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Distinction Between Construction and Interpretation of Wills

DISTINCTION BETWEEN CONSTRUCTION AND INTERPRETATION OF WILLS

The interpretation and construction of a will is a complex process which courts sometimes fail to recognize involves two distinct phases in the judicial determination of the proper distribution of a decedent's estate.[1] Interpretation is the process of discovering, from permissible data, the meaning or intention of the testator as expressed in his will.[2] If interpretation discloses a clear and full intention on the part of the testator, further inquiry is not necessary.[3] On the other hand, courts resort to the process of construction if the discovered intention is partial or ambiguous and therefore inconclusive.[4] In pursuing this process a court is aided by certain rules of construction or presumptions.[5] In applying these rules the court is seeking to assign intention to the words used by the testator, and is not seeking the testator's actual intention, for it has already failed to find this.[6] In essence, the court is attempting to formulate a permissible intent for the testator with the aid of rules of construction.[7]

A problem of property distribution under a will recently confronted the Maryland Court of Appeals in *McElroy v. Mercantile-Safe Deposit & Trust Co.*[8] The testator, Walter L. Clark, died unmarried in 1941. After making specific bequests in the first four items of his will, the testator undertook to dispose of the residue in the fifth item. A portion of the residuary fund was bequeathed to the Mercantile-Safe Deposit & Trust Company, as trustee, to be divided into three equal parts. The testator's sister and her family were named as beneficiaries of one

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[1]Some courts have not recognized the difference between interpretation and construction. Restatement, Property § 241 comment e (1940); Simes, Future Interests § 75 (1952). Today, however it is felt that it is helpful to draw a distinction between the two processes. In re Wittner's Estate, 301 N.Y. 461, 95 N.E.2d 798 (1950); Thompson, Construction of Wills § 2 (1928); Schiller, Roman Interpretatio and Anglo-American Interpretation and Construction, 27 Va. L. Rev. 733 (1941).

[2]Holmes, The Theory of Interpretation, 12 Harv. L. Rev. 417 (1899).

[3]Atkinson, Wills § 146 (2d ed. 1953); Page, Wills § 30.3 Bowe-Parker ed.

[4]Miller v. Equitable Trust Co., 27 Del. Ch. 282, 32 A.2d 431 (1943); Judik v. Travers, 184 Md. 215, 40 A.2d 306 (1944); In re Taylor's Will, 115 N.Y.S.2d 375 (Surr. Ct. 1952); In re Walker's Estate, 376 Pa. 16, 101 A.2d 652 (1954).

[5]Judik v. Travers, 184 Md. 215, 40 A.2d 306 (1944); Neblett v. Smith, 142 Va. 840, 128 S.E. 247 (1925).

[6]In re Lummis, 101 Misc. 258, 166 N.Y.S. 936 (Surr. Ct. 1917).

[7]For a comprehensive analysis and discussion of the interpretation and construction process see: Atkinson, Wills § 146 (2d ed. 1953).

[8]299 Md. 276, 182 A.2d 775 (1962). McElroy v. Mercantile-Safe Deposit & Trust Co. will hereinafter be referred to as McElroy.

of these parts; another part was to benefit an only brother and his family. It was this latter one-third part that became the subject of litigation. The applicable part of the residuary clause provided that the trustees should pay the income from this part to his brother Herbert for life, and upon Herbert's death:

> [T]o pay said income . . . *unto his widow and any of his children who may survive him* in the proportion of *one-third to the widow* and the balance to his surviving children until said children shall have attained the age of twenty-one years, at which time the trust as to such child or children shall cease and the proportionate part of the corpus of this part shall be paid to said child or children. . . . Upon distribution to the child last attaining the age of twenty-one years the *income on one-third* of this part shall be paid to my brother's widow during her lifetime; then upon her death *that part of the corpus* shall be distributed under item Sixth hereof."[9]

Then in the sixth item, the testator provided:

> "As and when *certain* of the trust estates set forth herein shall cease and the corpus thereof be available for distribution under this item Sixth of my will, I direct my Trustee to divide same into three equal parts and to pay one part thereof unto each of . . . [three named educational] institutions. . . .[10]

The testator's brother, Herbert, survived the testator, but died in 1959 without children. This gave rise to the problem of who was entitled to the two-thirds remainder interest of the "Herbert" trust which would have gone to Herbert's children had there been any to qualify as distributees. The testator's heirs-at-law, who were the adopted daughters of his sister and therefore his nieces, contended that there was an intestacy. The widow claimed there was no intestacy and that she was entitled to a life estate in the income of the whole of the "Herbert" trust. The educational institution agreed with the widow that there was no intestacy, but argued that one of the "certain of the trust estates," referred to in the sixth item, had ceased, and that the corpus should be distributed to them as beneficiaries under the sixth provision.

The lower court accepted the widow's contention, holding that she was entitled to the income from the entire "Herbert" trust for life. This decision was appealed by both the nieces and the educational institutions to the highest court in Maryland.

The Maryland Court of Appeals affirmed the lower court's hold-

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[9]182 A.2d 775, 777, n.1. (Emphasis added)
[10]Ibid.

ing. In reaching this conclusion, the court utilized, primarily, two well recognized rules of contsruction: (1) There is a presumption against a general or partial intestacy where the will contains a residuary clause;[11] and (2) Where there are two possible constructions, a court will adopt that construction which disposes of the entire estate rather than a construction that results in total or partial intestacy.[12] Applying these rules to the words of the will that describe the beneficiaries of the "Herbert" trust on Herbert's death, the court concluded that "unto his widow and any of his children who may survive him" meant "to his widow; and if any of his children survive him." Further, the court concluded that the word "certain" in the sixth item meant "any," so that the clause is read as meaning: "As and when any of the trust estates set forth herein shall cease."[13] As a result of these conclusions, the court held the will to mean that if Herbert died childless, the testator intended the widow to receive the entire income from the trust for life, and upon her death the trust was to cease and the entire corpus to be paid to the three named educational institutions.

Two members of the court, in a dissenting opinion, criticized the conclusions of the majority as constituting an alteration of the words in the will. They felt that there was no ambiguity in the language used and that the will failed to dispose of two-thirds of the "Herbert" trust. The dissent concluded that according to the plain meaning"[14]

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[11]Payne v. Payne, 136 Md. 551, 111 Atl. 81 (1920).

[12]Reese v. Reese, 190 Md. 311, 58 A.2d 643 (1948).

[13]The heirs at law and one educational institution argued that "certain of the trust estates" referred only to those trusts whose beneficiaries were fixed and determined by being named or described. By reading the word "certain" as meaning "any", the majority concluded that the will meant that on the termination of any trust, not just those with fixed beneficiaries, the corpus would pass under item sixth to the educational institutions.

[14]Sir James Wigram defines the "Plain Meaning Rule" as:

> "Where there is nothing in the context of a will, from which it is apparent, that a testator has used the words in which he expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

Warren, Interpretation of Wills—Recent Trends, 49 Harv. L. Rev. 689, 690 (1936), citing Wigram, Extrinsic Evidence par. 14 n.4 (4th ed. 1885). The "Plain Meaning Rule" received strong impetus in the United States from the decision of Chief Justice Shaw in Tucker v. Seaman's Aid Soc'y, 48 Mass. (7 Met. 188) 199 (1843).

of the words used by the testator, the widow should receive income on only one-third of the "Herbert" trust, and that there was an intestacy as to the other two-thirds.

Both the majority and the dissent in *McElroy* felt that the testator's true intention was the primary consideration,[15] but it is apparent from their opinions that each utilized a different approach in arriving at his conclusion. The majority seemingly failed to recognize that interpretation and construction are separate and distinct processes. Although employing some facets of the interpretation process, the majority passed over this primary step of determining the testator's true intention and formulated an intention for the testator through the construction process. The dissenting judges, on the other hand, approached the problem as one of interpretation, reaching a conclusion as to the testator's true intention by reading the will within "its four corners." The dissent argued that the court's only recourse was to interpret the testator's language in connection with the unforeseen circumstances which arose,[16] and not to view his words as ambiguous in order to avoid the interpretation process.

The majority seems to have placed great importance upon the presumption against intestacy.[17] As a rule of construction, this presumption has a definite function when there is a question of the testator's intention which cannot be resolved by the interpretation process.[18] It is reasonable to presume that the testator by executing a will intends to dispose of his entire estate, and not to die intestate as to any part thereof.[19] By applying this rule of construction in *McElroy* the majority imputed to the testator the intent that if there were no children, the widow and ultimately the educational institutions were to receive the full benefit of the "Herbert" trust. In order that the will might effectuate this imputed intention, the majority read certain words in the will to mean something other than the usual meaning

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[15]It is an axiom that the ascertainment of the intention of the testator is the controlling factor in construing a will. Williams v. Committee of Baptist Church, 92 Md. 947, 48 Atl. 930 (1901). See 57 Am. Jur., Wills § 1138 (1948).

[16]Hebden v. Keim, 196 Md. 45, 75 A.2d 126 (1950); Sabit v. Safe Deposit & Trust Co., 184 Md. 24, 40 A.2d 231 (1944); Perkins v. Iglehart, 183 Md. 520, 39 A.2d 762 (1944); Estate of Childs v. Hoagland, 181 Md. 550, 30 A.2d 766 (1943).

[17]For cases involving the presumption against intestacy see: In re Paulsen's Estate, 113 Colo. 373, 158 P.2d 186 (1945); Garacci v. Lillard, 7 Ill. App. 2d 382, 130 N.E.2d 514 (1955); Payne v. Payne, 136 Md. 551, 111 Atl. 81 (1920); In re Fabbri's Will, 146 N.Y.S.2d 276 (Surr. Ct. 955); Petition of Maybaum, 270 App. Div, 1028, 63 N.Y.S.2d 85 (1946).

[18]In re Ingham's Estate, 315 Pa. 293, 172 Atl. 662 (1934).

[19]Lewis v. Payne, 113 Md. 127, 77 Atl. 321 (1910); Glass v. Morgan, 241 Pa. 240, 88 Atl. 424 (1913); Daniel v. Brown, 155 Va. 563, 159 S.E. 209 (1931).

attached to them. In effect, the majority was disregarding certain words in the will, a practice usually employed only in the interpretation process.[20]

In the interpretation process, the courts will look to the will as a whole and interpret the words used by the testator to discern whether their meaning expressses his intention.[21] Some courts when interpreting the testator's language consider only the will itself.[22] Others look also to the circumstances existing at the time the will was executed, including the testator's relationship to the beneficiaries under the will.[23] Once the manifest intent of the testator has been ascertained by this process, most courts allow words in the will to be altered so as to effectuate such intention.[24] In England, words may be deleted in the probate proceeding in order that the will may conform more nearly to the testator's intention.[25] Although the English view has been adopted by some American courts in *post* probate proceedings,[26] most jurisdictions in the United States only allow alteration of the words in the sense that the court may disregard words.[27] Both in Eng-

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[20]Atkinson, Wills § 146 (2d ed. 1953).

[21]Grace v. Continental Trust Co., 169 Md. 653, 182 Atl. 573 (1936); Reeside v. Annex Bldg. Ass'n, 165 Md. 200, 167 Atl. 72 (1933); Smith v. Cockrill, 170 Va. 423, 196 S.E. 681 (1938).

[22]Usually where the will contains no ambiguity, latent or patent, extrinsic evidence of the testator's intention is not admissible. The courts will only consider the will itself. Shipley v. Mercantile Trust & Deposit Co., 102 Md. 649, 62 Atl. 814 (1906). See Annot., 94 A.L.R. 26, 39 (1935).

[23]Most courts hold that evidence of extrinsic circumstances is admissible to explain an ambiguous will. Sabit v. Safe Deposit & Trust Co., 184 Md. 24, 40 A.2d 241 (1944). See Annot., 94 A.L.R. 26, 44 (1935).

[24]Courts are reluctant to reject, supply or transpose words unless made necessary by the will as a whole. In re Trevor, 239 N.Y. 6, 145 N.E. 66 (1924); Blair v. Shannon, 349 Pa. 550, 37 A.2d 563 (1944); Tiffany v. Thomas, 168 Va. 31, 190 S.E. 101 (1937). See 4 Page, Wills § 30.25 (Bowe-Parker ed. 1961).

[25]In re Goods of Boehm, [1891] p. 247. In this case, Sir J. E. Boehm intended to create in his will two £10,000 trusts, one for each of his two unmarried daughters, Georgiana and Florence. However, the will provided for only one of these daughters, since the draftsman instead of inserting one clause in favor of Georgiana, and another clause in favor of Florence, inserted the name of Georgiana in the second clause as well as the first. Since there was proof of the testator's intention, the court probated the will with the word Georgiana omitted in the second £10,000 trust, so that the designation then appeared as "my said daughter——— Boehm." The Probate Court left it to the Chancery Court, the court of construction to decide what word the testator intended to place therein.

[26]Mason v. Willis, 326 Ill. App. 481, 62 N.E.2d 135 (1945); In re Vismar's Estate, 117 Misc. 554, 191 N.Y.S. 752 (Surr. Ct. 1921).

[27]Most courts do not actually alter the words in the will, but only read the will as if the words were omitted, Dulany v. Middleton, 72 Md. 67, 19 Alt. 146 (1890); inserted, Heald v. Heald, 56 Md. 300 (1881); or transposed, In re Gallien, 247 N.Y. 195, 160 N.E. 8 (1928). See Heden v. Keim, 196 Md. 45, 75 A.2d 126 (1950); Buchwald v. Buchwald, 175 Md. 103, 199 Atl. 795 (1938).

land and in the United States, the courts employ this procedure only when the testator's intention is known from permissible data, and do not resort to it upon mere conjecture as to what the testator might have intended.[28] Consequently, it seems doubtful whether the majority should have disregarded words, since its only justification for passing over the interpretation process was that it could not ascertain the testator's intent from the permissible data.

It appears that even if the majority had properly reached the construction process, it has defeated that part of the testator's intent which seems clear and unambiguous by applying the presumption against intestacy. It was stipulated in the fifth item that "the income on *one-third* of [the trust] shall be paid" to the widow for life, and upon her death *"that part of the corpus* shall be distributed under item Sixth thereof."[29] It would seem that these words could only be interpreted to mean that the educational institutions, under the sixth item, were to receive one-third of the corpus of the "Herbert" trust. The majority, however, by its application of the presumption against intestacy concluded that the educational institutions were ultimately entitled to receive the whole corpus. In effect, the application of this rule of construction conflicted with the testator's intention as illustrated by the fifth item.[30] Therefore, it is submitted that the presumption against intestacy should not have been applied, since the primary principle of giving effect to the testator's intent is violated when a rule of construction is put in competition with such intent.[31]

When the testator's brother, Herbert, died without children, the gift of the two-thirds portion of the "Herbert" trust became void since there was a failure of specified takers.[32] Generally, a void legacy

[28]Ickes v. Ickes, 386 Ill. 19, 53 N.E.2d 585 (1944); Grise v. Weiss, 213 Ind. 3, 11 N.E.2d 146 (1937); Perkins v. Iglehart, 183 Md. 520, 39 A.2d 672 (1944); Smith v. Baltimore Trust Co., 133 Md. 404, 105 Atl. 534 (1919); In re Haber's Will, 281 App. Div. 383, 119 N.Y.S.2d 843 (1953); Kostos v. Anderson, 204 Okla. 655, 240 P.2d 73 (1952). See 57 Am. Jur., Wills § 1153 (1948).

[29]Emphasis added.

[30]Courts hold that the intention of the testator is to be ascertained from the language of the Will. Robinson v. Mercantile Trust Co., 180 Md. 336, 24 A.2d 299 (1942); Grace v. Continental Trust Co., 169 Md. 653, 182 Atl. 573 (1936).

[31]Himmel v. Himmel, 294 Ill. 557, 128 N.E. 641 (1920); Burnett v. Goodyear, 329 Mich. 214, 45 N.W.2d 41 (1950); Robinson v. Martin, 200 N.Y. 159, 93 N.E. 488 (1910); Miller v. Buchanan, 114 Va. 76, 75 S.E. 773 (1912). See 57 Am. Jur., Wills § 1135 (1948).

[32]In re Kane's Estate, 161 Misc. 767, 293 N.Y.S. 39 (Surr. Ct. 1936), aff'd, In re Kane's Will, 251 App. Div. 710, 296 N.Y.S. 1005 (1937). See Barnes v. Johns, 261 Ky. 181, 87 S.W.2d 387 (1935), a case involving the distribution of the remander interest of a devise under circumstances similar to those in McElroy.

passes under the general residuary clause,[33] but when the invalid legacy is a part of the residuary estate, most courts hold that the subject matter becomes intestate property.[34] There is a view, however, which holds that where the residuary bequest was made to a named class, a void legacy in the residuum should pass to the surviving residuary beneficiaries.[35] It is clear, however, that the majority did not view the residuary bequest as a class gift since it concluded that only some of the surviving residuary beneficiaries were entitled to share in the two-thirds portion of the "Herbert" trust. Therefore, as the testator did not make a provision directing the disposition of the two-thirds part in the event his brother died without children,[36] all courts would seem to hold that this portion became intestate property distributable to the nieces as heirs at law.

In formulating the testator's intent, the majority implied that since the testator made provision for the nieces in his will, he did not intend for them to receive an additional portion. However, the same argument would apply to the widow and the educational institutions since they were also beneficiaries of provisions in the will. Therefore, no inference should be drawn from the fact that the testator made provisions in his will for each of the competing parties. They should all be considered to be on an equal basis in this respect, and the law of intestacy should be the determining factor as to what distribution is to be made of the undisposed portion of the estate. Intestate laws are the legislative judgment as to the just disposition of a decedent's estate not distributable by will. In effect, the majority in formulating this testator's intent through the construction process has employed a presumption to override a positive rule of law concerning void gifts.

Moreover, by adopting the "plain meaning" analysis of the language, as argued for by the dissent, there would have been no need

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[33]Bridgeport Trust Co. v. Parker, 97 Conn. 245, 116 Atl. 182 (1922); Dulany v. Middleton, 72 Md. 67, 19 Atl. 146 (1890); In re Allen, 151 N.Y. 243, 45 N.E. 554 (1896). See Thompson, Wills § 566 (3d ed. 1947).

[34]Bronson v. Pinney, 130 Conn. 262, 33 A.2d 322 (1943); Leighton v. Leighton, 193 Iowa 1299, 188 N.W. 922 (1922); Powers v. Godwise, 172 Mass. 425, 52 N.E. 525 (1899); In re Kent's Will, 169 App. Div. 388, 155 N.Y. 804 (1915); In re Penrose's Estate, 183 Misc. 226, 47 N.Y.S.2d 732 (Surr. Ct.). See Atkinson, Wills § 140 (2d ed. 1953).

[35]Courts hold that the void legacy passes to those members of the class who were in existence when the class was fixed. Strauss v. Strauss, 363 Ill. 442, 2 N.E.2d 699 (1936); In re Potter's Estate, 140 N.Y. 599, 35 N.E. 955 (1894); In re Wood's Estate, 321 Pa. 497, 184 Atl. 13 (1936).

[36]Courts have given full effect to similar provisions. Eee e.g., Perkins v. Iglehart, 183 Md. 520, 39 A.2d 672 (1944); Nelson v. Johnson, 354 Pa. 512, 47 A.2d 650 (1946); Lawless v. Lawless, 187 Va. 511, 47 S.E. 2d 431 (1948).