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Wills - Gift by Implication - Effectuating the Intent of the Testator: New Mexico Boys Ranch, Inc. v. Hanvey

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WILLS—GIFT BY IMPLICATION—Effectuating the Intent of the Testator: *New Mexico Boys Ranch, Inc. v. Hanvey*

I. INTRODUCTION

In *New Mexico Boys Ranch, Inc. v. Hanvey,*[1] the New Mexico Supreme Court addressed the issue of whether the testatrix intended the devise in her will to the New Mexico Boys Ranch to be solely contingent upon the simultaneous deaths of herself and her mother, or whether she also intended her estate to pass to the New Mexico Boys Ranch if her mother predeceased her.[2] After analyzing all of the provisions of the will, including the simultaneous death clause, the supreme court held the testatrix intended the New Mexico Boys Ranch to receive her entire estate if the testatrix' mother was deceased at the time the will became effective.[3] This result can be reconciled with the policy underlying the Statute of Wills,[4] which is to give effect to the intent of the testator.[5]

The supreme court appropriately decided *New Mexico Boys Ranch* because it was clear from the language of the will that the testatrix did not want her estate to pass by intestacy[6] to her heirs, which would have been the result if the devise to the New Mexico Boys Ranch had failed. Furthermore, extrinsic evidence of a trust created by the testatrix for the benefit of the New Mexico Boys Ranch indicated the testatrix wanted her estate to pass to the New Mexico Boys Ranch in the event her mother

1. 97 N.M. 771, 643 P.2d 857 (1982).

2. The supreme court stated more generally that the issue was "whether the intent of the testatrix can be ascertained from the language of her will. If it can be so ascertained, then it controls the distribution of decedent's estate." *Id.* at 772, 643 P.2d at 858.

3. *Id.* at 773, 643 P.2d at 859.

4. The Statute of Wills in New Mexico requires a will to be in writing, signed by the testator, and attested in the presence of the testator by two or more credible witnesses. N.M. Stat. Ann. § 45-2-502 (1978). These formalities serve three purposes: (1) to warn the testator of the seriousness and finality of the instrument (cautionary function); (2) to protect the testator from coercement and the testator's disposition of property from fraud (evidentiary function); and (3) to facilitate the processing of wills through the courts (channeling function). W. Bowe and D. Parker, Page on the Law of Wills § 19.4 (3d ed. 1960) [hereinafter cited as Page on Wills]. *See* Langbein and Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 529 (1982) [hereinafter cited as Langbein and Waggoner, *Reformation of Wills*].

5. N.M. Stat. Ann. § 45-4-603 (1978) provides that the intention of a testator as expressed in his will controls the legal effect of his dispositions. *See also* Langbein and Waggoner, *Reformation of Wills, supra* note 4, at 529.

6. An intestate estate results when a decedent has not effectively disposed of his or her property by will. In New Mexico, such property passes to the decedent's heirs as prescribed in N.M. Stat. Ann. § 45-2-102 to -103 (1978).

predeceased her. The conclusion reached by the supreme court, however, was not well-supported.

The intent of the testator is the primary consideration when interpreting a will.[7] The court in *New Mexico Boys Ranch* said the intent of the testatrix, as expressed in her will, was for the New Mexico Boys Ranch to take her estate if her mother was not living at the time of the testatrix' death. Yet, the devise to the New Mexico Boys Ranch appeared to be conditioned upon the simultaneous death of the testatrix and her mother. The court did not explain why the condition of simultaneous death was ignored and how it determined the testatrix' intent to give her estate to the New Mexico Boys Ranch in the event her mother predeceased her.

The occurrence of the testatrix' mother predeceasing her was not expressly provided for in the will. The "no-reformation" rule states that a court cannot add language to a will to supply an omission or to correct a mistake because such language has not been written down, signed, and attested as required by the Statute of Wills.[8] The court in *New Mexico Boys Ranch* did not explain how it could read the omitted provision into the will without violating the "no-reformation" rule. Hence, the court's opinion represents a troublesome precedent that has constructive and destructive potential.

The first part of this Note discusses an analytical framework which the New Mexico Supreme Court could have used to reconcile its result with the policies that underlie the Statute of Wills. This analysis assumes the supreme court determined the testatrix did not intend to condition her devise to the New Mexico Boys Ranch upon simultaneous death of her mother and herself. The court perceived that the terms of the will disclosed the intent of the testatrix to leave all her property to the New Mexico Boys Ranch in the event her mother predeceased her. To enforce this intent, the court apparently implied a gift to the New Mexico Boys Ranch from all the language of the will. Gift by implication is the most reasonable theory supporting the court's result in this case.

The second part of this Note addresses two remedies which the supreme court could have employed instead of implying a gift. Under the first remedy, the supreme court could have deleted some of the language in the simultaneous death clause. With this deletion, the New Mexico Boys Ranch would have been entitled to the testatrix' estate as an unconditional residuary beneficiary. The second remedy would have allowed the supreme court to add language obviously omitted by the testatrix in her

7. 97 N.M. at 773, 643 P.2d at 859.

8. Langbein and Waggoner, *Reformation of Wills*, *supra* note 4, at 566. The terms of a will must be in writing. A court cannot probate anything that is not in the instrument. An omitted devise cannot be supplied by a court, but a court has power to deny probate of words or to reject the entire will. T. Atkinson, Law of Wills § 58 (2d ed. 1953).

will by utilizing the doctrine of probable intent. The court could have added to the simultaneous death clause the phrase "or if my mother predeceases me," thereby enforcing the testatrix' probable intent to give her estate to the New Mexico Boys Ranch. Yet, this probable intent doctrine is a novel departure from traditional theory in that it in effect adds unattested words to the will.

The drawback of the first remedy is that words formally attested by the testatrix would be deleted from the will.[9] The drawback of the second remedy is that words not formally attested would be added to the will.[10] Both of these remedies are more difficult to reconcile with the policies that underlie the Statute of Wills than is the theory of gift by implication. Moreover, it is often unclear whether the correction of an omission or a mistake represents a permissible "construction"[11] of the language of the will or an inappropriate addition to existing language.

II. STATEMENT OF THE CASE

The testatrix, Mary E. Martin, died in New Mexico on September 18, 1979, leaving a will dated August 17, 1966. Martin devised her entire estate to her mother.[12] In the event of simultaneous death of Martin and her mother, however, Martin devised her estate to the New Mexico Boys Ranch.[13] The will also stated that the only other person known to the testatrix who might expect to share in her estate was her brother, whom

9. Even though a court has power to delete words from a will, those words have been written down and attested to by the testator and should only be deleted as a last resort in order to effectuate the overall intent of the testator. *See supra* note 8 and accompanying text.

10. *Id.*

11. "In the law of wills, it is generally said that construction is the ascertaining of testator's intention as expressed in his will when read in the light of the surrounding circumstances and in view of the admissible evidence, including the application of his intention as thus manifested to the facts and circumstances with which the will deals." Page on Wills, *supra* note 4, at § 30.2. "[T]he will of the testator is to be construed as an entirety and all of the provisions are to be rendered consistent with each other." *Id.* § 30.11. "[T]he general intent of the testator as deduced from the consideration of the will as a whole . . . [however] is [often inconsistent] with a particular clause." *Id.* "This usually arises when the testator has not carefully thought out the application of the provisions of his will to all possible states of fact, and has not, therefore, foreseen the contingency which has caused the inconsistency." *Id.* In such a case, the court will not make a new will for the testator, but may disregard the intent of a particular clause and give effect to the clear, general intent of the testator. *Id.*

12. PARAGRAPH SECOND of Martin's will provided: "I will, devise and bequeath all the rest, remainder and residue of my estate . . . unto my beloved mother, Mary M. Martin, absolutely." 97 N.M. at 772, 643 P.2d at 858.

13. PARAGRAPH FOURTH of Martin's will provided: "In the event that my death should occur simultaneously with my beloved mother . . . then it is to be presumed that my said mother, Mary M. Martin, died first, and the paragraph herein denominated SECOND [absolute devise of all property to Martin's mother] shall lapse and be inoperative, and I then, give . . . the rest, remainder and residue of my estate . . . to the New Mexico Boys Ranch. . . ." 97 N.M. at 772, 643 P.2d at 858 (emphasis omitted). New Mexico's Simultaneous Death Act furnishes a disposition of property where a will has not provided for the event of simultaneous death. N.M. Stat. Ann. § 45-8-1 to -8 (1978).

she desired to receive no part of her estate.[14] Martin also provided that if any person should establish a right to inherit her estate, that person was bequeathed one dollar.[15] Martin's mother died more than six years prior to the testatrix' death. Shortly before her own death, Martin placed the bulk of her property in trust for the benefit of the New Mexico Boys Ranch.[16]

In a probate proceeding, the trial court held that the testatrix left her entire estate by will to the New Mexico Boys Ranch.[17] Rosa Hanvey, testatrix' first cousin, appealed the decision of the trial court. The New Mexico Court of Appeals in *In re Estate of Martin* reversed the trial court and held that the New Mexico Boys Ranch was to take under the will only in the event Martin and her mother died at the same time.[18] The court of appeals stated that the testatrix' failure to include in her will an unqualified bequest disposing of her estate in the event that her mother predeceased her was an omission which could not be cured by the court.[19] The court of appeals determined the estate passed by intestacy to the appellant, Rosa Hanvey, because the contingency of simultaneous death did not occur and because there was no other distributee under the will.[20]

The New Mexico Supreme Court reversed the court of appeals and held it was the overall intent of the testatrix that the New Mexico Boys Ranch receive her estate if her mother could not inherit it.[21] In construing a will, the court noted that it primarily considers the intent of the testator.[22] The supreme court explained it cannot determine the testator's intent by looking at only one provision of the will, such as a simultaneous death clause, while ignoring the other provisions. The court must consider the will as a whole.[23] Furthermore, the court stated there is a strong presumption in favor of testacy.[24]

14. PARAGRAPH THIRD of Martin's will provided: "I hereby declare and state that I have a brother, Aubrey Lee Martin . . . who is the only other person known to me who might expect to share in my estate, and that it is my express will and desire that he receive no part of my estate whatever." 97 N.M. at 772, 643 P.2d at 858 (emphasis omitted).

15. PARAGRAPH SEVENTH of Martin's will provided: "I have noted in my lifetime that many times some person or persons have attempted through Courts and otherwise to establish a right to inherit from a deceased person. I do not wish for this to happen in my estate; therefore, should any person or persons other than my beloved mother, Mary M. Martin, establish a right to inherit from me . . . then . . . I hereby give . . . such person or persons the sum of ONE DOLLAR ($1.00) each, which shall constitute the only share of any such person or persons in my estate." *Id.* (emphasis omitted).

16. *Id.*

17. *In re* Estate of Martin, 97 N.M. 773, 775, 643 P.2d 859, 861 (Ct. App. 1981).

18. *Id.*

19. *Id.* at 778, 643 P.2d at 864.

20. *Id.* at 779, 643 P.2d at 865. The decision by the New Mexico Court of Appeals exemplifies traditional principles of the law of wills. It is generally held that a contingent will takes effect only upon the happening of a specific contingency. Page on Wills, *supra* note 4, at § 9.1.

21. New Mexico Boys Ranch v. Hanvey, 97 N.M. 771, 773, 643 P.2d 857, 859 (1982).

22. *Id.*

23. *Id.*

24. *Id.*

By construing the will in its entirety, the supreme court determined that Martin would have preferred the New Mexico Boys Ranch to inherit her estate. The court noted that she disinherited her only known heir, her brother, and bequeathed one dollar to all other possible heirs who might establish a right to inherit from her.[25] Furthermore, after her mother's death and shortly before her own death, Martin placed the bulk of her property in trust for the benefit of the New Mexico Boys Ranch. This evidence must have persuaded the court that Martin's primary intent was for her property to pass to the New Mexico Boys Ranch and not by intestacy to her heirs in the event her mother predeceased her.

III. DISCUSSION AND ANALYSIS

The following discussion includes an analysis of the gift by implication theory and two nontraditional remedies which practitioners may wish to present to the court in the future.

A. An Analytical Framework Supporting the Supreme Court's Decision

The New Mexico Supreme Court held it was the intent of the testatrix that the New Mexico Boys Ranch receive her estate if her mother predeceased her.[26] First, the following analysis centers upon what the supreme court perceived to be the intent of the testatrix regarding the disposition of her property. Second, the court must have considered the devise to the New Mexico Boys Ranch not to be contingent upon the simultaneous death of Martin and her mother, although the court did not address this issue. Third, the court apparently implied a devise to the New Mexico Boys Ranch when it determined that Martin's mother could not take the estate. Finally, extrinsic evidence that shortly before her death the testatrix placed the bulk of her property in trust for the benefit of the New Mexico Boys Ranch supported the court's conclusion that Martin intended the New Mexico Boys Ranch to receive her estate.

1. The Importance of a Testator's Intent

One goal of the Statute of Wills is to implement the intent of the testator.[27] Similarly, in construing a will, a court's primary consideration

25. A majority of states hold that negative bequests cannot prevent property from passing under the statutes of descent and distribution. Page on Wills, *supra* note 4, at § 30.17. If a testator provides that an heir shall receive no part of the estate, such heir nevertheless takes his or her share of any intestate property. *Id.*; *see, e.g.*, Kimley v. Whittaker, 63 N.J. 236, 306 A.2d 443 (1973) (exclusionary language in the will did not prevent the testatrix' daughter from taking by intestacy). The rule concerning negative bequests can be changed by statute under New York law. A will takes effect upon death "whereby a person disposes of property or directs how it shall not be disposed of. . . ." N.Y. Est. Powers & Trusts § 1-2.18 (McKinney 1981). *See also In re* Will of Beu, 70 Misc. 2d 396, 333 N.Y.S.2d. 858 (1972) (words of disinheritance are effective as to intestate property).

26. New Mexico Boys Ranch v. Hanvey, 97 N.M. at 773, 642 P.2d at 857.

27. *See supra* note 5 and accompanying text.

is the intent of the testator.[28] Intent need not be declared expressly in the will; it is sufficient if the intention can be clearly inferred from the particular provisions of the will.[29]

In construing a will, the testator's intent is to be determined from all of the language contained in the four corners of the will.[30] If the will, considered as a whole, is unambiguous, extrinsic evidence is not admissible to vary or supplement the language of the will.[31] Extrinsic evidence may, however, be admitted to ascertain the meaning of an instrument when it is doubtful or ambiguous.[32] The testator's scheme of distribution, the circumstances surrounding the testator at the time of making the will, and the existing facts may be considered by a court when the testator's intent as expressed in the will is not clear.[33]

Some problems of intent are easier to resolve than others. It is particularly troublesome when the problem is one of incomplete disposition of property. Mary E. Martin did not expressly dispose of her property in the event her mother predeceased her. Yet, the court solved the problem of the incomplete disposition by inferring Martin's intent from both the will itself and from extrinsic evidence. The court focused upon the language of the will, which disinherited Martin's heirs other than her mother. Additionally, the court noted evidence outside the will which showed that Martin, following her mother's death and shortly before her own death, placed the bulk of her property in trust for the benefit of the New Mexico Boys Ranch. From this evidence, the court thought it reasonable to imply that Martin intended the New Mexico Boys Ranch to be the sole devisee of her property.

2. Whether a Will Is Conditional Depends Upon the Intent of the Testator

The New Mexico Court of Appeals, however, held that the simultaneous death clause conditioned the devise to the New Mexico Boys Ranch, the condition was not met, and, therefore, the gift failed.[34] Yet whether a will is conditional depends upon the intent of the testator.[35]

28. *New Mexico Boys Ranch*, 97 N.M. at 773, 643 P.2d at 859.

29. *See, e.g.*, Brock v. Hall, 33 Cal. 2d 885, 206 P.2d 360 (1949) (the intent of a testator may be implied from all the language of an instrument and is not limited by any particular phrase); *In re* Estate of Zahradnik, 6 Kan. App. 2d 84, 626 P.2d 1211 (1981) (intent of testators to contract and be bound by a joint and mutual will may be ascertained circumstantially from other expressions in the will).

30. *In re* Estate of Martin, 97 N.M. at 777, 643 P.2d at 863.

31. *Id.* at 776, 643 P.2d at 862.

32. Brown v. Brown, 53 N.M. 379, 208 P.2d 1081 (1949).

33. Greg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963).

34. *In re* Estate of Martin, 97 N.M. at 779, 643 P.2d at 865.

35. *In re* Estate of Desmond, 223 Cal. App. 2d 388, 35 Cal. Rptr. 737 (1963). Although the will disposed of property in case of mishap and failure to return from a short trip due to some

If an intestate result is clearly against the testator's intent, a court is more likely to construe a conditional clause as unconditional rather than to defeat the will. For example, the Utah Supreme Court in *In re Estate of Gardner*[36] interpreted a will wherein the testatrix intentionally omitted six grandchildren from her will. She then willed her property to her two daughters "in the event my husband precedes me in death. . . ."[37] The testatrix died before her husband. The court held it was the clear intent of the testatrix that her daughters be the distributees of all her property, despite the conditional phrase "in the event my husband precedes me in death. . . ."[38] Therefore, the estate passed to the two daughters.[39]

The court in *Gardner* strongly emphasized the fact that the testatrix clearly disinherited her grandchildren. If the condition precedent were enforced, the heirs which the testatrix wished to disinherit would take her estate. The court stated: "Such a construction would produce an absurd result, clearly contrary to the intention of the testatrix as it is ascertained from the four corners of the will."[40] The court explained that if enforcement of an alleged condition precedent creates an inconsistency with the plain intent of the testatrix as unmistakably revealed in the remainder of the will, then those words should be disregarded.[41] Furthermore, if a testator makes no express provision for an alternative gift upon failure of a condition in a will, this omission tends to show the testator did not intend to impose the condition.[42] In reaching its decision, the court ignored the conditional language and the estate passed to the testatrix' daughters, whom the testatrix clearly would have preferred to take over her intestate heirs.[43]

In *New Mexico Boys Ranch,* the supreme court should have addressed the issue of whether Martin had intended the devise to the New Mexico Boys Ranch to be conditional. The court could have found the simultaneous death clause in the will to be language so inconsistent with other language that finding the devise conditional would produce an absurd result. The court did emphasize the presumption in favor of testacy,[44]

unforeseen accident, the court held the will not to be conditional. *Id.* The court reasoned that whether an instrument is conditional or not depends upon the intent of the testator. *Id. See also In re* Estate of Gardner, 615 P.2d 1215 (Utah 1980) (to render a will conditional, its language must show the intent of the testator was to make a will operative only during a certain period or until a certain emergency has passed).

36. 615 P.2d 1215 (Utah 1980).
37. *Id.* at 1216.
38. *Id.* at 1218.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. 97 N.M. at 773, 643 P.2d at 859.

which is stronger when the testator has included a residuary clause.[45] Additionally, the supreme court could have noted that Martin had made no alternative disposition of her property if the alleged condition precedent failed. Therefore, the court might have concluded the testatrix did not intend to impose the simultaneous death clause as a condition limiting the devise to the New Mexico Boys Ranch.

The Florida District Court of Appeals in *In Re Estate of Dickerhoff*[46] reached a result contrary to *Gardner* under similar facts. The testatrix willed to her husband her entire estate and provided that "in the event of a common casualty in which my husband and I should die simultaneously," her estate should go to William and Donna Jeffers.[47] The court held the disposition to these persons was conditional and the estate passed by intestacy because the testatrix' husband predeceased her.[48] The dissent in *Dickerhoff*, however, presented a persuasive argument for the opposite result. The dissent reasoned that the language of a will should not be taken literally when to do so does "violence to logic and reason and produces a result which appears . . . to be contrary to the clear intent of the testatrix."[49] The dissent stated it was illogical to assume the testatrix intended the two distributees, William and Donna Jeffers, to take her entire estate only if there was a "thousand to one chance" simultaneous death would occur.[50] The dissent criticized the majority opinion for analyzing the testatrix' intent solely on the basis of the language of the will, without testing the result against common sense. The dissent concluded the testatrix intended the Jeffers to take her estate in any event.[51]

The supreme court in *New Mexico Boys Ranch* could have followed the reasoning of the dissent in *Dickerhoff* and tested the result of enforcing the simultaneous death clause against common sense. It is unreasonable to believe the testatrix intended to devise her property to the New Mexico Boys Ranch only if there was a "thousand to one" chance of simultaneous death. It is illogical to assume Martin intended to provide for the contingency of simultaneous death, but not for the most probable case, her mother predeceasing her.

45. In Riemcke v. Schreiner, 80 Wash. 2d 722, 497 P.2d 1319 (1972), the testatrix willed the residue of her estate to her parents but the parents renounced their right to take under the will. Instead of allowing the estate to pass by the laws of intestate succession, the court held the testatrix' sister was entitled to the estate because she was the alternative beneficiary under the will in the event testatrix' parents predeceased the testatrix. The court reasoned that the testatrix did not intend to die intestate because she attempted to provide for all circumstances in her will. Furthermore, the presumption of testacy is stronger where the language of a residuary clause is used.

46. 267 So. 2d 388 (Fla. Dist. Ct. App. 1972).

47. *Id.* at 389.

48. *Id.*

49. *Id.* (Owen, J., dissenting).

50. *Id.* at 390.

51. *Id.*

3. A Gift by Implication to the New Mexico Boys Ranch

Even if Martin had not intended to condition her devise to the New Mexico Boys Ranch, it is apparent that Martin failed to provide for a disposition of her property in the event her mother predeceased her. The traditional view states that a court cannot supply an omitted provision. This rule was followed by the New Mexico Court of Appeals in *In re Estate of Martin*.[52] The court of appeals stated that "the will before us must be construed as written and we cannot make a new will for the testatrix."[53]

Some courts, however, have used the theory of gift by implication to supply an omission in a will where a firm basis for the construction is found in the will itself.[54] Under the theory of gift by implication, gifts are implied from the language of the entire will to fulfill the intent of the testator.[55] No unattested words are added to the will. The will is construed as written. To imply a gift, evidence of the intent must be so strong that a contrary intent cannot reasonably be supposed to have existed in the testator's mind.[56]

Under the theory of gift by implication, two conflicting policies face a court. On one hand, a court is obliged to enforce the intent of the testator. In most cases, implication of a gift will prevent intestacy. Usually the facts lead to an inference that the gap in disposition occurred merely through inadvertence.[57] On the other hand, courts are naturally reluctant to speculate about the intent of the testator when the will does not contemplate the occurrence of a particular event.[58] A devise "to A for life, remainder to B if A dies without children," has given courts an opportunity to imply a gift. If A dies with children, some courts have concluded that the testator intended to devise the property to A's children.[59]

In New Mexico, the supreme court embraced the gift by implication theory in *In re Will of McDowell*.[60] In that case, a joint and mutual will

52. 97 N.M. at 778, 643 P.2d at 864. *See also* Heinneman v. Colorado College, 150 Colo. 515, 374 P.2d 695 (1962); Leibrandt v. Adler, 30 Ill. App. 2d 257, 174 N.E.2d 228 (1961). *But see* Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976) (in giving effect to the intent of the testator, words may be supplied, rejected, or transposed).

53. 97 N.M. at 778, 643 P.2d at 864.

54. *See, e.g.*, Brock v. Hall, 33 Cal. 2d 885, 206 P.2d 360 (1949) (where an intention to make a gift appears in a will, a court will create a gift by implication); Porter v. Porter, 286 N.W.2d 649 (Iowa 1979) (when a testator's will clearly reveals a general plan of disposition, a gift may be implied with regard to the unmentioned contingency).

55. *In re* D'Alessandro's Will, 55 Misc. 2d 909, 286 N.Y.S.2d 914, 920 (1968). *See infra* text accompanying note 62 for discussion of this case.

56. *Id. See also* Seattle-First Nat'l Bank v. Tingley, 22 Wash. App. 258, 589 P.2d 811 (1978) (to imply a gift, the showing of the testator's intent must be so strong that a contrary intent cannot be supposed to have existed in the testator's mind).

57. L. Simes & A. Smith, The Law of Future Interests § 841 (2d ed. 1956).

58. *Id.*

59. *Id.* § 842.

60. 81 N.M. 562, 469 P.2d 711 (1970).

contained no express provision for disposition of the testators' estate upon death of the survivor. Considering the purpose of the will and the intent of the testators based upon the entire will, the court determined both testators intended that the survivor should have a life estate in the property, with remainder to nieces and nephews upon the death of the surviving testator. The court stated: "It is well settled that a gift by implication will be implied in order to effectuate the intent of the testator. . . ."[61]

The New Mexico Supreme Court in *McDowell* cited the case of *In re D'Alessandro's Will*[62] as support for the gift by implication theory. In *D'Alessandro,* the court read into the simultaneous death clause the omitted and most probable contingency, that either the testator's spouse or parent would predecease the testator. A joint and mutual will of husband and wife provided that if they should die simultaneously, they devised the residue of the estate to their nieces. The will did not provide for the event of either spouse predeceasing the other. The wife died before the husband. The court set forth a test for determining a gift by implication: whether in viewing the will as a whole, it leaves no doubt in the mind of the court that the testator intended a distributee to share in the estate although the event that occurred was not specified in the will itself.[63] The court found it unreasonable to assume the testator intended to limit distribution to the nieces only to the event of simultaneous death with his wife.[64] The nieces were the only distributees specified in the will who survived the testator, and the court must have presumed the testator would have preferred the nieces over intestate heirs. Therefore, the court read into the simultaneous death clause the omitted and most probable contingency and supplied a gift by implication.[65]

If the supreme court in *New Mexico Boys Ranch* had applied the *D'Alessandro* test for determining a gift by implication, it could have read into Martin's will the omitted and most probable contingency that Martin's mother would predecease her. Considering the will as a whole, the court could have found it unreasonable to assume the testatrix intended to limit distribution to the New Mexico Boys Ranch only in the event of simultaneous death of herself and her mother.

61. *Id.* at 564, 469 P.2d at 713.

62. 55 Misc. 2d 909, 286 N.Y.S.2d 914 (1968).

63. *Id.* at ___, 286 N.Y.S.2d at 920.

64. *Id.* at ___, 286 N.Y.S.2d at 919.

65. Similarly, in *In re* Hardie's Estate, 176 Misc. 21, 26 N.Y.S.2d 333 (1941), *aff'd,* 263 A.D. 927, 33 N.Y.S.2d 389 (1942), relied upon by the court in *D'Alessandro,* the court found a testamentary intent that relatives of the testator should not take under the will. The court implied a gift to the distributees under a simultaneous death clause even though the testator did not die simultaneously with his wife. The court stated: "It does not appear to me that Charles Hardie [testator] chose these beneficiaries only in the event of his dying simultaneously with his wife. I believe he intended them to be his beneficiaries in any event. . . ." *In re* Hardie's Estate, 176 Misc. at 23, 26 N.Y.S.2d at 335. The court stated that between two possible constructions, an interpretation which avoids intestacy is preferred. *Id.* at 24, 26 N.Y.S.2d at 336.

A gift contingent upon simultaneous death, however, need not be construed uniformly as indicating an intent that such a gift is to be effective even though the contingency does not occur.[66] For example, in *In re Estate of Bromley,*[67] the court construed a will in which the testatrix bequeathed a life estate to her son with a remainder to her grandson contingent upon the death of the testatrix and her husband as a result of a common disaster. The will, however, contained no provision for the death of the husband prior to the death of the testatrix. The testatrix' husband predeceased her by several years. The court held the bequest to be contingent under the simultaneous death clause. Therefore, the gift under the simultaneous death clause failed, and the testatrix' entire estate passed by intestacy to her son.[68]

Perhaps the distinguishing feature between *D'Alessandro* and *Bromley* is that in *D'Alessandro* the distributees under the simultaneous death clause were not the heirs at law. In *Bromley,* the son of the testatrix would have taken a life estate under the simultaneous death clause and the entire estate under the laws of intestacy. Consequently, the court in *Bromley* could not presume the testatrix would prefer the remainderman distributee under the simultaneous death clause over the heirs at law when the son of the testatrix qualified in part either way. The court refused to rewrite the will because it was not able, in these circumstances, to find the will ambiguous.

The theory of gift by implication is a satisfactory justification for the result reached by the supreme court in *New Mexico Boys Ranch.* Once the court determined Martin had intended the New Mexico Boys Ranch to receive her estate if her mother predeceased her, a gift to the New Mexico Boys Ranch could have been implied from the testatrix' testamentary plan and from the language of the will. Specifically, the language of the will whereby Martin expressly disinherited her heirs at law, indicated she would have preferred the New Mexico Boys Ranch to receive her estate over her heirs in the event her mother predeceased her.

4. Extrinsic Evidence of an Inter Vivos Trust for the Benefit of the New Mexico Boys Ranch

Extrinsic evidence of an inter vivos trust also supported the argument that the testatrix intended to leave her estate to the New Mexico Boys Ranch. Martin placed the bulk of her property in trust for the benefit of the New Mexico Boys Ranch after her mother's death and shortly before

66. Bradshaw v. Lewis, 54 Ill. 2d 304, 296 N.E.2d 747 (1973) (gift contingent upon simultaneous death of testators failed and gift by implication was not applicable); *In re* Estate of Blansett, 28 Ill. App. 3d 552, 328 N.E.2d 593 (1975) (where husband and wife did not die simultaneously, will was not construed to imply a gift).

67. 88 Misc. 2d 112, 387 N.Y.S.2d 765 (1976).

68. *Id.* at ___, 387 N.Y.S.2d at 767.

her own death.[69] Neither party presented this evidence to the court of appeals, however, because both contended the will was unambiguous.[70] The court of appeals in *In re Estate of Martin* declared that no extrinsic evidence was necessary to arrive at the intent of the testatrix as expressed in her will.[71]

Where a will is unambiguous, extrinsic evidence is not admissible to vary, contradict, or add language to the will.[72] The Statute of Wills would serve little purpose if ambiguities could be created routinely by extrinsic evidence.[73] Where the language of the will is ambiguous, however, extrinsic evidence may be admitted to assist the court in ascertaining its meaning.[74] The court of appeals in *In re Estate of Martin* stated: "The critical test for determining whether a will is ambiguous is whether the intent of the testator or testatrix can be determined from the four corners of the instrument itself. If the testamentary intent can be gleaned from the face of the will, ambiguity does not exist."[75] A determination that a will is ambiguous and admission of extrinsic evidence to explain what is written in the will remedies any obscurities in the will without adding unattested language to the will. Therefore, the Statute of Wills is not violated because the court merely is interpreting what is already written.

One case has been decided since *New Mexico Boys Ranch* in which a document has been determined to be ambiguous and extrinsic evidence was considered to clarify the ambiguity.[76] The New Mexico Court of Appeals in *Spencer v. Gutierrez*[77] found that property was ambiguously described in a will. The court drew a reasonable inference of the property to which the address was referring by considering the relationship between the parties, the testators' distribution scheme, and the testimony of the draftsman who prepared the will.[78] From this extrinsic evidence, the court

69. *New Mexico Boys Ranch*, 97 N.M. at 772, 643 P.2d at 858.

70. *In re* Estate of Martin, 97 N.M. at 775, 643 P.2d at 861.

71. *Id.* at 777, 643 P.2d at 863.

72. Lamphear v. Alch, 58 N.M. 796, 801, 277 P.2d 299, 302 (1954). In *Lamphear*, the court held that although the language of the will bequeathing personal property was not legally sufficient to transfer title to real estate, the will was too clear and unambiguous to permit extrinsic evidence. *Id.*

73. *See* Langbein and Waggoner, *Reformation of Wills*, *supra* note 4, at 566. *See, e.g.*, Watkins v. Jones, 193 S.E. 889 (Ga. 1937) (court will not refuse to probate a will due to extrinsic evidence that testator was angry with his daughter when he executed his will).

74. Brown v. Brown, 53 N.M. 379, 208 P.2d 1081 (1949). *See also In re* Estate of Taff, 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976) (extrinsic evidence was admissible to show the existence of and resolution of a latent ambiguity in the will); *In re* Estate of Zahradnik, 6 Kan. App. 2d 84, 626 P.2d 1211 (1981) (ambiguity in the language of a joint will allowed admissibility of extrinsic evidence to establish either the existence or nonexistence of a contract).

75. *In re* Estate of Martin, 97 N.M. at 776, 643 P.2d at 862 (quoting *In re* Estate of Zahradnick, 6 Kan. App. 2d 84, ___, 626 P.2d 1211, 1217 (1981)).

76. Spencer v. Gutierrez, 99 N.M. 712, 663 P.2d 371 (Ct. App. 1983). In another case, Lemon v. Hall, 97 N.M. 429, 640 P.2d 929 (1982), the New Mexico Supreme Court recently used extrinsic evidence to clarify an ambiguous trial court decision construing a trust instrument.

77. 99 N.M. 712, 663 P.2d 371 (Ct. App. 1983).

78. *Id.* at 715, 663 P.2d at 374.

determined the testators intended to give the entire property in question to their son, Ralph Gutierrez, instead of only the property identified by address in the will.[79]

In *New Mexico Boys Ranch,* the New Mexico Supreme Court could have found Martin's will was ambiguous in the sense that the court of appeals and the trial court interpreted the will differently and reached conflicting results. The supreme court could have considered the extrinsic evidence of the trust for the benefit of the New Mexico Boys Ranch which would have made the intent of the testatrix more clear. This extrinsic evidence, and the clauses in the testatrix' will disinheriting her brother and any possible heirs, indicated Martin's plain intent to leave her estate to the New Mexico Boys Ranch.

The holding in *New Mexico Boys Ranch,* however, must be read narrowly. The decision does not satisfactorily explain how the court decided that the gift was unconditional. Nor does the court explicitly justify its conclusion as implying a gift from very strong evidence of intent. Courts have not uniformly implied gifts from a will in order to complete a disposition of the testator's property.[80] Yet, the court in *New Mexico Boys Ranch* reached an appropriate result by implying a gift because one policy of the law of wills is to uphold rather than defeat testamentary dispositions.

B. Reforming a Will in Violation of the Statute of Wills

The second part of this Note suggests two remedies that a court may utilize to effectuate the intent of the testator. Both remedies, however, potentially conflict with the Statute of Wills, which requires all the words of a will to be written and witnessed at the time the testator signs the will.[81] The policy of the Statute of Wills to prevent fraud is designed to protect the expressed desires of the testator from persons who may wish to alter the testator's will to benefit themselves.[82] This policy is embodied by a rule known as the "no-reformation" rule, which prevents the addition of unattested language to a will.[83] When a court is charged with the interpretation of a will, however, it does not stand to benefit as a distributee of the property. If the proof of omission or mistake is convincing, a court should add or delete words in order to effectuate what is clearly the testator's intent as expressed in the will itself.[84]

79. *Id.* at 714, 663 P.2d at 373.

80. *See supra* note 66 and accompanying text.

81. *See supra* note 4 and accompanying text.

82. *Id.*

83. *See* Langbein and Waggoner, *Reformation of Wills, supra* note 4, at 528-29.

84. *Id.* at 526. *See also In re* Blalock's Estate, 95 Cal. 2d 46, 213 P.2d 100 (1949) (where it clearly appears on the face of the will that words have been omitted, those words may be supplied to carry out the intention of the testator as manifested by the context); Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976) (in giving effect to the intent of the testator, words may be supplied, rejected, or transposed).

1. Deleting Portions of the Simultaneous Death Clause from Martin's Will

In construing a will, a court may delete words that the testator did not intend.[85] Deletion of words, however, is an extreme remedy which courts should use only as a last resort. Once a mistake has been proven, the court usually strikes the appropriate language leaving a blank in the will. Extrinsic evidence then is admitted to construe the resulting ambiguity as to the person or thing intended.[86]

The supreme court in *New Mexico Boys Ranch* could have corrected the testatrix' failure to provide for the circumstance of her mother predeceasing her by deleting most of the simultaneous death clause from the will. The result of this deletion would have been as follows: "I then give, devise and bequeath all of the rest, remainder and residue of my estate . . . to the New Mexico Boys Ranch. . . ." The New Mexico Boys Ranch would have been entitled to Martin's estate as an unconditional residuary beneficiary. This remedy would have complied with one of the primary purposes of the Statute of Wills, to effectuate the intent of the testator, if the court had found the words it deleted to have been present through mistake or inadvertence. There was, however, no evidence presented in *New Mexico Boys Ranch* of mistake or inadvertence.

2. Adding Language to Martin's Will

It is generally held that an omission or mistake in a will cannot be corrected by a court.[87] The court of appeals in *In re Estate of Martin* strictly adhered to the "no-reformation" rule and declared, "[t]estatrix' failure to include in her will an unqualified provision disposing of her estate to another if her mother predeceased her . . . is a factor that cannot be cured now by the court."[88]

Yet, in some jurisdictions, omissions may be supplied by a court to effectuate the intent of the testator as expressed in the will. If it is certain beyond a reasonable doubt that the testator has not expressed himself or herself as intended, the omitted language may be added to the will.[89] For

85. *See supra* notes 8 and 9. *See, e.g.*, Brasser v. Hutchison, 37 Colo. App. 523, 549 P.2d 801 (1976) (spendthrift clause in a will was disregarded as inconsistent with the testator's obvious intent); Seattle-First Nat'l Bank v. Tingley, 22 Wash. App. 258, 589 P.2d 811 (1978) (anti-lapse clause was deleted from will as a drafting mistake).

86. *See, e.g.*, Patch v. White, 117 U.S. 210 (1886) (mistake in description of property); Brickheimer v. Kraft, 133 Ill. App. 2d 410, 273 N.E.2d 468 (1971) (mistake in name of nephew's wife); Moore v. Bean, 82 N.M. 189, 417 P.2d 823 (1970) (mistake in name of charity); *In re* Estate of Gibbs, 14 Wisc. 2d 490, 111 N.W.2d 413 (1961) (mistake in middle initial of distributee).

87. Page on Wills, *supra* note 4, at § 13.7.

88. 97 N.M. at 778, 643 P.2d at 864.

89. In Kostos v. Anderson, 240 P.2d 73 (Okla. 1952), the court held that an omission of a section number in the description of real property may be supplied by extrinsic evidence. *See also* McCauley v. Alexander, 543 S.W.2d 699 (Tex. Civ. App. 1976), where the court added the phrase "all of my property and estate," which the attorney mistakenly omitted. *Id.* at 701.

example, in *In re Estate of Snide*[90] a husband and wife who executed mutual wills at a common execution ceremony mistakenly signed the will intended for the other. The two wills were identical except for obvious differences in names of donors and beneficiaries. The court reformed this obvious mistake by substituting the husband's name whenever the wife's name appeared and vice versa. The court reasoned that even though evidence of the testators' testamentary scheme was dependent upon proof outside the will, there was absolutely no danger of fraud due to the contemporaneous execution ceremony.[91] Both wills were executed with statutory formality and attested by the same witnesses. In essence, the court brushed aside the strict compliance with the Statute of Wills to remedy an obvious mistake.[92] The clear proof of mistake and the importance of implementing the testator's true intent were the decisive elements in the court's decision.[93]

If such a remedy had been employed in *New Mexico Boys Ranch,* the supreme court could have added the language "also, in the event my mother precedes me in death" to Martin's devise to the New Mexico Boys Ranch. With this remedy, the New Mexico Boys Ranch would have been entitled to Martin's entire estate. This remedy appears extraordinary in light of the policies underlying the Statute of Wills because it gives effect to words not attested by the formalities required by the Statute of Wills. It is supported, however, by a primary purpose of the Statute of Wills: to effectuate the intent of the testator. The risk of fraud from a court adding or deleting language from a will varies from situation to situation. In a case such as *In re Estate of Snide,* the risk of fraud seems minimal.

A new theory supporting the addition of language to a will has been developed by the New Jersey Supreme Court in *Engle v. Siegel.*[94] In that case, a husband and wife who were killed in a common disaster left identical wills except for appropriate alterations as to names and relationships. Both wills devised the residue of their property one-half to the husband's mother, Rose Siegel, and one-half to the wife's mother, Ida Engle. Siegel predeceased her son and daughter-in-law. Engle argued that the entire residuary estate passed to her under a New Jersey statute, which provides that the share of any residuary devisee dying before the testator shall be vested in the remaining residuary devisees unless a contrary intent appears in the will.[95] Siegel's surviving children claimed her one-half interest. The court awarded one-half of the estate to the surviving

90. 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).
91. *Id.* at 197, 418 N.E.2d at 658, 437 N.Y.S.2d at 65.
92. Langbein and Waggoner, *Reformation of Wills, supra* note 4, at 564-65.
93. *Id.* at 565.
94. 74 N.J. 287, 377 A.2d 892 (1977).
95. N.J. Stat. Ann. § 3A:3-14 (West 1953).

children of Siegel based upon the testimony of the attorney who drafted the wills. The attorney testified that both testators wanted to divide their property equally between the two families and each mother was considered an appropriate representative of each family.[96] Looking at the extrinsic evidence of the testators' intent, the court used the doctrine of probable intent to provide for a contingency, the death of Rose Siegel, which the testators' did not delineate in their wills.

Under the doctrine of probable intent, a court strives to ascertain what the testator subjectively would have desired had the testator in fact addressed the contingency.[97] The court in *Engle* relied upon the analytical approach taken in *In re Estate of Burke*:[98]

> First, a contingency for which no provision is made in the will was identified as having occurred. The family circumstances and the plan of testamentary disposition set forth in the will were then carefully studied. Finally, the court placed itself in the position of the testatrix and decided how she would probably have responded to the contingency had she in fact envisioned its occurrence.[99]

If the doctrine of probable intent had been applied in *New Mexico Boys Ranch,* the court could have used the following reasoning. First, that Martin failed to provide for a contingency which occurred, the death of her mother before her own death. Second, the court could have considered the testatrix' family circumstances and testamentary plan. The testatrix had no immediate family besides her brother, whom she specifically disinherited, and all other possible heirs were bequeathed one dollar. Finally, the court, by placing itself in the position of the testatrix, could have decided how she would have responded to the contingency had she in fact envisioned its occurrence. If Martin had anticipated that her mother might predecease her, certainly she would have preferred the New Mexico Boys Ranch to take her estate over her intestate heirs. This probable intent may have been further demonstrated by Martin's placement of the bulk of her estate in trust for the benefit of the New Mexico Boys Ranch shortly before her death.

The doctrine of probable intent in *Engle* appears to be a new theory for overcoming the problem of unattested language. Extrinsic evidence of the testator's own declarations are admissible to prove the testator's probable intent had the testator considered the contingency which occurred but was omitted from the will. This theory, however, directly contradicts

96. 74 N.J. at ___, 377 A.2d at 896.
97. *Id.* at ___, 377 A.2d at 894.
98. 48 N.J. 50, ___, 222 A.2d 273, 280 (1966).
99. 74 N.J. at ___, 377 A.2d at 895.

the "no-reformation" rule that an omitted devise cannot be added to a will.[100]

Yet, the "no-reformation" rule should not be an insurmountable obstruction to adding an omitted devise to a will. When a court construes a will as passing property not mentioned, or as passing title to a distributee whose name was omitted, or when a court substitutes language, it is in effect reforming the will. Interpreting a will in a sense adds to a will by clarifying it. A court's reluctance to admit that it is reforming a will stems from its desire to avoid appearing to violate the Statute of Wills.

The court's power to interpret a will is broad. The evidentiary policy of the Statute of Wills might be better safeguarded if courts utilized a clear and convincing standard of proof of mistake to substantiate reformation of a will.[101] This standard would effectuate the intent of the testator and would end the manipulation of rules of construction and the creation of exceptions.[102] Therefore, in the future, practitioners may wish to confront the court directly with a suggestion of reforming a will if proof of an omission is clear.

IV. CONCLUSION

The New Mexico Supreme Court's decision in *New Mexico Boys Ranch* was appropriate if it enforced the expressed, but inartfully drawn, intention of Mary E. Martin regarding the disposition of her estate. If there is little doubt as to whether a testator would prefer the residuary beneficiary to receive the estate over intestate heirs, the will should be construed to carry out the desires of the testator. To enforce this intent, the supreme court construed all the provisions of the will as providing an unconditional gift to the New Mexico Boys Ranch. The court probably determined that Martin did not intend to condition her devise to the New Mexico Boys Ranch upon the simultaneous death of herself and her mother because she did not provide for an alternative disposition of her property if the contingency failed. More importantly, the extrinsic evidence of a trust for the benefit of the New Mexico Boys Ranch indicated the clear intent of the testatrix to leave her estate to the New Mexico Boys Ranch.

The theory of gift by implication supports the court's decision. This theory is consistent with the court's emphasis on the presumption in favor of testacy and the intent of the testator based upon the will as a whole.

100. Langbein and Waggoner, *Reformation of Wills*, *supra* note 4, at 561.
101. *Id.* at 569.
102. *Id.* at 590.

Finally, the theory of gift by implication is consistent with the policies underlying the Statute of Wills because it requires the court merely to construe the language of the will and does not add unattested language or delete language. Until the New Mexico Supreme Court admits it is abandoning the "no-reformation" rule, the theory of gift by implication constitutes an adequate rationale for the conclusion reached in *New Mexico Boys Ranch*.

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