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Changing the Estate Planning Malpractice Landscape: Applying the Constructive Trust to Cure Testamentary Mistake

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"[A] constructive trust will be erected whenever necessary to satisfy the demands of justice."¹

Introduction

A norm at the foundation of modern property ownership in the United States is the freedom of the individual to designate his heirs. Such determinations are made at death, and as the main actor is not available to express his intent, the law requires the decedent to place his wishes in a written instrument that complies with will formalities.² If represented, the decedent (viz., now the client) believes that counsel has assured the devolution of his property to his intended beneficiaries.³

It is not difficult to imagine a circumstance in which counsel has committed a fundamental error⁴ – perhaps imperfectly complying with statutory formalities or failing to

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¹ Latham v. Father, 85 N.E.2d 168 (1949).
² See 95 C.J.S. Wills § 328 (West 2010) (explaining that a nuncupative will may be valid in the absence of a written document).
³ Angela M. Vallario, Shape up or Ship out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents, 26 WHITTIER L. REV. 59, 71-72 (2004) (“When an attorney renders services to prepare a will or trust, . . . the attorney is expected to draft a valid document that disposes of the client’s property in accordance with the client’s wishes . . . .”).
⁴ Many generalists practice within this area without the knowledge or expertise to have a high level of competence in what has become an increasingly specialized field, requiring knowledge of many diverse areas of law. Damages arising from professional malpractice will not arise until the client is deceased and the estate plan is tested, at which point it is too late for an estate planner to correct any errors that have been made. See generally Gerald P. Johnston, Legal Malpractice in Estate Planning and General Practice, 17 MEM. ST. U. L. REV. 521, 521 (1987); Victoria J. Haneman & Jennifer M. Booth, 120 Hours Until the Consistent Treatment of Simultaneous Death Under the California Probate Code, 34 NOVA L. REV. 449, 462 n.92 (2010) (listing states that offer specializations to attorneys).
communicate his client’s intent accurately due to a scrivener’s mistake\(^5\) – but the error remains unnoticed until after the client’s death when the estate plan is tested. The unintended beneficiary reaps a windfall as a result of the error, while the intended beneficiary may only look for damages through a malpractice suit. If the attorney error is sufficiently obvious and the client’s intentions are clear, this seems to be a compelling case for a malpractice suit: negligence, duty, causation and damages are easily proven.

Surprisingly, the law of wills is an area in which recovery by the intended beneficiary is tenuous.\(^6\) When the attorney error negligently diverts an asset from the intended beneficiary to an unintended beneficiary, it is unlikely that the estate itself will be devalued or suffer damages, and it is therefore inappropriate for the executor to file a malpractice claim on behalf of the estate.\(^7\) As the attorney-client relationship existed between attorney and his now-deceased-client, the intended beneficiary may only file a malpractice action in those jurisdictions where relaxation of the privity doctrine has extended attorney liability to unrepresented third parties.\(^8\) If the intended beneficiary successfully hurdles the privity doctrine and presses forth with a malpractice suit, two additional issues must be weighed: Whether damages will be sufficient to

\(^5\) 66 AM. JUR. 2D Reformation of Instruments § 19 (2010) (defining the doctrine of scrivener’s error as “the mistake of a scrivener in drafting a document [that] may be reformed based upon parol evidence, provided the evidence is clear, precise, convincing and of most satisfactory character that the mistake has occurred and that the mistake does not reflect the intent of the parties.”).


\(^8\) “Proponents of strict privity believe that a greater good is being served by preserving the attorney’s ability to zealously represent clients without being compromised by the threat of a suit from a third party. . . Although most jurisdictions no longer follow strict privity, a minority of jurisdictions, despite its inequities, adhere to strict privity in the situation of estate-planning malpractice. Strict privity acts as an absolute bar to the cause of action and constitutes immunity of estate-planning attorneys when the defect is discovered after the testator’s death.” Angela M. Vallario, Shape up or Ship out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents, 26 WHITTIER L. REV. 59, 82-83 (2004).
compensate for unique family (real or personal) property, and whether the attorney carries malpractice insurance to justify the expense of obtaining a judgment.

The weight of judicial authority in the law of wills is against simply correcting the attorney mistake and rerouting the property to the intended heir, regardless of the testator’s actual intent. 9 Courts have historically leaned upon fixed rules that provide certain, and sometimes harsh, results.10 Over the past several decades, there has been a movement towards increased flexibility to ameliorate this harshness. The substantial compliance doctrine11 and harmless error rule12 have developed, and leading authorities such as the Third Restatement of the Law of Property (Donative Transfers), the Third Restatement of Trusts, and the Uniform Substantial Compliance with the Wills Act

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10 See In re Poley’s Estate, 422 A.2d 136 (Pa. 1980) (refusing to probate a will where the testator signed the document, but failed to sign at the “sequential end” as required by statute and stated, “The frustration of decedent’s apparent testamentary intent by her own failure to observe the proper formalities may seem at first a harsh result, but it is a result which is required by our Legislature and which this Court may not alter. ‘The courts must consider that the legislature, having regard to all probable circumstances, has thought it best, and has therefore determined, to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills.’”); Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983) (denying probate of a will where the attesting witnesses signed the at the end of the self-proving affidavit instead of after testator’s signature, even though their signatures were on the same page as the testator’s signature). The court also refused to consider the testimony of the two witnesses as to the proper execution of the will because “even clear evidence of intent cannot abrogate the mandatory provisions of the probate code.” 11


Trust Code have all adopted more flexible standards that permit re-writing of a will if clear and convincing evidence demonstrates that the instrument does not represent the actual intent of the testator. 13 Despite doctrine or statute, the call for increased flexibility has not been embraced by the judiciary, 14 and only a handful of cases can be said to trend in this direction. 15

This Article suggests a unique and efficient means by which attorney mistake can be addressed, property can be routed to the intended beneficiary, and a court may effectuate testator intent: The use of a constructive trust. Constructive trusts are equitable remedies that are properly applied when “one party has benefitted by the mistake of another at the expense of a third party” 16 – or in the instant case, when a client’s property is routed from the intended to the unintended beneficiary by virtue of the attorney mistake. This Article begins in Section I with an overview of the law of wills in the United States and the judicial formalism that has historically existed within this area of law. The use of equitable remedies is as rooted in tradition as the law of wills, and Section II explores this historical development, the distinction between law and equity in today’s unified system, and the use of the constructive trust. Section III briefly examines attorney malpractice claims in the United States, and specifically, malpractice liability in the estate planning field. The application of a constructive trust in favor of the intended beneficiary is not without precedent in the United States, and Section IV discusses a recent Florida Supreme Court case in which the use of a constructive trust allowed the judiciary to

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14 C. Douglas Miller, Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” and the Movement Toward Amorphism, 43 Fla. L. Rev. 167, 177 (1991); see also Leigh A. Shipp, Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States, 79 Tul. L. Rev. 723, 730 (2005) (“Langbein was disappointed with the lukewarm reception that the doctrine of substantial compliance received in the probate courts following his article . . . .”).
16 In re Estate of Tolin, 622 So.2d 988, 990-91 (Fla. 1993).
correct an obvious mistake without flying in the face of the law of wills. Section V explores the policy advantages and disadvantages of such an approach.

I. Judicial Formalism and the Law of Wills in the United States

The original Statute of Wills was enacted in 1540, and provided that real property could be conveyed by means of a writing. No other requirements or formalities were imposed, and nuncupative transfers of personal property were still allowed. The Statute of Frauds was enacted in 1677. The statute was enacted to mitigate fraud by establishing a standard of evidence, requiring both that all real property transfers were commemorated in writing and that all wills be written and witnessed. The requirement of formal execution produced instances in which a will was held invalid for technical failure to meet formalities, and in 1757, Lord Mansfield observed that he was convinced that more well-intentioned wills were overturned for such failure than fraudulent wills prevented. Judicial treatment of defectively executed wills

17 Statute of Wills 32 Henry VIII (1540), reprinted in HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS at 188-90 (1928).

[A]ll devises and bequests of any lands or tenements, devisable either by force of the statute of will, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

20 6 W. Holdsworth, A History of English Law 380-84 (2d ed. 1937) at 388-389; James Lindgren, Abolishing the Attestation Requirement for Wills, 68 N.C. L. REV. 541, 550 (1990). The Statute of Frauds required a minimum of three witnesses and required them to sign at the foot of the will; however, the witnessing requirement only applied to real property, not personal property.
was inconsistent and ultimately resulted in the enactment of the 1837 Wills Act, which requires that a will be signed by the testator and two witnesses.22

The law of every United States jurisdiction was derived from the English model set forth in either the Statute of Frauds of 1677 or the 1837 Wills Act.23 Every jurisdiction in the United States presently recognizes some form of a witnessed will.24 In the majority of these jurisdictions, a court will refuse to probate an invalidly executed will, thereby ignoring the testator’s last wishes.25 Indeed, courts have traditionally complied with statutory formalities even in those instances where the authenticity of the document and the intentions of the decedent are obvious. Judicial formalism may increase the efficiency of probate courts, but it also limits the

25 Bruce H. Mann, Self-Proof Affidavits and Formalism in Wills Adjudication, 63 Wash. U. L.Q. 39, 59-60 (1985): The requirements for writing, signature, and attestation impose a standard form on testamentary instruments that permits probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria. The formalities thus routinize probate in the large majority of cases. The problem lies not with the formalities but with judicial insistence on literal compliance with them.
principal of free testation. Three historically recent attempts at innovation were made in the form of the Model Probate Code of 1946, the Uniform Probate Code of 1969, and the Uniform Probate Code of 1990. The UPC of 1990 introduced the harmless error rule in UPC section 2-503 – which was intended to allow the probate of a technically defective document that was intended to be the testator’s will.

Most legal scholars seem to agree upon the usefulness of some formal rules in the law of wills. However, there is disagreement as to the degree to which such requirements must be strictly enforced by the judiciary. This discord is also reflected in inconsistent case law, from court to court and state to state, as to how rigidly statutory requirements are followed. The inconsistency is largely the product of courts straining to avoid the harsh consequences in testamentary mistake cases.

Chief among the criticisms against strict enforcement is the insistence that times have changed dramatically, and the law must change to reflect such changes. For example, common

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27 LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW (1946).
31 See, e.g., John H. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489, 493-98 (1975) (recognizing benefits of formalities, though opposed to rigid enforcement of those formalities). As first articulated in 1941 by Ashbel Gulliver and Catherine Tilson, will formalities generally serve a protective, evidentiary, and ritual function. Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 YALE L. J. 1, 5-9 (1941) (explaining that protective formalities reduce the possibility that the actions of a wrongdoer will corrupt the process, evidentiary formalities provide reliable evidence of testator’s intentions, and ritual formalities ensure that the testator understands the importance of his decision, and that his intent is not merely passing whim).
32 C. Douglas Miller, Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” and the Movement Toward Amorphism, 43 FLA. L. REV. 167, 186 (1991); see also Bruce H. Mann, Formalities and Formalism in the Uniform Probate Code, 142 U. PA. L. REV. 1033, 1033-36 (1994) (“‘Down with formalism’ has been the rallying cry of probate reform since 1975, when John H. Langbein published his landmark critique of formalism in wills adjudication . . . . The problem lies not with the formalities, but with judicial insistence on literal compliance with them.”).
law norms have reversed since the drafting of the Statute of Frauds in 1677. Historically, there was a presumption against testamentary schemes that expressly or implicitly disinherit one’s heirs at law – a rule that favors intestacy. Today’s presumption disfavors intestacy and therefore seeks to effectuate testator’s intent. Further, deathbed wills are a rarity in today’s society, as compared to a time when wills were “many times made in Extremity.” And notably, more than half of the states in the U.S. recognize the validity of holographic (handwritten) wills, without satisfying the nearly universal rule that a valid will must be witnessed.

Despite rigid will formalities imposed through state probate codes, two curative doctrines exist that are intended to mitigate the harshness of mistakes and noncompliance in the face of obvious testator intent. The substantial compliance doctrine was developed by Professor Langbein of Yale University, and permits the probate of a noncomplying will if it is found to substantially comply with the statutory requirements. In a state in which the harmless error

39 Victoria J. Haneman & Jennifer M. Booth, 120 Hours Until the Consistent Treatment of Simultaneous Death Under the California Probate Code, 34 NOVA L. Rev. 449, 458 n.64 (2010). See, e.g., Dukeminier et al., Wills, Trusts, and Estates 273 (8th ed. 2009) (discussing untraditional holographic wills that have been written on “tractor fenders, . . . a nurse’s petticoat, a chest of drawers, a cigarette carton, a bedroom wall, a napkin, a set of paper plates and the box that held them, and an eggshell.”).
40 See generally William M. McGovern, Jr. & Sheldon F. Kurtz, Wills, Trusts, and Estates Including Taxation and Future Interests 189-95 (3d ed. 2001) (illustrating an overview of the general witness requirement for wills). For a discussion of the importance of the witnessing requirement, see generally Richard Lewis Brown, The Holograph Problem—The Case Against Holographic Wills, 74 Tenn. L. Rev. 93, 124 (2007): “The difficulty with holographic wills is not the absence of witnesses per se. The notion that witnesses provide effective protection against coercion and duress is simplistic. As many commentators have recognized, the use of witnesses for protection against improper imposition on the testator is largely ineffective and unnecessary. Rather, the transformation of the will drafting and execution process from a formal, to an excessively informal, process causes concern.”
41 Stephanie Lester, Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule, 42 REAL PROP. PROB. & TR. J. 577, 579 (2007).
42 See generally John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 515-16 (1975).
rule has been codified, a court may probate a noncomplying will so long as clear and convincing
evidence demonstrates that the testator intended the document to be his will. As few courts
have statutorily codified the harmless error rule, and fewer courts have applied some version of
the substantial compliance doctrine in their analysis, one may safely conclude that these
ameliorative doctrines have not been wholeheartedly embraced by the American judiciary.

II. Equity, Law and Constructive Trusts

Traditional rules that distinguish between law and equity linger from a time when these
two systems were procedurally separate and distinct. Many of these traditional rules have either
become an obstacle to fair and efficient decisions, or courts have manipulated these rules as a
cover for their policy-based decisions. Section II of this Article considers the development of
law and equity as separate institutions, and provides an overview of constructive trusts as an
equitable remedy.

A. The Development of Law and Equity Courts as Separate Institutions

The historical distinction between common law and equity is an artificial one. The
eventual division between the two began during the Norman Conquest as Kings implemented
new judicial forums and procedures that provided greater protection than already existing

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43 The harmless error rule set forth in Uniform Probate Code (UPC) Section 2-503 provides:
Although a document or writing added upon a document was not executed in compliance with Section 2-
502, the document or writing is treated as if it had been executed in compliance with that section if the
proponent of the document or writing establishes by clear and convincing evidence that the decedent
intended the document or writing to constitute (I) the decedent's will, (ii) a partial or complete revocation of
the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her]
formerly revoked will or of a formerly revoked portion of the will.

44 See generally Stephanie Lester, Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the
For the 200 years prior to the fourteenth century, all actions in the King’s Court originated in the same manner: an individual would “petition asking the King to interfere to secure justice where it would not be secured by ordinary and existing processes of law.” In essence, all actions originally brought in the King’s Court originated in equity, as the petitioners were seeking remedies not afforded under pre-existing Frankish law.

As certain types of petitions became common, King Henry II established a Curia Regis to develop a national law based on standardized writs that would ultimately form the basis of the common law. During this time, judges construed writs liberally to allow justice where it seemed appropriate, including cases that would now be considered equitable in nature. In time, however, Parliament strongly curtailed the liberal construction of these writs as a limit on the King’s and judges’ authority to make new law. The law became focused on form and pleading to such an extent that equity actions were no longer permissible.

The court became an institution separate from the King, yet the King retained the sole power to grant relief where existing law did not provide a remedy. As England became more industrialized, the number of petitions to the King increased because new wrongs were occurring that simply had not been contemplated by earlier writs. To accommodate the influx of writs, King Edward I appointed a Lord Chancellor to take the King’s place as arbiter of these writs. As the “keeper of the king’s conscience,” the Lord Chancellor developed legal principals to offer

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relief where it would otherwise be denied because of inadequacies in the common law or procedural technicalities.\textsuperscript{57}

By the fifteenth century, the Court of Chancery emerged as its own institution, modeling remedies “so as to suit . . . mutual and adverse claims” as equity required.\textsuperscript{58} The Courts of Chancery took into consideration morality and corrected the law where strict application would produce unwarranted hardships.\textsuperscript{59} With conscience as the guiding principle, the Chancellor decided matters without regard to precedent.\textsuperscript{60} These liberal decisions again threatened Parliament’s power to establish law and a debate ensued as to whether the Court of Chancery had authority to issue writs.\textsuperscript{61} King James I affirmed the Court of Chancery’s authority, it being derived from the authority of the crown.\textsuperscript{62}

In 1618, the Court of Chancery underwent a radical transformation when Lord Chancellor Bacon instituted 100 rules of equity that restricted equitable actions and required the Court of Chancery to follow precedent.\textsuperscript{63}

\textsuperscript{57} Thomas O. Main, \textit{Traditional Equity and Contemporary Procedure}, 78 WASH. L. REV. 429, 442 (2003). In the sixteenth century, “[w]hen St. Thomas More was chancellor he gathered all the judges and advised them that it lay within their own discretion to mitigate and reform the rigor of the law ‘if they would do that, he promised he would issue no more common injunctions.’ Their flat rejection of More’s proposal, says John Baker, destined equity to develop in England as a separate system from the common law.” Vernon Valentine Palmer, \textit{“May God Protect Us from the Equity of Parlements”: Comparative Reflections on English and French Equity Power}, 73 TUL. L. REV. 1287, 1289-90 (1999).


\textsuperscript{62} Robert L. Munger, \textit{A Glance at Equity}, 25 YALE L.J. 42, 46 (1915). A battle ensued between two of the great legal minds of the time, Coke and Bacon. Coke had entered judgment against defendants for failure to produce a witness, despite plaintiff’s agents being responsible for the witness’s absence. Defendants then sought to attack the judgment in the Court of Chancery, prompting Coke to induce plaintiffs to seek indictments against the defendants for attacking the judgment. The matter then went before law officer Bacon, who sustained the Chancellor’s actions. The King affirmed this decision. Thomas O. Main, \textit{Traditional Equity and Contemporary Procedure}, 78 WASH. L. REV. 429, 446-47 (2003).

B. The Development of Law and Equity in the United States

Early American courts originally adopted the English distinction between courts of law and courts of equity. However, as equitable actions became formalized, similar to the formalities applied to actions at law, the need to keep the courts separate disappeared. In 1845, Texas began the movement of unifying the two courts by providing in its constitution that courts of law had jurisdiction to decide matters of equity. Almost all other states eventually followed suit, and only three states presently retain separate courts of equity: Delaware, Mississippi and Tennessee.

Despite the unification of the two courts, plaintiffs are still required to plead special circumstances in order to invoke a court’s equity jurisdiction. Before a court can grant an equitable remedy, it must find that there is no adequate remedy at law to compensate for plaintiff’s injuries.

C. Constructive Trusts

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66 There is some debate as to whether credit for the unification of courts of law and courts of equity should be given to New York for enacting Section 62 of the New York Code of Civil in Procedure in 1848, that provided: The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action. 1848 N.Y. Laws c. 379, § 62. See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 464-66, 464 n.213 (2003).
67 TEX. CONST. art. V, § 8 (stating “The District Court shall have original jurisdiction . . . without regard to any distinction between law and equity . . .”); Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 244 & n.1 (1945).
70 27A A. M. JUR. 2D Equitable Remedy § 21 (2010).
Constructive trusts differ from other types of trusts in that they arise absent any explicit or implicit intention that a trust be created. Rather, constructive trusts are imposed by operation of law, pursuant to a court’s equitable powers, “to satisfy the demands of justice.”

While English courts commonly applied the constructive trust in trust-by-analogy situations, American courts have embraced the constructive trust as a remedial tool. Justice Benjamin Cardozo, while sitting on the New York Court of Appeals, defined a constructive trust, as “the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.”

Constructive trusts may arise from actual fraud, constructive fraud, or equitable principals other than fraud. A court imposes a constructive trust in those circumstances in which the “holder of the legal title may not in good conscience retain the beneficial interest . . .”, and the holder of legal title becomes a constructive trustee for the sole purpose of transferring the property to another.

In the probate context, cases involving the imposition of a constructive trust can include undue influence, breach of fiduciary duty, failure to lodge a will, fraudulent and negligent misrepresentation, tortious interference with inheritance rights, abuse of process, tortious interferences, and nullity of marriage.*

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77 GEORGE GLEASON BOGERT ET AL., BOGERT’S TRUSTS AND ESTATES § 471 (2009).
misfeasance and nonfeasance, and conspiracy. A court will not usually grant this remedy unless one of three conditions exists: A fiduciary obligation, unique property, or an insolvent defendant. In the absence of one of these three criteria, legal damages are arguably sufficient.

III. Estate Planner Malpractice Liability

When attorney error is sufficiently egregious, the victim (or in this circumstance, the intended beneficiary) may seek recompense through a malpractice action against the attorney who represented the decedent. If recovery through a malpractice action is successful, it is unnecessary to correct the attorney error, as relief to the victim has been granted in the form of damages. However, several obstacles stand in the way of an intended beneficiary recovering through malpractice. Section III provides an overview of the inadequacy of legal malpractice actions as a means to making the intended beneficiary whole.

In 2008, the American Bar Association released its second statistical compilation of malpractice claims. The study presented data based on reports from nineteen United States malpractice insurance companies, and concluded that estate planning malpractice claims constituted 9.68% of malpractice claims reported through their year 2007 study. Further, it
found that while 35.2% of all malpractice claims resulted in some amount of attorney liability,\(^{84}\) only 21.6% of all malpractice claims were paid through indemnity dollars.\(^{85}\)

While twenty-five states require lawyers to report malpractice coverage to the state bar\(^ {86}\), only Oregon requires that all attorneys have malpractice insurance.\(^ {87}\) The percentage of attorneys who practice without any malpractice coverage varies from state to state,\(^ {88}\) and some states have no reliable information regarding these figures because they do not require attorneys to report their insurance status.\(^ {89}\) And even where attorneys do carry malpractice insurance, beneficiaries may still be prevented from recovering for their losses if the drafting attorney is

\(^{84}\) See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAWYERS’ PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS 2004-2007 12 (2008) (demonstrating that 64.8 percent of claims resulted in a payout of $0).

\(^{85}\) See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAWYERS’ PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS 2004-2007 13 (2008) (demonstrating that 78.4 percent of malpractice claims were paid with indemnity dollars).


\(^{87}\) OR. REV. STAT. § 9.080 (West 2009) (“The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.”). Oregon law requires all attorneys to carry a minimum of $200,000 in malpractice coverage. OR. REV. STAT. § 752.035 (West 2009) (“The commission shall require all qualified members of the profession to carry professional liability insurance offered by the fund with primary liability limits of at least $200,000.”).

\(^{88}\) For example, in 2006, 36.2% of Texas attorneys in private practice did not have any malpractice insurance. See Mary Alice Robbins, Bar Task Force Studies Insurance Disclosure Rule, 23 TEX. L. W. 1 (2007) (stating “a 2006 survey conducted by the State Bar's Research and Analysis Department, 63.8 percent of the Texas lawyers in private practice carried legal malpractice insurance in the previous year”); Also, as of 2007, 20% of California lawyers did not have malpractice coverage. See Devin S. Mills & Galina Petrova, Modeling Optimal Mandates: A Case Study on the Controversy Over Mandatory Professional Liability Coverage and its Decline, 22 GEO. J. LEGAL ETHICS 1029, 1037 (2009). In contrast, only 11% of Virginian attorneys reported that they did not have any malpractice insurance. See Devin S. Mills & Galina Petrova, Modeling Optimal Mandates: A Case Study on the Controversy Over Mandatory Professional Liability Coverage and its Decline, 22 GEO. J. LEGAL ETHICS 1029, 1043 (2009).

underinsured. A recent New Jersey Superior Court decision addressed the danger that arises when lawyers do not have or carry insufficient malpractice insurance: “[T]here's a reason we have a rule that says we have to carry insurance, and that's to make sure that there is coverage for clients who have claims. [It may be that] the claim is frivolous . . . but you got to be insured.”

In the estate planning context, there can be yet another barrier to malpractice recovery. Historically, strict privity of contract was the rule in estate planning cases – meaning that only the client could pursue a malpractice claim. It is often the case that the estate planner’s negligence is not discovered until after death, when the client’s estate plan is tested. An estate planner’s malpractice typically harms only the beneficiaries (or intended beneficiaries) of a client’s estate, and so the obvious effect of such a rule is to severely limit the malpractice claims.

An ever-shrinking minority of states continue to insulate an estate planning practitioner from liability to a third party. However, there are states that prevent estate beneficiaries from recovering against negligent attorneys, even where they have sufficient malpractice coverage.

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90 The recommended formula for determining how much coverage an attorney should be carrying is: y = [cd + dd + (2 lr)]/gb, where y is the number of years you have to practice without a claim; cd is the cost of defending yourself in a legal malpractice action; lr is the lost revenue during the pendency of a legal malpractice claim; dd is the cost of responding to or defending a disciplinary complaint, and gb is the savings from “going bare.” Briggs F. Cheney, *Shopping for Professional Liability Insurance: Something Every Lawyer Should Have*, available at http://docs.google.com/viewer?a=v&q=cache:Af0eHDcKt00J:www.nmbar.org/Attorneys/attyforms/LPLarticle.pdf+average+legal+malpractice+insurance+coverage&hl=en&gl=us&pid=bl&srcid=ADGEESjEwEdzwXV4uDa_sesGxwxEcSFwiidoK9jNR7T20kfqQgtnyOjC4NQ_pC4U37eSBomOd6iZiHUytUwrOcE0JEnquhVeyJWS4fTvTKiJAPdRleyF8hHrq5U9m6WwL5vKTCGn&sig=AHIEtbQouyPQNaeGLjgs5Qao0cGB4zf_y.A.


94 Frederick K. Hoops et al., *Estate Planning Discussion*, 42 FAM. EST. PLAN. GUIDE 47 (2010).

95 ALINE F. ANDERSON & DIANE H. KENNEDY, ANDERSON’S WILLS, TRUSTS AND ESTATE PLANNING § 1.5 (2010) available at 26 INPRAC §1:5.

96 Nine states still adhere to a privity standing requirement: Alabama (see, e.g., Robinson v. Benton, 842 So. 2d 631 (Ala. 2002)); Arkansas (ARK. CODE ANN. § 16-22-310 (1994)); Maine (see, e.g., Nevin v. Union Trust Co., 726
New York is one such example\textsuperscript{97}—it does not permit malpractice recovery against attorneys who are not in privity or near-privity with the injured party.\textsuperscript{98} Beneficiaries are generally not clients of the negligent attorney, meaning that they must satisfy the near-privity requirements in order to have standing to sue in malpractice.\textsuperscript{99} Near-privity is only satisfied where there is \textquoteright\textquoteright (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance."\textsuperscript{100} The near-privity/privity requirement can produce extremely unjust results, leaving beneficiaries without the property that the decedent intended for them to inherit, and without any cause of action against the attorney responsible for depriving them of their interests in the decedent’s estate.

IV. The Florida Supreme Court’s Novel Approach

The Florida Supreme Court dealt with a case that, after more than seventeen years, is still regarded as a leading case dealing with a court’s ability to correct a mistake when faced with the...
harsh outcome that would result with strict adherence to statute. Section IV considers the Florida Supreme Court’s willingness to impose a constructive trust in favor of the testator’s intended beneficiary, despite the fact that the testator’s underlying will was invalid for noncompliance with statutory will formalities.

In Estate of Tolin, Alexander Tolin invalidly revoked a photocopy of the codicil to his will, which he mistakenly believed to be the original. 101 In 1984, Tolin executed a will, leaving the residue of his estate to his friend, Adair Creag. 102 In 1989, Tolin executed a codicil changing the residuary beneficiary from Creag to Broward Art Guild, Inc. 103 Tolin’s attorney retained both the original will and codicil, and Tolin was provided with high-quality photocopies of both documents to keep in his possession. 104

Six months before his death, Tolin met with his neighbor, a former attorney, to discuss revoking his codicil and having Creag reinstated as his residuary beneficiary. 105 His neighbor informed him that in order to revoke the codicil, he needed to destroy it. 106 Tolin took the photocopied codicil and showed it to his neighbor, representing the copy to be an original. 107 Tolin then tore up the photocopy, intending the act to be a revocation of the codicil. 108 Tolin died in 1990 believing that he had validly revoked his codicil and reinstated Creag as his residuary beneficiary. 109

101 In re Estate of Tolin, 622 So.2d 988 (Fla. 1993).
102 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
103 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
104 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
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107 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
108 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
109 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
Creag petitioned the court to revoke the codicil. The circuit court revoked the codicil and reinstated Creag as the residuary beneficiary. The district court reversed, finding the revocation insufficient and certified the question for review by the Florida Supreme Court. The Florida Supreme Court found Tolin’s revocation insufficient under a state law requiring that the original will or codicil be destroyed.

Turing to the question of whether a constructive trust could properly be imposed where a mistake in fact prevented the testator from validly revoking a codicil, the court stated, “Although this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at the expense of a third party.” Finding that in the present case that Tolin clearly intended to revoke his codicil and that Broward Art Guild would benefit from Tolin’s mistake at Creag’s expense, the Florida Supreme Court remanded the case to the district court with instructions to impose a constructive trust on the residue of Tolin’s estate in favor of Creag.

The Florida Supreme Court declined to extend Tolin in the case of Allen v. Dalk.

Allen relied on In re Tolin to argue that a constructive trust should be imposed in her favor.

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110 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
111 In re Estate of Tolin, 622 So.2d 988, 989 (Fla. 1993).
112 In re Estate of Tolin, 622 So.2d 988, 989-90 (Fla. 1993).
113 In re Estate of Tolin, 622 So.2d 988, 990 (Fla. 1993).
114 In re Estate of Tolin, 622 So.2d 988, 990-91 (Fla. 1993).
115 In re Estate of Tolin, 622 So.2d 988, 991 (Fla. 1993).
116 Allen v. Dalk, 826 So.2d 245, 246-47 (Fla. 2002). Christel McPeak had her attorney prepare three documents: A will, a durable power of attorney, and a living will. Id. at 246. At an execution ceremony, she executed four duplicate originals of the living will and three duplicate originals of the durable power of attorney. Id. at 247. However, McPeak failed to sign a copy of her will, leaving her property to her niece, Bonnie Allen. Id. The circuit court ruled that the will should be admitted to probate despite the absence of McPeak’s signature, or alternatively, a constructive trust should be imposed in favor of Bonnie Allen. Id. The Fifth District Court of Appeal reversed the circuit court’s decision, and stated that a constructive trust could not be imposed when the effect of which would be to validate an otherwise invalid will. Id.
117 Allen v. Dalk, 826 So.2d 245, 248 (Fla. 2002).
but the Court found the factual background of *Allen* distinguishable.\textsuperscript{118} The court noted that unlike in *Tolin*, where the undisputed facts showed that the decedent took affirmative action with the intent to revoke his wills, the decedent in *Allen* failed to sign her will (which is required for the will to be valid), the facts did not clearly establish that she ever intended to sign her will, nor that the will would have even reflected her true testamentary intent.\textsuperscript{119} Viewing these two cases side-by-side, it appears that the Florida Supreme Court was willing to impose a constructive trust in the case of a defective revocation, but was unwilling to extend the remedy to a case of defective execution.

V. The Solution and Its Policy Implications

Though doctrines have been developed over the last half century to ameliorate the harshness of rigid testamentary rules, it is clear that these doctrines have not been wholeheartedly embraced and put to the purpose for which they were intended. Perhaps these doctrines feel uncomfortable in their application, as they strike at legal norms that are foundational to the law of wills. Section V suggests a more comfortable alternative.

The law of wills is steeped in tradition and slow to embrace change. Intent furthering proposals have faced resistance when they have challenged centuries-old legal traditions.\textsuperscript{120} The Florida Supreme Court’s use of a constructive trust to remedy attorney mistake in a testamentary case is novel, and worth considering as an alternative to other developing additional ameliorative doctrines that the judiciary seems inclined to only timidly embrace.

In cases of testamentary mistake, the intended beneficiary bears the risk of loss while the unintended beneficiary receives a windfall. A testator fairly expects an attorney to offer him

\textsuperscript{118} *Allen v. Dalk*, 826 So.2d 245, 248 (Fla. 2002).
\textsuperscript{119} *Allen v. Dalk*, 826 So.2d 245, 248 (Fla. 2002).
legal advice upon which he can relies. Unfortunately, in the realm of estate planning, discovery that negligence has occurred will typically occur well after the negligent action, often well after the statute of limitations or the statute of repose has lapsed.121

The Tolin court noted that application of the constructive trust remedy is “... proper in cases in which one party has benefited by the mistake of another at the expense of a third party.”122 This decision provides a unique approach that may be applied in cases of attorney mistake123 to provide a more equitable and efficient result: When the intent of the testator can be established by clear and convincing evidence, and an attorney mistake causes an adverse result that contravenes the testator’s intent, regardless of the availability of a malpractice remedy and perhaps in lieu of a malpractice remedy, a judge may consider the imposition of a constructive trust.124

This approach is consistent with the Florida Supreme Court’s imposition of a constructive trust in Tolin, and also accords with the Court’s later refusal to impose the same remedy in Allen.125 The Court believes that the testator’s intent is clear in Tolin: The testator took all of the requisite actions necessary to revoke his will, and was unsuccessful only because he mistakenly revoked a high-quality copy instead of the original. In Allen, the testator never signed her will, leaving doubt as to whether she failed to do so mistakenly or intentionally.

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122 In re Estate of Tolin, 622 So.2d 988, 991 (Fla. 1993).
123 Attorney mistake can come in many different forms: Forgetting a crucial detail or formality; misunderstanding the testator; doing a favor for a friend and practicing outside of one’s area of expertise; or providing informal advice to a friend or loved one. See generally Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 893-95 (1996).
124 David W. Kirch, *The Imposition of Constructive Trusts & Other Concepts at Probate-Part I*, 27 COLO. LAW. 41 (Dec. 1998). A constructive trust is an equitable remedy that is imposed to prevent unjust enrichment in situations wherein title to property is acquired or retained through the abuse of a confidential or fiduciary relationship. Id.
125 In re Estate of Tolin, 622 So.2d 988 (Fla. 19930; Allen v. Dalk, 826 So.2d 245 (Fla. 2002).
The use of the constructive trust in cases of testamentary mistake may be regarded as judicial expansion into an area that should be rightly retained by the legislature – touted as a blatant example of judicial activism. Critics will argue that it is the role of the legislature to set forth and reform the law, and if harm results from the law, it falls upon the legislature to correct such harm. Further, such an approach runs afoul of historically rigid deference by the judiciary to the norm that mistakes not be corrected.

The alternative in this instance is to require the judiciary to worship form over substance in their refusal to correct mistakes, which produces several troubling results. The unintended beneficiary receives a windfall as a result of the mistake, while the intended beneficiary is left with no remedy beyond filing a malpractice claim against the attorney-draftsman, which may or may not prove fruitful. The risk of loss falls upon the victim of the mistake – the intended beneficiary. In the event that the malpractice claim is successful, the damage award results in a duplication of benefit – because the unintended beneficiary is not stripped of his economic benefit, the same amount must be duplicated and paid to the intended beneficiary for him to be made whole. For the unintended beneficiary, this is a win-win situation: A windfall has fallen into her hands because of an attorney mistake that remains procedurally uncorrected.

126 See generally Keenan D. Kmiec, The Origin and Current Meanings of “Judicial Activism,” 92 CAL. L. REV. 1441, 1442 (2004) (stating at page 1446 that “the first use of the term” occurred in a Fortune magazine article in 1947); CASS R. SUNSTEIN, RADICALS IN ROBES 42 (2005) (observing that for some the “word ‘activist’ isn't merely a description” but is “always an insult”).

127 A fair response to this criticism is that the legislature may not act before serious or irreparable harm is done, and in such instances, it falls upon a court to intervene and protect the underdog.

128 For example, in Stevens v. Casdorph, testator was confined to a wheelchair, and went to his local bank and executed his will in the presence of a notary public. Stevens v. Casdorph, 508 S.E.2d 610 (W. Va. 1998). The notary then left her desk, walked across the lobby, and found two witnesses to sign the testator’s will. Id. The witnesses were not in testator’s presence when the testator executed the will, or when they signed the will, as required by the state statute. Id. The Supreme Court of West Virginia refused to probate the will, and testator’s estate passed to his nieces via intestacy. Id. The disappointed heir may not recover in a malpractice claim as a result of statutes of limitation, statutes of repose, the privity doctrine, or perhaps the attorney-draftsman allowed his malpractice insurance to lapse or has never carried malpractice insurance. And in those instances where heirlooms or unique real property is involved, no damage award may be sufficient to compensate the disappointed heir for his loss.
Moreover, there are larger social policy reasons that necessitate a move towards this creative remedy in cases of attorney mistake: the rising number of legal malpractice claims and pro se litigants. In the past decade, there has been a nationwide rise in malpractice actions against attorneys. It is impossible to gauge the number of malpractice suits that are not filed because as many as 40% of practicing attorneys in the United States do not carry malpractice insurance. This is coupled with a system of inefficient, traditional self-regulatory system of attorney discipline, in which there is only a 0.003% chance each year of losing one’s legal license.

The legal system overlooks malpractice as a rising problem, and no urgent call has been made to protect the public from bad lawyering. However, the public perception of the legal community may be reflected in the rising number of pro se litigants in today’s courtrooms. Though data on the rising number of pro se litigants is unreliable, it is clear that both state and federal courts have seen a rise in pro se litigants. An increase in the number of self-...

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130 See American Bar Association Standing Committee on Lawyers’ Professional Liability, Profile of Legal Malpractice Claims in the 1990s 10 (1996) (comparing statistically the number of claims with the types of activity performed by lawyers).

131 H.R. 6, 2006 Sess. (Va.), available at 2006 WLNR 1167628; Mary Ann Galante, Malpractice Rates Zoom, Nat’l L.J., June 3, 1985, at 25-26; Manuel R. Ramos, Legal Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor, 57 Ohio St. L.J. 863, 865-72 (1996) (“Tom Bousquet, head of a Houston law firm that sue lawyers, told my legal malpractice seminar at Tulane Law School that he gets two or three calls a day from potential clients who want to sue their lawyers—over five hundred calls a year, but he only takes four or five cases. Most of the calls are against solo practitioners and, incredibly, ninety percent of them do not have insurance. . . . [I]t does not make sense to sue the forty to ninety percent of lawyers who are uninsured. It is not worth spending the time and money to win a case only to see the judgment discharged in bankruptcy.”).


133 Manuel R. Ramos, Legal Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor, 57 Ohio St. L.J. 863, 871 (1996)(“[D]ue to confidential settlement agreements, judges, lawyers, and the general public do not have an accurate picture [of legal malpractice].”)

134 Nina Ingwer VanWormer, Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon, 60 Vand. L. Rev. 983, 989-90 (2007) (“[E]mpirical data on pro se civil litigation in state courts is relatively scarce. This is largely due to the fact that many states do not track such statistics; of the states that do monitor pro se trends, many do not keep precise records.”).

represented may be attributed to the increased cost of legal representation, a belief that the value of services provided are not commensurate with the fees charged, an overall distrust of the legal profession, and accessibility to resources afforded by the Internet.\textsuperscript{136}

Against the backdrop of rising numbers of legal malpractice claims and pro se litigants, it is time for the legal community to examine the impact of traditional approaches on the future of our profession. The area of law practice that boasts the third highest rate of malpractice claims is estate planning.\textsuperscript{137} While most estate planning attorneys silently fear that they will make a mistake that will defeat their client’s testamentary scheme, insufficient mechanisms exist to correct mistakes that are not discovered until after a client’s death. A constructive trust may be used to correct obvious attorney error, rather than forcing the intended beneficiary to seek damages through a malpractice action.

This Article proposes that in the face of the testator’s clear intent, a constructive trust may be imposed to shift property from the unintended beneficiary to the intended beneficiary, when the attorney mistake has caused the unintended beneficiary to be unjustly enriched. Following this approach, the unintended beneficiary is free to pursue a malpractice action for damages (if any) that arose from the attorney mistake.\textsuperscript{138}

The difficult question that remains is whether or not a constructive trust can be imposed to remove property from the hands of the unintended beneficiary – an innocent third party who has been enriched collaterally, as a result of the mistake or wrongdoing of another. Courts are

\textsuperscript{137} Stephanie B. Casteel et al., \textit{The Modern Estate Planning Lawyer}, 22 PROB. & PROP. 46 (2008).
\textsuperscript{138} 7A C.J.S. \textit{Attorney & Client} § 335 (2011) (explaining that malpractice damages are limited to actual losses and “the measure of damages in a legal malpractice action is the amount the client would have recovered but for the attorney's negligence.”). Because the unintended beneficiary is recovering solely because of the attorney’s negligence, it is unlikely an unintended beneficiary will be able to show actual losses.
The solution advanced in this Article is that a constructive trust may be used to reach property in the hands of the unintended beneficiary if it is determined that he would not have received this property but for the testamentary mistake. In this instance, the unintended beneficiary is more than the recipient of an innocent windfall.

Imposing a constructive trust in this circumstance arguably contravenes or circumvents state statutes of descent and distribution and the statute of frauds. However, the constructive trust is a creature of equity, and as such, it falls outside of such statutes. Testamentary formalities are codified for many policy reasons, including the prevention of fraud. The approach suggested in this Article is intended to ensure that any testamentary statute enacted to prevent unjust enrichment not be used as an excuse to perpetuate unjust enrichment.

VI. Conclusion

It is impossible to ignore the burgeoning number of estate planning malpractice claims in recent decades. A client reasonably expects his attorney (in this instance, the draftsman of his estate plan) to craft a testamentary schema that reflects his intentions and disposes of his property after death. However, the estate planning client is uniquely vulnerable, as he is unavailable after death to correct an error discovered when the plan is tested, to provide witness

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139 In favor of imposing a constructive trust on the innocent beneficiary, see Ruhe v. Ruhe, 77 A. 797, 800 (Md. 1910); Bohannon v. Trotman, 200 S.E. 852 (N.C. 1939). Several treatises also support this view, see generally RESTATEMENT OF RESTITUTION § 184 cmt. j, illus 17-18 (1937); SCOTT ON TRUSTS § 489.5, 489.6 (1939). Against imposing a constructive trust on an innocent beneficiary, see Dye v. Parker, 195 P. 599 (Kan. 1921); Powell v. Yearance, 73 N.J. Eq. 117 (1907); Heinisch v. Pennington, 73 N.J. Eq. 456 (1907), aff'd 75 N.J. Eq. 606 (1909).

140 Pope v. Garrett, 211 S.W. 2d 559 (Tex. 1948).


142 Pope v. Garrett, 211 S.W. 2d 559 (Tex. 1948).

143 “[W]e should shudder that we still inflict upon our citizens the injustice of the traditional law, and we should join in this movement to rid private law of relics so embarrassing.” John H. Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law, 87 COLUM. L. REV. 1, 54 (1987).

144 Martin D. Begleiter, Attorney Malpractice in Estate Planning—You’ve Got to Know When to Hold up, Know When to Fold up, 38 U. KAN. L. REV. 193 (1989).
as to the intended result, or to hold the attorney accountable in malpractice for any damage arising from his mistake.

The victim of the estate planners’ mistake is the intended beneficiary. And yet, several factors conspire against the intended beneficiary who wishes to seek recompense for attorney mistake through a malpractice suit: Financial constraints may prevent the beneficiary from retaining counsel; harsh privity requirements may bar the beneficiary from filing the suit; and increasingly, insufficient malpractice insurance may render it impractical to pursue a judgment against the estate planning attorney.

This Article proposes that in the face of clear and convincing evidence of testator’s intent, a probate court should apply equitable principals and impose a constructive trust to shift property from the unintended to the intended beneficiary. The unintended beneficiary is free to pursue a remedy in malpractice for damages that arise from the drafting mistake, provided that damages have arisen, which is unlikely.145 The times they are a-changin’146 and requiring the victim of attorney error in estate planning cases to file a malpractice action should be limited to those cases in which insufficient evidence of either testator’s intent or attorney error exists.

145 7A C.J.S. Attorney & Client § 335 (2011) (explaining that malpractice damages are limited to actual losses and “the measure of damages in a legal malpractice action is the amount the client would have recovered but for the attorney's negligence.”). Because the unintended beneficiary is recovering solely because of the attorney’s negligence, it is unlikely an unintended beneficiary will be able to show actual losses.
146 BOB DYLAN, The Times They Are a-Changin’, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).