Opinion issued December 8, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00669-CV

NADINE YVONNE COLEMAN ODOM, Appellant

V.

HOWARD WILLIAM COLEMAN III, Appellee

On Appeal from Probate Court No. 2
Harris County, Texas
Probate court Case No. 471981

O P I N I O N

This is a dispute between a brother, Howard William Coleman, III ("Howard"), and his sister, Nadine Yvonne Coleman Odom ("Nadine"), regarding the estate of their late-father, Howard E. Coleman ("Mr. Coleman"). The dispute centers on whether Mr. Coleman's will should be reformed pursuant to Estates Code

subsection 255.451(a)(3), which permits a court to modify or reform a will if "necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent," which must be established by clear and convincing evidence. *See* TEX. EST. CODE § 255.451(a)(3), (b).

Mr. Coleman's will stated that he "intend[ed] that [the] Will dispose of all property subject to [his] testamentary power." However, the will's residuary clause limited the property devised to "personal property," which passed first to Howard then to Nadine. The will, as written, failed to convey Mr. Coleman's real property, resulting in Mr. Coleman dying intestate with respect to his realty.

At trial, Howard offered evidence showing that the attorney who had prepared Mr. Coleman's will was instructed to draft a formal will to mirror a will handwritten by Mr. Coleman. Howard asserted that the handwritten will showed that Mr. Coleman had intended to dispose of all his property, real and personal. The attorney who prepared Mr. Coleman's formal will testified that he used a former client's will as a template to draft Mr. Coleman's will. He had intended to delete the word "personal" appearing before the word "property" in the template so that the will disposed of all of Mr. Coleman's property. He testified that he failed to delete the word, characterizing it as "just a cut-and-paste mistake." After considering the evidence, the probate court reformed Mr. Coleman's will by deleting the alleged scrivener's error, that is, the word "personal" before the word "property" in the

residuary clause, to make the will conform to Mr. Coleman's intent of disposing of all his property in the formal will.

On appeal, Nadine challenges the judgment raising six issues.[1] She contends as follows: (1) the probate court's reformation of the will was impermissible because "courts cannot rewrite a will after the testator's death when the will is unambiguous"; (2) the attorney correctly drafted the will to reflect Mr. Coleman's intent to dispose of only his personal property; (3) if there was scrivener's error, the probate court's reformation of the will was beyond the scope of what is permitted by subsection 255.451(a)(3); (4) the evidence was not sufficient to show Mr. Coleman's intent by clear and convincing evidence; (5) the probate court erred by admitting extrinsic evidence to prove Mr. Coleman's intent; and (6) the probate court erred by rejecting Nadine's claim that Howard forfeited his right to inherit under the will by violating the will's *in terrorem* clause.

We hold, pursuant to Estates Code subsection 255.451(a)(3), that the probate court correctly reformed the will by deleting the scrivener's error—the word "personal" before the word "property"—to make the will conform to Mr. Coleman's intent of disposing of all his property in his formal will, and we hold that the record

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[1] We note that the issues contained in the "Issues Presented" section of Nadine's brief do not exactly match the issues identified in the main headings in the body of her brief. Because they are supported by argument, we consider the issues presented in the body of Nadine's brief as the main issues on appeal.

supports the probate court's rejection of Nadine's claim that Howard violated the *in terrorem* clause. Accordingly, we affirm the probate court's judgment.

Background

Family History

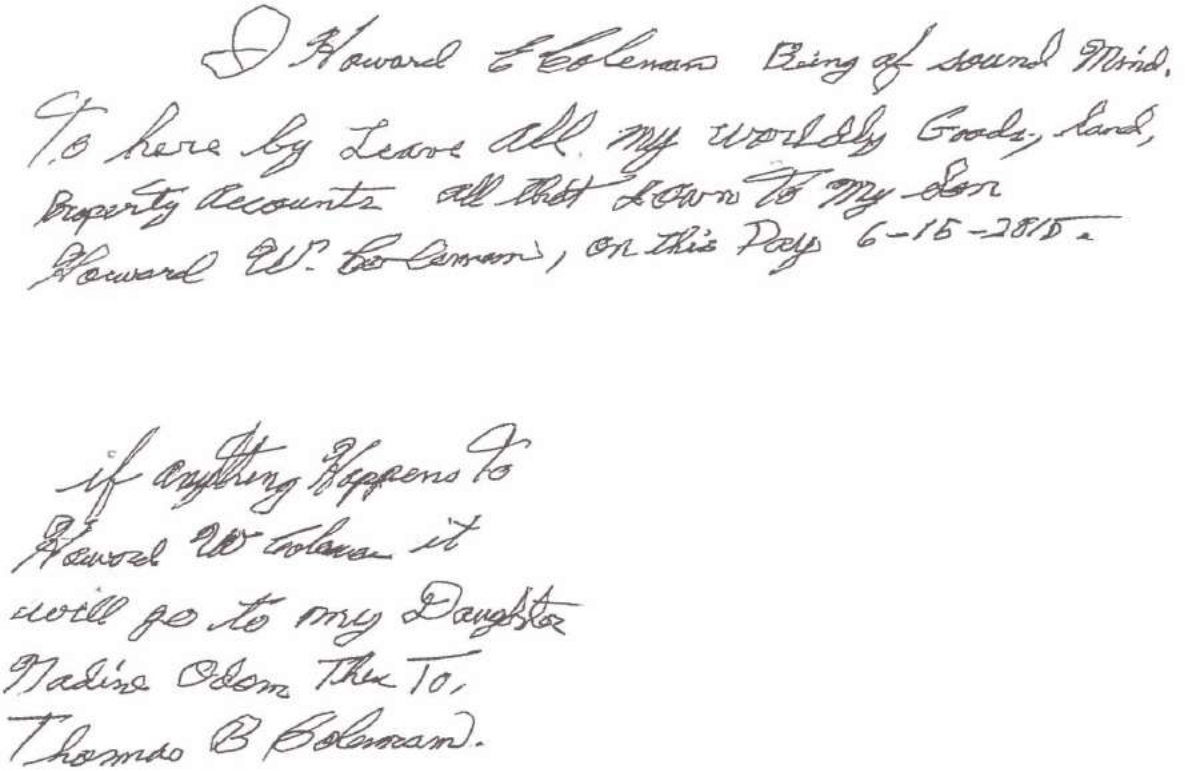
Mr. Coleman was married to Rosa Marie Coleman until her death in 1989. The couple had five children together: Ellsworth, Carolyn, Nadine, Thomas, and Howard. Ellsworth predeceased Mr. Coleman in 2000. Mr. Coleman died on July 6, 2018 at the age of 80. He was survived by his children Carolyn, Nadine, Thomas, and Howard.

Before his death, Mr. Coleman suffered from kidney disease and had not been in good physical health for many years. From 2000 to 2015, Howard and his wife, Vivian, had cared for Mr. Coleman in Mr. Coleman's home. In 2015, Mr. Coleman's health declined to the point where he had difficulty walking. Because he needed more care, Mr. Coleman moved to a nursing home, The Buckingham, on June 15, 2015. Howard and Vivian assisted Mr. Coleman in finding The Buckingham, and they were the only family members who helped Mr. Coleman move into the nursing home. Howard continued to assist Mr. Coleman while he lived at The Buckingham, and Howard paid for some of his father's nursing home costs. Howard testified at trial that, although his father's physical health had declined, Mr. Coleman remained "very coherent" while he lived at The Buckingham. Howard testified that he and his

father played dominoes every day, and he indicated that he and his father remained close. While Howard's siblings sometimes visited their father, Howard and Vivian were the family members who primarily attended to Mr. Coleman.

The Handwritten Will

When he moved to The Buckingham, Mr. Coleman did not have a will. After the nursing home's staff inquired whether he had a will, Mr. Coleman wrote a will by hand that same day. Vivian was with Mr. Coleman when he wrote the will, and she saw him write most of it. Below is an image of Mr. Coleman's handwritten will:


I Howard E Coleman Being of sound Mind.
To here by Leave all my Worldly Goods, Land,
Property Accounts all that I own To My Son
Howard W. Coleman, on this Day 6-15-2015.

if anything Happens To
Howard W Coleman it
will go to my Daughter
Nadine Odom Then To,
Thomas B Coleman.

As seen in the image, Mr. Coleman stated in his handwritten will: "I Howard E Coleman . . . leave all my worldly goods, land, property accounts all that I own to

my son Howard W. Coleman on this day 6-15-2015. If anything happens to Howard W Coleman it will go to my daughter Nadine Odom then to Thomas B Coleman."

Sabina Gonzalez, a notary public employed by the nursing home, notarized Mr. Coleman's signature on the handwritten will. That same day, Mr. Coleman also signed a durable power of attorney, naming Howard as his attorney-in-fact, which Gonzalez also notarized. Howard was not present when his father wrote the handwritten will, but Mr. Coleman indicated to Howard the next day that the will stated his intent regarding his estate.

Preparation of Mr. Coleman's Formal Will

Mr. Coleman expressed concern to Vivian whether his handwritten will was valid, so Vivian suggested that an attorney, Chris Iverson, review the will. Mr. Coleman agreed, and Vivian faxed the handwritten will to Iverson. Iverson testified at trial that one-third of his practice was probate and estate matters, and he was experienced in drafting wills. After reviewing the handwritten will, Iverson indicated that he thought that the will was probably valid but recommended that Mr. Coleman execute a formal, self-proving will.

Vivian and Mr. Coleman talked about asking Iverson to prepare a will, and Mr. Coleman decided that Iverson should prepare a formal will based on his handwritten will. Vivian faxed Mr. Coleman's handwritten will and the power of attorney to Iverson. Vivian testified that she was the intermediary between Mr.

Coleman and Iverson. On behalf of Mr. Coleman and at his request, Vivian asked Iverson to prepare a will based on what Mr. Coleman had written in his handwritten will. At no point did Mr. Coleman tell Iverson to prepare a will that was different than his handwritten will. Iverson testified that it was his intention to prepare a will that mirrored the handwritten will. In drafting Mr. Coleman's will, Iverson used a former client's will as the template. Iverson testified that, to make the will conform to Mr. Coleman's "wishes," he deleted "a lot of things" from the template.

Iverson prepared Mr. Coleman's will and sent it to Vivian. Mr. Coleman signed the formal will on August 19, 2015. Like the handwritten will, it was notarized by Gonzalez. The will reflects that David Wegner and Karina Denis were witnesses to the will's signing.

In 2016, Iverson was reviewing his client files in preparation of his retirement from the practice of law. He noticed that Mr. Coleman's will, signed the previous year, had not been printed in the correct format, which affected the document's pagination. The witnesses' initials, instead of being at the bottom of each page, had been pushed to the top of the next page. Iverson contacted Vivian and asked Mr. Coleman to re-execute the will printed in the correct format.

Mr. Coleman re-executed the will ("Final Will") on November 10, 2016. The Final Will had the same content as the will Mr. Coleman had signed in 2015, the only difference between the wills was the formatting to correct the pagination.

Gonzalez notarized the Final Will, and David Wegner and Karina Denis again witnessed Mr. Coleman's signing. At trial, Denis testified that she heard Mr. Coleman say that he was giving his property to Howard. Wegner testified that he and Mr. Coleman spoke at the time of the will signing. Mr. Coleman told Wegner that he owned "a piece of property" and that he was giving "his estate" to his son.

The Final Will named Howard as independent executor. It also stated that Mr. Coleman "intend[ed] that th[e] Will dispose of all property subject to [his] testamentary power." Paragraph 2.1 gave Mr. Coleman's "personal effects" to Howard. The will's residuary clause, Paragraph 3.2, provided as follows:

> I [Mr. Coleman] give all my remaining personal property to my son Howard W. Coleman. If he shall not survive me, then that portion of my estate that would have passed to him shall pass instead to my daughter Nadine Odom. If she shall not survive me, then that portion of my estate that would have passed to her shall pass instead to my son Thomas B. Coleman. If all three of said beneficiaries shall predecease me, then my estate shall pass to my heirs at law.

As drafted by Iverson, the Final Will (which was the re-formatted will prepared by Iverson in 2016) did not dispose of Mr. Coleman's real property. Paragraph 3.2, the residuary clause, only disposed of Mr. Coleman's "personal property." Iverson testified that when he prepared Mr. Coleman's will, he was aware that Mr. Coleman owned real property. Before he drafted the initial will in 2015, Iverson had learned that information from Howard and Vivian. Iverson stated that Mr. Coleman also told him in 2016 that he owned real property.

Iverson testified that his intention was "to write the will just as the handwritten will was written." Iverson indicated that he did not intend for the word "personal" to modify the word "property" in the residuary clause. He stated that he did not insert the word "personal" into the will, instead, he had intended to delete it. He explained that he had forgotten to delete the word "personal" from the former client's will that he used as a template for Mr. Coleman's will. Iverson stated that he "intended for the will to dispose of every piece of any interest [Mr. Coleman] had in anything, including realty, including personalty." Iverson testified that his failure to remove the word "personal" was his mistake, and he characterized it as "just a cut-and-paste mistake."

Probate Court Proceedings

After Mr. Coleman died, Howard filed an application (1) to probate the Final Will, (2) for issuance of letters testamentary, and (3) to be appointed as the will's independent executor. Nadine filed a petition for declaratory judgment, asking the probate court to construe the Final Will. She requested the probate court to render "a declaratory finding that [Mr. Coleman's] will does not dispose of his real property and the real property shall pass pursuant to the laws of intestacy." Howard answered Nadine's petition, pleading, as an affirmative defense, that it was "necessary for the [probate] court to modify or reform the [Final Will] to conform with [Mr. Coleman's] intent."

Howard amended his application to probate the will and for issuance of letters testamentary. Along with the application, Howard petitioned the court to modify or reform the Final Will pursuant to Estates Code subsection 255.451(a)(3), which permits the probate court to modify or reform a will's terms when "necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent." *See id.*

Howard requested the probate court to reform the residuary clause, which disposed of only Mr. Coleman's "personal property" and did not dispose of Mr. Coleman "real property." Howard asked the probate court "to reform or modify the will to strike the word 'personal' from Paragraph 3.2 [the residuary clause]," asserting that the word "personal" was a scrivener's error. Howard stated that Iverson would testify that it was his "mistake that the word 'personal' was included in Paragraph 3.2." Howard asserted that Iverson's testimony would show that Mr. Coleman "intended [the] Will to match the dispositions made in [his] previous holographic will" and that Mr. Coleman "intended to leave all of his property, both real and personal, to Howard."

Nadine answered Howard's application and petition to reform the Final Will. Nadine asserted that the alleged error in the will exceeded the scope of a scrivener's error permitted to be corrected under Estates Code subsection 255.451, and she objected to the admission of extrinsic evidence to show Mr. Coleman's intent. She

also asserted that Howard's petition to modify or reform violated the Final Will's *in terrorem* clause, which provided: "If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will, or any of its provisions, then I [Mr. Coleman] hereby revoke any share or interest in my estate given to that contesting beneficiary under this Will."

The dispute over Mr. Coleman's Final Will was tried to the bench. Howard, Iverson, and Vivian testified at trial. The probate court also heard the testimony of the notary public, Gonzalez, who notarized Mr. Coleman's handwritten and formal wills, and the testimony of Wegner and Denis, the two witnesses to Mr. Coleman's signing of the formal wills. Howard offered documentary evidence, including Mr. Coleman's handwritten will, the initial 2015 formal will, and Mr. Coleman's Final Will.

At the end of trial, the probate court ruled in favor of Howard. The court made its ruling on the record as follows: "[A]fter hearing the evidence and seeing the exhibits here, I think by clear and convincing evidence this is a scrivener's error. And, therefore, I'm going to reform the will to reflect the testator's intent, which I believe [was] to be leaving all the property that he owned to his son [Howard]."

The probate court signed a judgment ordering the Final Will admitted to probate, appointing Howard as independent executor, and issuing letters testamentary to Howard. In the judgment, the probate court found that Mr.

Coleman's Final Will "contained a scrivener's error" and that it was "necessary" for the probate court "to reform or modify the Will by striking the word 'personal' found in the first sentence of Paragraph 3.2 so the Will conforms with [Mr. Coleman's] intent; [and] that there [was] clear and convincing evidence that the Testator intended to leave his entire estate to his son Howard W. Coleman." The probate court ordered the word "personal" stricken "from the first sentence of Paragraph 3.2" of the Final Will.

At Nadine's request, the probate court issued findings of fact and conclusions of law in support of the judgment. Among its findings were the following:

> 2. On June 15, 2015, Mr. Coleman handwrote a holographic will that declared Mr. Coleman would "leave all my worldly goods, land, property accounts all that I own to my son Howard W. Coleman, on this day 6-15-2015. If anything happens to Howard W. Coleman it will go to my daughter Nadine Odom then to Thomas B. Coleman."
>
> . . . .
>
> 7. . . . Vivian Coleman testified after speaking with Mr. Coleman, she asked Chris Iverson to prepare a formal will that mirrors Mr. Coleman's intent as found in the holographic will. Chris Iverson confirmed in his testimony that he was asked to draft a formal will that mirrors Mr. Coleman's intent found in the holographic will.
>
> 8. Chris Iverson testified that he prepared the formal will by using a former client's will as a template and deleted non-applicable sections and bequeaths so as to mirror Mr. Coleman's intent as found in the holographic will.
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> 9. The formal will that Chris Iverson prepared stated Mr. Coleman intended "this Will to dispose of all property subject to my testamentary power." However, by mistake or omission, the formal Will failed to

convey Mr. Coleman's real property as intended in paragraph 3.2 of the formal will. . . .

10. Chris Iverson testified that he intended to draft the formal will to dispose of Mr. Coleman's entire estate, including his real property. Chris Iverson further testified that he did not type the word "personal" in paragraph 3.2 of the formal will but merely forgot to delete the word as he edited a previous client's will to conform to Mr. Coleman's intent. His testimony revealed that only by his clerical error did he neglect to delete the word "personal" from paragraph 3.2 of the formal will. Due to the scrivener's error in drafting the formal will, the formal will failed to dispose of Mr. Coleman's residue of his estate, including his real property.

11. On or about August 19, 2015, the formal will was executed by Mr. Coleman and a copy was faxed to Chris Iverson. David Wegner and Karina Denis were witnesses to the execution of the formal will. . . .

12. Approximately one year later, Chris Iverson testified that he was reviewing his client files in preparation of retirement and noticed the executed formal will was not printed out in the correct format. . . .

13. On or about November 10, 2016, Mr. Coleman re-executed the same formal will Chris Iverson prepared with the correct formatting. David Wagner and Karina Denis were again witnesses to the execution of the formal will.

14. David Wegner, witness to the signing of the November 10, 2016 will, testified that he personally heard Mr. Coleman state during the execution of the will that he was leaving all of his estate to his son Howard W. Coleman. This statement was corroborated by the second witness to the will, Karina Denis, who also testified that she heard Mr. Coleman make the same statement about leaving his entire estate to his son Howard W. Coleman.

. . . .

21. A trial for Howard W. Coleman's Petition for Modification was held on August 6, 2019. The Court found clear and convincing evidence of the testator's intent was established to show a necessity to reform or

modify the formal will to conform to the Testator's intent, and the Court ordered the word "personal" to be struck from the first sentence of paragraph 3.2 in the formal will.

The probate court's conclusions of law included the following:

> 1. Texas law has long held a presumption against intestacy when one leaves a will. . . .
>
> 2. Section 255.451 of The Texas Estates Code allows a personal representative to correct a scrivener's error in the terms of the will by petition of a personal representative to the Court.
>
> . . . .
>
> 4. Black's Law Dictionary defines a "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." BLACK'S LAW DICTIONARY 563 (7th ed. 1999).
>
> 5. The burden of proof for a clear and convincing evidence standard requires a party to prove that a particular fact is substantially more likely than not to be true.
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> . . . .
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> 7. The Court found that Mr. Coleman did not intend to die intestate as to his real property.
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> 8. The Court further found clear and convincing evidence had been established to show a necessity to reform or modify the formal will to correct a scrivener's error to conform the formal will to Mr. Coleman's intent and dispose of all of his property as intended by examining:
>
> > (a) Mr. Coleman's holographic will . . . .
> >
> > (b) The testimony of attorney Chris Iverson . . . ; and

> (c) the testimony of David Wegner and Karina Denis, the two witnesses to the execution of Mr. Coleman's formal will, who both testified that each heard Mr. Coleman state he was leaving his entire estate to his son Howard W. Coleman during the execution of the formal will. The testimony of David Wegner and Karina Denis regarding statements made by Mr. Coleman were admitted under the exception to the Dead Man's Statute [found in Texas Rule of Evidence 602(b)] that requires a party's statements be corroborated. The Court found that David Wegner's testimony regarding Mr. Coleman stating his desire to leave his estate to his son Howard W. Coleman was corroborated by Karina Denis, who testified she also heard Mr. Coleman make the same statement that he was leaving his entire estate to his son Howard W. Coleman.

Nadine now appeals. She raises six issues challenging the probate court's judgment.

Will Reformation Versus Will Construction

In her first issue, Nadine contends that the probate court's reformation of Mr. Coleman's will was "impermissible under long-standing Texas law" because "courts cannot rewrite a will after the testator's death when the will is unambiguous." Relatedly, in her fifth issue, Nadine asserts that the probate court erred by admitting extrinsic evidence, which the probate court then relied on to reform the Final Will, because "long-standing Texas law . . . bars [the use of] extrinsic evidence to cast doubt on an unambiguous term" in a will. Nadine raises these issues while acknowledging that the probate court relied on subsection 255.451(a)(3) of the Estates Code to reform Mr. Coleman's Final Will.

Estates Code section 255.451 provides as follows:

> (a) Subject to the requirements of this section, on the petition of a personal representative, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:
>
> > (1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;
> >
> > (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or
> >
> > (3) the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent.
>
> (a-1) A personal representative seeking to modify or reform a will under this section must file a petition on or before the fourth anniversary of the date the will was admitted to probate.
>
> (b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.
>
> (c) Chapter 123, Property Code, applies to a proceeding under Subsection (a) that involves a charitable trust.

TEX. EST. CODE § 255.451. Thus, under the statute, a court may modify or reform an unambiguous will to correct a scrivener's error when necessary to conform the will to the testator's intent, which must be shown by clear and convincing evidence. *See id.* § 255.451(a)(3), (b).

Nadine cites *San Antonio Area Found. v. Lang* for the principle that, when construing an unambiguous will (such as the Final Will here), a court ascertains the

testator's intent from the language in the document's four corners. *See* 35 S.W.3d 636, 639 (Tex. 2000) (citing *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980)). She also relies on the principle, reaffirmed in *Lang*, that, "when there is no dispute about the meaning of words used in a will, extrinsic evidence will not be received to show that the [testator] intended something outside of the words used." *Id.* (citing *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687, 688 (Tex. 1984); *Newton*, 554 S.W.2d at 153; *Huffman v. Huffman*, 339 S.W.2d 885, 888 (Tex. 1960)). However, *Lang*, the cases it cites, and the cases relying on *Lang* for these principles are not will reformation or modification cases; instead, they involve will construction. *See id.*; *see also Dudley v. Jake & Nina Kamin Found.*, No. 01-12-00579-CV, 2014 WL 298270, at *2 (Tex. App.—Houston [1st Dist.] Jan. 28, 2014, no pet.) (mem. op.) (citing *Lang* to construe will).

Reformation and modification cases involving written instruments are fundamentally different than construction cases, and, as a result, the same legal principles do not apply. *See In re Ignacio G. & Myra A. Gonzales Revocable Living Tr.*, 580 S.W.3d 322, 327–29 (Tex. App.—Texarkana 2019, pet. denied) (discussing legal principles that apply to construe unambiguous trust instrument and principles that apply to reform unambiguous trust instrument when scrivener's error alleged); *see also City of San Antonio v. Berry*, 48 S.W. 496, 498 (Tex. 1898) (explaining that, if parties agree to contract for term of fifteen months, and "if in drawing [the

contract] 'twelve' is inserted by mutual mistake instead of 'fifteen,' either [party] may enforce it as agreed upon by alleging and proving the mistake and reforming the instrument. In such a case it is a question of reformation, and not of construction").

Reformation cases involve a party claiming that the instrument, as written, contains an error and does not reflect the intent of the party or parties executing it. *See Horse Hollow Generation Tie, LLC v. Whitworth-Kinsey #2, Ltd*., 504 S.W.3d 324, 327 (Tex. App.—Austin 2016, no pet.) ("The fact that an error was caused by a scrivener's or draftsman's failure to embody the true agreement of the parties in a written instrument is a proper ground for reformation."); *Brinker v. Wobaco Tr. Ltd*., 610 S.W.2d 160, 163 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.) ("If, by mistake, an instrument as written fails to express the true intention or agreement of the parties, equity will grant reformation of the instrument so as to make it correctly express the agreement actually made."). In contrast, will construction cases seek to ascertain the testator's intent from the language in the will as written. *See Lang*, 35 S.W.3d at 639.

Significantly, Estates Code subsection 255.451(a)(3) expressly provides that a will may be reformed or modified to correct a scrivener's error in the will's terms, even if the will's terms are unambiguous. TEX. EST. CODE § 255.451(a)(3). Because reformation is permitted even when the will's language is unambiguous, reliance on

extrinsic evidence to determine whether the terms of the will accurately reflect the testator's intention may be necessary. *See id.* While extrinsic evidence is admissible in will-construction cases only when a term is open to more than one construction, *Lang*, 35 S.W.3d at 639, courts have considered extrinsic evidence in reformation cases in other contexts, such as reformation of trust instruments, even when the language in the instrument is unambiguous, *see In re Ignacio G. & Myra A. Gonzales Revocable Living Tr.*, 580 S.W.3d at 330 (citing *Brinker*, 610 S.W.2d at 164) (considering extrinsic evidence of settlor's intent to determine whether trust was properly reformed).

We note that Section 12.1 of the Restatement (Third) of Property also supports consideration of extrinsic evidence in reformation cases:

> A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 12.1 (2003). Comment b to Section 12.1 further explains that the higher clear-and-convincing standard of proof, which applies here to the reformation or modification of a will under Estates Code section 255.451(a)(3), safeguards against the possible dangers of considering extrinsic evidence to reform donative instruments:

> When a donative document is unambiguous, evidence suggesting that the terms of the document vary from intention is inherently suspect but possibly correct. The law deals with situations of inherently suspicious but possibly correct evidence in either of two ways. One is to exclude the evidence altogether, in effect denying a remedy in cases in which the evidence is genuine and persuasive. The other is to consider the evidence, but guard against giving effect to fraudulent or mistaken evidence by imposing an above-normal standard of proof. In choosing between exclusion and high-safeguard allowance of extrinsic evidence, this Restatement adopts the latter. Only high-safeguard allowance of extrinsic evidence achieves the primary objective of giving effect to the donor's intention.

Id. § 12.1 cmt. b; *see* TEX. EST. CODE § 255.451(b) (providing that order reforming or modifying will under subsection (a)(3) to conform will to testator's intent may be issued "only if the testator's intent is established by clear and convincing evidence").

After considering Estates Code section 255.451 and the other legal authorities discussed, we reject Nadine's assertion that "long-standing Texas law" prohibited the probate court from reforming the Final Will. We also hold that the probate court did not err by considering extrinsic evidence to ascertain Mr. Coleman's intent with respect to whether he intended to limit the property he bequeathed to Howard in Paragraph 3.2 of his will to "personal" property or whether he intended his will to convey all of his property.

We overrule Nadine's first and fifth issues.

The Probate Court's Reformation of the Final Will

In her second, third, and fourth issues, Nadine challenges the probate court's decision to reform Mr. Coleman's Final Will. In her second issue, Nadine contends

that the probate court incorrectly found scrivener's error in Paragraph 3.2 because Iverson properly drafted the will to reflect Mr. Coleman's intent. Second, Nadine asserts that, if Iverson did err in preparing the will, the probate court's reformation of the will was beyond the scope of what is permitted to correct scrivener's error under Estates Code subsection 255.451(a)(3). Third, she contends that the evidence was not sufficient to show, by clear and convincing evidence, Mr. Coleman's intent regarding the disposition of his property.

A. Standard of Review

We review the probate court's determination to reform or modify a will under section 255.451 for abuse of discretion. *See* TEX. EST. CODE § 255.452 (providing that "court shall exercise the court's discretion to order a modification or reformation under this subchapter . . . ."); *see also In re Willa Peters Hubberd Testamentary Tr.*, 432 S.W.3d 358, 365 (Tex. App.—San Antonio 2014, no pet.) (stating that probate court's order modifying terms of trust reviewed under abuse of discretion standard). A trial court abuses its discretion when it acts "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). An abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009).

B. Mr. Coleman's Final Will Contained an Error

In her second issue, Nadine asserts that the probate court's judgment should be reversed because "there was no error made by the scrivener," Iverson, in preparing Mr. Coleman's formal will. Rather, she asserts that the will was drafted as intended at the time it was made. As discussed, in the Final Will, the residuary clause, found in Paragraph 3.2, limited the property conveyed to "personal property." The will did not devise Mr. Coleman's real property, resulting in Mr. Coleman dying intestate with respect to his real property.

Nadine contends that, when he initially drafted the will in 2015, Iverson was not aware that Mr. Coleman owned real property because he did not speak directly with Mr. Coleman at that time. Iverson testified that he later learned from Mr. Coleman directly that he owned real property. Nadine posits that, without knowing that Mr. Coleman owned real property when he drafted the initial will in 2015, Iverson could not have erred in failing to remove the word "personal" in order to dispose of Mr. Coleman's real property because Iverson "was not apprised of the facts that would have allowed him to make such an error." The record, however, supports the probate court's determination that Iverson's failure to delete the word "personal" was an error by the scrivener and that it was an error when it was made.

Iverson testified that, at the time he initially prepared Mr. Coleman's will in 2015, he knew that Mr. Coleman owned real property. He stated that he learned that

information from Howard and Vivian. Thus, regardless of whether he learned the information from Mr. Coleman directly or through Howard and Vivian—with Vivian acting as Mr. Coleman's intermediary—the record shows that Iverson was aware that Mr. Coleman owned real property when he initially prepared Mr. Coleman's will. Iverson testified that he "intended for the will to dispose of every piece of any interest [Mr. Coleman] had in anything, including realty, including personalty."

Nadine also points out that both Vivian and Iverson testified that Iverson was asked to draft a formal will for Mr. Coleman that "mirrored" his handwritten will. Nadine claims that the will drafted by Iverson did, in fact, "mirror[] the language in the alleged handwritten will." She asserts that "[d]rafting a will in accordance with his client's wishes is not an error."

In his handwritten will, Mr. Coleman stated that he intended to "leave all my worldly goods, land, property accounts all that I own to my son Howard W. Coleman, on this day 6-15-2015. If anything happens to Howard W Coleman it will go to my daughter Nadine Odom then to Thomas B. Coleman."

To support her assertion that the will prepared by Iverson "mirrored" the handwritten will, Nadine asserts as follows:

> [T]he alleged holographic will uses the word "land" to describe the property to be disposed of. The will Mr. Iverson drafted for Mrs. Coleman included the term "personal property" as opposed to the term "land." Under Texas law, real chattel is included in the definition of

> "personal property." TEX. EST. CODE § 22.028. The term "real chattel" includes an interest in land. *See* Chattel Real, Black's Law Dictionary (10th ed. 2014). The record shows that, at some point before his death, [Mr. Coleman] acquired a joint interest in a property that was subject to a life estate interest. This restricted interest in land would be real chattel. Thus, Mr. Iverson drafted a will that mirrored the alleged holographic will[.]"

(Record references omitted.)

As referenced by Nadine, "personal property" includes "an interest in: (1) goods; (2) money; (3) a chose in action; (4) an evidence of debt; and (5) a real chattel." TEX. EST. CODE § 22.028. "'Real property' includes estates and interests in land, whether corporeal or incorporeal or legal or equitable. The term does not include a real chattel." *Id.* § 22.030. "A real chattel, also known as a chattel real, is a real property interest 'that is less than a freehold or fee, such as a leasehold estate.'" *Estate of Neal*, No. 02-16-00381-CV, 2018 WL 283780, at *3 n.5 (Tex. App.—Fort Worth Jan. 4, 2018, no pet.) (quoting Chattel Real, BLACK'S LAW DICTIONARY (10th ed. 2014)).

Howard testified that Mr. Coleman owned a piece of property jointly with Mr. Coleman's sister and that the property was subject to a life estate. But Nadine offers no authority to support her assertion that ownership of property subject to a life estate is a "real chattel," which, in turn, is considered "personal property." *See* TEX. EST. CODE § 22.028(5). Regardless of the propriety of Nadine's argument, the question is not what the evidence showed at trial with regard to Mr. Coleman's ownership

interest in "land"; rather, the question is whether Mr. Coleman intended to convey both his real property and his personal property in his handwritten will.

"We interpret the words in a will as a layperson would use them absent evidence that the testator received legal assistance in drafting the will or was otherwise familiar with technical meanings." *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) (citing *Bergin v. Bergin*, 315 S.W.2d 943, 946 (Tex. 1958)). Here, Mr. Coleman did not receive legal assistance in drafting his handwritten will. As Nadine points out, the evidence showed that Mr. Coleman and his sister owned property that was subject to a life estate. The evidence also showed that Howard and Vivian, who was relaying information from Mr. Coleman to Iverson, told Iverson that Mr. Coleman owned real property, and Mr. Coleman later directly told Iverson that he owned real property after the initial will was drafted. Because he was a lay person, the most reasonable interpretation of Mr. Coleman's conveyance of "land" in his handwritten will was a conveyance of real property, not a conveyance of personal property. *See id.*

Furthermore, the handwritten will did not convey only "land." Among the other conveyances listed was "property."[2] With regard to the use of the term "property" in a will, we have previously recognized as follows:

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[2] As mentioned, Mr. Coleman stated in his handwritten will that he left "all my worldly goods, land, property accounts all that I own to my son Howard W. Coleman, on this day 6-15-2015." Although no comma appears between "property"

> When used in a will, an unqualified reference to "property" encompasses everything of exchangeable value that the testator owned. *Ellet v. McCord*, 41 S.W.2d 110, 112 (Tex. Civ. App.—Austin 1931, writ ref'd). "Property" is synonymous with "estate" and includes assets of every category. *Van Hoose v. Moore*, 441 S.W.2d 597, 611 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.). As the Supreme Court of Texas stated in another context, the ordinary meaning of "property" includes every type of valuable right and interest, including but not limited to real and personal property and tangible and intangible property. *State v. Pub. Util. Comm'n of Texas*, 883 S.W.2d 190, 200 (Tex. 1994). In its ordinary usage, the term "property" is comprehensive. *Womack v. Womack*, 172 S.W.2d 307, 308 (Tex. 1943); *April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound*, 153 S.W.3d 519, 524 (Tex. App.–Amarillo 2004, no pet.).

In re Estate of Setser, No. 01-15-00855-CV, 2017 WL 444452, at *3 (Tex. App.—Houston [1st Dist.] Feb. 2, 2017, no pet.). Mr. Coleman used the term "property" not only without restriction but in a comprehensive list of conveyances, including giving Howard "all that I own."

We conclude that the handwritten will showed an intent by Mr. Coleman to covey both personal and real property to Howard. The Final Will prepared by Iverson did not "mirror" Mr. Coleman's handwritten will because it conveyed only Mr. Coleman's personal property. Thus, the evidence shows that the placement of the word "personal" before the word "property" in the Final Will was an error.

We overrule Nadine's second issue.

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and "accounts," the words appear in a list identifying everything that Mr. Coleman was bequeathing to Howard. We interpret "property" and "accounts" as separate items in the list.

C. Scrivener's Error under Subsection 255.451(a)(3)

In her third issue, Nadine contends that, even if including the word "personal" before the word "property" in the Final Will's residuary clause was error, it was not "scrivener's error" as contemplated by Estates Code subsection 255.451(a)(3). Although we review the probate court's decision to modify or reform a will under section 255.451 for abuse of discretion, to the extent this issue turns on a matter of statutory construction, we review it de novo. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

The Estates Code does not define the phrase "scrivener's error." Generally, when a statute uses an undefined word, a court should apply the word's common, ordinary meaning. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). "We often look to dictionary definitions to shed light on the ordinary meaning of a statutory term." *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 60 (Tex. 2019). Black's Law Dictionary defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." BLACK'S LAW DICTIONARY 563 (7th ed. 1999).

Iverson's failure to delete the word "personal" from the residuary clause falls within the definition of "scrivener's error." As discussed, Iverson testified that he used a former client's will as a template to draft Mr. Coleman's will. Iverson stated

that, to make the will conform to Mr. Coleman's "wishes," he had to delete "a lot of things" from the former client's will. Iverson intended to delete the word "personal" before the word "property" but failed to do so. Iverson testified that his failure to remove the word "personal" was "just a cut-and-paste mistake." The evidence showed that the error was not a result of Iverson's professional judgment or based on a decision that he or Mr. Coleman made to limit the property he devised to personal property. Instead, the evidence showed that Iverson's error in failing to delete the word "personal" resulted from an "inadvertence." *See id.* Thus, we conclude that the evidence and the plain and ordinary meaning of what constitutes a scrivener's error supports the probate court's determination that Iverson's failure to delete the word "personal" was a scrivener's error for purposes of Estates Code subsection 255.451(a)(3).

In her brief, Nadine asserts that we should "hold that the term 'scrivener's error'" found in subsection 255.451(a)(3) "can only include correction of typos and clerical errors that do not (1) change the dispositive provisions of the will or (2) disinherit a would-be heir without evidence of an intent to disinherit the would-be heir by the testator in the four-corners of the will." She asserts that "these rules are needed to prevent unnecessary litigation by profiteers at the expense of the heirs selected by the testator at a time when the testator cannot defend his own will."

Nadine cites no legal authority for limiting the definition of "scrivener's error" in the way she suggests. Nothing in the Estates Code permits us to adopt Nadine's narrow reading of what constitutes a scrivener's error. We are mindful that "[a] court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015). If it had intended to limit the definition of scrivener's error to the circumstances described by Nadine, then the Legislature could have included those limitations in the Estates Code. Because the Legislature did not include such restrictions, we must apply subsection 255.451(a)(3) as written. *See id.*; *Jaster*, 438 S.W.3d at 562 ("We must enforce the statute as written and refrain from rewriting text that lawmakers chose.").

We overrule Nadine's third issue.

D. Clear and Convincing Evidence of Mr. Coleman's Intent

In its findings of fact and conclusions of law, the trial court determined that clear and convincing evidence established Mr. Coleman's intent to dispose of all his property in his Final Will, necessitating the court to reform the formal will to correct the scrivener's error in order to conform the will to Mr. Coleman's intent. *See* TEX. EST. CODE § 255.451(a)(3), (b). In her fourth issue, Nadine asserts that Mr. Coleman's intent to dispose of all his property, including his real property, was not shown by clear and convincing evidence as required. *See id.* § 255.451(b).

1. Legal Principles

While we review a probate court's determination to reform or modify a will under subsection 255.451 for an abuse of discretion, *see* TEX. EST. CODE § 255.452, the legal and factual sufficiency of the evidence are factors to consider in assessing whether there was an abuse of discretion, *see In re Guardianship of A.E.*, 552 S.W.3d 873, 877 (Tex. App.—Fort Worth 2018, no pet.). In reviewing the legal sufficiency of the evidence under a clear and convincing standard, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We presume that the trier of fact resolved disputed facts in favor of its findings if a reasonable trier of fact could do so. *Id.* We disregard any contrary evidence if a reasonable trier of fact could do so, but we do not disregard undisputed facts. *Id.*

In reviewing the factual sufficiency of the evidence, we must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *Id.* We must consider the disputed evidence and determine whether a reasonable factfinder could have resolved that evidence in favor of the finding. *Id.* "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could

not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id.*

2. **Analysis**

The probate court indicated in its findings of fact and conclusions of law that Mr. Coleman's handwritten will and the testimony of Iverson, Wegner, and Davis supported its determination that clear and convincing evidence established Mr. Coleman's intent to dispose of all of his property in his Final Will. We agree with Howard that the evidence demonstrated Mr. Coleman's intent to dispose of all his property, including his real property.

Mr. Coleman's handwritten will stated that he intended to "leave all [his] worldly goods, land, property accounts all that [he] own[ed] to [his] son Howard W. Coleman." As discussed, the handwritten will's comprehensive language demonstrated an intent by Mr. Coleman to dispose of all his property, not just his personal property. The evidence—namely the testimony of Vivian and Iverson—showed that Iverson was asked to prepare Mr. Coleman's formal will based on his handwritten will.

In her brief, Nadine questions the "validity" of the handwritten will. She suggests that Vivian and Howard unduly influenced Mr. Coleman, not only to write the handwritten will, but also to execute the two formal wills prepared by Iverson. However, Nadine did not plead in the probate court that Mr. Coleman was unduly

influenced nor was the issue tried by consent. *Cf.* TEX. R. CIV. P. 94 (requiring pleadings to affirmatively set forth every "matter constituting an avoidance or affirmative defense"); *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 851 (Tex. App.—Dallas 2005, pet. denied) (recognizing that affirmative defenses are waived if not pleaded or tried by consent). Moreover, Nadine cites no evidence in the record that supports a finding that Mr. Coleman was unduly influenced to execute his handwritten or formal wills.

Nadine also points out that Vivian testified that she saw Mr. Coleman write most of the handwritten will but not all of it. To show that Mr. Coleman had written and signed the will, Vivian and Howard testified that they were familiar with Mr. Coleman's handwriting and his signature. While viewing the handwritten will at trial, they each provided testimony indicating that the handwritten will was written and signed by Mr. Coleman. *See* TEX. EST. CODE § 251.052 ("[A] will written wholly in the testator's handwriting is not required to be attested by subscribing witnesses"); *Lemus v. Aguilar*, 491 S.W.3d 51, 56 (Tex. App.—San Antonio Mar. 16, 2016, no pet.) ("If the will is handwritten entirely by the testator, the testator need only affix a signature or initials to the document to execute the instrument.").

In addition, Iverson's testimony supported the probate court's finding regarding Mr. Coleman's intent. Iverson testified that he was asked by Mr. Coleman, through Vivian (who acted as an intermediary between Mr. Coleman and Iverson),

to prepare a will that mirrored the handwritten will. Iverson stated that he intended "to write the will just as the handwritten will was written." At no point did Mr. Coleman tell Iverson to prepare a will that was different from his handwritten will. Iverson testified that he had "intended for the will to dispose of every piece of any interest [Mr. Coleman] had in anything, including realty, including personalty." Iverson stated that he did not intend for the word "personal" to modify the word "property" in the residuary clause. He testified that he did not insert the word "personal" into the will; instead, he had meant to delete the word. Iverson acknowledged that his failure to remove the word "personal" was his mistake.

Nadine questions Iverson's credibility. She asserts that, because he was an experienced wills and estates attorney, it was improbable that Iverson reviewed both formal wills without noticing that the wills disposed of only Mr. Coleman's personal property. We are mindful that, in a bench trial, the trial court is the sole judge of the credibility of the witnesses, assigns the weight to be given their testimony, may accept or reject all or any part of their testimony, and resolves any conflicts or inconsistencies in the testimony. *Bush v. Bush*, 336 S.W.3d 722, 730 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014) ("[D]espite the heightened [clear and convincing] standard of review," we "must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter

when assessing the credibility and demeanor of the witnesses."). Here, the probate court was best able "to observe the demeanor and personalities of the witnesses and [to] 'feel' the forces, powers, and influences that cannot be discerned by merely reading the record." *Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). Thus, we defer to the probate court's credibility determinations affecting its decision to reform the Final Will. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

The testimony of Wegner and Denis, the two witnesses to Mr. Coleman's signing of the formal wills, further supported the probate court's finding regarding Mr. Coleman's intent. Wegner testified that he and Mr. Coleman spoke when Mr. Coleman signed his Final Will. Mr. Coleman told Wegner that he owned "a piece of property" and that he was giving "his estate" to his son. Denis testified that she heard Mr. Coleman say that he was giving his property to Howard.

Briefed as part of her sufficiency-of-the-evidence challenge, Nadine questions the admissibility of Wegner's and Davis's testimony. In its conclusions of law, the probate court stated that it had admitted Wegner's and Denis's testimony into evidence under the Dead Man's Rule found in Texas Rule of Evidence Rule 601(b). The Dead Man's Rule generally prohibits a party in certain civil actions from testifying regarding oral statements made by a testator unless the statements can be corroborated or are solicited by the opposing party. *See* TEX. R. EVID. 601(b); *In re*

Estate of Wright, 482 S.W.3d 650, 655 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). In other words, the rule does not prohibit testimony concerning statements made by the deceased testator that are properly corroborated. *See* TEX. R. EVID. 601(b).

The probate court explained that it had determined: "David Wegner's testimony regarding Mr. Coleman stating his desire to leave his estate to his son Howard W. Coleman was corroborated by Karina Denis, who testified she also heard Mr. Coleman make the same statement that he was leaving his entire estate to his son Howard W. Coleman." Nadine claims that Denis's testimony did not corroborate Wegner's testimony. She points out Denis testified that she heard Mr. Coleman state that he was leaving his "property" to Howard while Wegner testified that he heard Mr. Coleman say that he was leaving his "estate" to his son. Nadine asserts that it was unclear to what property either the witnesses or Mr. Coleman was referring in making the statements. However, as we recognized in *Setser*, "'[p]roperty' is synonymous with 'estate' and includes assets of every category." 2017 WL 444452, at *3 (citing *Van Hoose*, 441 S.W.2d at 611). Thus, the probate court could have determined that the witnesses' testimony was sufficiently corroborating. We conclude Nadine has not shown that the probate court abused its discretion in admitting Wegner's and Denis's testimony under the Dead Man's Rule. *See* TEX. R. EVID. 601(b); *see also Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231,

234 (Tex. 2007) ("Evidentiary rulings are committed to the trial court's sound discretion.").

Nadine further challenges Wegner's and Denis's testimony by questioning the witnesses' credibility. She points out that Wegner and Denis were "associates" of Vivian, and neither witness knew Mr. Coleman. Nadine also points out that "[n]either witness could remember basic facts about the execution of the wills. For example, Ms. Denis could not recall who was in the room, who was making statements, and what statements were made." Again, we defer to the probate court's determination of the witnesses' credibility, and we do not re-weigh the evidence. *See In re A.B.*, 437 S.W.3d at 503; *City of Keller*, 168 S.W.3d at 819.

We conclude that the evidence, viewed in the light most favorable to the probate court's finding regarding Mr. Coleman's intent, was sufficiently clear and convincing that a reasonable factfinder could have formed a firm belief or conviction that Mr. Coleman intended to dispose of all his property, real and personal, in his Final Will. *See In re J.F.C.*, 96 S.W.3d at 266. Thus, the evidence was legally sufficient to support that finding. We further conclude that, viewed in light of the entire record, any disputed evidence could have been reconciled in favor of the probate court's finding regarding Mr. Coleman's intent or was not so significant that the probate court could not reasonably have formed a firm belief or conviction that Mr. Coleman intended to dispose of all his property, including his real property, in

the Final Will. *See id*. Accordingly, we hold that the evidence was factually sufficient to support the probate court's finding.

We overrule Nadine's fourth issue. Based on our determination of this and the previous issues, we hold that the probate court properly exercised its discretion when it reformed Mr. Coleman's Final Will by deleting the scrivener's error, that is, the word "personal" before the word "property" in the residuary clause, to make the will conform to Mr. Coleman's intent to dispose of all his property, real and personal. *See* TEX. EST. CODE § 255.451(a)(3), (b); *id.* § 255.452.

***In Terrorem* Clause**

In her sixth issue, Nadine asserts that the probate court erred by determining that Howard did not forfeit his inheritance under the will's *in terrorem* clause by filing his petition to reform and modify the will.

A. Legal Principles

"An *in terrorem* clause in a will or a trust typically makes the gifts in the instrument conditional on the beneficiary not challenging or disputing the validity of the instrument." *Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see In re Estate of Hamill*, 866 S.W.2d 339, 341 n.1 (Tex. App.—Amarillo 1993, no writ) ("The term, *in terrorem*, as applied to wills refers to a legacy given upon condition that the beneficiary will not dispute the validity or disposition of the will."). *In terrorem* clauses are intended to dissuade

beneficiaries under a will or trust from filing vexatious litigation, particularly as among family members, that might thwart the intent of the testator. *See Di Portanova*, 402 S.W.3d at 715 (citing *Gunter v. Pogue*, 672 S.W.2d 840, 842–43 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)); *Ferguson v. Ferguson*, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, pet. denied). If the intention of a suit is to thwart the testator's intention, the *in terrorem* clause should be enforced. *See id.* (citing *Ferguson*, 111 S.W.3d at 599.); *see also Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531, at *2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) ("Courts have enforced *in terrorem* clauses only when the intention of a suit is to thwart the grantor's intention"). We narrowly construe *in terrorem* clauses to avoid forfeiture, while also fulfilling the testator's intent. *Di Portanova*, 402 S.W.3d at 716 (citing *McLendon v. McLendon*, 862 S.W.2d 662, 678 (Tex. App.—Dallas 1993, writ denied)).

B. Analysis

The Final Will contains the following *in terrorem* clause:

> 5.1 No Contest: If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will, or any of its provisions, then I [Mr. Coleman] hereby revoke any share or interest in my estate given to that contesting beneficiary under this Will.

As she did in her answer to Howard's petition, Nadine asserts on appeal that Howard's petition to modify and reform Mr. Coleman's will violated the *in terrorem* clause. She contends that Howard "directly and indirectly contested or attacked [Mr.

Coleman's] will when he filed . . . suit to modify the dispositive terms of [Mr. Coleman's] will" under Estates Code subsection 255.451(a)(3). She claims that the "suit was not brought to merely construe [Mr. Coleman's] will, but rather to modify the terms of [Mr. Coleman's] will." She asserts that, "by filing this suit, [Howard] triggered the expansive no-contest clause included in [Mr. Coleman's] will."

Howard responds that his petition to modify Mr. Coleman's formal will did not violate the *in terrorem* clause because the basis for filing the petition under Estates Code subsection 255.451(a)(3) was "to carry out [Mr. Coleman's] intent—not to frustrate it." We agree with Howard.

Subsection 255.451(a)(3)'s purpose is to correct a will that does not conform with a testator's intent due to a mistake in the will's preparation. An action brought under subsection 255.451(a)(3) serves to correct a scrivener's error and to prevent the error from thwarting the testator's intent, which must be proven by clear and convincing evidence. *See* TEX. EST. CODE § 255.451(a)(3), (b). Here, Howard's petition shows that he did not bring the action to attack the will's terms selected by Mr. Coleman. Instead, Howard brought the action to attack a term not selected by Mr. Coleman, which was frustrating Mr. Coleman's intent to dispose of all his property. The entire focus of the action was to ensure that Mr. Coleman's intent was preserved and given effect by reforming the will to conform with his intent. Thus, given the facts of this case, we hold that the probate court did not err in rejecting

Nadine's claim that Howard forfeited his right to inherit under the will by violating the *in terrorem* clause. *See Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. 1932) ("[W]e do not think a suit, brought in good faith and upon probable cause, to ascertain the real purpose and intention of the testator and to then enforce such purpose and intention, should be considered as an effort to vary the purpose and intention of the will.").

We overrule Nadine's sixth issue.

Conclusion

We affirm the judgment of the probate court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Hightower, and Countiss.