
Paul T. Whitcombe
DEFAMATION BY WILL: THEORIES AND LIABILITIES

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INTRODUCTION

For hundreds of years, the dead have taken advantage of a unique and singular opportunity to avenge themselves upon the living. Despite the sage advice that says "men should not sin in their graves," the dead have reached out from beyond the grave to insult those who offended them in some way during life. However, this seemingly supernatural process by which the dead speak has resulted in little damage but bruised egos and confused jurisprudence because this haunting takes the form of testamentary libel.

A testator, vexed by a spouse, child or business partner, has often chosen to express his feelings in his will, perhaps hoping to avoid the consequences of his candor by fleeing to "the undiscovered country," where his unwitting victim (or the victim's lawyers) may not reach him. That approach has not always been successful, however, as courts have taken varying approaches to the problem that arises when the targets of the testator's ire bring a libel action. In some instances, courts have simply excised the offending portions of the will, leaving the dispositions untouched. Other courts have refused to rewrite the will for a variety of reasons, and they have prevented the embarrassed party from suing. Still other courts have treated the will as a defamatory document and allowed recovery in appropriate cases.

Obviously, many questions are raised by testamentary libel. First and foremost among them is, who is liable? The estate of the

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2. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.
3. See infra notes 61-85, 139-43 and accompanying text for a discussion of a court's power to delete libelous material from a will.
4. See infra notes 33-60 and accompanying text for a discussion of courts' refusal to grant relief.
5. See infra notes 86-103 and accompanying text for a discussion of liability of the estate.
testator? The executor? If the latter, is he liable personally or only in his representative capacity? If either, on what theory can liability be found: agency? Willful publication of defamatory material? If neither, does the law leave the plaintiff without remedy? This quandary is well-described in In re Croker's Will:

What then, of a testator, who deliberately and needlessly renders articulate by his Will all his pent up frustrations, his desire for revenge unanswerable by the living victim, his unreasoned prejudices, his desires for spite past the grave; or who acts as a result of the unhappy and ill-founded suspicions of a mind once more noble, but of late weakened and debased by the remorseless toll of time and infirmity?

Indeed, these are difficult questions without easy answers. Though this topic has been addressed by many scholars in the past, none have addressed it recently or with an analytical, as op-

6. 105 N.Y.S. 190, 191 (Sup. Ct. 1951).
7. Id.
8. The questions raised by testamentary libel have generated much discussion over the years, among both student and professional commentators, with almost every American case generating at least one casenote. Some reviews have shown particular interest in the topic. For example, the Fordham Law Review has published three notes on testamentary libel. The Michigan, Harvard, Minnesota, and Georgetown reviews have each twice addressed it. See, e.g., S. Samuel Di Falco, Libel in Wills, 8 N.Y. L.F. 495 (1962); Samuel Freifield, Libel by Will, 19 A.B.A. J. 301; Leona M. Hudak, The Sleeping Tort: Testamentary Libel, 12 Cal. W. L. Rev. 491 (1976); William H. Russell, Testamentary Libel, 16 Tex. B.J. 733 (1953); Julius T. Cage, Case Note, 7 Ala. L. Rev. 211 (1954); Recent Decision, 21 Ala. L. Rev. 120 (1957); John E. Higginston, Note, Wills-Testamentary Libel-Survival of Actions-Authority of Probate Court to Omit Libelous Matter from Probate, 17 B.U. L. Rev. 268 (1937); Recent Decision, 23 Brook. L. Rev. 156 (1957); Harvey E. Nair, Comment, 11 B.U. L. Rev. 575 (1931); John A. Lambert, Note, Wills: Testamentary Libel: Disposition of the Original Instrument, 37 Cornell L.Q. 336 (1952); Recent Decision, 6 Fordham L. Rev. 180 (1937); Recent Decision, 4 Fordham L. Rev. 349 (1935); Comment, Libel in a Will: The Problem, 24 Fordham L. Rev. 417 (1956); John P. McCarthy, Note, Testamentary Libel, 27 Geo. L.J. 476 (1938-39); Recent Decision, 25 Geo. L.J. 1063 (1937); Note, Damages for Testamentary Libel, 15 Harv. L. Rev. 483 (1901); Note, Right of Recovery for Testamentary Libel, 27 Harv. L. Rev. 666 (1913-14); C. William Isaacson, Comment, Libel in a Will, 38 Marq. L. Rev. 246 (1955); Recent Decisions, 35 Mich. L. Rev. 854 (1937); Note, Liability of Testator's Estate for Libel Contained in His Will, 12 Mich. L. Rev. 489 (1914); Recent Case, 21 Minn. L. Rev. 870 (1937); Recent Cases, 16 Minn. L. Rev. 93 (1931); Joseph F. Turner, Jr., Note, Torts-Libel in Will-Publication Liability of Estate, 33 N.C. L. Rev. 146 (1954); Robert A. Hovis, Note, Libel and Slander-Liability of Estate for Libel in Will, 10 N.C. L. Rev. 88 (1931); Charles D. Boston, Note, Torts-Testamentary Libel-Action for Injuries Resulting after Death of Testator, 33 Tex. L. Rev. 146 (1954); Note, Libel-Charge of Illegitimacy in a Will-Liability of Executor for Publication by Probate, 62 U. Pa. L. Rev. 643 (1914); Edward J.I. Gannon, Recent Decision, 16 U. Pitt. L. Rev. 74 (1954); Recent Case, 8 Vand. L. Rev. 158 (1954); Recent Decision, 31 Va. L. Rev. 189 (1945); Sidney Rubin, Note, Defamation by Will, 1950 Wash. U. L.Q. 122; W. Bernard Smith, Comment, Torts-Liability of Testator's Estate for Libel Incorporated in a Will and Published in Probate Proceedings, 12 Wash. & Lee L. Rev. 288 (1955); Donald Loftsgordon, Comment, Legal Remedies Available to the Victim of Libel by Will, 1 UCLA L. Rev. 575 (1954); Schwartz, Annotation, Libel by Will, 21 A.L.R.3d 754 (1968 & Supp. 1993).
posed to historical, focus. Indeed, the last paper on the topic was written nearly twenty years ago.9

The purpose of this Article, then, is to revisit this interesting area of the law that has been neglected of late. The Article is not, however, intended to be an in-depth historical review of each case in the area.10 Rather, its purpose is to isolate and analyze the legal issues that arise in cases of testamentary libel, examine how the courts have dealt with them in the past and, focusing especially on Illinois law, suggest a better approach for the future.

This Article is in three parts. Part I provides the basic definitions as well as a brief introduction to the fundamental issue involved in testamentary libel. Part II discusses the various approaches courts have utilized when faced with a defamatory will. Part III examines the potential liability of the usual parties involved in the probate of a will and recommends a uniform approach that courts can take when the problem of testamentary libel arises in the future.

I. SOME FUNDAMENTAL ISSUES

Libel is commonly defined as a false and malicious statement, traditionally in print or writing, that tends to denigrate the reputation of the plaintiff, or expose him to public hatred, contempt, or ridicule.11 Wills, being written documents, may contain libelous statements. Testators through the years, perhaps recognizing the biblical admonishment that "[a] good name smells sweeter than the finest ointment,"12 have provided us with some pungent examples of testamentary libel.13 Common subjects of testators' wrath in-

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10. Should the reader desire such a work, none is more comprehensive than Professor Hudak's treatment. See generally Hudak, supra note 8 (discussing cases).
13. Though excellent examples of testamentary libel abound, few are more colorful than the last will and testament of Mr. Garvey B. White of Philadelphia, Pa., whose final wishes included:
[B]efore anything else is done fifty cents be paid to my son-in-law to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.
John Marshall Gest, Some Jolly Testators, 8 TEMP. L.Q. 297, 311 (1934) (quoting Will No. 2249 of 1908, Philadelphia, Pa., Register of Wills). Nearly as crea-
clude filial and spousal mistreatment,\textsuperscript{14} marital discord,\textsuperscript{15} fraudulent business dealings,\textsuperscript{16} adultery,\textsuperscript{17} and charges of illegitimacy,\textsuperscript{18} the most popular form of testamentary libel.

Where allegations of this nature are made by an accuser who has "shuffled off this mortal coil,"\textsuperscript{19} and are, thus, unanswerable, the targeted person's desire for a legal remedy is easily understood. However, clear the harm of such allegations may be, the proper remedy for testamentary libel remains elusive. Several problems stand in the way of a victim who desires compensation. Foremost among these concerns is an essential element of libel, publication to a third party. Because of the ambulatory nature of a will,\textsuperscript{20} the statements therein are meaningless until the death of the testator. Thus, publication, which gives rise to the cause of action,\textsuperscript{21} may not occur until the tortfeasor is beyond the jurisdiction of any court. Yet the defamation lives on. A discussion of the differing ways in which courts have grappled with this paradox, which lies at the very heart of any testamentary libel action, forms the focus of the next part of this Article.

\textsuperscript{14} Gest, \textit{supra} note 13 at 312 (quoting the Will of Mary Burns, Will No. 1843 of 1907, Philadelphia, Pa., Register of Wills). For a flagrant example of a testator accusing his children of mistreating him, see \textit{Our Daily Bread}, Feb. 1994, at entry for Feb. 18, 1994 ("Unto my two daughters, Frances Marie and Denise Victoria, by reason of their unfilial attitude toward a doting father,... I leave the sum of $1.00 to each and a father's curse. May their lives be fraught with misery, unhappiness, and poignant sorrow. May their deaths be soon and of a lingering malignant and torturous nature. May their souls rest in hell and suffer the torments of the condemned for eternity.").

\textsuperscript{15} See, \textit{e.g.}, Brown v. DuFrey, 134 N.E.2d 469 (N.Y. 1956) (wife making no provision for husband).

\textsuperscript{16} See, \textit{e.g.}, Gest, \textit{supra} note 13, at 312 (quoting the Will of Charles F. Hoeckel, Will No. 52714, Denver Co. Court, where testator bequeathed shares in failed corporations to use as bookmarks).

\textsuperscript{17} See, \textit{e.g.}, \textit{id.} at 314 (quoting the Will of Harry Charles Preston, Will No. 220 of 1932, Philadelphia, Pa. Register of Wills) (accusing wife of being "adulteress and fiend in human form").

\textsuperscript{18} Citizens' & S. Nat'l Bank v. Hendricks, 168 S.E. 313 (Ga. 1933); \textit{In re Bomar's Will}, 18 N.Y.S. 214 (Sup. Ct. 1892); Nagle v. Nagle, 175 A. 487 (Pa. 1934); Harris v. Nashville Trust Co., 162 S.W. 584 (Tenn. 1914).

\textsuperscript{19} \textit{William Shakespeare}, \textit{Hamlet} act 3, sc. 1.


\textsuperscript{21} See \textit{supra} note 11 and accompanying text (discussing elements of a cause of action for libel).
II. An Analytical Framework

Several distinct methods of dealing with testamentary libel have developed in the courts over the years. A court may decline to address the issue by applying the doctrine of privilege, or by following the common law maxim of actio personalis moritur cum persona, or by simply refusing to act without clear authority. Another court, however, may face the issue head-on by removing the offending portions of the will or by imposing liability on either the estate or the executor in his representative capacity.

22. See infra notes 35-59 and accompanying text (discussing cases in which courts have declared defamatory statements in a will to be privileged).

23. Personal actions die with the person. Citizens' & S. Nat'l Bank v. Hendricks, 168 S.E. 313 (Ga. 1933). This approach may be a bit too facile. It is indeed possible for publication to occur and, thus, for the tort to arise, prior to the probate of the will. In Harris v. Nashville Trust Co., 162 S.W. 584, 585 (Tenn. 1914), the plaintiff claimed that publication occurred when the attorney dictated the testator's will to a stenographer. The court avoided addressing the issue by stating that even if dictating the will was sufficient publication, the case as pleaded only concerned republication at probate. Id. at 586.

Though the Harris court seemed to assume that dictating the will to a stenographer was sufficient publication in and of itself, the law is unsettled in that area. Though no cases concern a will, several jurisdictions have held that dictating a defamatory letter to a secretary is insufficient publication for purposes of establishing libel. See, e.g., Dixon v. Economy Co., 477 So. 2d 353, 354 (Ala. 1985) (finding privilege applies); Farris v. Tvedten, 623 S.W.2d 205, 206 (Ark. 1981) (finding privilege when someone with an interest in a matter dictates a letter to one who has a duty to take the letter); Peurifoy v. Congressional Motors, 255 A.2d 332, 339 (Md. 1969) (holding dictation not publication when the communication is privileged); Demmell v. Triumph of Europe, 208 N.Y.S.2d 463, 469 (Sup. Ct. 1960) (stating dictation to secretary not publication); Satterfield v. McLellan Stores, 2 S.E.2d 709, 711 (N.C. 1939) (finding stenographer not a "third person" with respect to publication); Watson v. Wannamaker, 57 S.E.2d 477, 478 (S.C. 1950) (holding dictation of defamatory letter by a "business man to his private secretary" not to be publication).

Other courts have taken the opposite view, holding that dictation of defamatory material is a publication. See Pirre v. Printing Devs., 468 F. Supp. 1028, 1042 (S.D.N.Y. 1979) (applying New York law and finding publication where third party participated in producing libelous material); Ostrowe v. Lee, 175 N.E. 505 (N.Y. 1931) (Cardozo, C.J.) ("publication there still is as a result of the dictation, at least where the notes have been examined or transcribed. Enough that a writing defamatory in content has been read and understood at the behest of the defamer."); Lux Brill Prods. v. Remco Indus., 265 N.Y.S.2d 440, 442 (Sup. Ct. 1965) (holding dictation to corporate stenographer constitutes publication); Rickbeil v. Grafton Deaconess Hosp., 23 N.W.2d 247 (N.D. 1946) (finding dictation is publication regardless of whether secretary is the manager's servant or a corporate employee).


25. See infra notes 61-85 and accompanying text (discussing deletion of offensive passages).

26. See infra notes 86-103 and accompanying text (discussing cases imposing liability).
A. Is the Language Defamatory?

A critical threshold issue in any case of defamation by will is whether the language at issue is indeed libelous. Though this factor is often overlooked because of the egregiousness of the language involved in many cases, its importance cannot be overstated. An illustrative example is the English case of Estate of Caie,27 where the court refused to remove language from the probate copy of the will that the widow found offensive, even though the words were not dispositive and there was no opposition from anyone involved. The widow moved to strike a passage that called the Christian religion a "blasphemy," on the grounds that such an assertion was "objectionable and offensive to persons professing the Christian religion."28

Demonstrating a typically English reluctance to tamper with a will,29 as well as a religious tolerance uncharacteristic of the period, the judge asked if he could remove the language in the will of a Muslim in a similar fashion: "Suppose that a convinced Mahomedan writes in his will, 'If am convinced that every other religion is false,' can I omit [sic] the words? Can I leave out part of a man's will because I do not like it?"30 Counsel for the applicant indicated that was a different matter, and agreed that such words may not be omitted.31 The judge did not find the distinction persuasive:

In the clauses sought to be omitted the testator expressed certain views on religious subjects, but there is nothing defamatory of any individual. The applicant apparently desires their omission from the probate because the views expressed do not happen exactly to coincide with hers. She appears quite to have misunderstood the law on the subject.32

28. Id.
29. For an example of this English reluctance to remove libelous matter from a will, see In re Goods of Honywood, 2 L.R.-P. & D. 251 (1871), where Lord Penzance stated that "[it] would be a great misfortune if the Court on light grounds should . . . put before the world . . . a document professing to be, but actually not, a true copy of the will." Australian judges share their English cousins' diffidence in this regard. See In re Will of O'Reilly, [1927] V.L.R. 533, 535 ("Construing this document as best I can, I am of opinion that the principle is not one to be applied to the will before me, and that I should not make the order which is sought.").
31. Id.
32. Id. Judge Hill, presiding in Caie, was not reluctant to use his power to excise defamatory language when appropriate. On the day Caie was decided, he granted a motion to exclude from the probate copy of another will some language he found to be defamatory. Id.

American judges also agree that the challenged language must be defamatory and not merely offensive. Indeed, the focus of the opinion in Brown v. DuFrey, 134 N.E.2d 469 (N.Y. 1956) was whether or not the allegations in the will that accused the testator's former husband of abandoning her were
B. No Cause of Action Stated and No Relief Granted

Several courts have refused to afford relief to the victims of testamentary libel. Interestingly, these cases stand, like bookends, on each end of the development in this area. Both the earliest and the most recent reported cases on testamentary libel, decided 150 years apart, failed to reach the merits of the issue and denied the plaintiff relief.

A common way to avoid the issue of testamentary libel is to hold that defamatory statements in a will are absolutely privileged as a function of the judicial process. Of all the cases that take this approach to the problem, perhaps most straightforward, and indeed the most relevant in Illinois, is the decision of the Illinois Appellate Court in Nolin v. Nolin. In Nolin, the court considered the question of whether a cause of action exists against one who presents a will containing libelous matter for probate. The court rejected the plaintiff's argument that a provision in the Illinois Constitution giving every person a remedy for injury to his reputation created a remedy for testamentary libel, and the court held that no cause of action existed against the executor in his individual capacity. The Nolin court found that "defamatory words are privileged where their publication is pertinent to a judicial proceeding where made" and, thus, the executor is absolutely privileged for presentation of a will for probate.

While the concept of privilege pursuant to a judicial proceeding is simple both in theory and in practice, the cases in this area are libelous. The court found that the allegations were libel per se. See also In re Meyer, 131 N.Y.S. 27, 32 (Sup. Ct. 1911) ("As the matter complained of . . . is not in my judgment grave enough to be harmful to respondents, I prefer not to exercise the power invoked, even if I possess it.").

33. The earliest reported case on the topic comes from England. Curtis v. Curtis, 162 Eng. Rep. 393 (Prerog. 1825) dealt with a holographic will that stated, "I leave all property of every kind to my sister Mary, in consequence of the cruel and murderous conduct of my wife, in this illness, as well as in past instances." Though the testator's wife offered to abandon any claim to her husband's estate if the offensive language was removed, the court refused to do so. Id. Looking to an earlier unreported case with similar facts, the court in Curtis avoided the intricacies of the issue by holding that it did not have the authority to strike the offending passages. Id.


37. Id. at 24.

38. Id. The court also noted that the Illinois Probate Act imposed on the executor a duty to submit the will to probate. Id. Moreover, suppression or alteration of a will is a felony. Id. The court expressed concern that if an executor was held liable for merely presenting a libelous will in court, the executor would be faced with a Hobson's choice: to submit the will to probate and face potential civil liability, or refuse to do so and face potential criminal liability. Id.
far from clear. In fact, *Nolin* is the only case to focus on privilege without getting bogged down by odd facts or an uncertain focus. Other cases discuss privilege only briefly in their haste either to disclaim testamentary libel or deal with such unusual facts so as to be highly questionable as precedent.

Some value can be derived from them, however. While the privilege doctrine, as explained in *Nolin*, would appear to close the door to a claim for testamentary libel in jurisdictions where it applies, the most recent case to rely on privilege leaves the impression that the door remains open ever so slightly. In *Binder v. Oregon Bank*, the Supreme Court of Oregon held that statements in a will are absolutely privileged when admitted to probate. Overruling its previous decision in *Kleinschmidt v. Matthieu*, the court analogized the filing of a will with defamatory contents to the pretrial publication of defamatory statements by the victim's lawyer to the victim's insurance company. Citing a recent case where such pretrial publication was held absolutely privileged, the court held that defamatory statements in a will are also privileged as pursuant to a judicial proceeding. The court felt that allowing testators to speak freely in their wills was worth the risk of the occasional abuse, citing to similar privilege in affidavits filed in divorce proceedings and objections to a final account in a probate proceeding.

However, in an interesting twist, the court limited this privilege in a fashion that opens the door ever so slightly to the victim of testamentary defamation: "The only limitation imposed, which is a limitation consistent with the rationale behind the rule, is that the statement must be pertinent or relevant to the interest we have found to be so important." Thus, libelous language in a will that is not "pertinent or relevant" is not privileged under *Binder*.

It is not unusual for a court to strike language when it is offensive but not dispositive. What is unusual about *Binder*, however,

39. 585 P.2d 655 (Or. 1978) (en banc). The charge in *Binder* was that the will declared the plaintiff to be illegitimate. The relevant portion read, "I declare that I have no other living children . . . and if an individual who I understand has used the name Corinne Kernan [Binder] establishes herself or is held to be my daughter, then I give . . . to her the sum of One Dollar . . . ." *Id.*

40. 266 P.2d 686 (Or. 1954) (en banc).

41. *Id.*, 585 P.2d at 656.

42. *Id.* (citing Chard v. Galton, 559 P.2d 1280 (Or. 1977)).

43. *Id.*

44. *Id.*

45. *Id.*

46. See, e.g., *In re Speiden's Estate*, 221 N.Y.S. 223 (Sup. Ct. 1926) (striking nondispositive language); *In re Bomar's Will*, 18 N.Y.S. 214 (Sup. Ct. 1892) (removing allegations that grandson was illegitimate as nondispositive); *In re Goods of Wartnaby*, 162 Eng. Rep. 1088, 1089 (Prerog. 1846) (finding court may remove nondispositive language from probate copy).
is its broad idea of relevancy. The allegation of illegitimacy that the 
Binder court found "pertinent and relevant"\(^4\) is precisely the type 
of nugatory assertion which other courts have held to be surplusage 
and have removed from the will.\(^4\) The court in Binder did not elu-
cidate why allegations of illegitimacy were pertinent to the disposi-
tion of the estate.\(^4\) The only guidance we are left with is that it 
was "important" for the beneficiaries and the "honest administration 
of justice" that the statement concerning the plaintiff's relation-
ship with the testator be revealed.\(^5\)

At a minimum, it appears that libelous words must shed some 
light on the intent of the testator in order to be privileged under 
Binder. Exactly where privilege ends and defamation begins, how-
ever, is not so clear. Perhaps, had the testator libeled a stranger 
unconnected with the will in any fashion, such language would not 
be privileged.\(^5\)

In another case where privilege was invoked but in reality 
played only a minor role, the Supreme Court of Pennsylvania held 
that defamatory statements in a will were absolutely privileged.\(^5\)
In Nagle v. Nagle,\(^5\) the testator listed his children, indicating that 
any other claimant would be illegitimate.\(^5\) The plaintiff, was omit-
ted from the list and sued for defamation. The court, in applying 
the privilege, likened statements in a will to those in other judicial 
settings:

> A will is the foundation of a judicial proceeding, the administration of 
the estate in the orphans' court. It is closely analogous to a plaintiff's 
statement in a civil action\(^5\) in the respect that it is the beginning of a 
judicial proceeding. We believe that the rule which makes the pleading 
in a judicial proceeding absolutely privileged may properly be ap-
plied to a will in which there is no apparent purpose to injure the 
reputation of any one but merely a purpose to insure the distribution of 
the testator's estate . . . .\(^5\)

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\(^4\) Binder, 585 P.2d at 657.


\(^4\) See *In re Estate of Rawlings*, 78 Sol. J. 338 (1934) (refusing to remove the words "that rascal" from the probate copy "as they might be of assistance . . . in construing the condition of which they formed part"). *But see infra* note 58 and accompanying text (discussing possible justification for holding accusation of illegitimacy to be pertinent).

\(^5\) Binder, 585 P.2d at 656-57.

\(^5\) See *In re Goods of Wartnaby*, 162 Eng. Rep. 1088, 1089 (Prerog. 1846) (omitting "a purely voluntary and atrocious libel on a mere stranger, unconnected with the testamentary disposition of the deceased").


\(^5\) Id.

\(^5\) Id. The testator did manage to avoid mentioning the plaintiff by name, a courtesy which the court looked upon with favor. *Id.* at 488.

\(^5\) The problem with this comparison is that a testator, when he writes his 
will, is not a party to any judicial proceeding concerning the will, nor will he 
ever be.

\(^5\) *Id.*
Thus, by extending the privilege to language that has some purpose aside from injuring the plaintiff, the court framed a qualified privilege much like the one in *Binder*.

Close examination of *Nagle*, however, shows that at least three other factors aside from privilege were at work. First, the plaintiff had alleged the testator's paternity in no fewer than four lawsuits against the testator over a twenty-seventy year period.\(^{57}\) The fact that the testator's denials had already received considerable exposure, at least among those involved in the litigation, could not have escaped the court. Second, the plaintiff was not named in the will, thus, only those who had already been exposed to the nature of her dispute with the testator could possibly see the implied defamation. Third, the phrases at issue were seen as a valuable expression of the testator's intent should the plaintiff attempt to challenge the provision of his will as she had challenged him in life.\(^{58}\)

The precedential value of *Nagle* on the question of privilege is unclear. While privilege was certainly among the motivating factors in the court’s decision, the presence of other issues muddies the waters here significantly. The end result is that no cases other than *Nolin* squarely address the privilege question.\(^{59}\) As *Nolin*’s review of privilege was limited to the liability of the executor, much remains to be explored.\(^{60}\)

C. Petition for Deletion of Defamatory Matter

In what is perhaps the simplest approach to this problem, aside from avoiding it altogether, a rule has developed in the English courts and the state courts of New York that recognizes the power of the probate courts to delete libelous material from the probate

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57. *Nagle*, 175 A. at 488.

58. *Id.* The court stated: The persistence of the claims made against [the testator] in his lifetime afforded him sound reasons for believing that such claims would be made against his estate after his death . . . . [T]hey might have seemed to his executors, in the absence of testamentary injunction, a proper ground for compromise and settlement, thus subjecting his estate, in effect, to demands which he felt to be unjust. *Id.*

59. Privilege has also played a supporting role in other decisions. For example, elements of privilege played at least some role in the oft-cited case of Citizens & S. Nat'l Bank v. Hendricks, 168 S.E. 313 (Ga. 1933). There, the Supreme Court of Georgia flatly rejected the tort of testamentary libel. *Id.* The court invoked the common law maxim *actio personalis moritur cum persona*, and held that the estate may not be liable because the testator had died before the essential act of publication had been committed. *Id.* at 315. However, the court also rejected liability for the executor in his representative capacity on the grounds that the executor was not the agent of the testator at all, but rather of the probate court. *Id.*

copy of the will.\textsuperscript{61} In fact, several courts have applied this rule unflinchingly.

Perhaps most typical of these cases is the straightforward treatment given the issue in \textit{In re Bomar's Will}.\textsuperscript{62} In Bomar, the court cited the English case \textit{Goods of Wartnaby}\textsuperscript{63} as precedent for its authority to delete nondispositive portions from the probate copy of a will. The court simply held that "[t]he opprobrious designation should not be probated or recorded; the dispositive words only should be admitted,"\textsuperscript{64} and removed allegations that a young grandson of the testator was illegitimate.

In \textit{In re Draske's Will},\textsuperscript{65} the court deleted a portion of the will that explained a limited gift to one of the beneficiaries. In a thorough, eloquent,\textsuperscript{66} and oft-cited opinion, the Surrogate interpreted the case law to mean that the court not only had a right, but also a duty to delete defamatory material from the probate copy of a will.\textsuperscript{67} Because the language before the court was nondispositive, the court found unlimited power to delete it:

\begin{quote}
[A] testator \ldots possesses no basic right to require from the administrators of the law the recognition or perpetuation of any expression of wish or feeling which is not directly relevant to an affirmative disposition of a portion of the assets belonging to him \ldots . The inclusion in the will of anything in excess of such directions is pure surplusage possessing no claim to judicial protection or perpetuation.\textsuperscript{68}
\end{quote}


\textsuperscript{62.} \textit{18 N.Y.S. 214} (Sup. Ct. 1892).

\textsuperscript{63.} 163 Eng. Rep. 1088 (Prerog. 1846).

\textsuperscript{64.} \textit{In re Bomar's Will}, 18 N.Y.S. 214, 215 (Sup. Ct. 1892).

\textsuperscript{65.} 290 N.Y.S. 581 (Sup. Ct. 1936); see generally John E. Higginson, Note, \textit{Wills-Testamentary Libel-Survival of Actions-Authority of Probate Court to Omit Libelous Matter from Probate}, 17 B.U. L. Rev. 268 (1937); Recent Decision, 6 \textit{Fordham L. Rev.} 180 (1937); Recent Decision, 25 Geo. L.J. 1063 (1937); Recent Decisions, 35 Mich. L. Rev. 854 (1936-37); Recent Case, 21 Minn. L. Rev. 870 (1937).

\textsuperscript{66.} Surrogate Wingate quoted Shakespeare as part of his rationale: "Good name in man or woman \ldots is the immediate jewel of their souls. Who steals my purse, steals trash\ldots but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed." \textit{In re Draske's Will}, 290 N.Y.S. 581, 890 (Sup. Ct. 1936) (quoting \textit{WILLIAM SHAKESPEARE, OTHELLO} act 3, sc. 3).

\textsuperscript{67.} \textit{Id.} at 589.

\textsuperscript{68.} \textit{Id.}
Finally, analogizing the defamatory material to nondispositive matters that follows a signature, the court ordered the material omitted from the probate copy.69

Unfortunately, the issue is not as clear as it appeared in Draske. Even in jurisdictions like New York that apply the simple rule of excising the offending passages, dealing with testamentary libel is rarely a simple matter. Many courts have expressed deep reservations about their power to simply edit the will,70 and such reluctance is a significant factor where the language can in any way be characterized as “helpful” to the disposition of the testator’s wishes.71

This reluctance has led some courts to refuse to remove the offending passages altogether. For example, in In re Goods of Honywood,72 the court expressed the following reluctance73 to tamper with the will even to the extent required to omit the offending passages from the probate copy, and rejected the motion:

69. Id. at 591. The New York court applied the same reasoning confidently in In re Speiden’s Estate, 221 N.Y.S. 223, 224 (Sup. Ct. 1926), stating: “It is clear that the surrogate possesses complete power to exclude objectionable matter contained in a testamentary script from the form of the last will as admitted to probate . . . .”

70. The court was unwilling to alter the original will in In re Meyer, 131 N.Y.S. 27 (Sup. Ct. 1911). The court held that it was without power to strike offensive language from the will itself: “The power of the surrogates of this state to expunge matter from an original will in any case to my mind does not exist.” Id. at 29. For this reason, the court treated the motion as a motion to strike scandalous or libelous language from the probate copy only. Id. at 30. However, because the English probate courts have greater powers than their American counterparts, the court rejected English precedent as “remote analogies,” id. at 31, and held that the words involved here were not so harmful as to merit that severe remedy. Id. However, they were harmful enough to be omitted from the opinion. Id. at 32.

71. See In re Estate of Hall, 2 All E.R. 159 (1943); In re Estate of Rawling’s, 78 Sol. J. 338 (1934) (precisely how the court felt the words “that rascal” would be helpful is unclear). But see In re Draske’s Will, 290 N.Y.S. 581 (Sup. Ct. 1935) (motivations of testators are immaterial); In re Speiden’s Estate, 221 N.Y.S. 223 (Sup. Ct. 1926) (explanatory phrases of testator immaterial).

72. 2 P.D. 251 (1876).

73. This conservative use of the authority to censure wills has been applied in other courts as well. The High Court of Australia expressed the same cautionary thoughts before refusing to use its authority to expunge the phrase “I make no provision for my wife B. on account of her intemperate habits and other misconduct” from the probate copy of a will. In re Will of O’Reilly’s, [1927] V.L.R. 533, 533 (“Construing this document as best I can, I am of opinion that the principle is not one to be applied to the will before me, and that I should not make the order which is sought. I therefore refuse to accede to the application, with the usual result that the motion must fail, with costs, which I fix at 5 guineas.”). Id. at 535. Though recognizing that it had the power to remove defamatory language from a will, the court felt that accusing one’s wife of being a lush was not “scandalous and defamatory” enough to warrant deletion from probate. Id. at 535. Certainly, this was a curious holding that may well have turned out differently had it been the will of the wife accusing the husband of such misconduct.
The whole thing is objectionable, for the probate professes to be a true copy of the will. How, then, can I order any part of the will to be omitted from it? After the cases cited it would be too strong to say that I have no power to do so; but it is a power to be exercised with great moderation . . . . It would be a great misfortune if the Court on light grounds should interfere in such a matter, and put before the world under its seal a document professing to be, but actually not, a true copy of the will.\textsuperscript{74}

As we have seen, then, the English courts and the state courts of New York recognize the power of the probate courts to delete libelous material from the probate copy of the will.\textsuperscript{75} However, the efficacy of this approach is subject to question for two reasons. First, when faced with a petition to delete defamatory matters, the courts are often reluctant to do so, and in several cases refuse to use their authority to remove the libel.\textsuperscript{76} Second, merely allowing the executor to petition for removal of libelous materials is a reactionary rather than proactive approach that limits, but does not prevent, injury to the victim.\textsuperscript{77}

D. Granting a Third Party Authority to Excise Libelous Language

In an interesting and rather novel approach to testamentary defamation, some cases grant a third party the authority to remove libelous language from the probate copy of the will. The court applied a similar approach in In re Payne's Estate,\textsuperscript{78} which involved an interesting twist on the usual factual scenario.

In Payne, the testator directed that his property be sold and that the proceeds be used to publish a religious tract he had written, entitled The Elijah Message, which was to be placed in public libraries.\textsuperscript{79} The court, quoting extensively from the work, expressed some agreement with the testator's writings, especially his "keen" observation that the world is populated with a large number of "morons."\textsuperscript{80} Despite the court's agreement with some portions of

\textsuperscript{74} In re Goods of Honywood, 2 P.D. at 252. See also Marsh v. Marsh, 164 Eng. Rep. 845 (Prerog. 1860). In Marsh, the court dealt with "certain expressions in the last codicil derogatory" to the family of the testator's sister. In a brief passage in a complex case, the court expressed concern about setting liberal precedent, but granted the motion of defendant's counsel to omit the offending passages upon plaintiff's consent. \textit{Id.} at 849.

\textsuperscript{75} See In re Meyer, 131 N.Y.S. 27 (Sup. Ct. 1911); Curtis v. Curtis, 162 Eng. Rep. 393 (Prerog. 1825).

\textsuperscript{76} See, e.g., In re Meyer, 131 N.Y.S. 27 (Sup. Ct. 1911).

\textsuperscript{77} This approach is not without its benefits, however. As far as this author can tell, no suit for testamentary libel has ever arisen in England, where this approach has been applied consistently for many years. See, e.g., S. Samuel Di Falco, Libel in Wills, 8 N.Y. L.F. 495, 498 (1962) (citing GATLEY, LIBEL AND SLANDER 414 (4th ed. 1953)).

\textsuperscript{78} 250 N.Y.S. 407 (Sup. Ct. 1936).

\textsuperscript{79} \textit{Id.} at 408.

\textsuperscript{80} \textit{Id.} at 412. The judge apparently shared the testator's egalitarianism.
the tract, it found references to a contemporary religious leader as
being an “insane,” a “fraud,” and a “fakir” potentially offensive.81

Payne was unique in that no prior New York case had dealt
with potential defamatory testamentary instructions, as opposed to
nugatory explanations, and the judge sought guidance from other
jurisdictions.82 Looking to precedent for testamentary libel,83 the
court gave the executor editorial power to remove the offending
passages, which amounted to forty five lines out of a total of
4,400,84 from the tract.

A similar approach was taken in the Pennsylvania Orphan’s
Court in 1960. In an obscure case, the court noted the unique na-
ture of testamentary libel and held that the Register of Wills could
delete defamatory material from the testamentary document.85 In
conformity with our observations above, the court held that the
statements were libelous per se and nondispositive. However, in an
unprecedented move, the court ordered the alterations made in the
original document.

E. Courts Recognizing a Cause of Action for Testamentary Libel

Two states have explicitly recognized causes of action for testa-
mentary libel.86 In those states, in the case of testamentary libel

81. Id. at 415.
82. Id. at 413 (citing Citizens’ & S. Nat’l Bank v. Hendricks, 168 S.E. 313
(Ga. 1933)).
83. The court used an interesting metaphor, comparing a testator who puts
libelous material in his will to one “harboring a supposedly defamatory testa-
mentary plan until his death, and by then leaving it in train, and beyond his
power to recall thereafter . . . .” Id. at 415 (citation omitted).
84. Id. at 415-16.
1960). See Hudak, supra note 8 at 504; Schwartz, supra note 8 at 759.
86. Cases from two other jurisdictions have recognized the tort as well.
However, given that they have both been overruled in favor of the privilege
document, they merit little attention herein. The first case to recognize a cause
of action was In re Gallagher’s Estate, 10 Pa. D. 733 (1900), where the testator
accused a young attorney of failing to pay a debt accrued by providing food,
shelter, and schooling over a ten-year period. The attorney sued the estate for
libel and the court rejected the defense arguments of privilege and that any
cause of action died with the tortfeasor. For a discussion of Gallagher’s Estate,
see Schwartz, supra note 8 at 761; Note, Damages for Testamentary Libel, 15
HARV. L. REV. 483 (1901). However, Gallagher was almost certainly overruled

In Kleinschmidt v. Matthieu, the Oregon Supreme Court also recognized a
cause of action for testamentary libel. 266 P.2d 686 (Or. 1954). Kleinschmidt
causd quite a stir among scholars. For a discussion of Kleinschmidt, see
Charles D. Boston, Torts-Testamentary Libel-Action for Injuries Resulting after
Death of Testator, 33 TEX. L. REV. 146 (1954); Julius T. Cage, Jr., Case Note, 7
ALA. L. REV. 211 (1954); Edward J.I. Gannon, Jr., Torts-Libel by Will, 16 U.
PERR. L. REV. 74 (1954); W. Bernard Smith, Comment, Torts-Liability of Testa-
tor’s Estate for Libel Incorporated in a Will and Published in Probate Proceed-
ings, 12 WASH. & LEE L. REV. 288 (1955); Joseph F. Turner, Jr., Torts-Libel in
Will-Publication-Liability of Estate, 33 N.C. L. REV. 146 (1954); Recent Case, 8
that is neither: (1) privileged under the laws of the jurisdiction; nor
(2) redacted by the court, a cause of action may be recognized.

In Harris v. Nashville Trust Co., the plaintiff’s uncle got his
revenge upon the plaintiff by stating in his will that she was an
illegitimate child of his brother. Recognizing that there was no pre-
cedent for an action for libel by will, the court emphasized the
importance of the right to enjoyment of one’s reputation, and held it
libelous per se to charge someone with illegitimacy in a will:

No more effective means of publishing and perpetuating a libel can be
conceived than to secure the inscription of such matter on court
records, as by probate of a will. The libel is not only permanently re-
corded, but in this case will be of widespread circulation for many
years.

In order to give the plaintiff the opportunity to salvage her
mother’s reputation, the court held that actio personalis moritur
cum persona was inapplicable for two reasons. First, because of the
ambulatory nature of a will, no action arose until after the death of
the tortfeasor, and second, the applicable survival statute said
that actions for “wrongs affecting the character of the plaintiff” did
not abate with the death of the tortfeasor.

The court also held that the estate, as principal, was liable be-
because the “libel was made by the agent of the executor, in literal
pursuance of the authority given.” However, it found the agent
without fault, for he was acting under threat of criminal sanction if
he failed to present the will to probate. That, of course, is a privi-

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VAND. L. REV. 158 (1954). However, Kleinschmidt was overruled by Binder v. Oregon Bank, 585 P.2d 655 (Or. 1978).

87. 162 S.W. 584 (Tenn. 1914). Harris was roundly criticized in legal circles at the time, even earning review by the Yale Law Review. See Comment, Can a Testator’s Estate be Held Liable for a Libel Contained in His Will?, 23 YALE L.J. 534 (1914). The comment was critical of the decision for several reasons, and concluded that the English rule of deleting the offending passage before probate was a better solution. However, this ignores the policy reason in creating the cause of action, because every person potentially subject to defamation in a will may not have notice of such prior to probate. Precisely such a case was presented in Brown v. Mack, 56 N.Y.S.2d 910 (Sup. Ct. 1945). If such a harsh rule is to be the law, perhaps a third party such as the Register of Wills, the executor, or the probate court should review all wills prior to probate for defamation to prevent such a mishap. For further discussion of Harris, see Note, Damages for Testamentary Libel, 15 HARV. L. REV. 483 (1901); Note, Liability of Testator’s Estate for Libel Contained in His Will, 12 MICH. L. REV. 489 (1914); Note, Libel-Charge of Illegitimacy in a Will - Liability of Executor for Publication by Probate, 62 U. PA. L. REV. 643 (1914).

88. 162 S.W. at 585.

89. Id. Every time the plaintiff wished to make a transfer of land, the title
would have to be examined, exposing the interested parties to the libel in the
will granting it anew. Id.

90. Id. at 586.

91. Id. (citing Shannon’s Code § 4569).

92. Id. at 585.

93. 162 S.W. at 585 (citing Shannon’s Code § 6565).
As we have noted above, the New York courts have followed the English doctrine and excised libelous language from the probate copy of the will. However, deleting defamatory language from a will is only effective if the defamed party has notice prior to probate or a third party takes up an interest. Because that is not always the case, New York courts have also recognized a cause of action for defamation by will when the will has already been probated, with the probate proceeding itself serving as the publication of the defamatory statements.\(^{94}\)

After seven reported cases at the trial court level, the issue of testamentary defamation finally made it to a New York appellate court in Brown v. Mack.\(^{95}\) In Mack, the testator made accusations against his wife so foul that the court declined to include them in its opinion or give any hint as to what they may have been.\(^{96}\) The wife sued the estate of her late husband and her son, the executor of the estate, both individually and as a representative of the estate. The court found the accusations to be libelous \textit{per se}, and proceeded with an extensive analysis of the potential causes of action.\(^{97}\)

As to the liability of the estate, the court held that the estate was not entitled to judicial protection for the libel intentionally set in motion by the decedent fourteen years prior to his death.\(^{98}\) Though a testator may give reasons for distributing his property which may at times help in construction of the will, the court felt that "justice and public policy" did not allow him to hide behind privilege for such a calculating and intentional tort, especially where the provisions were nondispository.\(^{99}\) The court noted that truth remains a defense to a charge of testamentary libel, but held that because the testator composed the statement, the estate must bear the burden of defending its contents.\(^{100}\)

The court next addressed the problem of the executor's liability. Because Christopher F. Mack acted solely as executor of his father's estate and did nothing as an individual, the court found his actions privileged as a matter of law. The court held that an executor is privileged as an individual for presenting a will, "where he acted in good faith and without malice, because it is necessary for the court to consider the libelous portions of the will in order to eliminate them, at least to the extent of clearing the way for recording and

\(^{94}\) See Schwartz, \textit{supra} note 8.
\(^{95}\) 56 N.Y.S.2d 910 (Sup. Ct. 1945); see \textit{generally} Recent Decision, 21 ALB. \textit{L. Rev.} 120 (1957); Recent Decision, 32 VA. \textit{L. Rev.} 189 (1945).
\(^{96}\) 56 N.Y.S.2d at 914.
\(^{97}\) \textit{Id}.
\(^{98}\) \textit{Id.} at 917.
\(^{99}\) \textit{Id}.
\(^{100}\) \textit{Id}.
effectuating any unobjectionable provisions remaining.” However, the defense of privilege was denied the executor in his representative capacity because the testator was not a party to a judicial proceeding when he wrote the will.102

Because testamentary libel does not occur until after the death of the testator, the defendants argued that the testator could not be held liable for a tort that took place after his death. However, the court rejected this argument by making the obvious analogy between testamentary libel and “setting a slow fuse” or hiring another to assault a victim, and then dying before the tort is completed.103

III. SUMMATION AND DISCUSSION

We have seen the variety of approaches to testamentary libel taken by the American and English courts. The discussion that follows questions the potential liability of the various parties, including the drafting attorney, and suggests that several important questions about testamentary libel have yet to be answered. In conclusion, a recommended uniform approach to the problem is discussed.

A. Is the Estate Liable?

As we noted above, allowing the executor to petition the court to remove defamatory language prior to probate and allowing no other remedy assumes much. First and foremost, it assumes that the executor will know libel when she sees it. Second, it assumes that she will wish to do something about it. Obviously, that is not the way things have always gone, because many libelous wills have been probated. To address this issue, several reported cases allow the plaintiff to recover against the testator’s estate for libel that was published in a will.104 These courts reject the maxim actio personalis moritur cum persona. Hence, because no cause of action arose prior to the death of the tortfeasor, these courts allow the plaintiff to proceed against the estate.105

Other courts, however, have held that no cause of action for

102. Id. at 923.
103. Id. at 916.
104. Id.; Kleinschmidt v. Matthieu, 266 P.2d 686, 691 (Or. 1954), overruled by Binder v. Oregon Bank, 585 P.2d 655, 656 (Or. 1978); In re Gallagher’s Estate, 10 Pa. D. & C.2d 733 (1900); Harris v. Nashville Trust Co., 162 S.W. 584 (Tenn. 1914).
105. See supra notes 86-103 and accompanying text for a discussion that a cause of action for testamentary libel exists and survives the death of the testator.
testamentary libel may be stated. These courts primarily apply the familiar common law maxim that personal actions die with the person, as well as the doctrine of privilege, and a host of other fact-specific policies. Thus, these courts leave the victim of testamentary libel without remedy.

B. Is the Executor Liable, and if so, in what Capacity?

In no reported case has the executor been held personally liable for presenting a libelous will for probate. Courts shield the executor on two theories, both variations on privilege: (1) the executor is not the agent of the testator, but of the probate court; and (2) presentation of the will for probate is absolutely privileged as pursuant to a judicial proceeding. Though it has been argued that an executor has a duty to petition the court to remove libelous material from a will, no court has so held.

It is also conceivable that the executor may be liable as a representative of the estate. In Kleinschmidt, the court found the executor liable as a representative of the estate, and in Brown v. Mack, the court so stated in dicta, though the plaintiff had sued the executor only as an individual.

C. Is the Drafting Attorney Liable?

An aspect curiously absent from the reported cases on defamation by will is the potential liability of the attorney who helped the testator to draft the document. Where the will at issue is holographic, no attorney need be involved. However, where the will is prepared by an attorney, additional questions about liability arise.

1. Attorney Liability for Defamation

Though in many jurisdictions the drafting lawyer need not fear

106. See supra notes 33-60 and accompanying text for a discussion on how many courts have rejected claims of testamentary libel.
109. Because the very process of petitioning the court to remove libel involves a limited publication, this idea was rejected in Brown v. Mack, 56 N.Y.S.2d 910, 922 (Sup. Ct. 1945).
110. 266 P.2d 686, 698 (Or. 1954), overruled by Binder v. Oregon Bank, 585 P.2d 625 (Or. 1978).
112. A holographic will is an unwitnessed will entirely in the handwriting of the testator. Black's Law Dictionary 659 (6th ed. 1990). The Uniform Probate Code accepts holographs, whether or not witnessed, if the signature and material provisions are in the handwriting of the testator. See U.P.C. § 2-503 (1987). However, several states categorically reject such wills.
a suit for malpractice by the victim of the libel, he may be liable to the victim directly for defamation. It is a well-established principle of tort law that everyone who assists, directly or indirectly, in the publication of defamation is liable: "Participation in publishing a libel is participation in the commission of a tort, and the old and well known rule is that all who aid, advise, countenance or assist the commission of the tort are wrongdoers." There is little doubt that drafting a defamatory will aids, advises, and assists in its publication.

Even though there are no reported cases where the victim of testamentary libel sued the drafting attorney, in many jurisdictions there is no legal doctrine to prevent such a suit. Preparation of a defamatory document necessitates knowledge of its contents, and that may be sufficient to meet the fault requirement in defamation. In Arnold v. Ingram, the court found the defendant liable for merely delivering a slanderous article from the author to a newspaper. Because he had knowledge of the defamatory nature of the material, the court found that the delivery man had participated in publication of the libel. An attorney, in drafting a defamatory will, does more than merely deliver the defamation to others. What the attorney does is "aid, advise, countenance or assist" the preparation of a defamatory document, which is sufficient to make the attorney liable.

113. See infra note 127 and accompanying text (discussing how an attorney participates in publication of defamatory material).


115. Assuming, of course, that one is not in a jurisdiction that holds testamentary defamation privileged as pursuant to a judicial proceeding. In such a jurisdiction, the attorney's preparation of the will results from the attorney-client relationship, and is probably privileged. See Binder v. Oregon Bank, 585 P.2d 655 (Or. 1978) (stating privilege is to protect "important" interests relating to the judicial process); Nagle v. Nagle, 175 A. 487, 489 (Pa. 1934) (holding defamatory accusations in the will privileged as pursuant to a judicial proceeding); Martin v. Graham, No. 11105 (Tex. Ct. App. 1942) (finding testamentary defamation privileged); see also Carver v. Morrow, 48 S.E.2d 814 (S.C. 1948) (finding the executor absolutely privileged).

116. Fault at least amounting to negligence is an element of defamation. See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

117. 138 N.W. 111 (Wis. 1911).

118. Id.

119. Westby v. Madison Newspapers Inc., 259 N.W.2d 691, 695 (Wis. 1977) (quoting Arnold v. Ingram, 138 N.W. 111, 117 (Wis. 1911)).

120. Id.
Nor is there a public policy rationale to protect the lawyer who drafts such a document. In the current legal climate, overburdened as it is with lawyers, perhaps a little legal Darwinism is a healthy thing. Exposing lawyers that draft defamatory documents to liability may not solve the profession’s troubles, but at least it may daunt a few of its most inept from further damaging its reputation. Further, because defamation is harmful and false information, no public goal is furthered by protecting its dissemination. Thus, there is no reason to protect any party who participates in defamation from liability.

2. Attorney Liability for Negligence

One possible avenue of recovery is suing the drafting attorney for negligence. In Illinois, a proper complaint for legal malpractice under a tort theory of negligence must allege (1) the existence of an attorney-client relationship; (2) a duty arising from that relationship, and in the case of a nonclient, that the relationship between the attorney and client was primarily or directly to benefit the nonclient; (3) a breach of that duty by defendant counsel; (4) proximate cause; and (5) damages.121

Though no court has yet addressed the malpractice liability of a lawyer for preparing a defamatory will, the possibility of liability under several different theories is certainly an interesting issue that a practitioner should be aware of. Given the blatant nature of the libel in most of the reported cases in this area, it should be a simple matter to avoid, whether one is well-versed in defamation law or not, by simply refusing to include language that may be libelous.

a. Liability to Plaintiff

Though the attorney who drafts a will containing defamatory statements may be guilty of negligence, it is unclear that the plaintiff will be able to reach him on that theory. In most scenarios for testamentary libel, the victim is a non-client third party not named as a taker under the will. In such cases, courts apply the so-called “privity rule,” which says that absent a duty to a non-client third party, a cause of action for negligence against an attorney does not exist.122 Though there are exceptions to the privity rule, none

clearly apply to non-client third parties.\textsuperscript{123}

However, if an estate is successfully sued for testamentary libel, some jurisdictions allow the beneficiaries to proceed against the drafting attorney on the ground that his negligence caused the dissipation of their gift.\textsuperscript{124} Though many jurisdictions still bar such a suit because of the lack of privity,\textsuperscript{125} the modern trend is to allow

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\textsuperscript{123} Heyer v. Flaig, 449 P.2d 161, 163 (Cal. 1969) (en banc) (stating will beneficiaries are intended beneficiaries of contract to draft will); Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961) (holding beneficiaries of will could sue drafting attorney); cert. denied, 368 U.S. 987 (1962); Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (en banc); Ventura County Humane Soc'y for Prevention of Cruelty to Children & Animals, Inc. v. Holliway, 115 Cal. Rptr. 464, 468 (Cal. Ct. App. 1974) (allowing charity, as intended beneficiary of will, to sue attorney for malpractice when attorney's failure to correctly identify it in will resulted in loss of bequest); Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988) (allowing malpractice action for negligent drafting of a will by a known beneficiary); Guy v. Liederbach, 459 A.2d 744, 746 (Pa. 1983) (stating named beneficiaries may sue attorney for negligent drafting of will); see also Ogle v. Fuiten, 445 N.E.2d 1344, 1346 (Ill. App. Ct. 1983), aff'd, 466 N.E.2d 224 (Ill. 1984) (ruled putative "intended beneficiaries" may sue attorney for negligent drafting which resulted in their being excluded from will).

\textsuperscript{124} Many jurisdictions still follow the Supreme Court decision in National Savings Bank v. Ward, 100 U.S. 195 (1879) (privity is requisite to suit against attorney), and have refused to allow non-clients to sue regardless of their status. These courts generally rely on two grounds: (1) extending liability would deprive the parties to the contract of control of their bargain; and (2) imposing a duty to the general public is unreasonable. See Jack W. Shaw, Jr., Annotation, Attorney's Liability, To Other Than His Immediate Client, For Consequences of Negligence In Carrying Out Legal Duties, 45 A.L.R.3d 1181, 1184 (1984) (superseded by annotation in A.L.R. 4th). See also Franko v. Mitchell, 762 P.2d 1345, 1353 (Ariz. Ct. App. 1988) (finding disciplinary proceedings, rather than abandoning privity rule is proper course of action); Layman v. Layman, 578 A.2d 314, 315-17 (Md. Ct. Spec. App. 1990) (ruling that beneficiary or one who claims to have been an intended beneficiary has no cause of action against drafting attorney if will is valid, testamentary intent carried out, and no concession of error by attorney) (citing Kirgan v. Parks, 478 A.2d 713 (Md. Ct. Spec. App. 1984)); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) (barring beneficiary because of lack of privity); Thomas v. Pryor, 847 S.W.2d 303, 304-05 (Tex. Ct. App. 1992); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. Ct. App. 1989); Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. Ct. App. 1987) (refusing to allow beneficiaries of will to sue drafting attorney for malpractice); see also Note, Privity as a Bar to Recovery in Negligent Will-Preparation Cases: A Rule Without a Reason, 57 U. Cin. L. Rev. 1123 (1987); Note, The Negligent Drafting of Will and Simon v. Zipperstein: A Step Backward in Ohio Jurisprudence?, 20 U. Tol. L. Rev. 133 (1988).
third parties to proceed against attorneys. The courts that allow beneficiaries to sue generally do so on one of two basic theories: (1) that the plaintiff, as beneficiary of the will, is a third party beneficiary to the relationship between the testator and the attorney; and (2) a broader, policy-based balancing of factors test.

In some of the states that allow beneficiaries to sue, such as Pennsylvania, a lawyer need not fear a suit based on drafting a defamatory will because the jurisdiction does not recognize testamentary libel. However, in other jurisdictions which allow beneficiaries to sue, this is not necessarily the case. For instance, though Illinois courts have held that the executor is absolutely priv-

126. See Joan Teshima, Annotation, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client, 61 A.L.R.4th 464, §§ 8-12 (1988 & Supp. 1993); Shaw, supra note 125, at 1196 (stating trend is to relax privity requirements).


128. Other jurisdictions allow liability to non-clients on a policy-based "balancing of factors" test essentially similar to, but broader than, the "third party beneficiary" doctrine. The factors include: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered harm; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to defendant's conduct; and (6) policy of preventing future harm. Bird v. Rothman, 627 P.2d 1097, 1099 (Ariz. Ct. App.), cert. denied, 454 U.S. 65 (1981); Fickett v. Superior Court of Pima County, 558 P.2d 988, 990 (Ariz. Ct. App. 1976); Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961) (substituting element concerning effect on legal profession for moral blame element); Schick v. Bach, 238 Cal. Rptr. 902, 908 (Cal. Ct. App. 1987); McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); Baer v. Broder, 436 N.Y.S.2d 693, 696 (N.Y. 1981); Auric v. Continental Casualty Co., 331 N.W.2d 325 (Wis. 1983).

ilegged for presenting a defamatory will to probate, they have not addressed the liability of the estate. Therefore, in jurisdictions like Illinois which allow beneficiaries to sue and recognize or do not bar suits for testamentary libel, the drafting attorney is potentially liable.

D. Suggested Uniform Rules

It seems a matter of simple fairness that the estate should be held liable for testamentary libel. When a testator purposefully sets the process in motion, he should not be able to hide behind privilege or outdated common law maxims. Indeed, writing a defamatory will is little different from the tortfeasor who sets a trap for the plaintiff or lights a slow fuse on a bomb before dying. If there is any distinction, it may be that the writer of a defamatory will is more certain to injure his intended victim in some way. Unlike the hypothetical trap or bomb, where the intended victim may avoid harm through any number of circumstances, with testamentary libel, the laws of probate assure that the defamation will be published.

It can hardly be said that public policy favors defamation. In fact, it is probably public policy as much as any other reason that has led courts to hold the estate liable for testamentary libel. By holding the estate liable, perhaps testators and their lawyers will be more reluctant to use the will as a vehicle for tortious conduct, and the incidents of testamentary libel, already rare, will become rarer still. In addition, the executor should also be held personally liable for testamentary defamation. Though some courts have held that the executor is absolutely privileged in presenting a defamatory will for probate, a better rule is to hold executors liable for testamentary libel while at the same time giving them the duty to petition the court to expunge the libel from the probate copy.

There is also authority for holding the executor liable to the beneficiaries for diminishing the assets of the estate. Just as an executor may be removed for waste, negligence, or mismanagement as a fiduciary, he is also personally accountable for negli-
In Matter of Piccione's Estate, the Court of Appeals of New York held that an executor is personally liable for acts "motivated by an improper purpose," even if committed in the course of administration of the estate. Certainly, defamation is an improper purpose, and the executor should not be able to hide behind privilege where a better alternative exists. Holding the executor personally liable for testamentary defamation not only gives the victim an avenue of redress, but also serves other public policy goals. Holding the executor to a higher standard encourages professionalism and may well help eliminate inefficiencies caused by executors unprepared or unwilling to do the job properly.

If the executor's duty to petition the court is to have any meaning, the probate courts must be given the authority to grant such a motion. Giving the court the authority to strike scandalous non-dispositive language from the probate copy is supported by substantial precedent. Such authority allays the concerns expressed in cases such as Nolin v. Nolin, that if an executor held liable for merely presenting a libelous will in court, the felonious alteration of wills, to avoid such liability, might result.

Those courts that allow removal of libel from the probate copy of the will do so on two theories. First, and foremost, because the primary intent of the testator is thought to be to bequeath his estate to his beneficiaries, deleting the actionable language protects the estate from liability and assures most of the corpus will be distributed as directed. Second, the courts have held that such language, being nondispositive in nature, is not technically a part of the will, and may be removed without affect. Even though there is conflicting precedent concerning the authority of the courts to remove any language from a testamentary document, a more open


136. 442 N.E.2d 1180 (N.Y. 1982).

137. Id. at 1185 (citations omitted).

138. See supra notes 86-103 and the accompanying text for a discussion that a cause of action for testamentary libel exists and survives the death of the testator.

139. See, e.g., Hudak, supra note 8 at 1150.

140. Id.

141. Some courts have held that words may be omitted to effectuate the testator's intent. See, e.g., Wheeler v. Williams, 81 N.E.2d 175, 177 (Ill. 1948) ("The intention of the testator must be carried out, even though some words must be rejected or changed.") (citation omitted); Papa v. Papa, 36 N.E.2d 717, 719 (Ill. 1941) (finding repugnant words may be rejected or transposed); Chicago Title & Trust Co. v. Schwartz, 458 N.E.2d 151, 154 (Ill. App. Ct. 1983)
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reading of case law allows for such power. Even accepting the language of the most conservative courts as controlling on this issue, the possibility of removing defamatory language from probate still exists.

For example, the courts of New York hold that courts may not treat any language as superfluous if at all possible.\textsuperscript{142} However, New York also follows the English rule of deleting libel from the probate copy of the will as nondispositive, nugatory language.\textsuperscript{143} Thus, the court's general reluctance to tamper with the language of a will and the authority to excise defamation are not necessarily incompatible.

A simple and direct approach would be a concise statute declaring that the testator's estate, the drafting attorney, and the executor are liable for testamentary libel. This assures the victim of adequate means of redress for his injuries. Also, the statute should clearly grant the probate courts the authority to excise defamatory matter from a will and place the original under seal. The statute should also specifically state that testamentary libel survives the death of the tortfeasor.\textsuperscript{144} Finally, the statute should state that the fiduciary duties of an executor include the duty to petition the court for removal of any testamentary libel.

This approach has the benefit of being preventative rather than merely remedial. Its goal of preventing all forms of defama-

\textsuperscript{142} See, e.g., Carr v. Herman, 158 N.E.2d 770, 772 (Ill. 1959) (construing will so that no language will be rejected as superfluous if possible).

\textsuperscript{143} See, e.g., supra notes 61-85 and the accompanying text discussing courts willingness to expunge defamatory material from text of a will.

\textsuperscript{144} This is necessary to remove problems with abatement. Under the common law and most modern statutes, a cause of action for defamation or libel does not survive the death of either party. See, e.g., 755 ILCS 5/27-6 (1993); KY. REV. STAT. ANN. § 411.140 (Michie/Bobbs-Merrill 1992); N.C. GEN. STAT. § 28A-19-3 (1984). This arbitrary rule, however, does not adequately address a tort that does not arise until the death of the defendant. Though two early attacks on the constitutionality of the exclusion of slander and other intentional torts from survival statutes failed. See Stanley v. Petherbridge, 42 P.2d 293 (Colo. 1935), overruled on other grounds sub nom. Publix Cab Co. v. Colorado Nat'l Bank of Denver, 338 P.2d 702, 712 (Colo. 1959); Nadstanek v. Trask, 281 P.2d 840 (Or. 1929). Two more recent attempts have succeeded and those jurisdictions have held the arbitrary exclusion of libel actions from the survival statutes unconstitutional. See Thompson v. Petroff's Estate, 319 N.W.2d 400, 406 (Minn. 1982) (equal protection violation); Moyer v. Phillips, 341 A.2d 441, 444 (Pa. 1975) (holding exclusion of libel and slander from survival statutes violated state equal protection clause). However, the Fourth Circuit has held South Carolina's survival statute—as interpreted by the state supreme court to exclude slander, malicious prosecution, and fraud—survives an equal protection challenge under the rational basis test. Faircloth v. Finesod, 938 F.2d 513, 516-17 (4th Cir. 1991).
tion presented by testamentary libel is reached by attaching liability at all stages of development of the tortious act. Unlike merely removing the objectionable language from probate, which cannot prevent publication of the libel to the probate court, this approach has the potential to eliminate it from the beginning. Holding the drafting attorney and the executor liable may thwart the clever defamer from committing libel in his will and draining his estate of all probate assets. Perhaps this combination of responsibilities and liabilities will put an end to this problem that has vexed the courts for years, and the tort of testamentary defamation will itself be finally put to rest.