 cmt. c (2003) ("This Comment (to §24 of Restatement (Third) of Trusts) 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.'")

[22] Restatement (Third) of Trusts § 24 cmt. c (2003).

[23] Richard F. Storrow, "Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction," 56 Case W. Res. L. Rev. 65 (2005).

the extrinsic evidence is permitted. 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 have a nephew named John and a cousin named James."[24] 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. A patent ambiguity would be a bequest of "my money" raising the question as to whether this phrase was intended to apply only to the decedent's cash on hand or, more generally, to the decedent's assets.[25] As a general rule, latent ambiguities permit extrinsic evidence, whereas patent ambiguities do not.

The "leading American decision"[26] establishing the availability of extrinsic evidence to remedy an ambiguity is *Patch v. White*.[27] In that case, the testator's will referred to property bequeathed to his brother that the testator did not, and never did, own. 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. The Court held, "It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence."[28]

A latent ambiguity, however, only exists where the extrinsic evidence is necessary to show the ambiguity. The Restatement (Third) of Property 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 does not exist. It is only when there was never a cousin John to begin with, or the testator had two cousin Johns, that a latent ambiguity exists.

When the Maryland court in *Emmert*, held 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. 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, supra,* 183 Md.

[24] Restatement (Third) of Property (Wills and Other Donative Transfers) § 11.1 cmt. c (2003).
[25] Restatement (Third) of Property (Wills and Other Donative Transfers) § 11.1 cmt. b (2003).
[26] Langbein and Waggoner, *supra* note 7 at 530.
[27] 117 U.S. 210 (1886) (A split, 5 to 4 decision).
[28] *Id. at* 217.

> at 138-39, 36 A.2d 716; *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).[29]

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 "personal property" to mean only tangible personal property.[30] The Florida court began with an acknowledgement that the phrase has an established technical meaning: "Every lawyer learns that the term personal property includes both tangible and intangible property." Nevertheless, the court saw an ambiguity because 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. 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."[31] Since this decision, Florida codified sweeping use of extrinsic evidence in will interpretation matters, completely untethered by whether an ambiguity exists.[32] This approach is advanced by the Restatement (Third) of Property (wills and other donative transfers).[33]

1.3.2 Common Law Exception to Plain Meaning for Surrounding Circumstances

The second exception to the plain meaning rule has likewise been long-standing: that evidence of the circumstances surrounding and informing the testator's situation is admissible if there is either a patent or latent ambiguity. 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.
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> According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of

[29] *Emmert*, 309 Md. at 26–27.
[30] *In re Estate of Walker*, 609 So.2d 623 (Fla. 1992).
[31] *In re Estate of Walker*, 609 So.2d at 625.
[32] Fla. Stat. Ann. § 732.615 (West 2012) permits a court to reform the terms of a will "even if unambiguous" to conform to the testator's intent. This parallels the UTC treatment for testamentary and *inter vivos* trusts.
[33] Restatement (Third) Property (Wills and Other Donative Transfers) § 12.1 (2003).

> 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.[34]

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.[35] 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.' Wig. Wills, (2d Amer. Ed.) 161.[36]

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."[37]

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.[38] The court

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[34] R. T. Kimbrough, "Admissibility of Extrinsic Evidence to Aid Interpretation of Will," 94 A.L.R. 26 (Originally published in 1935).
[35] Restatement (Third) of Property (wills and other donative transfers) § 10.2, cmt. d(2003).
[36] *See Gilmer v. Stone*, 120 U.S. 586, 590 (1887) (noting that many denominations had foreign and home missions; the decedent, however, probably meant the Presbyterian missions because of his connection with that church).
[37] *Marty v. First Nat. Bank of Baltimore*, 209 Md. 210, 217 (Md. 1956).
[38] *Marty*, 209 Md. at 217.

concluded that the phrase could have one of two different interpretations – either vesting when the sister's grandchildren then in being had all reached twenty-one years of age as of any point in time or, effectively measured after all of the sister's children had died (thus closing the class) and then waiting for the youngest grandchild to reach twenty-one years of age. The court opted for the second reading based on the extrinsic evidence of the testator's situation. This evidence was that early vesting had caused adverse tax issues in the testator's mother's estate and that he was 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 that extensive extrinsic evidence be entertained in order to interpret what certain words in his testamentary trust meant. The extrinsic evidence established his intent although the language of the trust created a patent, not a latent, ambiguity.

In recent Court of Special Appeals case, the court permitted "surrounding circumstances" evidence of the testator's family relations, including his marital history and dislike of his wife's extended family, as well as the history of his previous estate planning, to be considered under the "surrounding circumstances" rule in a declaratory judgment action construing the terms of his will.[39] The court noted that this evidence did not contradict, modify, or vary the terms of the will. Rather, it assisted the Court in construing the meaning and effect of a specific provision requiring his wife to satisfy certain conditions before she qualified to receive a bequest under his will.

1.3.3 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 a "natural" one.[40] In one case, a will was challenged solely based on whether it properly followed the testamentary formalities and whether the document was, in fact, an expression of the testatrix's last wishes. 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 but not in the first will. 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.[41]

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. 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,

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[39] *Castruccio v. Estate of Castruccio*, 239 Md. App. 345 (2018); *cert. denied* 463 Md. 149
[40] *See* 79 Am. Jur.2d Wills § 102 (West 2013).
[41] *Gage v. Hooper*, 169 Md. 527 (1934).

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.[42]

1.4 The Plain Meaning Rule Was Never Applicable To *Inter Vivos* Trusts

Historically, 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 circumstances is admissible to determine its interpretation."[43] 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.[44]

Indeed, in Maryland a trust of personalty may be created wholly by parol evidence.[45] 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 under the common law, *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

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[42] *Lyon v. Townsend*, 124 Md. 163 (1914). See also V. Woerner, *Effective Mistake of Draftsmen (Other Than Testator) In Drawing Will*, 90 A.L.R.2d 924 (originally published in 1963).

[43] RESTATEMENT (SECOND) OF TRUSTS § 38 cmt. a. (1959).

[44] 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.").

[45] *See Shaffer v. Lohr*, 264 Md. 387, 407–408 (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*, 143 Md. App. 547, 557 (2002); *Fasman v. Pottashnick*, 188 Md. 105, 109–110 (1947).

> 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 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.[46]

This general rule is followed in Maryland: " [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.[47]

As noted, the rule for *inter vivos* trusts, however, permitted modification relying on extrinsic evidence. Indeed, after the death of a 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.[48]

1.5 The Plain Meaning Rule For Trusts Under the Maryland Trust Act

In 2014, the Maryland General Assembly enacted the Maryland Trust Act with a delayed effective date of January 1, 2015. The Maryland Trust Act is derived from the Uniform Trust Code but adapted to conform with certain aspects of the Maryland common law. Prior to the enactment of the Maryland Trust Act, most of the Maryland law of trusts was not codified.

The Maryland Trust Act applies to all express charitable or non-charitable trusts in Maryland. It obliterates the distinction between testamentary and *inter vivos* trusts[49] when applying the plain meaning rule. The Maryland Trust Act is "directed primarily at trusts that arise in the estate planning or other donative context."[50]

Although effective January 1, 2015, the Maryland Trust Act applies to all trusts whether created before, on, or after the effective date of the statute other than judicial proceedings concerning trusts that were commenced prior to the effective date.[51]

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[46] 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).
[47] *Shriner's Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2 (1973).
[48] *See Kiser v. Lucas*, 170 Md. 486 (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).
[49] MTA § 14.5-102 (application of title).
[50] Uniform Trust Code cmt. at §102 (scope). UTC § 102 is identical to MTA §14.5-102.
[51] MTA § 14.5-1006.

Like the Uniform Trust Code, the Maryland Trust Act does not supplant the common law of trusts: "The common law of trusts and principles of equity supplement this title, except to the extent modified by this title or another statute of this State."[52] The common law, of course, is not static. Conceptually, rules regulating complex human relationships, like those involved in trusts, may be more perfectly developed by the evolutionary process of the common law as opposed to attempting to create such rules from a universal theory of human relationships based on a comprehensive statute.[53] Thus, the codification of the Maryland Law of Trusts must be understood against the backdrop of the common law as it developed up to the Maryland Trust Act and, for that matter, as it evolves going forward. Thus, the prior law as to the interpretation and modification of *inter vivos* trusts continues forward except as modified by the Maryland Trust Act.

1.5.1 Coordination of the Restatements of Property (Wills and Other Donative Transfers) and the Uniform Trust Code

The Restatement (Third) of Property: Wills and Other Donative Transfers "disapprove[s]" of the plain meaning rule.[54] 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.[55]

The Uniform Trust Code, § 415, followed an approach similar to the aspirational provisions

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[52] MTA § 14.5-106

[53] This was Oliver Wendell Holmes' argument for the common law: "What has been said (about the development of judge-made law) will explain the failure of all theories which consider the law only from its formal side; whether they attempt to deduce a corpus from a priori postulates, or fall into the humbler era of supposing the science of law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law always approaching, and never reaching, consistency. It is forever adapting new principles from life and at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will come entirely consistent only when it ceases to grow." Oliver Wendell Holmes, Jr., "The Common Law, Lecture I-Early Forms of Liability (Project Gutenberg 2000, www.gutenberg.org).

[54] *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.

[55] Restatement (Third) of Prop.: Wills and Other Donative Transfers § 12.1 cmt. b.

of the Restatement of Property:

> 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.[56]

Both under the aspirational standards of the Restatement (Third) of Property and the Uniform Trust Code, there was imposed a "clear and convincing" standard to guard against fraudulent testimony. Maryland adopted § 414 of the Uniform Trust Code as ET § 14.5-413. It is clear from the comments under the Uniform Trust Code that it meant to abolish the plain meaning rule for testamentary trusts and accordingly made the proof issue the same for a testamentary trust as that for *inter vivos* trusts.

The Uniform Trust Code, however, does not stop there. It authorized extrinsic evidence to reform a trust even if the terms are not ambiguous. Reformation is different from resolving an ambiguity: Resolving an ambiguity involves the interpretation of language already in the instrument; reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language in the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such a circumstance, the higher standard of clear and convincing proof is required. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof.[57]

Thus, the plain meaning rule no longer applies to testamentary trusts and, indeed, for both testamentary and *inter vivos* trusts the unambiguous language of the instrument does not necessarily govern.

2.0 The Dead Man's Statute In General

2.1 The Maryland Dead Man's Statute

The Maryland "Dead Man's Statute" states:

> A party to a proceeding by or against a personal representative, heir, devisee, distribute, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent

[56] Unif. Trust Code § 415 (2010).
[57] UTC § 415 cmt.

> person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.[58]

Dead man's statutes have been widely disapproved by scholars and judges.[59] Indeed, most jurisdictions have abandoned the dead man's statute.[60] Nevertheless, these statutes continue in some form in over one-third of U.S. jurisdictions.[61]

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.[62]

The general disqualification of a witness who has a pecuniary or other interest in the matter at issue was removed by the Maryland Evidence Act of 1864:

> The evidence act [of 1864] has removed all disqualifications founded upon interest, and made the party's litigant competent and

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[58] Md. Code Ann., Cts. & Jud. Proc. § 9-116 (2013 Repl. Vol.).

[59] *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).

[60] *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.

[61] *See infra* Appendix.

[62] WIGMORE, *supra* note 6, § 576.

> compellable to give evidence in all save a few well-defined cases.[63]

That Act, however, retained the interest disqualification "'Where an original party to a contract or cause of action is dead, or shown to be lunatic or insane, or where an executor or administrator is a party to the suit, action, or other proceeding, either party may be called as a witness by his opponent, will not be permitted to testify on his offer, or upon the call of his co-plaintiff or co-defendant, otherwise then now by law allowed, unless a nominal party merely.'"[64] As will be discussed in more detail below, the dead man's statute is an exception to the general rule of witness competency and as an exception has been interpreted narrowly.[65]

2.2 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.[66] Those rules contained Rule 601, which generally eliminated the common law witness incompetency rules.[67] 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.[68] 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.[69]

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

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[63] *Robertson v. Mowell, EX'R, etc.*, 66 Md. 530 (1887).
[64] *Mowell*, 66 Md. 530.
[65] Indeed, in *Davis v. State*, 38 Md. 15, WL 4269 (1873) the Court held that an alleged accomplice to a murder, who obviously would have an interest in the outcome, was competent to testify as a witness because of the Maryland Evidence Act of 1864. Additionally, in *Leitch v. Leitch*, 144 Md. 330, 79a 600 (1911) an attesting witness to a will that left that witness valuable real property was not precluded from testifying to the underlying facts of the execution of the will due to his interest. See also, *Estep v. Morris*, 38 Md. 411 (1873).
[66] *See* H.R. REP. No. 93-650, at 2-3 (1973).
[67] *See id.* at 9.
[68] *See id.* at 3-4.
[69] *Id.* at 9.

> 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.[70]

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."[71]

Most states have adopted all or part of the Federal Rules of Evidence, including Rule 601 either in its original or revised form.[72] 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 man's statute] was in fact expressly repealed by the Uniform Rules of Evidence."[73] Other jurisdictions have more straightforwardly repealed their statutes.[74]

2.3 The General 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.[75] Under the Illinois statute, "no adverse party or person directly interested in the action

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

[71] *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.

[72] *See infra* Appendix.

[73] *Davis v. Hare*, 561 S.W.2d 321, 322 (Ark. 1978).

[74] 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).

[75] *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

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]."[76] 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.[77] The court held the dead man's statute was not merely to guard against the impairment of the estate, but also to defend the legacies set out in the will.[78] 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.[79]

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.[80] 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.[81]

Before amendments to its statute, Colorado's dead man's statute was similar to that of Illinois.[82] A Colorado court likewise permitted the attorney to testify as a fact witness regardless

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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).

[76] 735 ILL. COMP. STAT. ANN. 5/8-201.

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

[78] *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).

[79] *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.

[80] *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).

[81] *Michalski*, 365 N.E.2d at 655-57.

[82] *See infra* note 95.

of the operation of the dead man's statute under the prior law because the attorney lacked a direct interest in the outcome of the suit.[83] 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."[84] Generally, however, the attorney may testify.[85]

2.4 The Maryland Application of the Dead Man's Statute

Maryland and some other jurisdictions have narrowed the scope of their dead man's statute by applying it only to a limited category of cases – generally those that impact the size or obligations of the estate.[86] Maryland 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):
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> > "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

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

[84] *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).

[85] 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.*

[86] Tennessee, for example, applies its Dead Man's Statute similar to the manner in which it has been applied in Maryland—i.e., only in cases in which the estate would be increased or diminished. *See e.g. Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 230-31 (Tenn. Ct. App. 1976); *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). Virginia permits otherwise disqualified testimony if it is independently corroborated. *Diehl v. Butts*, 499 S.E.2d 833, 837-38 (Va. 1998) (holding that a confidential relationship increases the degree of corroboration needed).

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.[87]

In keeping with this general approach, the Maryland courts have 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*.'"[88]

2.4.1 Applicability Depends Upon Relief Sought

Because of this all-important limitation, the remedy or relief sought by a party is a critical component of any Dead Man's Statute analysis. 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.[89] 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.[90]

Close analysis of the relief or remedy sought is required in cases dealing with non-probate assets. For example, the Dead Man's Statute will not apply in a dispute over the proper payee of life insurance proceeds if the judgment would not result in the estate receiving the life insurance proceeds.[91] However, if the judgment would result in the life insurance proceeds being payable to the decedent's estate, the Dead Man's Statute would apply. This wrinkle has thorny consequences in cases where multiple non-probate arrangements (e.g. life estate deeds, revocable trusts, beneficiary designations) are challenged on the same substantive grounds, but the effect of invalidating such arrangements may result in some but not all of the assets reverting to the decedent's estate. In such a case, it may be necessary to provide a limiting instruction or sever the trial under Rule 2-503(b) to comply with the limitations imposed by the Dead Man's Statute.[92]

2.4.2 Applicability to Testimony Regarding "Transactions"

In addition to applying to "statements," the Maryland Dead Man's Statute also prohibits

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[87] *See Reddy v. Mody*, 39 Md. App. 675, 679 (1978).
[88] *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.).
[89] *See Griffith v. Benzinger*, 125 A. 512, 520 (Md. 1924).
[90] *See Soothcage's Estate*, 176 A.2d at 222, 226.
[91] *Sheeler v. Sheeler*, 207 Md. 264, 269 (1955); *see also Guernsey v. Loyola Fed. Sav. & Loan Ass'n*, 226 Md. 77, 81 (1961)
[92] For a more detailed exploration of this issue, including the procedural issues that arise in "omnibus" challenges to a decedent's probate and non-probate estate planning, *see generally* "Pesky and Persistent Evidentiary Issues in Estate

evidence of "transaction with" the decedent. Maryland courts have limited the definition of "transaction" to include only testimony that the decedent could contradict with his or her own knowledge, if he or she were living.[93] In some cases, this interpretation means that the scope of a "transaction" for Dead Man's Statute purposes will be broader than the common definition of "transaction." For example, a party could not testify as to her understanding that she was to be reimbursed by the decedent for funds the party advanced to an attorney on behalf of the decedent.[94] This was because the decedent, if alive, could have contradicted the party's testimony. This was the case even though the party was not, in a conventional sense, purchasing or procuring anything from the decedent.

The Dead Man's Statute does not, however, bar admission of all testimony or documentary evidence that relates in any way to a "transaction." A party could introduce letters from a decedent that related to the purported transaction at issue, even if the party could not testify as to the transaction itself or any statement made by the decedent.[95] A party whose testimony is subject to the Dead Man's Statute can, for example, testify about payments made to third parties, but cannot testify that such payments were made pursuant to an agreement with the decedent.[96] In both cases, the decedent could not contradict the evidence at issue based on his or her own knowledge, so the evidence was not barred by the Dead Man's Statute.

2.4.3 Express Statutory Limitations – "Testimony" and "Parties"

The express statutory language places two more important limitations on the Maryland Dead Man's Statute. The statute applies only to *testimony* from *parties* to the action (or those with a direct pecuniary or proprietary interest in the outcome of the litigation).

Testimony from individuals who are neither formal parties nor real parties in interest will not fall within the scope of the Dead Man's Statute. [97]

Although the author is unaware of any case law on point, it would similarly seem that non-testimonial evidence obtained from a party to an action would similarly not be barred by the Dead Man's Statute. While answers to interrogatories and deposition testimony are given under the penalty of perjury and are therefore testimonial in nature, the Dead Man's Statute does not purport to apply to evidence admissible without testimony from a party. For example, an admission of fact obtained from a party under Rule 2-424 is not "testimony," per se (unlike interrogatories or deposition testimony, Rule 2-424 does not require responses to requests for admissions to be signed under oath). In fact, that Rule arguably anticipates that admissions may be used to establish facts that would otherwise be admissible only through non-party testimony. Consequently,

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& Trust Litigation," MSBA CLE (June 25, 2018), available at https://msba.inreachce.com/Details/Information/79e9e2a0-e08a-42fb-88d4-8b20b753d61d . This course provides an overview of the myriad of evidentiary and procedural issues that can arise when probate and non-probate claims are being litigated in the same action.

[93] *Ridgely v. Beatty*, 222 Md. 76 (1960)

[94] *Boyd v. Bowen*, 165 Md. App. 635 (2002)

[95] *Stacy v. Burke*, 259 Md. 390 (1970).

[96] *See* note 93, *supra*.

[97] *See* Reddy v. Mody, 39 Md. App. 675, 679 (1978)

admissions obtained under Rule 2-424 may be one "workaround" to the Dead Man's Statute's bar on testimony.

2.4.4 Waiver

Like many other evidentiary rules, the Dead Man's Statute can be waived. The Dead Man's Statute does not bar testimony when the party offering such testimony is "called to testify by the opposite party" or if "the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement."

Maryland courts have stated that the Dead Man's Statute is not waived by calling a party to testify as to otherwise-forbidden matters in discovery. For example, testimony otherwise barred by the Dead Man's Statute can be elicited in a deposition or by interrogatories without resulting in a waiver.[98] However, a litigant who relies upon his opponent's interrogatory answers or deposition testimony that would otherwise be barred by the Dead Man's Statute—for example, by submitting such discovery material into evidence or incorporating it into a motion for summary judgment—likely waives the Dead Man's Statute, although there is not (yet) a published Maryland decision on point.[99]

3.0 Hearsay – Definition, Rule, and Significance in Will & Trust Cases

3.1 Hearsay Under Md. Rule 5-801

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. A "declarant" is a person who makes a statement. Except as otherwise provided by the Rules of Evidence or permitted by applicable constitutional provisions or statutes, hearsay is not admissible. Md. Rule 5-802.

In practice, the exceptions to the hearsay rule make a huge amount of hearsay admissible. "Rule 803 [tracked by Md. Rule 5-803], 23 exceptions which may be invoked even though the hearsay declarant is available. 804(b) [tracked by Md. Rule 5-804], four exceptions, which may be invoked only when the hearsay declarant is unavailable. In addition to the foregoing, any other hearsay will be admissible if it tends to prove an important fact, if it's better than any other evidence that's available, if it has indicia of reliability, and you give the other side due notice."[100] The Maryland Rules track the federal rules of evidence.

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[98] *Rhea v. Burt*, 161 Md. App. 461, 458 (2005); *Clark v. Strasburg*, 79 Md. App. 406, 411–12 (1989), *rev'd on other grounds* 319 Md. 583 (1990).

[99] *Bekessy v. Floyd*, 2015 WL 5885162 (Ct. Spec. App. July 15, 2015) (unpublished) (reviewing decisions from a number of other jurisdictions and determining that reliance upon a deposition transcript in a motion for summary judgment constituted waiver).

[100] Irving Younger, *The Irving Younger Collection*, Chapter 4, "Hearsay," American Bar Association, Section of Litigation (2010)

3.2 Significance of Hearsay Evidence in Estate, Trust, and Fiduciary Litigation Cases

Hearsay evidence is often critical in estate, trust, and fiduciary litigation cases, particularly since critical witnesses (including the decedent) are often dead or incapable of providing live testimony.

- Need to prove intent or state of mind of the decedent (for example, in interpreting provisions of a will (subject to the plain meaning rule), trust, or other documents; for determining the purpose of account or asset titling changes).

- Need to prove testamentary capacity or lack thereof.

- Need to prove a confidential relationship (by, for example, statements indicating the decedent relied on dominant party).

3.3 Exceptions to the Hearsay Rule

3.3.1 State-of-Mind/Intent Exception (Md. Rule 5-803(b)(3)):

"A statement 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), offered to prove the declarant's then existing condition or the declarant's future action, 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." This is discussed in greater detail below.

3.3.2 Statements for Purposes of Medical Diagnosis or Treatment (Md. Rule 5-803(b)(4)):

"Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment."

3.3.3 Records of Regularly Conducted Business Activity (Md. Rule 5-803(b)(6)):

"A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business,

institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

Under Rule 5-902(b), no testimony of authenticity is required to introduce records under the business records exception if a certificate of custodian of records is completed and the certificate, records, notice of the intention to introduce the records under Rule 5-803(b)(6) is given to the adverse party at least 10 days prior to the proceeding. The adverse party has 5 days to object based on lack of trustworthiness in preparation of the records.

3.3.4 Others:

The Rules contain many exceptions that are potentially applicable in estate & trust cases—e.g. statements in ancient documents (Rule 5-803(b)(16)) and the residual exception (Rule 5-803(b)(24)).

3.4 State-of-Mind Exception

Rule 5-803(b)(3) provides the "state of mind" hearsay exception: "A statement 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), offered to prove the declarant's then existing condition or the declarant's future action, 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."

3.4.1 History/Rationale

Rule 5-803(b)(6) is derived from Federal Rule of Evidence ("FRE") 803. *See* Rule 5-803 cmte. note. Comments to the FRE and federal case law are therefore persuasive authority.

Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892): This 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 maintained 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. The evidence was held admissible to demonstrate that Mr. Walter probably went to the remote location—a very broad exception to the hearsay rule. 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. FRE 803(3) carves out these forward-looking statements of intent as a general hearsay rule exception.

Shepard v. U.S., 290 U.S. 96 (1933): Murder trial where the defendant, Dr. Shepard, was charged with poisoning his wife. 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." These statements were inadmissible. The Court explained its rationale: "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." *Shepard*, 200 U.S. at 105–06.

FRE 803(3) and Rule 5-803(b)(3) codified the hearsay exception relating to present- or forward-looking statements of the declarant's intent, plan or state of mind, while maintaining a general bar to "backward-looking" statements that rely on the declarant's memory. However, the rules provide a "testamentary" exception to this general bar on "backward-looking" statements. Backward-looking hearsay in relation to the "execution, revocation, identification, or terms of declarant's will" is permitted under the state of mind exception. "The carving out, from the exclusion mentioned in the preceding paragraph, of declarations related 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." Advisory Cmte. Note, FRE 803(3).

3.4.2 State-of-Mind: Is It Really Hearsay?

One explanation for the rationale of the hearsay rule is that out-of-court statements should not be admissible to prove the matter asserted by the declarant when the declarant cannot be cross-examined to determine the foundation for making the statement. The classic example is a declarant who observes a car crash and recounts the speed of the car causing the crash to a third party. If a third party testifies to the declarant's estimate, then we cannot fully evaluate the declarant's basis for making the estimate—for example, was he positioned to adequately observe the car and crash?[101]

Under this rationale, many statements embraced by the Rule 5-803(b)(3) "exception" are not truly hearsay to begin, or at least do not implicate many of the underlying concerns addressed by the hearsay rule—namely, the fact-finder's lack of ability to evaluate the declarant's testimonial capacities. A statement of the declarant's present state of mind may, for example, be the ultimate operative legal fact (e.g. was a transfer intended by the declarant to be gratuitous?), meaning that the statement will be the primary source of evidence.[102] Statements of the declarant's present state of mind are not being filtered through a third party unavailable for examination.

3.5 Thorny Issues

The application of the "temporal" element of the state-of-mind hearsay exception and the "testamentary" exception to backward-looking state-of-mind hearsay can be difficult in practice. In analyzing testimony under Rule 5-803(b)(3), one may encounter the following issues:

- How to distinguish between the three temporal periods (past, present, and future) discussed in the rule? A simple statement that "I do not need to execute a will because I want all of my properties and accounts to pass at my death to the joint owner" can conceivably be a

[101] *See* Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1786-1807 (1980) (explaining that traditional hearsay analysis turns on the testimonial capacities of narration, sincerity, memory, and perception).
[102] *Figgins v. Cochrane*, 174 Md. App. 1 (2007) (quoting McCormick on Evidence (4th Ed. 1992), § 274, 227–28).

statement of the declarant's present plan and future action (if the funds pass to the joint owner), and also be a backward-looking statement relating to the execution (or non-execution) of the decedent's will.

- Is the "backward-looking" exception limited strictly to wills or might it be extended to other types of estate planning instruments such as revocable trusts, joint properties, and pay-on-death accounts?

- There is significant tension between the text of decisions themselves and how later cases interpret the decisions. For example, a case employing Rule 5-803(b)(6) may state or imply that the hearsay at issue was analyzed as a statement of the declarant's present state of mind, but a later case citing to the decision may characterize the hearsay statement as a backward looking statement of testamentary intent.

3.8 Some Guideposts

3.8.1 The Outer Limits of "Backwards-Looking" Statements that Relate to Wills

The sample size is small, but Maryland decisions have been quite flexible with the purportedly "narrow" exception permitting backward-looking hearsay relating to the terms, identification, execution, or revocation of a declarant's will.

- An oft-cited case (*Ebert v. Ritchey*, discussed below) appears to apply this exception to non-testamentary planning specifically, joint bank accounts.

- Later statements paired with action (or inaction) that inferentially casts light onto the meaning of a provision in a will are embraced by the exception. The exception does not apply only to express statements of intent.

Ebert v. Ritchey, 54 Md. App. 388 (1983): Decedent executed account documents adding his brother as a joint owner on several of his bank accounts. There was a dispute over whether the bank accounts belonged to the estate or passed to the brother as a joint owner by right of survivorship (this case preceded enactment Maryland's multiple-party account statute, FIN. INST. § 1-204, which creates a presumption that the funds pass to the joint owner). At issue was the admissibility of testimony from witnesses to the effect that some time after processing the account changes the decedent had told them that he had "put his brother on the accounts to pay the bills and take care of things" and then the decedent's children could "divide up the estate." The Court determined that the statement was of the declarant's then existing state of mind and therefore was admissible. *Ebert*, 54 Md. App. at 398. The *Figgins* Court classified this as a "backwards-looking" case. 174 Md. App. at 28 (classifying this as a "backward looking" hearsay case, with a backward looking statement of "testamentary intent" despite not technically involving interpretation of a will); *but cf. D.A.R. v. Goodman*, 128 Md. App. 232, 238 (1999) (implying that *Ebert* related to forward-looking statements of intent).

D.A.R. v. Goodman, 128 Md. App. 232 (1999): Decedent executed a will leaving a residuary bequest to "Daughters of the American Revolution Nursing Home." Decedent's attorney later learned and informed the decedent that Daughters of the American Revolution (D.A.R.) did not maintain a nursing home. The decedent told her attorney that because the nursing home did not exist, she wanted to revise her will to eliminate the bequest to D.A.R. The decedent died before she could execute the revised will. D.A.R. argued that its bequest was the product of general charitable intent and the doctrine of *cy pres* applied. At trial the decedent's statement to the attorney was admitted. The Court of Special Appeals affirmed, holding that the statement was a statement of memory or belief relating to the terms of the decedent's will. It specifically characterized the statement as a statement of what the decedent's "testamentary intention would be if the bequest to the DAR nursing home lapsed." *D.A.R.*, 128 Md. App. at 239; *but cf Yivo Institute for Jewish Research v. Zaleski*, 156 Md. App. 527, 538 (2004) (observing that the statements in *D.A.R.* could "could easily be considered to be forward-looking").

Yivo Institute for Jewish Research v. Zaleski, 156 Md. App. 527 (2004): Decedent left a bequest in his will to a charity and then he later made a gift to the same institution. 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, years after making the subsequent charitable gift, the decedent stated 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. Although the Court analogized the facts to *D.A.R.*, whose holding expressly related to backward-looking hearsay, the Court also noted that the declarant/testator's statement could be deemed forward-looking in that he "was articulating the opinion that, as he had already satisfied his gift, there was no need to take future action, to wit, amendment of his will," consistent with his intentions. *Yivo*, 156 Md. App. at 538.

But cf. In Estate of Gill v. Clemson Univ. Foundation, 397 S.C. 419, 725 S.E. 2d 516 (Ct. App. S.C. 2012): the testatrix left a $100,000 bequest to Clemson to fund a scholarship for "academically deserving football players." 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. The court excluded testimony of what the testatrix told his 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 did not qualify under the exception (also patterned on FRE 803(3)).

3.8.2 "Requirement" of Future Action (Or: When is Inaction an Action?)

The *Hillmon* case and its progeny stand for the principle that a statement of intent to accomplish something in the future is only admissible if used to prove a subsequent action in conformity with the statement of intent. A forward-looking statement of intent cannot be used when the declarant's future actions are contradictory. However, the *Yivo* case implies that a failure to take action can itself be "action" consistent with a stated intention or plan. *Yivo*, 156 Md. App. at 538.

There is no "corroboration" requirement—i.e., there is no requirement to prove that the future action have been completed by the declarant. *Gray v. State*, 137 Md. App. 460, 499–500 (2001), *rev'd on other grounds*, 368 Md. 529.

Figgins v. Cochrane, 174 Md. App. 1 (2007), *aff'd* 403 Md. 392: Daughter sought to introduce testimony from father's attorney that father had told the attorney that he would like to transfer a property to the daughter. The purpose of introducing this statement was (apparently) to prove that when this transfer was later effectuated (by the daughter to herself, under a power of attorney), it had been directed by the father. The trial court excluded the statement as hearsay, and the Court of Special Appeals affirmed, reasoning that since the father never actually executed the deed. The Court of Appeals affirmed, noting this analysis was correct. 403 Md. at 420.

Farah v. Stout, 112 Md. App. 106 (1996): A purported creditor made a claim for $100,000 against decedent's estate. For several years, she had allegedly cared for decedent and performed numerous household chores for him, and she undertook those responsibilities in return for the decedent's promise to make a bequest of $100,000 to her, but the decedent never made such provision in his will. The purported creditor sought to introduce testimony of witnesses that they heard the decedent state that he would pay $100,000 through his will to the purported creditor. However, since no such bequest was actually made by the declarant, the statements were inadmissible.

Edery v. Edery, 193 Md. App. 215 (2010): Siblings sought an injunction against other siblings to prevent them from taking mother's remains back to Israel for burial (at the time of the hearing, mother was still alive but in intensive care). Siblings arguing for Israel burial presented a written statement purportedly dictated by their mother in 2006 stating her intention to be buried in Israel and also sought to testify as to their mother's oral statements that she wished to be buried in Israel. Under the governing statute, the fact that the mother had made her wishes known negated the authority of the other siblings to make burial arrangements. The Court refused to admit the written statement on the basis that it was hearsay. The Court of Special Appeals reversed, citing that the statements by the mother were evidence of her "state of mind, namely, a want or desire, and a sense of emotional attachment to the place her husband and deceased son were buried." *Edery*, 193 Md. App. at 237. Although the statement was in a sense forward-looking, the declarant necessarily could not have carried out her burial intentions herself.