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The "Terms of the Trust"
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> "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.
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> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
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> 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'"[1]
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> "The ordinary standard, or 'plain meaning,' is simply the meaning of the people who did *not* write the document.
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> The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document."[2]

INTRODUCTION

1.1 ***Introduction***. When engaged in the practice of estate planning, we work hard to capture in writing what our clients, the settlers of Wills or trusts, intend to accomplish. The result of this effort – the written provisions of a trust – may often be interpreted in various ways. Interestingly, the standard definition of the "terms of the trust" used by all three Restatements of Trusts does not limit that term to the written document but instead means the written document and anything else that may be admissible to establish the intent of the settler. Thus, to understand the terms of a trust one must become familiar to what would be admissible in evidence if such terms are contested.

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[1] L. Carroll, *Through the Looking-Glass* (Raleigh, NC: Hayes Barton Press, 1872), ISBN 1593772165, p. 72.
[2] 9 Wigmore, Evidence § 2462 (Chadbourn rev. 1981).

1.2 ***The "Terms of the Trust."*** The terms of the trust communicate the settlor's intent which intent is the lodestar of trust interpretation: "The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings."[3] Obviously this definition casts a wide net, limited only by various rules of evidence and construction:

> The phrase "the terms of the trust" is used in a broad sense in this Restatement, as in many statutes and cases. It includes any manifestations of the settlor's intention at the time of the creation of the trust, whether expressed by written or spoken words or by conduct, to the extent the intention as expressed in the manner that permits proof of the manifestation of intent in judicial proceedings. The terms of the trust may appear clearly from written or spoken words, or they may be provided by statute, supplied by rules of construction, or determined by interpretation of the words or conduct of the settlor in the light of all of the circumstances surrounding the creation of the trust.
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> Among the circumstances that may be of importance in determining the terms of the trust, either in the absence of a written instrument declaring those terms or in matters about which a written instrument is silent or ambiguous, are the following: (1) the situations of the settlor, the beneficiaries, and the trustee, including such factors as age, legal and practical competence, personal and financial circumstances, and the relationships of these persons and these factors to each other; (2) the value and character of the trust property; (3) the purposes for which the trust is created; (4) relevant business and financial practices at the time; (5) the circumstances under which the trust is to be administered; (6) the formality or informality, the skill or lack of skill, and the care or lack of care with which any instrument containing the manifestation in question was drawn.[4]

EXTRINSIC EVIDENCE AND THE TERMS OF THE TRUST

2.1 ***Rules of Construction and Settlor Intent.*** Whether interpreting a testamentary trust or an inter vivos trust, the role of the Court is purportedly the same – to implement the intent of the settlor:

> When overseeing the administration of an estate, probate courts are primarily concerned with ascertaining and carrying out the testator's intent. Courts have used a multiplicity of adjectives to express the importance of this task, describing it variously as "paramount," "fundamental," "cardinal," "primary," "overarching,"

[3] Restatement (Third) of Trusts § 4 (2003) (Emphasis added.)
[4] Restatement (Third) of Trusts § 4, cmt. a (2003).

> "controlling" "basic," "proper," and even as "the cornerstone," "the touchstone," or "the polestar" driving their duty, regardless of the unreasonableness or eccentricity of the will's terms. Whether they call it interpretation, construction, or something else, most courts agree that, in dealing with the contents of a will, the initial step is to determine the testator's intent at the time the will was executed. That determination employs the presumption that the testator knew the law in force at the time of such execution. After determining the testator's intention, the court's duty is to carry out that intention unless it is illegal, violates public policy, or is unconstitutional. This governing framework continues to be vaunted in recent will-interpretation jurisprudence as serving donative freedom, one of the core values of Anglo-American property law.[5]

Oddly, the rules of construction that pertain to testamentary trusts are different from those that govern inter vivos trusts:

> *c. Trusts created by will.* If a trust is created by will, the terms of the trust are determined by the provisions of the will as interpreted in light of all the relevant circumstances and direct evidence of intention in accordance with the general rules of law governing interpretation of wills.
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> *d. Trusts created inter vivos by written instrument.* If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the governing instrument as interpreted in light of all the relevant circumstances and such direct evidence of the intention of the settlor with respect to the trust as is not denied consideration because of a statute of frauds, the parol-evidence rule, or some other rule of law.[6]

2.2 ***The Plain Meaning Rule Generally Excludes Extrinsic Evidence for Testamentary Trusts But Not for Inter Vivos Trusts.*** The general rule of will construction, that extrinsic evidence of a testator's intent is not admissible, but that such testimony related to the settlor's intent in an inter vivos trust may be admissible, has a ripple effect. Generally, testamentary trusts are not to be modified due to mistake or to more fully comport with the settlor's intent which is not the rule for inter vivos trusts: "[T]he doctrine of (trusts) reformation

[5] Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case W. Res. L. Rev. 65, 69-70 (2005). Although this statement of the importance of seeking and implementing the settlor's intent is in the setting of testamentary transfers, it is equally applicable to inter vivos trusts. See Restatement (Third) of Trusts § 4.
[6] Restatement (Third) of Trusts § 4.

is ordinarily applicable only in cases … involving inter vivos trust instruments. Here we are confronted with a testamentary trust and … the general prohibition against reformation of a will would prevail."[7] This non-reformation rule as to wills or testamentary trusts, as distinct from the treatment of nonprobate transfers, is universal under the common law:

> The no-reformation rule is peculiar to the law of wills. It does not apply to other modes of gratuitous transfer - the so-called nonprobate transfers - even though many are virtually indistinguishable from the will in function. Reformation lies routinely to correct mistakes, both of expression and of omission, in deeds of gift, inter vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death. Alternatively, courts sometimes find it necessary to remedy mistakes in these nonprobate transfers by imposing a constructive trust on the mistakenly named beneficiary in favor of the intended beneficiary.[8]

The general rule of construction for wills is, of course, the plain meaning rule. Courts are to tease out the meaning from the four corners of the will without resort to extrinsic evidence, including extrinsic evidence from the drafter of the document:

> And the evidence of the draftsman of the will is not offered to contradict the will. In the case of Fersinger v. Martin, 183 Md. 135, on page 138, 36 A.2d 716, at page 718, this Court, speaking through Judge Collins, said, 'The general rule is that no expression as to the intention of the testator may be considered for the reason that an oral utterance would not be a compliance with the statutory requirement that the will be in writing. Miller on Construction of Wills, Section 40; Darden v. Bright, 173 Md. 563, 568, 198 A. 431. We cannot resort to extrinsic evidence to ascertain from the draftsman what the testator instructed or intended him to say, nor can we in order to establish the intention of the testator accept his declarations.' See also Board of Visitors, etc., v. Safe Deposit & Trust Co., Md., 46 A.2d 280. The testimony of the draftsman is, therefore, clearly inadmissible to show what the testator intended by Paragraph II. A testator cannot be heard to say what were his intentions in putting a certain clause in his will, and his attorney, who drafted the will, cannot say what the testator told him about it unless there is a latent ambiguity in the words of the will. No such ambiguity exists here.[9]

The essential irrationality of the plain meaning rule has been long noticed:

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[7] *Shriners Hospital for Crippled Children v. Maryland Nat. Bank*, 270 Md. 564, 581-2, 312 A.2d 546, 555 (1973).
[8] John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 527 (1982).
[9] *Bradford v. Eutaw Sav. Bank of Baltimore City*, 186 Md. 127, 135-6, 46 A.2d 284, 288 (1946).

> [W]e think that there is no principled way to reconcile the exclusion of extrinsic evidence in the law of wills with the rule of admissibility in the law of nonprobate transfers. Not surprisingly, the no-extrinsic-evidence rule has long been embattled even in the traditional law of wills; it has been subjected to a variety of exceptions, some of which we discuss below in part II; and it is now on the decline. Wigmore's immensely influential critique of the no-extrinsic-evidence rule underlies its abrogation in California and New Jersey. Wigmore argued that any effort to limit the proofs to the words of a document runs afoul of the "truth ... that words *always* need interpretation ...." Wigmore coined the famous phrase that "the 'plain meaning' ... is simply the meaning of the people who did *not* write the document."[10]

Also:

> There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to define how they would have dealt with the unforseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.[11]

2.3 ***Exceptions to the Plain Meaning Rule***. The plain meaning rule is not, however, absolute. In Maryland there are at least two formal exceptions involving will interpretation that permit extrinsic evidence despite the plain meaning rule: (1) the latent ambiguity exception, and (2) evidence of the facts and circumstances of the settlor's situation at the time of trust creation. Additionally, there are cases permitting extrinsic evidence to rebut the presumption that a document that complies with all the testamentary formality rules does not necessarily mean that the decedent had read and understood the will thus permitting the document to be set aside. Finally, there are evidentiary cases involving charitable bequests that, if having general application which they seem to have, would foretell a more modern, permissive approach to the admissibility of extrinsic evidence. The plain meaning rule has been characterized as an historic relic with limited, recognized utility by several Courts:

[10]John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev., page 526 (1982).
[11] *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Learned Hand in a concurring opinion.)

> Because of a growing distrust and dissatisfaction with the application of hidebound interpretive rules to testamentary documents, the law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the wills context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution, the use of will interpretation manuals has fallen from favor and the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined.[12]

2.4 ***The Latent Ambiguity Exception***. The exception for an ambiguity turns on whether the ambiguity is latent or patent. A latent ambiguity is one where the terms of the will are definite but that term could yield more than one meaning because of facts not showing on the face of the instrument. An example of the latent ambiguity would be a bequest to "John Doe" without any further identification where extrinsic evidence would be required to determine which John Doe was intended for the bequest. A patent ambiguity is one arising from an apparent contradiction within the document or where a term is used in the document that could yield several meanings. Obviously, in the example of the latter case the line between patent and latent ambiguity is fine:

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

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

32.7, p. 255 (rev. ed. 1961).[13]

If the ambiguity, however, is latent then the extrinsic evidence may come in.

2.5 ***Exception to Plain Meaning for Surrounding Circumstances.*** The second exception to the plain meaning rule has likewise been long-standing: that evidence of the circumstances surrounding and informing the testator's situation is admissible if there is an ambiguity regardless of whether that ambiguity is latent or patent:

> ***(b) Qualifications and true scope of (plain meaning) rule***
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> The statement of the rule given in the next preceding subdivision is too broad, and has led to much confusion among the courts. No such unqualified rule can stand in the face of the numerous cases admitting some extrinsic evidence where the indefiniteness, inaccuracy, or ambiguity was apparent on the face of the instrument.
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> According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of the testator and all the relevant facts and circumstances surrounding him at the time of the making of the will, for the purpose of explaining or resolving even a patent ambiguity.[14]

This evidence frames the settlor's point of view when he or she drafts the document:

> Of the competency of this evidence there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as 'the Board of Foreign and the Board of Home Missions;' and thus the court is enabled to avail itself of the light which the circumstances in which the testator was placed

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[13] *Emmert v. Hearn*, 309 Md. 19, 26-7, 522 A.2d 377, 381-2 (1987). In *Emmert*, the "ambiguity" was whether "personal property" meant tangible personal property or tangible and intangible personal property. The excluded evidence was that of the draftsman of the will and various family members who would have testified that the term only meant tangible personal property. The Court, however, held that it could determine the issue without resort to extrinsic evidence and determined that the language meant tangible and intangible property. A Florida Court, wrestling with the identical issue, saw an ambiguity and brought in extrinsic evidence ruling the other way. As for the Maryland case, the Florida Court stated "We treat it (the Maryland decision) as a minority view in conflict with the view expressed here." In *Estate of Walker*, 609 So.2d 623, 625 (Fla. 1992).

[14] Admissibility of extrinsic evidence to aid interpretation of will, 94 A.L.R. 26 (Originally published in 1935.) (Section IIe(4)(b)).

> at the time he made the will would throw upon his intention. 'The law is not so unreasonable,' says Mr. Wigram, 'as to deny to the reader of an instrument the same light which the writer enjoyed.' Wig. Wills, (2d Amer. Ed.) 161.[15]

Thus Courts look to the particular circumstances of a decedent to ascertain the "plain meaning" of the words used: "If we put ourselves, in the traditional place, behind the armchair of the testator as he contemplates the disposition he wished to be made to the objects of his bounty, we would be standing behind a man who was not unaware of the problems and methods of early, as contrasted to late, vesting of trust estates and one upon whom had been urged the desirability of continuing property in trust."[16] Also: "Sitting in Loretta's armchair, her testamentary intent becomes clear …"[17]

This exception to the plain meaning rule that enables the Courts to sit in a testator's "armchair" does not permit direct evidence of intent by extrinsic evidence but may yield a close approximation. In one Maryland case, for example, the Court addressed the meaning of the phrase "upon the youngest living grandchild (of the testator's sister) … attaining the age of twenty-one years" in a testamentary trust.[18] The Court concluded that the phrase could have one of two different interpretations – vesting when the sister's grandchildren then in being had all reach twenty-one years of age as of any point in time or, effectively measured after all of the sister's children had died (thus closing the class) and then waiting for the youngest to reach twenty-one years of age. The Court opted for the second reading based on the extrinsic evidence of the testator's situation. This evidence concluded that early vesting had caused adverse tax issues in his mother's estate and that he was urged, upon receiving assets from his family, to continue those assets in trust. Examining the circumstances at the time of the execution of his

[15] *Gilmer v. Stone*, 120 U.S. 586, 590, 7 S.Ct. 689, 690 (1887).
[16] *Marty v. First Nat. Bank of Baltimore*, 209 Md. 210, 218, 120 A.2d 841, 845 (1956).
[17] *Bregel v. Julier*, 253 Md. 103, 111, 251 A.2d 891, 895 (1969).
[18] *Marty v. First Nat. Bank of Baltimore*, 209 Md. 210, 120 A.2d 841 (1956).

will in order to place the Court in his "armchair" at the critical moment, required that extensive extrinsic evidence be entertained in order to interpret what certain words in his testamentary trust meant. In a word, it established his intent as that intent was expressed in the language of the trust. This was not a case where the Court found a latent ambiguity.

2.6 ***Other "Exceptions" to the Plain Meaning Rule.*** Not rising to an exception to the plain meaning rule per se, there are Maryland cases that permit direct extrinsic evidence of a testator's intent nevertheless. In one case, a will was challenged solely based on whether it properly followed the testamentary formalities and whether that document was, in fact, an expression of the testatrix's last wishes. The testatrix was ill, facing surgery, and had executed two wills within two days of each other. The wills were dramatically different from each other. The second will was upheld despite the fact that the last name of a legatee had been crossed out and a new name substituted by hand in the will. The Court based its ruling that the second will was valid on the parol evidence offered by witnesses to the will that the actual intent of the testatrix as expressed to them was reflected in the second will not in the first will. Additionally, because the second will was more in line with the testatrix's older wills this likewise demonstrated that she would have wanted to have the provisions that were contained in the second will apply at her death.[19]

In another case, where the testatrix signed a document purporting to be her will when she was ill and under the influence of narcotics, the will challenge was based on whether the decedent knew the contents of the document that she had signed. That, in turn, raised the issue of what she had attempted to accomplish with her will (what her intent was) and whether the signed document accomplished that intent. The Court held that in these "unusual and exceptional" circumstances, extrinsic evidence of the draftsman's error could be used to support

[19] *Gage v. Hooper*, 165 Md. 527, 169 A. 925 (1934).

the contention that she had not read and understood her will before signing it thus not having it admitted to probate.[20]

2.7 ***Plain Meaning and Inter Vivos Trusts.*** The restrictions imposed by the plain meaning rule on the introduction of extrinsic evidence of intent do not apply to inter vivos trusts: "If the meaning of the writing is uncertain or ambiguous, evidence of the circumstances is admissible to determine its interpretation."[21] Such evidence is permitted to aid in the construction of the language of a trust:

> Oral evidence will be received, however, to remove an ambiguity in the construction of the trust instrument by explanation of the meaning of the words therein, based on the situation of the parties and other facts. This principle (applies) … both as to private and charitable trusts.[22]

Indeed, in Maryland a trust of personalty may be created solely by parol evidence.[23] Because parol evidence can be used to interpret trusts that were created inter vivos, parol evidence may also be used to reform or modify such a trust:

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

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[20] *Lyon v. Townsend*, 124 Md. 163, 91 A. 704 (1914). See also *Effective Mistake of Draftsmen (Other Than Testator) In Drawing Will*, 90 A.L.R.2d 924 (originally published in 1963).

[21] Restatement (Second) of Trusts § 38 (1959).

[22] George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 51. Also: "The Courts have, however, distinguished between using oral evidence to supply a term entirely missing and offering oral testimony to clear up ambiguities, explain doubtful terms, and give a setting to the writing. If all of the essential elements of the writing are present, they may be clarified by non-documentary evidence." George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees*, § 88.

[23] *Shaffer v. Lohr*, 264 Md. 397, 287 A.2d 42 (1972) (A joint bank account was regarded as an inter vivos trust because an expression of clear and unmistakable intent to create such a trust could be proved by parol evidence.) Presumably, the *Shaffer* decision would be now impacted by the multiple account statute. Parol evidence can also be used to establish a resulting and constructive trust, including such trusts regarding land. *Jahnigen v. Smith*, 143 Md.App. 547, 795 A.2d 234 (2002); *Fasman v. Pottashnick*, 188 Md. 105, 51 A.2d 664 (1947).

> reform a testamentary trust under similar circumstances, unless the will which contained the trust can be reformed. It seems arbitrary for the law to hold that an inter vivos trust used as a receptacle for assets poured over from probate can be reformed, while a testamentary trust cannot. If will substitutes, including revocable trusts, can be reformed for scriveners' errors, then wills should also be able to be reformed under similar circumstances, especially when both kinds of instruments accomplish the same testamentary objectives.[24]

A Maryland case held that after the death of the settlor, the beneficiary could press for a modification due to mistake to the same degree that the settlor could have brought such an action for modification.[25]

HEARSAY RULE

3.1 ***The State of Mind/Intent Exception to the Hearsay Rule.*** The Maryland rules provide an exception to the hearsay rule that covers a declaration of intention:

> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.[26]

This hearsay exception, the "state of mind" exception, is a true exception: it permits someone else to testify to the declarant's statements and those statements are offered for the truth of the assertions made. Thus, in *Ederly v. Ederly*, 193 Md.App. 215, 996 A.2d 961 (2010) the Court held that a woman's supposed declaration of where she wanted to be buried (Israel not Maryland) was admissible in a dispute among her children as to the eventual disposition of her body. *Ederly* is a remarkable case because the then state of mind obviously was not offered to prove "the declarant's future action" which, as the *Ederly* Court observed, is the usual circumstance. In

[24] 40 Cath. U. L. Rev. 1, 34-35.
[25] *Kiser v. Lucas*, 170 Md. 486, 185 A. 441 (1936). See also *Roos v. Roos*, 42 Del. Ch. 40, 203 A.2d 140 (1964) (Citing *Kiser* for the proposition that a declaration of trust may be amended to reflect the intent of the settlor after his or her death.)
[26] Maryland Rule 5-803(b)(3).

Ederly, by definition, others and not the declarant would need to take the further action.

3.2 ***Exception Covers the Declarant's Later Action***. In *Figgins v. Cochrane*, 403 Md. 392, 942 A.2d 736 (2008) the Court of Appeals ties the state of mind for state of intention to the declarant's (and no one else's) later action:

> In order to side-step the ruling of the Court of Special Appeals that correctly articulated that Maryland law does not permit testimony regarding the forward-looking aspect of the state of mind of a declarant when the declarant takes no further action after making a declaration, *see Figgins*, 174 Md.App. at 23–43, 920 A.2d at 585–97, Ms. Figgins contends that the trial judge erred because the proffered statement was admissible to show the state of mind of Mr. Borison, her father's attorney, rather than her father.
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> We, however, have concluded consistently that evidence of a "forward-looking" state of mind is admissible only to show that the declarant, *not the hearer*, subsequently acted in accord with his or her stated intention.[27]

At least one intermediate appellate Court held that the state of mind exception must result in future action. In *Farah v. Stout*, 112 Md.App. 106, 684 A.2d 471 (1996), the Court upheld the exclusion of a decedent's statements purportedly saying that he was going to leave his caretakers money in his will as compensation for their services. The *Farah* case upheld the exclusion of the testimony on the basis that the decedent's will did not reflect that he made such a provision, and therefore did not result in the future action required by Maryland Rule 5-803(b)(3). The Appellants, of course, regarded the failure to take the further action as a breach of the decedent's contract with them. The *Farah* case, therefore, appears to hold that future action must be an element of the admissibility of the statements.

3.3 ***Future Action May Include No Action.*** Subsequent Court of Appeals' decisions, however, do not follow this tack. In *Yivo Institute for Jewish Research v. Zalenski*, 386 Md. 654, 874 A.2d 411 (2005), for example, the Court permitted testimony of the decedent's intent or state of mind that did not result in future action. In *Yivo*, the decedent left a bequest in his will to a

[27] *Figgins v. Cochrane*, 403 Md. 392, 420-1, 942 A.2d 736, 753 (2008).

charity and then he later made a gift to the same institution. The issue was whether the subsequent gift adeemed the bequest in the will. The testimony sought to be excluded was that of a friend who said that the decedent declared years after making the subsequent charitable gift, that he did not need to change his will because the charitable institution would understand that the gift that he had made was adeeming the bequest in the will.

Another Maryland case illustrated the backward looking element of Maryland Rule 5-803(b)(3). *National Society of Daughters of American Revolution v. Goodman*, 128 Md.App. 232, 736 A.2d 1205 (1999) involved whether a restricted gift to the D.A.R. for the purpose of funding its nursing home facility lapsed because the D.A.R., in fact, did not maintain a nursing home. The decedent had prepared a will leaving part of her estate to Gallaudet University and part of her estate to the D.A.R. for the nursing home. After execution, the attorney contacted D.A.R. to discuss the gift and learned that the D.A.R. did not maintain a nursing home. He thereupon contacted his client who said that she did not want any gift going to the D.A.R. in that situation but all to Gallaudet University. The attorney prepared a new will but his client died before she adopted to execute the new will. Nevertheless, the testimony was permitted as a backward looking declaration of what she intended to do with her original will.

DEAD MAN'S STATUTE

4.1 ***The Maryland Dead Man's Statute.*** The dead man's statute in Maryland states:

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.[28]

[28] Courts & Judicial Proceedings § 9-116.

This statute purportedly seeks to "equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent or at least by requiring those asserting claims against a decedent's estate to produce testimony from disinterested persons."[29] The dead man's statute has long been subject to criticism: "[T]he dead man's statute (is) an anachronism and an obstruction to truth."[30]

4.2 ***Dead Man's Statute is Strictly Construed***. The dead man's statute may have the purpose of equalizing the playing field but it is narrowly construed because it is an exception to the general rule permitting evidence to be heard: "The statute is an exception to the general rule that all witnesses are competent to testify … and is strictly construed 'in order to disclose as much evidence as possible' without ignoring the purpose of the statute. … In close cases involving the dead man's statute, Maryland precedent consistently has favored the admission of testimony." *Walton v. Davy*, 86 Md.App. 275, 285, 586 A.2d 760, 765 (1991).

One example of the narrow construction of the dead man's statute is reflected by the case *Reddy v. Mody*. *Reddy* involved three causes of action in a medical malpractice case that resulted in death. The first cause of action was an action by the decedent's estate and the other two causes of action were by the decedent's husband and the decedent's child for wrongful death. The Court held that the dead man's statute did not apply as to the wrongful death actions because those actions were not brought by or against the personal representative. The estate case, on the other hand, fell directly into the statute. In *Reddy*, the testimony of a nurse (an employee of the defendant hospital) and the testimony of the attending physician (one of the defendants) were admitted. On appeal, the Court held that the testimony of the nurse was admissible but not that of the doctor:

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[29] *Reddy v. Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 558-9 (1978).
[30] 1938 ABA Report on evidence as quoted in Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change*, 53 Clev. St. L. Rev. 75, 80 (2006).

> The first two issues raised by the appellants attack the trial court's ruling that Nurse Nella Williams was a competent witness. It is the appellants' position that the working relationship of the appellee, Dr. Mody, and Nurse Williams was such as to render her a "party" for the purposes of the Dead Man's Statute and, therefore, she was rendered incompetent to testify. We disagree.
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> The purpose of the Statute, as was pointed out above, is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement. Ortel v. Gettig, 207 Md. 594, 116 A.2d 145 (1955). This disability, while protecting the deceased's estate, can create a great injustice to the survivor. As was stated in C. McCormick, Evidence, s 65 (2d ed. 1972):
>
> "Most commentators agree that the expedient of refusing (to) listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard."
>
> Faced with the uncertainty and injustice created by the Dead Man's Statute, the Maryland Courts have sought to construe strictly the Statute in an effort to disclose as much evidence as the rule will allow.[31]

4.3 ***Examples of Strict Construction***. The exclusion of the nurse in *Reddy* as a non-party, although obviously very much associated with the party, illustrates the narrow interpretation of the statute. In *Trupp v. Wolff*, the Court of Special Appeals listed some witnesses who had been permitted to testify regardless of the statute:

> 1. "the husband of a party who would obviously benefit emotionally as well as tangibly by his wife's recovery, *Marx v. Marx*, 127 Md. 373;
> 2. a stockholder of a party corporation notwithstanding obvious similarity of tangible interest differing in degree only, *Downs v. Md. & Del. Ry. Co.*, 37 Md. 100;
> 3. an officer of a corporation which was a party, *Guernsey v. Loyola Fed., etc., supra*;
> 4. witnesses, not parties to the suit, who were stockholders or directors of a party corporation, *Whitney v. Halibut*, 235 Md. 517;
> 5. legatees under a will where the estate would benefit from a recovery by the executor, *Schaefer v. Spear, Ex'r.*, 148 Md. 620;
> 6. a daughter named as party defendant called by the plaintiff mother notwithstanding her "identity of interest" with the "opposite party" calling her,

[31] *Reddy v. Mody*, 39 Md.App. 675, 681, 388 A.2d 555, 560 (1978).

> *Cross v. Iler*, 103 Md. 592;
> 7. a son where his mother's estate was suing his creditors to enforce a prior lien on stock in his name. In spite of the obvious benefit to the son who was named a party defendant by the estate, he was permitted to testify when called by opposite party. *Duvall, Adm'r v. Hambleton & Co.*, 98 Md. 12." (*Trupp* at 599-600).[32]

In *Farah v. Stout*, the purported caretaker's husband was not permitted to testify, not because of his indirect interest as the husband, but because he had originally claimed to be directly owed money from the decedent in the original pleading. His amendment to the pleading to remove himself as a party plaintiff was to no avail.[33]

4.4 ***A "Transaction" for Purposes of the Statute***. The dead man's statute precludes testimony "concerning any transaction with or statement they made by the dead or incompetent person." The test for determining whether there has been a "transaction" within the meaning of the dead man's statute is whether the deceased, if living, could contradict the assertion by his own knowledge. In *Boyd v. Bowen*, 145 Md. App. 635, 806 A.2d 314 (2002) one part of the lawsuit was whether money paid by a third party to a lawyer to facilitate the decedent's new will constituted a "transaction" between the third party and the decedent. The Court held that it was such a transaction:

> The appellant maintains she was not a party to the transaction because the transaction was solely between Mr. Arch and Mrs. Cole. Admittedly, the professional relationship being established at the meeting was between Mr. Arch and Mrs. Cole, and did not include the appellant. The term "transaction" as used in the dead man's statute, however, has a broader meaning than it might in other situations. Mrs. Cole, if alive, could, based on personal knowledge, contradict the appellant's testimony on the issue of reimbursement of the legal fees. Accordingly, the meeting was a "transaction with" the decedent, and the trial court properly precluded the appellant's testimony on the matter.
>
> The dead man's statute expressly prohibited the appellant from testifying about anything Mrs. Cole may have said to indicate her intention to reimburse the appellant.

[32] *Trupp v. Wolff*, 24 Md. App. 588, 599-600, 335 A.2d 171, 178-9 (1975).
[33] *Farah v. Stout*, 112 Md.App. 106, 684 A.2d 471 (1996).

> Further, the appellant could not testify that she paid Mrs. Cole's legal fees because she "understood" that she would be reimbursed at some point in the future.

The documents themselves, however, can be introduced into evidence but not testimony that links the documents to a "transaction" or other arrangement between the party and the decedent. The Court of Appeals in *Stacy v. Burke*, 259 Md. 390 (1970), on the other hand, permitted the nephew/claimant to identify and introduce two critical letters sent to him by the uncle/decedent, regardless of the Dead Man's Statute. In that case, the Court made certain important distinctions:

- "The statute does not make the party in an action to which the statute applied incompetent as a witness for all purposes but only in regard to 'any transaction had with or statement made by' the decedent.

- Although the letters permitted to be introduced by the nephew/claimant, in fact, related directly to the transaction, the introduction of these documents "was not testifying in regard to any transaction had with or statement made by Uncle Erle."

This was despite the fact that those very letters had to do with the "transaction" in question.

Likewise, in *Ridgely v. Beatty*, 222 Md. 76 (1960), checks and payments by the son-in-law/claimant were admissible by him because those checks and payments were not a "transaction" with the mother-in-law/decedent. This was despite the fact that those very checks and payments were the proof of his support of the decedent (the disputed contention in that case). In *Ridgely*, the distinction was made between permitting the introduction of documents versus the introduction of testimony as to what the "agreement or understanding" was between the claimant and the decedent about those payments:

> "In the instant case the claimant, over the objection of the executor, was allowed to testify as to some sixty checks given by the claimant to third persons during the period of time when he and his family resided with the decedent. The checks represented payments which had been made on the mortgage and expenditures for coal, electricity, telephone, taxes, legal expenses and hospital bills. The court permitted the clamant to identify each check, describe it and to state the item for which the check was given, but it would not permit him to connect such payments with any 'agreement or understanding or transaction' the claimant had with the

decedent."

4.5 ***Opening the Door to Excluded Evidence.*** The dead man's statute explicitly permits otherwise excludable evidence to be admitted if the door is opened. The statute holds that such testimony is excluded "unless (the party is) called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement." Thus, if a party is cross-examined by an adverse party in regard to the transaction with the decedent then the protection of the dead man's statute has been waived.[34] Additionally, the Maryland dead man's statute applies only to "testimony of a party to a cause which would tend to increase or diminish the estate of the decedent."[35] Thus it should not apply in any suit among various legatees as to what is to be distributed to them.

CONCLUSION

5.1 ***General Comments.*** It is wholly irrational that the rules governing what may be used to determine settlor intent differs depending on whether the instrument is testamentary or inter vivos. In the planning setting, these differences may dictate the form the planning should take. There is a much greater ability to go beyond (behind?) the document in the case of an inter vivos trust. Where one wants to give full reign to the settlor's voice, having a wide scope of admissible material may be important given the inherent imperfection of language. On the other hand, if the desire is to minimize interpretive uncertainty, a testamentary trust may be the preferable form. In either case, however, it would be good drafting practice to add language explicitly stating intent.

[34] *DeMarco v. DeMarco*, 261 Md. 396, 275 A.2d 471 (1971); *Stacy v. Burke*, 259 Md. 390, 260 A.2d 837 (1970).
[35] *Reddy v, Mody*, 39 Md.App. 675, 679, 388 A.2d 555, 559 (1978).