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# EXTRINSIC EVIDENCE AND THE MEANING OF WILLS IN TEXAS

*by*

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INTERPRETATION of a will is perhaps the most frequently encountered and persistently troublesome problem in the administration of estates. The broad aim of interpreting a will is clear. As Bailey says in his treatise, interpretation of a will is the process of giving meaning to the will so that the estate will pass to the persons designated in the manner outlined by the will.[1] Although the ultimate goal is clear, the means of attaining it are obscure. Texas cases on the subject are a jumble of seemingly contradictory authority. For every case stating that a specific clause of the will controls over a more general one, another states that the general intent of the will must control over individual contradictory clauses;[2] for every case stating that extrinsic evidence is inadmissible to prove a will, another exists admitting virtually every conceivable sort of evidence. For example, the two most recent Texas Supreme Court cases discussing the latter issue take positions apparently opposed to one another.[3] Because of such contradictions among the cases on the verbal level, to bring sense out of this morass by charting the interaction of the rules, contradictions, and policies involved one must focus on what the courts do, not what they say.

This Article suggests a methodology for the interpretation of wills that is grounded in an analysis of Texas case law, although it does not purport to reconcile all of the cases on the subject. The Article begins by identifying the purpose of interpretation. Since interpretation of a will often turns on whether evidence other than the will itself may be considered, much of the Article is devoted to the issue of the admissibility of extrinsic evidence. The Article then considers the measures taken by courts to arrive at a single meaning for a will when interpretative efforts have failed. Finally, the Article analyzes the current state of Texas law regarding the interpretation of wills and suggests a desirable course for its further development.

In working through problems of interpretation and the evidence that may be considered as an aid to solving them, only moderate obeisance should be given to the almost scholastic structure of rules and subrules that exist. Instead, one should keep firmly in mind two factors that color every such problem and in many instances determine its solution. First, the aim of interpreting a will is to find the intent of the testator that is expressed in the

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1. BAILEY ON WILLS § 560 (1968).

2. *Compare* McNabb v. Cruze, 101 S.W.2d 902 (Tex. Civ. App.—El Paso 1937), *aff'd*, 132 Tex. 476, 125 S.W.2d 288 (1939), *with* Burney v. Burney, 145 Tex. 311, 197 S.W.2d 334 (1946).

3. *Compare* Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971), *with* Frost Nat'l Bank v. Newton, 20 Tex. Sup. Ct. J. 370 (June 22, 1977). *See also* notes 34-36, 41-42 *infra* and accompanying text.

will.[4] A conservative precedential history regarding the admissibility of extrinsic evidence and other legal principles and policies often limit or otherwise influence this search for intent. For example, policy considerations sometimes result in a presumption that the testator means a particular thing.[5] Nevertheless, the cardinal rule of law in the area remains, quite simply, to effectuate the testator's expressed intent; nearly all other rules are either subsidiary or secondary to this one. Secondly, seemingly contradictory cases regarding the admissibility of extrinsic evidence[6] and the testator's nontestamentary statements[7] result from a policy competitive with that delineated above. This is the policy, codified in the Statute of Wills,[8] that only expressions of intent set forth with the required formalities should be given effect in passing property under a will. While courts make an effort to observe the expressed intent of the testator in disposing of his property, his intent cannot be so vaguely stated in the will that his property would ultimately be passed based on testimony regarding his orally declared intent. This tension between the policy of carrying out the testator's intent and that of requiring a properly executed formal statement of his wishes underlies the entire topic of interpretation and contruction of wills.

## I. THE PROCESS OF INTERPRETATION

No useful discussion of the methods of and rules for interpreting a will is possible without a clear definition of the ultimate goal of interpretation. The purpose of a will is to set forth formally the testator's wishes for the disposition of his property at his death. Since the sole purpose of executing a will is to alter the laws of intestate succession in the testator's particular situation, the implicit justification for permitting property to pass by will is that a policy exists in favor of permitting the testator himself to determine to whom and how his property will pass on his death. This policy provides the fundamental goal of the process of interpreting a will: to determine the testator's expressed intent regarding the disposition of his property.

This goal presents a starting point for practically every Texas case on the subject[9] and overrides the application of most other rules of interpretation. If a rule is advanced to frustrate rather than aid the testator's clear intent, it is invariably rejected. For example, in *White v. White*[10] a will made an apparent fee simple devise to the testator's daughter. In a subsequent section of the will, the testator placed in trust for the benefit of the daughter

4. *See, e.g.*, Powers v. First Nat'l Bank, 138 Tex. 604, 161 S.W.2d 273 (1942); Mayfield v. Russell, 297 S.W. 915 (Tex. Civ. App.—Waco 1927, writ ref'd); White v. White, 257 S.W. 939 (Tex. Civ. App.—Texarkana 1924, writ dism'd).

5. *E.g.*, Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955) (regardless of testator's intent, will is not widow's election will unless open to no other construction).

6. *Compare* Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971), *with* Frost Nat'l Bank v. Newton, 20 Tex. Sup. Ct. J. 370 (June 22, 1977).

7. *Compare* Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971), *with* Peet v. Commerce & E. St. Ry., 70 Tex. 522, 8 S.W. 203 (1888), *and* Kelley v. Harsch, 161 S.W.2d 563 (Tex. Civ. App.—Austin 1942, no writ).

8. TEX. PROB. CODE ANN. §§ 57-71 (Vernon 1956 & Supp. 1976-77).

9. *See, e.g.*, Powers v. First Nat'l Bank, 138 Tex. 604, 161 S.W.2d 273 (1942); Mayfield v. Russell, 297 S.W. 915 (Tex. Civ. App.—Waco 1927, writ ref'd); White v. White, 257 S.W. 939 (Tex. Civ. App.—Texarkana 1924, writ dism'd).

10. 257 S.W. 939 (Tex. Civ. App.—Texarkana 1927, writ dism'd).

the property apparently already devised. Holding that the trust had legal title, the court rejected the argument that the property had passed in fee simple to the daughter, stating:

> The contention is overruled because it plainly appeared from the language used in the will that the intention of the testator was to the contrary thereof. The doubt as to this intention, if any appeared, did not arise from language in the will, but from application thereto, as attempted by appellant, of technical rules for construing a will where the language used by the testator renders his intention uncertain. That such rules should not be resorted to when the language used by a testator sufficiently indicates his intention is clear.[11]

A statement that a court should effectuate the intention of the testator when the intention is clear does not adequately describe the court's ultimate goal. The will and other evidence may suggest conflicting intentions. Therefore, a definition of the particular intent to be sought is necessary. In general, Texas courts are guided by three propositions in determining the testator's relevant intent. They are (1) that the will should be looked to as a whole in determining the intent, (2) that the intention to be given effect is that which existed when the will was executed and not that which existed when the testator died, and (3) that the court should seek to determine the intention actually expressed in the will and not some intent of the testator expressed elsewhere.

The proposition that the testator's intent should be determined from a consideration of the will as a whole is so basic that a plethora of cases ritualistically identify this as the starting point of their analysis. Typically, the statement goes something like this:

> It is to be presumed that the testator, in writing his will, did not intend to use meaningless or superfluous words, but that he used each word and term advisedly and that he intended that every provision, clause, or word used, should have a meaning in the disposition of his property. [12]

Other cases talk of finding the testator's intention "within the four corners of the instrument"[13] or state such propositions as "[a] will should be so construed as to give effect to every part of it, if the language is reasonably susceptible of that construction."[14] Thus, no single clause of a will should be looked at to determine the testator's intent without giving due consideration to other statements in the will.[15] This emphasis on an overall consideration of the will facilitates the accurate interpretation of the decedent's intent because one portion of the document will often shed light on the meaning of other parts and because separate seemingly contradictory statements may sometimes be reconciled through language found elsewhere in the instrument.

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11. *Id.* at 940.
12. Aron v. Aron, 168 S.W.2d 917, 919 (Tex. Civ. App.—Galveston 1943, writ ref'd).
13. *E.g.*, Republic Nat'l Bank v. Fredericks, 155 Tex. 79, 83, 283 S.W.2d 39, 42 (1955).
14. *Id.* at 83, 283 S.W.2d at 43.
15. *See also* Haile v. Holtzclaw, 414 S.W.2d 916 (Tex. 1967); Estes v. Estes, 267 S.W. 709 (Tex. Comm'n App. 1924, jdgmt adopted); City of Austin v. Austin Nat'l Bank, 488 S.W.2d 586 (Tex. Civ. App.—Austin 1972), *aff'd in part, rev'd in part*, 503 S.W.2d 759 (Tex. 1973); Wattenburger v. Morris, 436 S.W.2d 234 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

Since a testator's wishes regarding disposition of his property may change with time, and since changes in his property may be perceived to change the consequences of a disposition made in his will, it often becomes important to determine the particular time at which the testator's intent must be measured. Texas cases uniformly hold that the testator's intent must be determined as of the time the will was executed, not as of the time of the testator's death or as of some other time. In *Winkler v. Pitre*,[16] for example, the court refused to hold that the interpretation of a will would be affected by the testatrix's acquisition of property after executing the will if the will did not purport to convey the newly acquired property. In that case, the testatrix executed her will while her husband was living. In the devises in question, she purported to pass only her community property interest in certain assets, for example, "my half of our home," "my half of the Attoyac farm."[17] Her will had no residuary clause. Her husband died leaving all of his property to her, and the question when she died without changing her will was whether the intervening death of her husband and her consequential ownership of all of the home, all of the Attoyac farm, and all the other assets similarly in question caused the entirety of these assets to pass to the devisees named in the will. The court construed the will as of the date it was executed, held that the testatrix intended at that time to dispose of the property in question only to the extent of her interest in it, and therefore concluded that the devisees were entitled only to half of the questioned assets and that the balance passed to her heirs by intestate succession.[18] This refusal to consider changes in the intent of the testatrix after the date of execution of her will furthered the policy of the Statute of Wills by assuring that the effect given the will accorded as closely as possible with the testatrix's intent at the time that she formally executed the document. It prevented the decedent's property from passing according to her subsequent wishes because she had not seen fit to accord to them the formal expression required by the Statute of Wills.

The third guideline laid down by the courts is that the testator's actual subjective intent at the time of executing the will is inconsequential if it clearly conflicts with the intent expressed in the terms of the will, supported by evidence of the circumstances surrounding the testator at the time of execution.[19] For example, the court in *Winkler* held that the task was to "determine what testatrix meant by what she actually said, and not by what she should have said."[20] The court thus recognized that the testatrix might have actually intended to devise on her death certain assets to the full extent of her interest at death. But it refused to give judicial consideration to this possibility because the words actually used in the will did not permit this

16. 410 S.W.2d 677 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.).
17. *Id.* at 678.
18. *Id.* at 680.
19. *See* Jackson v. Templin, 66 S.W.2d 666, 668 (Tex. Comm'n App. 1933, jdgmt adopted); Bryan v. Melvin, 499 S.W.2d 17, 19 (Tex. Civ. App.—Waco 1973, no writ); Holcomb v. Newton, 226 S.W.2d 670 (Tex. Civ App.—Texarkana 1950, writ ref'd); Kennard v. Kennard, 84 S.W.2d 315, 320 (Tex. Civ. App.—Waco 1935, writ dism'd).
20. 410 S.W.2d at 679.

interpretation. While this attitude may on occasion have a harsh result, it is required by the Statute of Wills. The alternative—seeking the testator's actual subjective intent—would create uncertainty regarding the effect of executing a will and vitiate the importance of formal execution.

### A. *Extrinsic Evidence and the Unambiguous Will*

Having established the nature of the testamentary intent to be sought and effectuated in interpreting a will, one must next establish the evidentiary sources that can be drawn on to determine that intent. The will itself is one source of evidence; its status as a formally executed document whose sole purpose is to set forth the testator's intent gives it a unique place of importance in any search for the testator's intent. Indeed, some cases flatly state that no extrinsic evidence[21] whatsoever is admissible to show the disposition intended by the testator if the language of the will is clear.[22] This position fails, however, to recognize that the words used in a will, like those used in any document, are only imperfect symbols for physical objects, people, or concepts.

In the process of interpreting and applying any will some basic extrinsic evidence must be used to give it meaning. For example, if an individual writes a will stating, "I give all my property to my wife," evidence must be admitted on the questions of what the word "property" includes and to whom the word "wife" refers. Even the court in *Heinatz v. Allen*,[23] while stating that no extrinsic evidence is admissible, in fact admitted such basic evidence. Thus, the real issue is not whether to admit extrinsic evidence but rather how much and which types may be admitted without endangering the sanctity of the written will.

Traditional precepts divide extrinsic evidence into two categories: that which is admissible only if the will is ambiguous, and that which is admissible without regard to whether the will is ambiguous.[24] Although one may question whether such a distinction makes sense,[25] it is generally followed by Texas courts and is, therefore, made here for organizational purposes.

Texas cases seem at first glance to be in hopeless conflict on the admissibility of extrinsic evidence to prove the terms of an unambiguous will. Some cases appear liberal in their views of the evidence admissible while others categorically state that the admission of any evidence is impermissible. Cases admitting extrinsic evidence state the justification for admission along these lines:

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21. Extrinsic evidence includes all evidence other than the words of the will itself.

22. *E.g.*, Foy v. Clemmons, 365 S.W.2d 384 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

23. 147 Tex. 512, 217 S.W.2d 994 (1949); *see* text accompanying notes 32-33 *infra*.

24. Wigmore makes this distinction to some extent, 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2470-2473 (3d ed. 1940), but he is not as obsessed with the distinction as are the Texas courts, which cite the proposition frequently. *See, e.g.*, Republic Nat'l Bank v. Fredericks, 155 Tex. 79, 83, 283 S.W.2d 39, 42 (1955).

25. "Ambiguity" seems a chameleon term that can encompass virtually every interpretative problem or none of them, depending on the inclination of the particular tribunal. While this is not necessarily an undesirable characteristic for an operative legal term to possess, it introduces complexity unnecessarily because Texas courts have never been able to articulate or even identify a set of policies on the basis of which certain interpretative problems, and not others, should be characterized as ambiguities.

> As he [the testator] may be supposed to have used language with reference to the situation in which he was placed, to the state of his family, his property, and other circumstances relating to himself individually, and to his affairs, the law admits extrinsic evidence of those facts and circumstances, to enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts in the case.[26]

In addition to courts' admitting material facts that enable them to identify the persons or things mentioned in the instrument, courts also speak of using extrinsic evidence to place the court as nearly as possible in the situation of the testator when he made the will.[27] Even in these cases, however, one is likely to run across qualifying language expressly prohibiting the use of parol evidence for any purpose other than interpreting the words actually contained in the instrument itself. The courts, having declared themselves ready to admit extrinsic evidence, seek to minimize the apparent departure from precedent by adding, in effect, that they are not really going to admit very much.[28]

This verbal restraint in describing admissible evidence is sometimes transformed into a virtual bar to the admission of any evidence at all. In these cases, the general proposition that the will is a dispositive document with respect to the testator's expressed intent and not with respect to his actual subjective intent at the time of the will's execution results in the view that no extrinsic evidence at all should be admissible to give a will meaning.

In *Crossland v. Dunham*,[29] for example, the court refused to consider extrinsic evidence. In that case, the testator made the following devise: "I hereby bequeath to my lawful wife at time of death, one-half of all my worldly property, balance to be divided equally among my children . . . ."[30] The testator wrote the will in a common law state, subsequently moved to Texas and died there, survived by his wife and two children. The result of the will when written in the common law state would have been to give the wife a one-half interest in all of the property currently held by the couple and to give the two children one-fourth interests in that property. The effect of the will under Texas law was to give the wife a one-half interest in the community property passing under the will as well as her one-half interest in the entire community and to give the two children what amounted to only one-eighth interests in the community. The court refused to consider

26. Peet v. Commerce & E. St. Ry., 70 Tex. 522, 8 S.W. 203 (1888). *See also* Hunt v. White, 24 Tex. 643, 652 (Tex. 1860); Jackson v. Templin, 66 S.W.2d 666, 668 (Tex. Comm'n App. 1933, jdgmt adopted); Houston Bank & Trust Co. v. Landsdowne, 201 S.W.2d 834, 837 (Tex. Civ. App.—Galveston 1947, writ ref'd n.r.e.).

27. Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971); Bailey v. Price, 495 S.W.2d 378 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.).

28. Wigmore traces the development of the parol evidence rule in the English common law. 9 J. WIGMORE, *supra* note 24, §§ 2470-2473. According to this analysis, extrinsic evidence was initially inadmissible to prove a will in England, but by the mid-nineteenth century the rule was well established that extrinsic evidence, other than direct statements of intent by the testator, was admissible regardless of whether an ambiguity existed. Although the "no extrinsic evidence" forces apparently put up a battle during that century, they were in the end soundly thrashed. Apparently, the battle-torn remnants found a home in Texas, for the exclusionary rule still has proponents there.

29. 135 Tex. 301, 140 S.W.2d 1095 (1940).

30. *Id.* at 303, 140 S.W.2d at 1096.

extrinsic evidence, including evidence that the will had been written in a common law state and under the law of that state would have given to the two children a one-fourth interest each. Instead, the court applied the rule that the personalty and Texas realty of one domiciled in Texas passes under Texas law, therefore limiting the two children to a one-eighth interest each. Construed according to the law of the state in which it had been executed, the contrary result would have been reached, and from the standpoint of giving effect to the testator's intent, this would have been a better result. Nevertheless, the court felt that an earlier Texas decision controlled and refused to consider extrinsic evidence tending to show the testator's actual intent.[31]

In *Heinatz v. Allen*,[32] a second case illustrating a refusal to consider extrinsic evidence, the Texas Supreme Court determined that as a matter of law the term "mineral rights" in a will did not include rights to commercial limestone where those items possessed no rare or exceptional character nor any peculiar property giving them special value. In so holding, the court considered a wide range of authorities defining the term "mineral rights" in other contexts but refused to consider extrinsic evidence of the meaning that the testatrix intended the words "mineral rights" to convey.[33]

Dictum in the recent Texas Supreme Court case of *Frost National Bank v. Newton*[34] also indicates an enduring reluctance to admit extrinsic evidence where the evidence might controvert the predisposition of a court toward a specific interpretation or require the court to face a difficult problem of interpretation that could otherwise go unraised. In *Newton* the decedent left a will establishing a trust. The beneficial interests in the trust were as follows: the testatrix's husband had a life interest of one-third of the trust's income; certain great-nieces and great-nephews of the testatrix were entitled to so much of the remaining income as was required for their support and schooling through college, with a gift of $1,000 to each on graduation; two nieces of the testatrix were entitled to the balance of trust income, if any, and they were also the remaindermen. Frost National Bank was named as trustee. The testatrix's husband predeceased her. After all of the income beneficiaries had graduated from college, the trustee sought a declaratory judgment on whether the trust should be terminated. Paragraph three of the

31. *Id.* at 306, 140 S.W.2d at 1097. The court viewed the case as raising a conflict of laws question: whether the will should be construed under Oklahoma (the common law state) or Texas law. Following Holman v. Hopkins, 27 Tex. 38 (1863), the court held that Texas law controlled construction of devises of personalty because the testator's last domicile was in Texas, and controlled construction of devises of realty because all of the testator's realty was located in Texas. Granting that the conflict of laws rule laid down by the *Holman* case could be viewed as controlling, the court nevertheless failed to apply Texas law correctly. The court construed the will without considering the circumstances surrounding its execution and without recognizing the principal Texas rule to be furthered: to give effect to the testator's expressed intent after considering the circumstances surrounding the execution of the will.

32. 147 Tex. 512, 217 S.W.2d 994 (1949).

33. Like the court in *Crossland* eight years earlier, the *Heinatz* court apparently decided that determining the expressed intent of the testatrix was an improper goal because the result might create a perceived conflict between this case and the judicially developed definition of "mineral rights."

34. 20 Tex. Sup. Ct. J. 370 (June 22, 1977).

will provided that the trust should continue in force during the remainder of the lifetime of the last survivor of her husband and the two remaindermen and should terminate upon the death of the last survivor of the three. Further, the trustee was given the option to terminate the trust earlier if the income from it became insufficient to justify its continuance.[35] Paragraph four stated that on termination of the trust, its assets should be distributed to the two remaindermen, and, if either was deceased, then to her then living children. Thus, paragraph three of the will established a termination date on or after the death of the last surviving remainderman, while paragraph four suggested that the distribution should be made, providing all payments of college expenses had been made, while the two remaindermen were still alive. The court held that the trust could not be terminated because one purpose of it was to provide payment of income to the two remaindermen and this purpose had not yet been fulfilled. In so holding, the court considered the proper manner of interpreting the will and stated:

> The beneficiaries of the trust . . . do not contend the will is ambiguous, and the trial court did not so find. Therefore, the true meaning of the will must be determined by construing the language used within the four corners of the instrument . . . . No speculation or conjecture regarding the intent of the testatrix is permissible where, as here, the will is unambiguous, and we must construe the will based on the express language used therein.[36]

While the case does not clearly state whether extrinsic evidence was proffered and its admission denied, the language quoted indicates a reluctance of the court to admit such evidence if the meaning of a will appears clear.

Such statements reflect a fundamental misunderstanding of the function of extrinsic evidence when proffered to prove the terms of an unambiguous will. That the correct interpretation of a will must be derived ultimately from the words used by the testator does not establish, or even imply, that extrinsic evidence may not be considered to ascertain the meaning of those words. The court's misunderstanding of the uses of extrinsic evidence is parallelled by its apparent misconception of its interpretative function. A court's primary function is to interpret a will, not to construe it.[37] In interpreting a will, the court should seek to determine the meaning assigned by the testator to words and phrases used in the will. Effect is then given to the will based on these meanings to the extent that the words in the will support them. In contradistinction, a court construes a will by giving it a reasonable, objective reading without regard to the testator's actual intent. Since the purpose of a will is to enable the testator to dispose of his property according to his wishes, these wishes should be given effect to the extent supported by the will. A finding that a will is not ambiguous is no justification for construing it rather than interpreting it based on available evidence. Construction is proper only after efforts at interpretation end inconclusively.

35. *Id.* at 370.
36. *Id.* at 372.
37. The preference for a result reached by interpretation arises from the policy permitting one to devise his property. *See* notes 5-12 *supra* and accompanying text.

While some authorities[38] support a supposed rule excluding extrinsic evidence from consideration for purposes of interpreting or construing a so-called unambiguous will, two recent cases have taken a more liberal view. In *Moore v. Wardlaw*[39] the court was required to interpret a clause in a will that gave the testatrix's grandchildren her community interest in a ranch, subject to the right of her husband, the children's step-grandfather, to sell or hypothecate it. The court held that the husband's right to sell or hypothecate did not give him a power of appointment over the proceeds obtained by selling the ranch. Without focusing on the question of admissibility, the court considered the following in reaching its decision: the decedent's marital relationship; that the decedent's grandchildren spent a great deal of time with her; that she continued to write and phone them frequently after they grew up; that she made frequent gifts to them; her intent regarding the management of the ranch in question; and numerous other facts. A reading of the opinion suggests that the trial court considered and admitted virtually all extrinsic evidence proffered.[40]

This consideration of extrinsic evidence is explicitly sanctioned by the 1971 Texas Supreme Court case of *Stewart v. Selder*.[41] In determining that the term "cash" in a devise included only cash on hand and demand deposits and excluded securities readily convertible into cash, the court there considered an abundance of extrinsic evidence without regard to

38. Frost Nat'l Bank v. Newton, 20 Tex. Sup. Ct. J. 370 (June 22, 1977); Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949); Crossland v. Dunham, 135 Tex. 301, 140 S.W.2d 1095 (1940).

39. 522 S.W.2d 552 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

40. A few paragraphs from the opinion give the flavor of the court's view of extrinsic evidence:

The extrinsic evidence supports the above construction of that part of the will relating to Red Town Ranch.

. . . .

> Mrs. Moore's relations with her grandsons were especially close. The boys were reared in San Angelo practically in the shadow of their grandmother's house. As small children, and as youths, the boys spent a great deal of time with their grandmother. Winkie, as a youngster, usually spent one night a week at her house, and as long as a month or more during summers when his parents were out of town or on vacation. While in college, the boys would still stay overnight in their grandmother's home when in San Angelo for holidays or on weekends.
>
> As the boys matured, their grandmother continued to be interested in what they were doing. When they were away at college she wrote them frequently, and occasionally called them by telephone. When Winkie was at Southern Methodist University, Mrs. Moore visited him on campus several times.
>
> The record makes clear that doing things for her grandsons was one of Mrs. Moore's pleasures. She remembered their birthdays, graduation days, and Christmas days with expensive presents. She gave the two older grandsons an automobile each. She had offered on several occasions to buy Winkie another automobile when he enrolled in college, but he had told her that the old one was still serviceable. She also gave the boys money, rifles, and fine paintings. When the boys went on trips she usually gave them money for expenses.
>
> Mrs. Moore's love for her grandsons continued without interruption until her death. One illustration suffices as a demonstration of her intention of continuing to surround herself with those whom she loved most. She caused her old house to be pulled down, and on the same lot she caused to be built a large residence known as River Terrace. River Terrace had two kitchens and five bedrooms. She assigned each grandson a bedroom for his use then or in later years so that if he lived away from San Angelo he and his family, if married, could stay close to her while visiting in San Angelo.

*Id.* at 558-59.

41. 473 S.W.2d 3 (Tex. 1971).

whether the will was ambiguous. The evidence admitted included the testatrix's divorce in 1948 and that she had no children; that her parents were divorced, remarried, and had died; who her closest living relatives were and whether she was friendly with them; the interest that the relatives showed in her during her life; the sources of the property that the testatrix owned at her death; and an inventory of the property on hand at her death.[42]

The liberal attitude of the *Stewart* and *Moore* courts toward extrinsic evidence certainly weakens the force of the earlier *Crossland* and *Heinatz* cases, and draws into question the persuasiveness of the dictum in *Newton*. It convincingly establishes that a wide variety of extrinsic evidence is admissible without regard to whether a will is characterized as ambiguous. Despite the liberal approach of the *Stewart* and *Moore* cases, however, the *Heinatz*, *Crossland*, and *Newton* cases do reveal an important point. They show that the extrinsic evidence which courts will admit to show the testator's intent is limited in kind by the specific context in which admission is sought. As the language of the will itself becomes clearer with respect to the devises made, the probative value of extrinsic evidence decreases. At some point, the evidence of the will itself becomes so compelling that it obviates the need for any other evidence. In the *Crossland* and *Heinatz* cases well-settled legal rules appear either to have overridden the testator's intent or to have led the courts to disregard it. Thus, in the *Heinatz* case the term "mineral rights" had a recognized legal meaning, and the court was unwilling to dwell on the question of whether the testatrix had intended to vary that meaning. For the sake, perhaps, of keeping the meaning of the term clear in other legal contexts such as oil and gas leases and deeds, the court refused to vary the term's meaning in the will. Likewise, in the *Crossland* case the court refused to consider extrinsic evidence of the testator's expressed intent because that evidence would tend to produce a perceived conflict between that intent and Texas rules governing the disposition of property after death. Thus, these cases indicate that extrinsic evidence will not be admitted when the will is highly probative of the testator's intent and the extrinsic evidence would be less so, when admission would create a perceived conflict with an established rule of law, or when admission could result in confusing the law in other areas. Further, the cases suggest that other competing policies might encourage even the liberal *Moore* and *Stewart* courts to restrict their consideration of extrinsic evidence if the specific context made such a restriction desirable in the court's view.

### B. *Ambiguities and Extrinsic Evidence*

*Stewart* specifically states in dicta that the admissibility of extrinsic evidence to prove an unambiguous will is limited in at least one way: statements by the testator asserting that he intended to, or his will did, make a certain disposition are inadmissible to prove the meaning of an unambiguous will.[43] This restriction grows out of the policy of the Statute of Wills succinctly stated in *Huffman v. Huffman*:[44]

42. *Id.* at 7.
43. *Id.*
44. 161 Tex. 267, 339 S.W.2d 885 (1960).

> While the Texas decisions are liberal in the construction of wills, and the courts of Texas go a long way in the relaxation of the rules of construction of wills to arrive at the manifest intention of the testator, especially when the will is written by a layman, courts are limited to the intent found within the will itself and may not redraft the will . . . . The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others, after he is dead, to change or add to his will or to show that he intended something not set out in, or different from, that set out in his will.[45]

Whether refusal to admit assertive statements of the testator to prove an unambiguous will in fact furthers the policy of the Statute of Wills, and at what cost, are topics for discussion after a consideration of the circumstances under which these statements may be admitted. Suffice it to state here that based on the wide-ranging consideration of extrinsic evidence in *Moore*[46] and the fact that this is the sole restriction stated in *Stewart*, current Texas law arguably permits the consideration of every other kind of extrinsic evidence in proceedings to interpret a will without regard to whether the will is ambiguous. If so, the importance of characterizing a will as "ambiguous" or "unambiguous" and of the old distinction between patent and latent ambiguities[47] is considerably reduced. Nevertheless, these concepts still receive judicial attention in Texas, and, at least with respect to assertive statements by the testator, they continue to determine whether extrinsic evidence is admissible.

Whatever the extent of the evidence admissible at the initial stages of interpretation, problems of interpretation, called ambiguities, are likely to arise. According to traditional precepts, ambiguities occur in two ways. The first is through the admission of extrinsic evidence. An example is the will that leaves property to "my nephew John," the evidence showing that the testator had two nephews named John. The second is the situation in which apparent inconsistencies and ambiguities exist in the language of the will even without the initial consideration of extrinsic evidence. At early common law, the former was called a latent ambiguity or equivocation and the latter a patent ambiguity.[48]

Although many Texas cases find ambiguities in the language of wills and discuss at length the rules for admitting evidence to resolve them, the author has found no Texas case expressly defining the meaning of the term "ambiguity." Texas cases do, however, designate specific interpretative problems as ambiguities, thereby shedding some light on the term's meaning.

For example, in *Kelley v. Harsch*[49] the testatrix devised her "home place." The term "home place" could have referred to two adjoining lots, each of which had improvements suitable for use as a residence upon it, or

45. *Id.* at 273, 339 S.W.2d at 889.
46. *See* note 40 *supra*.
47. For a discussion of the development of the rules regarding the existence of latent and patent ambiguities see 9 J. WIGMORE, *supra* note 24, §§ 2470-2478. *See also* Warren, *Interpretation of Wills—Recent Developments*, 49 HARV. L. REV. 689, 705-06 (1936).
48. *See* 9 J. WIGMORE, *supra* note 24, § 2473 (citing Sir Francis Bacon, Maxims, rule XXV, XIV Works 273 (Spedding's ed. 1861), discussing "ambiguitas latens" and "ambiguitas patens" circa 1597).
49. 161 S.W.2d 563 (Tex. Civ. App.—Austin 1942, no writ).

to the lot with improvements in which the testatrix had lived. The court held that extrinsic evidence regarding the situation and nature of the two lots showed the existence of a latent ambiguity.

In *Hultquist v. Ring*[50] the testator made a bequest to "Alma Ring" and identified her as a child of his sister. Extrinsic evidence showed that, although an Alma Ring existed, she was not a child of the testator's sister. The evidence further showed that the testator's sister had a child named Elmer; that the testator suffered impaired vision and therefore seldom read, instead requesting others to read to him; and that the testator was of Swedish descent and would have had difficulty distinguishing the names "Alma" and "Elmer" because those names sound alike to the Swedish ear. The court held that a latent ambiguity existed in the will because no one met both parts of the description of the devisee.[51]

In *Pruett v. Berkeley*[52] the court held the following phrase in a will ambiguous: "*In event my death predeceased her* it is my desire and I will, devise and bequeath all my real property as follows . . . ."[53] The court found the phrase ambiguous, holding that it could mean either "in the event I predecease her," or "in the event of my death predeceased by her." In *Cannan v. Walker*[54] the court held the words "Sattler Creek" in a description of real estate to be ambiguous because extrinsic evidence showed that the name was applied to two different streams.

These cases suggest that an ambiguity may arise whenever a term or phrase in a will can be reasonably interpreted in more than one way, and neither the will as a whole, nor such evidence as the court is willing to consider without regard to whether the will is ambiguous, provides adequate ground for determining which interpretation expresses the testator's intent. Although the word "ambiguity" has no arcane legal meaning, in construing a will a court will hold that an ambiguity exists only if it is convinced that a serious problem of interpretation exists. For example, in *Stewart* the Texas Supreme Court found extrinsic evidence to provide no implication that the testatrix intended the term "cash" to mean anything other than cash on hand and demand deposits. It therefore applied the ordinary meaning of the term. The defendant's contention that the word "cash" included securities readily convertible to cash was rejected. While the court did not expressly determine whether an ambiguity was present, it found the evidence inadequate to show that the term "cash" was reasonably susceptible in the context to any other than its ordinary meaning.[55] Whether an ambiguity exists in a will is a question of judgment and degree. The only test, though concededly imprecise, is whether, considering the will as a whole and the

50. 301 S.W.2d 303 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.).

51. *Id.* at 305. *I.e.*, no one existed who was named Alma and who was a child of the testator's sister.

52. 405 S.W.2d 433 (Tex. Civ. App.—Waco 1966, no writ).

53. *Id.* at 434-35 (emphasis added).

54. 385 S.W.2d 271 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

55. 473 S.W.2d at 9. *But see* Pruett v. Berkeley, 405 S.W.2d 433 (Tex. Civ. App.—Waco 1966, no writ), in which the court readily held a problem of interpretation to be an ambiguity, but then resolved the ambiguity by considering evidence that would have been admissible in any case.

circumstances surrounding the testator at the time the will was executed, the section of the will in question is reasonably susceptible of more than one meaning.

If a court determines that an ambiguity exists, it may be important to decide whether the ambiguity is latent or patent in order to determine what evidence may be considered in resolving it. At early common law, parol evidence was admissible to resolve a latent ambiguity but not to resolve a patent ambiguity.[56] Is the distinction recognized in Texas? *Haupt v. Michaelis*[57] suggests it is not. In that case the court condemned the distinction, recognized that scholars universally despise it,[58] and stated that it has no validity in Texas.[59] Nevertheless, a series of Texas cases[60] extending into the 1970's suggests that the distinction endures. All of these cases deal, however, with the admissibility of extrinsic evidence to resolve a latent ambiguity. Each case simply applied the term "latent ambiguity" to define the issue presented, and then proceeded to admit extrinsic evidence to answer it. Because none of the cases presented a patent ambiguity for resolution, it is uncertain whether the latent-patent distinction was in fact significant. In view of the condemnation of the latent-patent distinction, one may argue that the references to latent ambiguity were made only because the facts of each case required no more than the admission of evidence to resolve a latent ambiguity.

Once an ambiguity is clearly raised, the question then is what to do with it. In the past, Texas cases have handled ambiguities in two different ways. The simplest of these is the application of a rule-of-law approach that in effect establishes an irrebuttable presumption of the testator's intent. For example, when a widow's election will[61] is in question, courts have consistently applied the rule that a will ambiguous as to whether the testator intended to dispose of his spouse's as well as his own community property never operates to dispose of the surviving spouse's one-half interest in the community.[62] A second example of the use of a rule of law to resolve an ambiguity appears in the semi-secret trust situation. In *Heidenheimer v. Bauman*[63] the testator left property to his brother as trustee but failed to

56. *See* 9 J. WIGMORE, *supra* note 24, § 2470, at 225.

57. 231 S.W. 706 (Tex. Comm'n App. 1921, jdgmt adopted).

58. The rationale for admitting extrinsic evidence to resolve a latent but not a patent ambiguity was that the latent ambiguity arose by applying extrinsic evidence to the will and so could be solved through the same means while the patent ambiguity required use of no extrinsic evidence to become apparent and thus required none for solution. Warren, *Interpretation of Wills—Recent Developments*, 49 HARV. L. REV. 689 (1936). The rule has an admirable ring of simplicity and rightness to it; however, its apparent simplicity has always given rise to Byzantine complexities, and it has no basis in common sense.

59. 231 S.W. at 709.

60. *See* Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949); Mercantile Nat'l Bank v. National Cancer Research Foundation, 488 S.W.2d 605 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Cannan v. Walker, 385 S.W.2d 271 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); Hultquist v. Ring, 301 S.W.2d 303 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

61. A widow's election will is a will that purports to dispose of both the one-half interest of the testator in community property and the one-half interest of his spouse. When this situation occurs, the surviving spouse must elect either to give up her community rights and take under the will, or to assert her right to one-half of the community and take nothing under the will. *See, e.g.*, Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955).

62. *Id.*

63. 84 Tex. 174, 19 S.W. 382 (1892).

name the beneficiaries of the trust in his will. In this semi-secret trust situation the court refused to consider extrinsic evidence on the identity of the intended beneficiaries. Instead, the court decided that the res of the trust should be held for the benefit of the testator's heirs as beneficiaries. Since the cardinal aim of interpreting a will is to give effect to the particular testator's intent, the cases that ignore this aim by applying legal presumptions suggest either that courts in these situations are confident that application of a rule of law will consistently give effect to the testator's intent or that effecting some other policy outweighs that of permitting the testator to dispose of his estate as he wishes.[64]

The other approach to resolving latent and patent ambiguities seeks to give effect to the testator's intent. Since Texas law is liberal regarding the character of evidence it regards as admissible to interpret wills without regard to whether the will is ambiguous,[65] the distinction between this approach and the general rule for admission of evidence to prove the terms of a will turns primarily on the question of whether assertive statements by the testator are admissible.

Older Texas cases follow the rule that a testator's statements cannot be admitted to prove the meaning of a will.[66] In *Peet v. Commerce & Ervay Street Railway*[67] the court agreed that extrinsic evidence of the circumstances surrounding the testatrix could ordinarily be admitted to help the court discover the meaning she attached to the words used in her will; nevertheless, the court held that her statements could not be admitted:

> Parol evidence, however, cannot be introduced to contradict, add to, or explain the contents of a will, by proving declarations made by the testator before, at the time of, or subsequently to the making of a will. The courts have excluded the evidence of declarations made by [the testatrix], about the time the will was written, as to the persons she intended should take under it.[68]

As recently as 1942 the court of civil appeals applied this rule in resolving the latent ambiguity raised by the testatrix's unexplained use of the word "home place."[69] The court remanded the case for a determination of the meaning of the term, and in doing so gave guidance to the lower court on the evidence admissible to resolve the ambiguity. The court agreed that "any extrinsic facts or circumstances which will aid in determining the testator's intent are admissible," but added, "it appears settled, however, that oral declarations of the testatrix, whether made before, at the time of, or subse-

64. For example, in situations involving widow's election wills the courts obviously want to avoid forcing the widow to elect. They give effect to this aim by presuming that the testator intends only to devise his own property. Although the basis in policy is different, this use of interpretative presumptions is similar in effect to the use of rules of construction. *See* notes 84-105 *infra* and accompanying text.

65. Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971); Moore v. Wardlaw, 522 S.W.2d 552 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

66. This old Texas rule was opposed to the majority of jurisdictions insofar as latent ambiguities and non-assertive statements were concerned. *See* 9 J. WIGMORE, *supra* note 24, §§ 2471, 2472.

67. 70 Tex. 522, 8 S.W. 203 (1888).

68. *Id.* at 528, 8 S.W. at 206.

69. Kelley v. Harsch, 161 S.W.2d 563 (Tex. Civ. App.—Austin 1942, no writ).

quent to the execution of said will would not be admissible for the purpose of showing intent."[70]

This inflexible rule does not mean that statements of the testator are never admissible. Even when a will is unambiguous, statements by the testator are admissible if they do not purport to give the testator's intentions in setting down the words of the will. Thus, in *Waxler v. Klingemann*[71] the question was what the term "Red River Street property" meant in a will. The court admitted testimony that the testatrix referred to a certain property as the Red River Street property, citing in support those Texas cases in which the circumstances surrounding the testator at the time the will was executed were admissible.[72] Although the specific problem raised in *Waxler* was interpretation of a latent ambiguity, the basis for admitting evidence regarding the testatrix's use of words is broader. The case suggests that nonassertive statements by a testator are admissible along with other facts and circumstances ordinarily admitted as extrinsic evidence. This conclusion is sensible because only when the testator orally asserts the meaning of specific language in a will does the danger of transgressing the policy underlying the Statute of Wills become serious.

In fact, one Texas case has gone so far as to reject the parol evidence rule as a basis for excluding statements by the testator declaring the intended meaning of his will. In *Hultquist v. Ring*[73] the court faced the question of whether to award a bequest to Alma or Elmer where Alma's name appeared in the will but her relationship to the testator was incorrectly described.[74] The description in the will fit Elmer, and evidence suggested that the name "Alma" had been substituted in error for Elmer at the transcription of a dictaphone record. The proffered evidence consisted of hand-written notes and the contents of a dictaphone record made by the attorney who drew up the will. The notes and the record were made by the attorney during a meeting with the testator and were in essence a transcription of the testator's oral instructions to the attorney regarding the bequests he wished placed in his will. The court held that if the evidence met other applicable evidentiary requirements, it could be admitted, stating:

> There is no doubt but that where a latent ambiguity is shown to exist in a will, testimony of the attorney or the scrivener as to the testator's declarations or instructions is admissible to resolve the ambiguity as to the identity of a beneficiary . . . .
>
> 'Where there is a latent ambiguity or equivocation as to the identity of the devisee or the property devised, it is generally held that evidence of the testator's instructions to the draftsman of the will is admissible to aid in determining the persons or property intended.'[75]

Thus, the court explicitly held the testator's statements to the attorney preparing his will admissible to resolve a latent ambiguity.[76]

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70. *Id.* at 567.
71. 272 S.W.2d 746 (Tex. Civ. App.—Austin 1954, writ ref'd).
72. *Id.* at 748 (citing Adams v. Maris, 213 S.W. 622 (Tex. Comm'n App. 1919, jdgmt adopted); Gilkey v. Chambers, 146 Tex. 355, 207 S.W.2d 70 (1947)).
73. 301 S.W.2d 303 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.).
74. *See* notes 50-51 *supra* and accompanying text.
75. 301 S.W.2d at 307 (quoting 57 AM. JUR. *Wills* § 1118 (1937)).
76. Nevertheless, the court then found that the record and the notes constituted hearsay evidence and as such were inadmissible because they did not fall within an exception to the

The admissibility of the testator's statements to the attorney drafting his will in the *Hultquist* case was approved in *Stewart*, which in a dictum expanded the *Hultquist* ruling to permit admission of all relevant statements by the testator where a latent ambiguity is in question.[77] The *Stewart* opinion states that, insofar as the admissibility of extrinsic evidence goes, there is no longer much difference in Texas between ambiguous and unambiguous wills. While some older cases[78] suggest that extrinsic evidence may not be received as an aid in construing an unambiguous will, *Stewart* holds that most extrinsic evidence is admissible without regard to whether a will is ambiguous. The court in the *Stewart* case ruled admissible "evidence concerning the situation of the testator, the circumstances existing when the will was executed, and other material facts that will enable the court to place itself in the testator's position at the time."[79] After stating this rule, the court went on to consider in great detail extrinsic evidence surrounding the will it was construing.[80]

Thus, one may well ask what advantage is gained regarding the admissibility of evidence of the testator's intentions by showing an ambiguity exists in the will. *Stewart* also answers this question in stating:

> Extrinsic evidence of that nature is received, of course, to assist the court in determining the sense in which the words were used by the testator. The general principle that admits the evidence for that purpose is subject to at least one exception. The intention of the testator must be found, in the last analysis, in the words of the will, and for that reason his other declarations of intention dealing with the subject of the specific document are generally not admissible. These declarations may be received only as an aid in resolving certain specific problems of interpretation, such as an equivocation or latent ambiguity.[81]

Thus, the only advantage to be gained by proving the will ambiguous is the admission of a testator's nontestamentary oral or written declaration of intent dealing with the subject of the will. Further, the *Stewart* dictum suggests that this advantage would be available only if one can show that the will contains a latent ambiguity. If the distinction between patent and latent ambiguities exists in Texas after *Stewart*, its only probable impact would be to render admissible direct statements by the testator regarding the intended meaning of the words set forth in his will in resolving a latent but not patent ambiguity.

Whether the distinction between latent and patent ambiguities does endure in Texas is at present a question without an answer. One earlier Texas case suggests that the distinction between latent and patent ambiguities has no validity in Texas. In *Haupt v. Michaelis*[82] the Commission of Appeals

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hearsay rule. Obviously, even if evidence successfully runs the gantlet of the parol evidence rule, it must meet the other criteria of admissible evidence, such as the hearsay rule or the Dead Man's Statute. In fact, the parol evidence rule is arguably not a rule of evidence at all, but rather a substantive rule regarding the sanctity of documents constituting legal acts.

77. *See* note 81 *infra* and accompanying text.
78. *See* notes 29-36 *supra* and accompanying text.
79. 473 S.W.2d at 7.
80. *See* notes 41-42 *supra* and accompanying text.
81. 473 S.W.2d at 7.
82. 231 S.W. 706 (Tex. Comm'n App. 1921, jdgmt adopted).

faced the problem of interpreting a clumsily drafted holographic will. Two separate clauses raised the particular ambiguity: the first stated, "Each heir should have an undivided interest in said pasture . . . ," while the second stated, "There is one exception to this rule. I don't want A.P. Landers to ever have any interest whatever in any part of this land. Nor his two children, Willie and Johnny. His wife, my daughter, Alice, has lived with me five years and she is entirely incompetent to do anything and has to be taken care of all her life." The question was whether Alice received any interest in the pasture. Apparently, the lower court had admitted much evidence over the objection of the appellant. The court stated that extrinsic evidence of the circumstances surrounding the testator were admissible to resolve an ambiguity without regard to whether the ambiguity was latent or patent.

> [I]t is made evident by the examination of the latest textbooks, and the decisions of our own courts, that the distinction between 'latent' and 'patent' ambiguities is now practically ignored and disregarded; and the courts, without regard to the distinction, endeavor to arrive by the most direct way at what the testator meant when he wrote the will.[83]

Thus, *Haupt* might be cited for the proposition that all extrinsic evidence, impliedly including assertive statements by the testator, is admissible without regard to whether the ambiguity it resolves is latent or patent. Nevertheless, the fact that *Haupt* did not involve the admission of a direct statement and subsequent dicta to the contrary in *Stewart* weakens this position. A cautious statement of the current Texas law regarding admissibility of extrinsic evidence to prove the terms of a will is as follows:

1. No otherwise admissible extrinsic evidence, apart from assertive statements of the testator, is inadmissible as a matter of law to prove the terms of a will;

2. Assertive statements of a testator are inadmissible to prove the terms of an unambiguous will;

3. Assertive statements of the testator may also be held inadmissible to prove the terms of a will having a patent ambiguity.

## II. Rules of Construction

Of course, after finding an ambiguity in a will and admitting extrinsic evidence, a court may be able to resolve it. Even the admission of extrinsic evidence, however, may give no clear-cut answer to the interpretative problem raised by the language of the will. In this latter event, the court must apply legal rules of construction to determine how to dispose of the testator's property.

Although the courts often combine them, factual analysis of the testator's intent and the application of rules of construction are separate and distinct methods of determining the meaning of a will. In applying rules of construction, the court has already attempted and failed to discover from an analysis of the facts surrounding the will's execution the testator's expressed intent. Despite this failure, the court must nevertheless reach a conclusion regard-

83. *Id.* at 709.

ing the dispositions made in the will, and thus must infer or presume an intent by the testator that cannot be shown from the facts considered.

The application of rules of construction to a will is a troublesome area of the law and is confused in part because courts seldom clearly delineate the distinction between interpreting the testator's expressed intent and construing an ambiguous will where no evidence of intent supports one meaning over another. Although the area is perhaps not susceptible of a completely consistent and rational explication, nevertheless on the anvil of judicial construction the meaning of the most perplexing will is finally hammered out. The succeeding discussion analyzes six of the most common rules of construction, reviewing the ways in which these rules are applied to resolve interpretative problems that fail to respond to efforts at interpretation. Although other rules of construction exist, the author has not attempted to discuss all of them since the application of the rules is in many instances arbitrary and little is to be gained by a more exhaustive analysis.

*Later Expression Controls over Earlier.* One rule of construction frequently cited is the rule that the last expression on a particular topic within a will controls over the first. For example, in *Brooker v. Brooker*[84] a testator gave the term "legatees" two different meanings. In the earlier portion of the will the testator used the term to mean six living devisees; in the later portion he used the term to mean those devisees and their heirs as well. The will established a trust to terminate after a period measured by the life of the last living "legatee" plus twenty-one years. If "legatee" meant the six devisees and their heirs, the trust violated the Rule Against Perpetuities. Holding that later sections of the will controlled over earlier ones, the court solved the direct conflict in the use of the term "legatee" by including the heirs in this group as required by the later sections of the will, thereby invalidating the trust because it violated the Rule Against Perpetuities. The conflict within the will was directly raised by the language of the will itself, and the court had to select one meaning or the other.

*Give Effect to Every Word if Possible.* The case of *McQueen v. Stephens*,[85] however, makes clear that a later section of a will will control over earlier ones only if no other option is available. In *McQueen*, the plaintiff's mother was born out of wedlock but was subsequently legitimated by the marriage of her mother. Three years later, the mother divorced her husband. The husband later remarried and had three children; he had no contact with the plaintiff's mother and intentionally disinherited her in his will. The will before the court was that of the husband's brother. The second section of the will devised certain real estate to the testator's wife for life with the remainder "unto the sons and daughters of my brother."[86] A later section devised the testator's personal property to the children of his brother by the second marriage, thereby specifically excluding the plaintiff's mother, and a

84. 76 S.W.2d 180 (Tex. Civ. App.—Forth Worth 1934), *rev'd*, 130 Tex. 27, 106 S.W.2d 247 (1937).
85. 100 S.W.2d 1053 (Tex. Civ. App.—Amarillo 1937, no writ).
86. *Id.* at 1057.

still later clause devised his community real estate in the event his wife died or remarried to "the said sons and daughters of my brother."[87] The question before the court was whether "said sons and daughters" included or excluded the plaintiff's mother. The court said: "The rule which sacrifices the former clause in a will because inconsistent with the later one is never applied except upon failure to give such construction as renders the whole will effective and allows each provision to stand."[88]

The court then refused to apply this rule and instead transposed the second and third sections above, holding, "provisions apparently conflicting must be reconciled if it is possible to do so, and . . . the intention of the testator must be given effect where it contravenes no inflexible rule of law."[89] The court thus permitted the plaintiff to take under the third clause as one of the "sons and daughters." This decision clearly holds that the rule "last controls over first" applies only when an otherwise insoluble conflict exists.

Further, the case demonstrates that the paramount rule in construing a will is to give effect to all of the words of the will if possible; for if "said sons and daughters" had been construed to exclude the plaintiff, the result would have been the nullification of the first clause. Other cases[90] also support the proposition that in construing the will one should give effect to all portions of the will if possible. In *Curtis v. Aycock*,[91] for example, the court in a complicated factual situation chose the interpretation that gave effect to each portion of the will rather than a possible inconsistent construction, stating:

> In construing a will the intention of the testator is controlling. It is the duty of the court, in arriving at such intention, to look alone to the language actually used and to give effect to every part of the will, if it is legally possible or practical to do so, and to consider the instrument as a whole in keeping with the general intention of the testator and to bring every provision of the will into harmony with the other provisions thereof.[92]

Where it is not possible to give effect to all of the words of the will as written, then the court must, of course, use some other method to arrive at the meaning of the will. Before deciding to reject an earlier statement in a will in favor of a later, courts resort to many other presumptions and rules of construction.

*Testator Presumed to Know Law.* Generally, the testator is presumed to know the law. The testator's expressed intent may override the ordinary legal definition of terms or the laws of descent and distribution; indeed, the

87. *Id.*
88. *Id.* at 1058.
89. *Id.* (citing Dublin v. Moore, 96 Tex. 135, 138, 70 S.W. 742, 743 (1902)).
90. *See* Darragh v. Barmore, 242 S.W. 714, 716 (Tex. Comm'n App. 1922, jdgmt adopted); Jackson v. Evans, 305 S.W.2d 236, 239-40 (Tex. Civ. App.—Forth Worth 1957, writ ref'd n.r.e.).
91. 179 S.W.2d 843 (Tex. Civ. App.—Waco 1944, writ ref'd w.o.m.).
92. *Id.* at 847-48 (quoting Aron v. Aron, 168 S.W.2d 917, 918-19 (Tex. Civ. App.—Galveston 1943, writ ref'd). The court in *Aron* was quoting from an earlier decision, Henderson v. Stanley, 150 S.W.2d 152, 154 (Tex. Civ. App.—Waco 1941, no writ)).

latter is what a will usually does. Where no contrary intent is apparent, however, courts will apply the language of a will as if the testator were aware of the law on a particular subject. Thus, in *King v. Howell*[93] the court held that the joint and mutual will of a husband and wife leaving everything to the survivor of them with the remainder on the survivor's death to be "equally divided between" their "nearest blood kin" created a class on the death of the survivor of the two's nearest blood kin and required the remainder to be distributed equally among them. It is doubtful on the facts of the case that this is exactly the manner in which the couple wished the property to be distributed.[94] No extrinsic evidence, however, sufficiently supported any other method of distribution. Thus, if any phrases in the testator's will would have an ordinary legal meaning, the court will apply that meaning unless some evidence of a contrary intent by the testator exists.

*Specific Language Controls over General.* Another rule sometimes applied in construing a will is that specific language in a will supersedes more general language. For example, in *McNabb v. Cruze*[95] the first clause in a will gave the testator's wife a life estate in the residue of his estate while a subsequent clause provided that $2,000 of a $10,000 note held by the testator should be paid to his son and the note then cancelled. The wife sued, claiming that the interest on the note constituted a portion of her life estate. The debtors answered that they had paid the $2,000 to the son and that the will entitled them to cancellation of the note. The court held for the debtors, stating, "[i]t is an elementary principle of law that specific provisions of a will control its general provisions."[96] This rule has the ring of logic, since one could ordinarily presume that the testator intended the specific clause to override the more general. The rule is not, however, consistently applied.

The court also relied on the proposition that later clauses in a will prevail "as being the latest expression of the testator's intent."[97] The rationale behind this rule seems to be that a specific clause, like a later clause, leaves less to speculation regarding the testator's actual intent than the general clauses.

93. 120 S.W.2d 298 (Tex. Civ. App.—Fort Worth 1938, no writ).

94. J.J. and Julia Hudspeth executed the will. J.J. died in 1915, survived by two brothers of the full blood and ten half-siblings, and predeceased by three siblings of the full blood. Julia died in 1935. On her death, J.J.'s two full brothers and four of his half-siblings had died, all leaving issue; thus, six of J.J.'s half-siblings and many nieces and nephews were still alive. When Julia died, all of her siblings had predeceased her, and she was survived by a niece and a nephew by two of her siblings and four grand-nephews and grand-nieces by a third sibling. The court held the will created a class on Julia's death made up of J.J.'s six surviving half-siblings and Julia's niece and nephew and divided the estate equally among these eight individuals to the exclusion of all other descendants. This result was mechanistic, was doubtless unforeseen by J.J. and Julia, and, based on the language of the will, attributed to them a legal sophistication that they did not have.

95. 101 S.W.2d 902 (Tex. Civ. App.—El Paso 1937), *aff'd*, 132 Tex. 476, 125 S.W.2d 288 (1939).

96. 101 S.W.2d at 904 (citing Classen v. Freeman, 236 S.W. 979, 981 (Tex. Comm'n App. 1922, jdgmt adopted)).

97. 101 S.W.2d at 904 (quoting from Martin v. Dial, 57 S.W.2d 75, 79 (Tex. Comm'n App. 1933, jdgmt adopted)).

*General Intent Controls over Individual Contradictory Clause.* While many cases require that the specific clause control the more general, it is also said that where the testator's general intent is clearly expressed, this general intent will control over an arguable construction of a more narrow clause. Thus, in *Burney v. Burney*[98] the testator's will stated that if his wife's income should ever fall below $12,000 per year, the income from his estate should be applied to make up the difference. The will also stated that, if the wife sold her real estate, the income lost thereby reduced the estate's liability to her because otherwise the remaining heirs would be penalized by the wife's profligacy. The wife pointed to this clause as the only restriction on the alienability of her property and claimed that she was free to give away her personal property and not to invest her capital funds without losing her right to reimbursement for income lost thereby from the estate. Although a literal reading of the will supported this claim, the court rejected it because the testator intended to assure both the wife and the other devisees of a fair income and because the wife's alienation of her property without compensation would unilaterally frustrate this intent. The court said: "A clearly expressed intention of the testator contained in one part of the will should not yield to a doubtful construction in any other portion thereof."[99] Again application of this rule of construction makes sense when it is used, as in *Burney v. Burney*, to fill a lacuna unwittingly left by the testator. Nevertheless, the rule itself is in conflict with other rules of construction and only the good sense of the construing court assures prudent application.

*Words Used Twice Presumed to Have Same Meaning.* In *Ellis v. Bruce*[100] a husband and wife made a joint will, one sentence of which gave to the survivor of them all of the property of the decedent, "to be *used, occupied, enjoyed, conveyed and expended* by, and during the life of such survivor as such survivor may desire . . . ."[101] On the death of the survivor, the estate passed to a nephew, the will stating that the nephew should "have and that full title be vested in him to all the property then remaining . . . to be *used* as he may desire so long as he lives . . . ."[102] On the death of the nephew, "the remaining property, if any,"[103] passed to certain survivors. The nephew contended that he received fee simple title to all of the property on the death of the survivor; the beneficiaries who would take on the nephew's death contended that the nephew took only a life estate and, therefore, was limited in the use and disposition he could make of the property. The court emphasized that the joint testators had provided that all the property should go to the survivor of them "to be used, occupied, enjoyed, conveyed, and expended by" him while the clause passing the property to the nephew provided only that the property was "to be used" by him. The court applied the following rule: "When the same words are used in different parts of the

98. 145 Tex. 311, 197 S.W.2d 334 (1946).
99. *Id.* at 314, 197 S.W.2d at 336.
100. 286 S.W.2d 645 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.).
101. *Id.* at 646 (emphasis added).
102. *Id.* (emphasis added).
103. *Id.*

will with reference to the same subject matter, it will be presumed that they were intended to have the same significance, unless there is something in the context to show they were used in a different sense."[104] The court then went on to hold that the nephew received only a life estate in the property because in the first clause the term "used" must have meant something less than "conveyed and expended by." If the term "used" had a limited meaning in the former clause, the court reasoned that it must also have had such a restricted meaning in the latter. Again, this rule of construction makes sense only if judiciously applied by the tribunal construing the will.

*Rules of Construction in General.* Even if arbitrarily applied, rules of construction serve a useful purpose. They enable a court to resolve problems of interpretation when no extrinsic evidence illuminates the intent that the testator was actually expressing. When misapplied, the rules may give rise to results probably unforeseen and unintended by the testator.[105] But in the hands of a judge sensitive to the sophistication, general aims, and linguistic limitations of the particular testator, selective application of the network of conflicting presumptions called rules of construction frequently enables the judge to reach a result similar to that probably desired by the testator.

Nevertheless, an analysis of the application of these rules clearly reveals that they are at most only a second-best means of arriving at the testator's true intent. Thus, the importance of avoiding the need to resort to these rules is clear. In order to do so, full consideration of extrinsic evidence during the interpretation process is essential.

## III. AFTERWORD

The development of the parol evidence rule in Texas as it relates to the interpretation of wills generally parallels the development of the rule that Wigmore finds in the English common law.[106] Initially the rule was an exclusionary one, prohibiting the admission of any evidence other than the words of the will itself. Little by little this general exclusionary rule was softened by exceptions until most jurists permitted the admission of all kinds of evidence other than direct statements of the testator, and even these statements were admissible to resolve a latent ambiguity or equivocation. In England this development was complete by the early nineteenth century.

In Texas, the forces favoring liberal admission of evidence appear not to have won so decisively. True, cases abound stating and applying the liberal rule, but the general prohibitory rule is sometimes stated as well. The latter arises more from confusion regarding the proper role of extrinsic evidence in interpreting a will than from a reluctance to consider such evidence.

This confusion has its basis in the historical development of the area. In the earliest cases involving interpretation jurists took the view that words

104. *Id.* at 647 (citing 44 TEX. JUR. *Wills* § 183, at 748 (1936) [*sic*]).
105. *See* note 94 *supra* and accompanying text.
106. 9 J. WIGMORE, *supra* note 24, § 2461.

had fixed, objective meanings not dependent on the meaning that the speaker desired to convey.[107] If the words written were legible, then all that remained, in the court's view, was to assign these fixed, objective meanings to the words; if properly done, the meaning of the document as a whole would be clear. As the law, and our understanding of language, has developed, however, it has become clear that the speaker's subjective intent in using words is also important in arriving at his meaning. This is particularly obvious when the speaker uses words to identify a person or thing. Thus, when a testator bequeaths his "home place," it is not enough to look the words up in the dictionary to determine the thing to which they refer. Rather, the interpreter must delve into the testator's mind and attempt to identify the thing to which the testator intended to refer. On a more subtle level, this same subjectivity may govern the interpretation of grammatical units[108] and punctuation.

The view that the testator's words should be interpreted according to the subjective meanings he assigned to them is correct for two reasons. First, the ultimate purpose of a will is to permit the testator to pass his property according to his wishes and, therefore, his subjective intent as expressed in his will should control the effect given to it. Secondly, the view that words have fixed, objective meanings is, from the present-day perspective, clearly wrong. True, the commonly used meanings of words may provide a perimeter within which the meaning of a word in a particular context must ordinarily be found. Yet a word itself has no fixed, finite, or magical meaning that invariably obviates the necessity of interpreting it in light of the connotations attributed to it by the speaker. Since a will is the testator's attempt to convey his thoughts to others, it is the meaning that he, not Noah Webster, attributes to the words used that should govern the effect given them.[109]

While this conclusion is easily stated, in particular cases such a result will often be reached only with difficulty or not at all. When the extrinsic evidence is ambiguous or meager and the will itself compels no single interpretation of the testator's intent, the court interpreting the words must rely primarily on its own view of the ordinary meaning of the words used. Thus, the process of construction, of judically inferred meaning, must be resorted to in some instances. Judicial construction should, however, be a remedy of last resort. The fact that a testator's expressed intent is not empirically determinable in some instances never justifies a failure to attempt its determination. An effort to determine a testator's intent should be made on the basis of the best available evidence. This analysis supports the proposition that all probative, reliable, and otherwise admissible evidence,

107. *Id.*

108. See, *e.g.*, Pruett v. Berkeley, 405 S.W.2d 433 (Tex. Civ. App.—Waco 1966, no writ), where the court had to determine the meaning of "In event my death predeceased her." For a discussion of the court's rather confused solution to this problem see note 55 *supra*.

109. A perplexing problem is raised here. Most wills today are written by attorneys, not testators, and many testators have not the faintest idea what the more complex sections of their wills are meant to accomplish. Because in effect the interpretation of the attorney is interposed between the court and the wishes and instructions of the testator, it is all the more important that the court have the best available evidence—the testator's instructions to his attorney—in interpreting a difficult will.

including assertive statements of the testator, should be considered, regardless of whether the court elects to label the will ambiguous.

With regard to all evidence other than assertive statements by the testator no valid policy militates otherwise. The Statute of Wills requires property to be passed according to the will, but as we have seen, the words of the will need interpretation, and interpretation requires an inquiry into the meaning the testator tried to convey by the words; since the words themselves have a range of possible meanings with the correct one depending on the intent of the testator, extrinsic evidence becomes a valuable tool to satisfy rather than thwart the statute. The better the data available, the more likely the testator's property will pass according to his expressed wishes.

This leaves the question of whether to admit statements by a testator asserting that his will has a particular meaning. These statements have ordinarily been excluded from consideration, at least when the court construing the will finds that the will is unambiguous. The reason is not that the testator's assertive statements would not be helpful in construing the will; rather, because the statute requires the testamentary act to be in written form, the risk is viewed as great that the statute would be circumvented and the passage of property affected according to the testator's oral statements if such statements were admissible. Further, it is often said that the admission of such statements to prove an unambiguous will would encourage fraud and perjury.[110]

With respect to the ambiguous will, as we have seen, Texas probably clings to the rule that assertive statements by the testator are admissible to resolve a latent, but not a patent, ambiguity. This distinction appears to have arisen from the theory that because a latent ambiguity describes equally well two separate external objects, an oral statement by the testator identifying the object actually referred to cannot be shown to controvert the will.[111] In contrast, courts have apparently treated patent ambiguities as primarily a problem of construction of the will itself. In this case, since no extrinsic evidence is required to show the existence of the ambiguity, neither is any extrinsic evidence required to resolve it. Of course, with respect to problems of interpretation not involving a so-called ambiguity, assertive statements are generally held not to be admissible at all.

Whether these formalistic rules, relying as they do, on the division of wills into those involving latent ambiguities, those involving patent ambiguities, and unambiguous documents, serve a useful purpose is doubtful. First, the division of wills into ambiguous and unambiguous groups is a discretionary exercise. As we have seen, every will requires the admission of some extrinsic evidence to resolve interpretative problems or to identify the objects sought to be passed under the will and those who are intended to take the bequests. Thus, the distinction between an ambiguous and an unambiguous will is not at all clear even though the characterization of a will as ambiguous or unambiguous may have drastic evidentiary consequences.

110. *See generally* Estate of Trunk v. Commissioner, 550 F.2d 81 (2d Cir. 1977); 9 J. WIGMORE, *supra* note 24, § 2471.

111. 9 J. WIGMORE, *supra* note 24, § 2472.

Secondly, the distinction between latent and patent ambiguities, while obvious as an abstract proposition, is a matter of some controversy and uncertainty in specific situations. For example, while ambiguity arising out of a phrase such as "personal property" is generally held to be latent, the variety of meanings that have been attributed to this phrase in constantly recurring construction proceedings support an argument that it is ambiguous on its face.[112] Thus, the doubtful value of the latent-patent distinction draws into question the advisability of making potentially determinative decisions regarding the admissibility of evidence on this basis.

Entirely apart from the fact that characterization of a will as ambiguous or characterization of an ambiguity as latent or patent is in large part discretionary with the court, the fact is that where an ambiguity does exist there seems to be no policy jusitification for the exclusion of assertive statements by the testator. If the court cannot tell what the meaning of a will is without considering assertive statements as evidence, then the admission of that evidence and the consideration of it in an attempt to identify the testator's actually expressed intent seems clearly preferable to an arbitrary decision by the court to exclude the evidence based on the fact that, under certain sixteenth century concepts, a patent rather than a latent ambiguity exists. The risk of fraud or perjury in the admission of such assertive statements is no greater than exists in many other evidentiary situations. Further, the risk that the ultimate disposition of the property will follow the testator's oral expression rather than his formal will does not, in the author's opinion, reduce the value of its admission since the construing court will require the words of the will to support the interpretation finally made. The alternative, an arbitrary interpretation made in disregard of the oral testimony, involves the more serious risk that the testator's expressed intent will be ignored. Thus, Texas courts should more carefully consider whether a blind allegiance to the rule excluding assertive statements in the patent ambiguity situation is desirable. The modern trend appears to be to ignore the latent-patent distinction and to admit assertive statements where an ambiguity exists, regardless of the subclassification into which a court might place it.[113]

While the need for admitting assertive statements by the testator is not so urgent when a will is characterized as unambiguous or when extrinsic evidence other than direct statements apparently resolve an interpretative problem, neither is it clear that the perceived dangers of admitting such statements are so serious that they should be excluded altogether. Application of general rules of evidence go a long way in protecting a court from fraudulent or perjured testimony. Moreover, consideration of the will itself as the ultimate source for determining whether a bequest is permissible in large part protects a court from the danger of giving effect to a devise based on the testator's oral statements rather than the words of the will. Finally, the testator's assertive statements would not be the sole source of extrinsic

112. Estate of Trunk v. Commissioner, 550 F.2d 81, 85 n.4 (2d Cir. 1977).

113. *See, e.g*, Estate of Trunk v. Commissioner, 550 F.2d 81 (2d Cir. 1977); Steele v. Langmuir, 65 Cal. App. 3d 459, 135 Cal. Rptr. 426 (1976); *In re* Momand's Will, 7 App. Div. 2d 280, 128 N.Y.S.2d 565 (1976).

evidence to be relied upon; rather, all other evidence ordinarily admissible would also be considered and would temper the perceived importance of testimony regarding the testator's assertive statements. In the future, Texas courts should give more creative attention to this problem, exhibit a willingness to reexamine the bases for traditional exclusionary rules, and make an effort to reach their own resolution of a difficult problem based on their own perception of the weight to be given the conflicting policies and interests involved.