

CONSTRUCTION OF WILLS: “TIPS, TRAPS AND THE LATEST CASES”

Richard Williams¹

1. The construction of wills can, at first sight, appear to involve the navigation of an unfathomable maze of principles, presumptions and apparent contradictions. Some 400 years ago, in 1613, Coke CJ made the following observation:²

“Wills are the construction of them do more perplex a man, than any other learning, and to make a certain construction of them, this *excedit juris prudentum artem*;³ but I have learned this good rule, always to judge in such cases, as near as may be, and according to rules of Law; and in so doing, I shall not err, and this is a good and a sure rule, if a will be plain, then to collect the meaning of the Testator out of the words of the Will: we all agree in all these Rules but we differ in the application of them;”

Edmond Cahn, an American lawyer writing in the Georgetown Law Journal in 1937,⁴ ventured to suggest the reason for Lord Coke’s despair:

“This is not because of any lack of rules or maxims, – the books and the precedents are full of them. It is rather because the rules are constantly broken and the maxims distinguished when cases arise for actual determination. Thus the observation that “No will has a twin” has grown popular. This motto reflects the general conviction of the bench and bar that the construction of wills is a process without plan or rule.”

2. This paper considers the following aspects of the construction of wills:
 - (a) The general principles of construction.
 - (b) The importance of extrinsic evidence.
 - (c) Some recent cases that illustrate the application of the principles.
 - (d) The distinct remedy of rectification, and the relationship between construction applications and applications for judicial advice.

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² *Roberts v Roberts* 2 Bulst 123 at 130; 80 ER 1002 at 1008.

³ ‘is the despair of jurisprudence’.

⁴ E N Cahn, *Testamentary Construction: The Psychological Approach* (1937) 26 Geo L J 17.

General principles of construction

3. The starting point for the construction of a Will is that the Court must give effect to the intention of the testator, which is gathered from reading the Will as a whole and giving the words the meaning which, having regard to the terms of the Will, the testator intended: *Perrin v Morgan*.⁵ Reference should also be made to the ten ‘incontestable principles’ of construction that were articulated by Isaacs J in *Fell v Fell*;⁶ see Appendix 1 to this paper.
4. A summary of the general principles is found in *Bowering v Knox (No 2)*, where Sackar J said as follows:⁷

[17] In *Fell v Fell*,⁸ Isaacs J referred to certain “incontestable” principles, namely that the will must receive a construction according to the plain meaning of the words and sentences therein contained, ascertaining the meaning of the instrument as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it.

[18] In *Fairbairn v Varvaressos*,⁹ Campbell JA observed:

As Powell J said in *Coorey v George*,¹⁰ in a passage approved by Bryson J in *Perpetual Trustee Co Ltd v Wright*,¹¹ in construing a will:

“... [O]ne’s task is, first, if it be possible, to ascertain, what was the basic scheme which the deceased had conceived for dealing with his estate, and, then, so to construe the will as, if it be possible, to give effect to the scheme so revealed.”

[19] In *Muir v Winn*,¹² Bryson AJ (as His Honour then was) observed:¹³

Will construction is not an exercise in which any passage in a will can be isolated from the whole document; see *Sidle v Queensland Trustees Ltd*,¹⁴ including the following passage:

“But one universal principle is that the whole will must be read before finally arriving at an opinion as to the meaning of any controverted portion. You read the whole document through in the first place to ascertain whether it contains anything to affect the meaning of the passage in controversy.”

⁵ [1943] AC 399 at 406, 420.

⁶ (1922) 31 CLR 268 at 273-276.

⁷ [2014] NSWSC 1749.

⁸ (1922) 31 CLR 268 at 273-275.

⁹ (2010) 78 NSWLR 577; [2010] NSWCA 234 at [19].

¹⁰ Unreported, 27 February 1986, at 14.

¹¹ (1987) 9 NSWLR 18 at 33.

¹² [2009] NSWSC 857.

¹³ At [3]-[4].

¹⁴ (1915) 20 CLR 557 at 560-561, Isaacs and Powers JJ.

The whole terms of the will and its surrounding circumstances may well show that the language used has some meaning other than its ordinary meaning; see *Re Hodgson; Nowell v Flannery*.¹⁵

[20] Bryson AJ also held:¹⁶

It is not in my understanding a correct approach to the construction of wills to understand what they say only in entirely literal terms. It is improbable that the testatrix intended to bring about the result for which the plaintiff contends, and entirely improbable that she would have expressed that intention in the almost undetectably obscure way attributed to Clause 1.7. Interpreting a will is not an exercise from the logic schools nor is it an exercise in entire purity of language. The Court seeks to ascertain the intention of the testator as expressed in the language used, while understanding that the language used might not express that intention perfectly.

It is necessary to seek to understand the scheme of a testator's dispositions. Where the terms of the will are perfectly clear search for the scheme may be of little use, but where the language is obscure or the effects of the literal reading and the reasoning impliedly underlying it are startlingly unlikely, as in this case, the scheme of dispositions is very important ...

[21] Bryson J had earlier observed in *Hatzantonis v Lawrence*:¹⁷

In ascertaining the meaning of wills, consideration should in my opinion start with the fundamental rule stated by Viscount Simon LC in *Perrin v Morgan*:¹⁸

... the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are “expressed intentions” of the testator.

[22] The observations of Joyce J in *Re Sanford*¹⁹ are also apposite, where His Honour said (referring to the decision of the English Court of Appeal in *Re Blantern*²⁰):

It has been said by the Court of Appeal that the true way to construe a will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given.

[23] The principles relating to the construction of wills were also recently concisely set out by White J in *Keulemans v Attorney-General*.²¹ His Honour said:²²

¹⁵ [1936] 1 Ch 203 at 206, Farwell J.

¹⁶ At [23]-[24].

¹⁷ [2003] NSWSC 914 at [6].

¹⁸ [1943] AC 399 at 406.

¹⁹ [1901] 1 Ch 939 at 941.

²⁰ [1891] WN (ENG) 54.

The Court's task is to "put on the words used the meaning which, having regard to the terms of the will, the testator intended" (*Perrin v Morgan*²³), that is, to ascertain what the testator meant by the words used in the will (*Hatzantonis v Lawrence*;²⁴ *Public Trustee v Herbert*;²⁵ Theobald on Wills).²⁶

The instrument ... must receive a construction according to the plain meaning of the words and sentences therein contained. But ... you must look to the whole instrument, and, in as much as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give it effect, if it be possible to do so, to the intention of the framer of it." (Lord Halsbury LC in *Leader v Duffey*;²⁷ *Ward v Brown*;²⁸ Buckley J in *Kirby-Smith v Parnell*,²⁹ quoted from *Fell v Fell*³⁰).

One's task is, first, if it be possible, to ascertain, what was the basic scheme which the deceased had conceived for dealing with his estate, and, then, so to construe the will as, if it be possible, to give effect to the scheme so revealed." (*Coorey v George*;³¹ *Perpetual Trustee Co Limited v Wright*;³² *Fairbairn v Varvaressos*³³).

5. A further useful summary of the general principles of construction of Wills (and Codicils) is found in *Ashton v Ashton*:³⁴

"The first question involves the proper construction of the Codicil. The principles applicable to that question were not in dispute at the hearing. The Will and Codicil are to be constructed having regard to their words. If the usual meaning of those words is clear, they will be given that construction. If not, the Court may have regard to extrinsic evidence as allowed by the rules of construction applied by the Court and s 33C of the *Succession Act 1981* (Qld).³⁵

In undertaking this determination, the Will and Codicil:

²¹ [2013] NSWSC 1772.

²² At [15]-[17].

²³ [1943] AC 399 at 406.

²⁴ [2003] NSWSC 914 at [6].

²⁵ [2009] NSWSC 366 at [27].

²⁶ Sweet and Maxwell, 17th ed 2010 at [15-003].

²⁷ (1888) 13 App Cas 294 at 301.

²⁸ [1916] 2 AC 121.

²⁹ [1903] 1 Ch 483 at 489.

³⁰ (1922) 31 CLR 268 at 273-274.

³¹ Unreported, 27 February 1986, Powell J; BC8601222 at 14.

³² (1987) 9 NSWLR 18 at 33.

³³ (2010) 78 NSWLR 577 at [19], 581-582.

³⁴ [2010] QSC 326 per Boddice J.

³⁵ *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at 33 [26].

- (a) must be construed as a whole to ascertain the meaning of the instrument taken as a whole, in order to give effect, if it be possible to do so, to the intention of the framer of it;³⁶
- (b) should not be construed in a strictly technical or legalistic sense and its construction should be sensitive to the factual context of ordinary lives and circumstances.³⁷

One of the rules of construction is to allow evidence under the “armchair rule”. This rule allows the Court to put itself in the position of the testator and to consider all material facts and circumstances known to the testator with reference to which he or she is taken to have used words in the Will and Codicil and then to declare what was the testator’s intention evidenced by the words used with reference to those facts and circumstances.³⁸ The testator’s language is to be read in the sense the testator appears to have attached to the expressions used, unless a rule of law gives them some fixed operation.³⁹”

6. The case of *Suthers v Suthers*⁴⁰ also contains a succinct summary:⁴¹

“The principles of construction governing the approach to be taken by the court on an application such as this are of long-standing. The object is to discover the testator’s intention through examination of the words used in the will.⁴² To do so, regard is had to the rules of construction traditionally applied by the courts and the aids to construction contained in s 33C of the *Succession Act 1981* (Qld).⁴³

At the heart of this interpretative exercise is the consideration of the usual meaning of the language used in the testamentary provision in question, and this is to be done in light of the will read as a whole.⁴⁴ If the meaning of the provision is clear, the will shall be given that construction.⁴⁵ However, in determining what a testator *meant* by the words used in the will, the court may receive evidence under the “armchair rule” so as to place itself in the position of the testator at the time when the will was made. In this way, the court can take account of the material circumstances which were known (or ought to have been known) by the testator at the time when he or she used the words contained in the will. The rationale for the rule is to be found in the proposition that “the meaning of words varies according to the circumstances of and concerning which they are used”⁴⁶ and, because of that, the court is often assisted by establishing the context in which the testamentary intentions were expressed. Importantly, such a rule applies where

³⁶ *Fell v Fell* (1922) 31 CLR 268 at 273-274; *Underwood v Underwood* [2007] QSC 256 at 7 [16].

³⁷ *Re Willis* [1996] 2 Qd R 664 at 667; see also *Underwood* at 7 [17].

³⁸ *Allgood v Blake* (1873) LR 8 Ex 160 at 162.

³⁹ *Brennan v Permanent Trustee Co* (1945) 73 CLR 404 at 414.

⁴⁰ [2015] QSC 285.

⁴¹ At [3] and [4] per Burns J.

⁴² *Perrin & Ors v Morgan & Ors* [1943] AC 399 at 406 per Viscount Simon LC; *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at 31, [20] per Atkinson J.

⁴³ *Smith* at 22, [26] per Atkinson J.

⁴⁴ *Fell & Anor v Fell & Anor* (1922) 31 CLR 268 at 273-274 per Isaacs J.

⁴⁵ *Smith* at 33, [26] per Atkinson J.

⁴⁶ *Allgood & Ors v Blake* (1872-73) LR 8 Ex 160 at 162-164 per Blackburn J. And see *Perrin* at 420 per Lord Romer; *Smith* at 32-33, [24]-[25] per Atkinson J.

those intentions appear, on a plain reading of the will, to be clear as well as in circumstances where s 33C of the Act applies.⁴⁷ ...”

7. More recently, in *Re Melbourne; Wall v Wathen*,⁴⁸ McMillan J summarised the general principles as follows:

“[18] The will falls to be construed in accordance with the principles of construction of wills, with the written words in the will being given their ordinary meaning and the determination of the issues being made by reference to the words used by the testatrix in her will, having regard to any established rules of construction, as well as any statutory provisions that may apply.

[19] At common law, the task of a court of construction is to give effect to the intentions of the testator by examination of the words used in the will, having regard to the will construed as a whole, aided as is necessary by any admissible extrinsic evidence.⁴⁹

[20] The ten principles relating to the construction of wills are set out by Isaacs J in *Fell v Fell*, principles that his Honour described as ‘incontestable’.⁵⁰ Prima facie, the written words in the will must be given their ordinary meaning, with the court making a determination of the issue by reference to the words used by the testator in the will, having regard to any established rules of construction and construing a will ‘as trained legal minds would do’.⁵¹ As articulated in the second principle in *Fell v Fell*, his Honour stated:

The instrument ... must receive a construction according to the plain meaning of the words and sentences therein contained. But ... you must look *at the whole instrument*, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole *in order to give effect, if it be possible to do so, to the intention of the framer of it*.⁵²

[21] If, in the context of the will read as a whole and the surrounding circumstances, the ordinary meaning of the words in the will does not make sense, extrinsic evidence is admissible in a court of construction under the ‘armchair principle’.⁵³ This principle allows the court to place itself in the position of the testator at the time of executing the will and take into account all of the circumstances actually known to the testator when the will was made.⁵⁴

⁴⁷ *The Trust Company Limited & Anor v Zdilar & Ors* (2011) ASTLR 379 at 384-385, [21] per Margaret Wilson J.

⁴⁸ [2016] VSC 514.

⁴⁹ *Fell v Fell* (1922) 31 CLR 268; *Perrin v Morgan* [1943] AC 399.

⁵⁰ *Fell v Fell* at 273-6.

⁵¹ *Fell v Fell* at 273, quoting *Ralph v Carrick* (1879) 11 Ch D 873 at 878 per Cotton LJ.

⁵² *Fell v Fell* at 273-4 (emphasis as in original).

⁵³ *Boyes v Cook* (1880) 14 Ch D 53 at 56 per James LJ.

⁵⁴ The other instance at common law that allows the admission of extrinsic evidence in a court of construction (which is not relevant in this proceeding) is in the case of equivocations where direct evidence of a testator’s actual testamentary intentions may be admitted: see John G Ross Martyn et al, *Theobald on Wills* (17th ed, Sweet & Maxwell, 2010) 281–3.

- [22] This approach was succinctly stated by Fullagar J in *ANZ Executors & Trustee Co Ltd v McNab*:⁵⁵

The search for testamentary intention must be a search for intention disclosed by the words used, and in this search words must prima facie be given their ordinary meanings and, if the law has consistently given a particular meaning to some word or phrase, that is the meaning which the word or phrase must prima facie be given. Nevertheless, the intention is to be gathered from a study of the will as a whole, and in the light of any relevant and admissible evidence of surrounding circumstances.

- [23] At common law, the general rule is that a testator's declarations as to his or her intentions and the meanings of words used in the testamentary document are inadmissible as direct evidence of testamentary intentions. This means that in most circumstances evidence of instructions of a testator to his or her solicitor would be inadmissible in construing the meaning of a will.
- [24] The circumstances in which extrinsic evidence may be used and the purposes for which it may be used in interpreting a will are also governed by statute. In Victoria, pursuant to s 36 of the *Wills Act 1997*, where a will is made on or after 20 July 1998, evidence of the testator's intention is admissible in certain circumstances.⁵⁶ The legislation does not oust the armchair principle but supplements it.
- [25] Where there are cases of uncertainty or ambiguity, evidence may be admitted to assist in the interpretation of the language of the will, both where the uncertainty or ambiguity arises on the face of the will or in light of surrounding circumstances, although in the latter situation evidence of the testator's intention may not be given.
- [26] As concluded by Atkinson J in *The Public Trustee of Queensland v Smith*, after setting out the principles applicable to the construction of wills, including s 33C of the *Succession Act 1981* (Qld) (the Queensland equivalent to s 36 of the *Wills Act 1997*):⁵⁷

It follows from the foregoing discussion that the court of construction should start with the words of the will. If their usual meaning is clear, the will will be given that construction. If not, the court may have regard to such extrinsic evidence as allowed by the rules of construction traditionally applied by the courts with the addition of the aids to construction found in s 33C of the Act."

The importance of extrinsic evidence

8. In many cases, the resolution of the proper construction of a Will turns on particular evidence, other than the terms of the Will or Codicil itself. Such evidence is referred to as 'extrinsic evidence'.

⁵⁵ (1999) 3 VR 666 at 667.

⁵⁶ See *Morgan v Moore* [2000] VSC 94, where a detailed discussion of the legislative history of s 36 of the *Wills Act 1997* and its precursor, s 22A of the *Wills Act 1958*, is set out.

⁵⁷ [2008] QSC 339; [2009] 1 Qd R 26 at 33.

9. Extrinsic evidence may be admissible at common law pursuant to the ‘armchair principle’ (also referred to as the ‘armchair rule’). This was explained in *Allgood v Blake*:⁵⁸

“The general rule is that, in construing a Will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is taken to have used the words in the Will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.”

10. In addition, a statutory modification originally introduced in England⁵⁹ has been adopted, in similar terms, in all States and Territories except South Australia. Section 32 of the *Succession Act 2006* (NSW) provides:

“32 Use of extrinsic evidence to construe wills

- (1) In proceedings to construe a will, evidence (including evidence of the testator’s intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the will:
- (a) meaningless, or
 - (b) ambiguous on the face of the will, or
 - (c) ambiguous in the light of the surrounding circumstances.
- (2) Despite subsection (1), evidence of the testator’s intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
- (3) Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.”

11. The leading case on the operation of these statutory provisions is *The Public Trustee of Queensland v Smith*,⁶⁰ which concerned the corresponding provision of the *Succession Act 1981* (Qld), s 33C. Atkinson J analysed the effect of that provision, as follows:⁶¹

“The circumstances in which extrinsic evidence may be used and the purpose for which it may be used are now governed by s 33C of the *Succession Act 1981* (Qld) (“the Act”) which was extensively amended with effect from 1 April 2006. Section 33C sets out what extrinsic evidence is admissible in interpreting a will ...

... in addition to the circumstances set out in s 33C(1), s 33C(3) continues to allow the admission of extrinsic evidence in the construction of wills in the three circumstances which obtained prior to the introduction of s 33C in its present form on 1 April 2006. The three rules of construction which have been retained are:

⁵⁸ (1873) Lr 8 Ex 160 at 162 per Blackburn J.

⁵⁹ *Administration of Justice Act 1982* (UK) s 21.

⁶⁰ [2009] 1 Qd R 26; [2008] QSC 339.

⁶¹ At [22] to [26].

- (1) The “armchair principle” which permits the court to sit in the testator’s armchair to take account of his or her “habits of speech and of his or her family, property, friends and acquaintances”⁶² in order to determine what the testator meant by the words of a will. The “armchair principle” does not, however, allow direct evidence to be given of the testator’s intention by, for example, allowing evidence of the instructions to the solicitor.⁶³
- (2) The “equivocation” exception. This rule of construction provides that “evidence of the testator’s actual intention, while not ordinarily admissible to assist in the construction of a will, is admissible where there is what is described as ‘equivocation’ in the will, that is, where a description, usually of a person, is equally capable of referring to more than one person.”⁶⁴ This rule is sometimes referred to as the “latent ambiguity rule” where there are, for example, two legatees of the same name.⁶⁵
- (3) The equitable presumption rule. Evidence of a testator’s intention may be given when a presumption arises in equity that a legacy in a will is in satisfaction of payment due under another instrument such as a deed.⁶⁶

In addition to these three circumstances in which extrinsic evidence may be led are the three circumstances set out in s 33C of the Act:

- (1) when the language used in the will makes the will or part of it meaningless;
- (2) when the language used in the will makes the will or part of it ambiguous on the face of the will;

In both of these circumstances extrinsic evidence, including evidence of the testator’s intention, is admissible to help in the interpretation of the language used in the will.

It follows from the forgoing discussion that the court of construction should start with the words of the will. If their usual meaning is clear, the will will be given that construction. If not, the court may have regard to such extrinsic evidence as allowed by the rules of construction traditionally applied by the courts with the addition of the aids to construction found in s 33C of the Act.”

Procedure

12. The relief sought will usually be framed in the following way:

“A declaration that, upon the proper construction of the will of John Smith, deceased dated 1 October 2010,”

The relevant procedural requirements are contained in Part 54 of the UCPR (Administration of estates and execution of trusts).

13. In some cases, it may be clear that there is not only a construction issue but some other problem posed by the terms of the Will. For example, the Will may be an informal

⁶² LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd edition) [1103].

⁶³ LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd edition) [1103].

⁶⁴ QLRC Miscellaneous Paper 29 at p 68.

⁶⁵ *In Re Tussaud’s Estate* (1878) 9 Ch D 363 at 374.

⁶⁶ *In Re Tussaud’s Estate* at 373 to 375.

document that has not been executed in compliance with the formal requirements prescribed by s 6 of the *Succession Act 2006* (NSW). An issue then arises as to whether all of the difficulties can be resolved in a single application. Historically, there was a distinction in English law between the roles of the ecclesiastical courts in respect of the granting of probate, and the Court of Chancery in respect of construction. Probate and construction are now dealt with, in New South Wales, by the Equity Division of the Supreme Court. It may in some cases be necessary for the Court to construe a Will in the course of considering a probate application. There is, though, authority that the determination of the probate court on construction does not, depending on the form of the order, bind a court of construction when construing a document admitted to probate.⁶⁷

Some recent cases

*Estate George Roby, deceased*⁶⁸ – nature of interest in property

14. This case concerned two sets of proceedings:

- (a) a proceeding commenced by a granddaughter of the deceased, Grace, seeking a declaration about the proper construction of the deceased's Will, and an order that a home unit, which formed part of the estate, be transferred to her; and
- (b) a proceeding commenced by the deceased's son, Ian (Grace's estranged father), seeking family provision relief, if the Will was construed in a manner adverse to him.

Both proceedings were, by the consent of the parties, heard together.

15. The deceased's Will provided, amongst other things, for money to be left on trust to purchase two home units. The relevant clause provided:

“5. I GIVE to the Trustee [that is, the Executor] so much of my estate as is necessary for my Trustee to purchase two one or two bedroom home units at a purchase price not exceeding \$160,000 for each unit together with such further sum as is necessary for the payment of all expenses associated with the purchase of such units including stamp duty, legal costs and other disbursements and I DIRECT my Trustee to hold such home units upon trust as follows:

- (a) As to one unit (to be determined by the Trustee) my son IAN BRUCE ROBY may live in that unit as long as he wishes provided he pays all

⁶⁷ *Re Hawksley's Settlement* [1934] Ch 384 at 397.

⁶⁸ [2017] NSWSC 265.

rates and taxes and other outgoings in respect thereof and keeps it in repair to the satisfaction of the Trustee PROVIDED HOWEVER that in the event that the said IAN BRUCE ROBY ceases to use the said unit as his principal place of residence or upon his death whichever shall first occur then UPON TRUST for my granddaughter GRACE ALEXANDRA ROBY provided she shall survive me and attain the age of twenty-one (21) years;

(b) As to the other unit”

Lindsay J observed that:⁶⁹

“The deceased made his Will with knowledge of [Ian’s] domestic circumstances, and with a belief (apparently grounded in reality) that his sons were entrenched in a debilitating drug culture which could limit their ability to retain, and responsibly manage, any property given to them.”

16. A unit was purchased by the executor pursuant to clause 5(a). Ian lived there from the time of its acquisition (June 2001) until late 2006. He then relocated, and had not lived at the unit since her moved out. He had not, since that time, paid any rates, taxes or outgoings in respect of the property, or done anything towards its maintenance or repair. The unit had been leased from January 2007, by the executor.
17. In 2012, Grace, having attained the age of 21 years, demanded that title to the unit be transferred to her. The matter then became complicated by the fact that, in 2016, Ian proposed to re-enter into possession of the unit. Grace commenced the proceedings for construction of the Will.
18. Ian filed his own summons, to the effect that, should clause 5(a) of the Will be construed in a manner that resulted in Grace being entitled to beneficial title to the unit, he sought to be granted, by way of family provision relief, a life estate (or a lifetime right of residence) in the unit.
19. His Honour determined the construction of the Will as follows:
 - (a) The Will was to be read as a whole and in the context in which it was made by the deceased, in accordance with the principles outlined in *Fell v Fell*.
 - (b) In construing the Will, sitting in the deceased’s armchair,⁷⁰ the deceased’s concern about the welfare of Ian (his son) and Grace (his granddaughter, “a child of a child of doubtful dependability”) should be taken into account.

⁶⁹ At [13].

- (c) The Will did not confer upon Ian a life estate or a right of residence unrelated to his acceptance of responsibility for maintenance of the home unit. He was granted a right to “live in that unit as long as he wishes” on provisos that he:
 - (i) pay all rates and taxes and other outgoings in respect of the unit;
 - (ii) keep the unit in repair to the satisfaction of the executor; and
 - (iii) not cease to use the unit as his principal place of residence.
 - (d) Objectively, Ian had abandoned the unit as a place of residence at the time of his relocation.
 - (e) Grace became beneficially entitled to the unit when, in February 2012, she turned 21, Ian having ceased to use the unit as his principal place of residence no later than 12 January 2007, when the unit was let out by the executor to the exclusion of any interest that Ian may have had in it.
 - (f) In letting out the unit in and following 2007, the executor was bound to hold the net rental proceeds on behalf of Grace, subject only to her attaining age 21.
20. This conclusion having been reached, his Honour then considered Ian’s family provision claim. Provision was granted in the form of a legacy of \$40,000.

***Allen v Siebuhr*⁷¹ – whether equitable estate or right of residence**

21. The testator died in 1990. Her last Will, made in 1985, provided for the following trusts:

- “3. I GIVE DEVISE AND BEQUEATH all my estate both real and personal whatsoever and wheresoever situate and all property over which I may have any power of appointment, disposition or control unto and to the use of my trustee upon the following trusts:
- (a) To pay all my just debts funeral and testamentary expenses and all probate succession federal estate and other duties arising by reason of my death.
 - (b) As to my house property situated at 5 Allport Street Pittsworth in the said State for my daughter MAUREEN ANN SIEBURHR to live therein and to enjoy the use and benefits thereof during her life-time free of rental PROVIDED THAT the said MAUREEN ANN SIEBURHR shall pay all municipal rates household and contents insurance and all other outgoings of and incidental thereto as my

⁷⁰ In accordance with *Succession Act 2006* (NSW) s 32 and the authorities cited in *Garbett v Bear* [2015] NSWSC 1524 at [10] per Rein J.

⁷¹ Unreported, Supreme Court of Queensland, 25 November 2015, Applegarth J.

trustees shall from time to time determine and shall also keep the said house property in a good and usable state of repair and condition fair wear and tear excepted PROVIDED THAT the said MAUREEN ANN SIEBURHR shall take up residence or notify my trustees that she desires to continue in residence in my said house property should be residing there at the date of my death within three months of the date of my death AND PROVIDED FURTHER THAT the said MAUREEN ANN SIEBURHR shall at all times during the continuance of her life estate use my said house property as her principal place of residence.”

Clauses 3(c) to (k) then provided for nine separate gifts of “a one ninth share of the rest and residue and remainder of my estate” to various grandchildren.

22. It was clear from clause 3(b) that the structure of the clause was the conferral of some form of interest on the beneficiary, Maureen, followed by three provisos.
23. In 2011, Maureen was admitted to a nursing home. From that point, it appeared reasonably clear that she was no longer using the property as her principal place of residence.
24. Clause 3(b) posed several construction issues:
 - (a) whether the clause provided an equitable estate in the property, or a personal right of residence; and
 - (b) whether the interest had determined (ended).
25. Some of the difficulties posed by the way in which the clause was drafted were as follows:
 - (a) The opening words of the clause – “to enjoy the use *and benefits thereof* during her lifetime” – suggested that an equitable estate was conferred on Maureen, for her lifetime, rather than a mere right of residence. This was reinforced by the words “during the continuance of her life estate” that appear towards the end of the clause.
 - (b) The clause was silent as to what was to occur if any of the three provisos was not satisfied, or ceased to be satisfied.
26. Applegarth J approached the construction of the clause as follows:
 - (a) There was no extrinsic evidence that could assist the Court as to construction of the clause. The Court therefore needed to construe the clause in accordance with the principles outlined by Boddice J in *Ashton v Ashton* (see above at para. 5).

The Will needed to be construed as a whole, and without adopting an unduly legalistic construction.

- (b) As regards the third proviso, the house was no longer being used as the beneficiary's principal place of residence. She was residing in a nursing home, and there was no indication that she was to return to the house. Her principal place of residence was the nursing home.
- (c) It was unclear whether the references to "residence" were anything more than a right of residence. However, the opening words "enjoy the use and benefits thereof" might have suggested a life estate, rather than a right of residence. The matter was finely balanced. On a proper construction, it seemed that clause 3(b) granted a life estate, which was capable of being determined, including where the beneficiary ceased to use the property as her principal place of residence.
- (e) The third proviso was more than a mere expression of a wish. In the context that the testator required the property to be used as the beneficiary's principal place of residence, it seemed that in default of her doing so, the life interest would come to an end.
- (f) The clause, properly construed, envisaged that there would be consequences of the beneficiary failing to do certain things – such as a failure to pay the rates – which would erode the residue. For example, the clause did not say that if rates were not paid, then rent would be payable. Construing the clause as a whole, it seemed more likely that the testator intended that the life interest would come to an end if the provisos were not complied with.

27. The order made was as follows:

"Upon the proper construction of the will dated 19 February 1985 of Joan Horder, deceased, and in the circumstances which have occurred, the right granted by clause 3(b) of the Will to the second respondent:

- (a) is an equitable estate for life determinable upon her ceasing to permanently reside in the house property situated at 5 Allport Street, Pittsworth in the State of Queensland; and
- (b) has determined."

***Bryan v Oxfam Australia & Anor*⁷² – the nature of the gift**

28. The deceased died in 2013, leaving a substantial estate. Her Will, prepared by her solicitors, provided for various specific gifts, and for the residue to pass to Oxfam Australia ('Oxfam'). Some of the specific gifts were also in favour of Oxfam, but the meaning and effect of those particular three clauses was unclear. Two of those clauses were framed as follows:

“... to Oxfam Australia for the purposes of education projects in developing countries”

The third provided:

“... to Oxfam Australia for the purposes of school education projects including disabled students in developing countries ...”

An application was made by the deceased's executor, seeking various declarations as to the proper construction of these clauses of the Will.

29. There were various ways in which the first two clauses could be construed:
- (1) as an absolute gift to Oxfam for its general purposes, coupled with a (non-binding) wish as to how the property was to be applied by Oxfam;
 - (2) as a conditional gift to Oxfam, the condition being that the property must be applied for the purposes of education projects in developing countries; or
 - (3) as creating a charitable trust for the purposes of education projects in developing countries.
30. The third clause posed the same construction issues, but there was a further difficulty concerning the meaning of the additional words “for the purposes of school education projects including disabled students in developing countries”.
31. Enquiries made of Oxfam had established that it had previously carried out school education projects including disabled students in the developing countries in which it works, but had begun winding up such projects, and that there were was no current project that met the requirements of the three clauses.
32. Jackson J, in applying the principles of the construction of Wills, examined the overall dispositive scheme of the Will, and noted that the residuary gift to Oxfam contained no

⁷² Unreported, Supreme Court of Queensland, 25 August 2015, Jackson J.

qualification, direction or provision as to any purpose. His Honour found that, contextually (examining the context of the particular gifts among the other clauses), there was a strong indication that the three clauses did not provide for a gift on trust. It was also important to recognise that the extrinsic evidence showed that the testator had paid careful attention to the language used in her Will, especially that she had changed the words “in particular” to “including” in the third clause (as compared with how that clause appeared in her previous Will). That suggested that, in the language used, she was not expressing a mere wish or desire. A gift for a nominated purpose could be consistent with the gift being a conditional gift. There was evidence that the testator had over a number of years benefitted Oxfam and its various projects.

33. His Honour determined that the three clauses provided for conditional gifts to Oxfam, the condition being that the property must be applied for the purposes stated in those clauses. If the purposes could not be carried out, such that the gifts failed, the consequence would be that the property the subject of those gifts would fall into residue, and pass to Oxfam under the gift of residue.
34. As regards the further construction issue, it was found that the words “in developing countries” qualified the projects, not the students. By using the word “including”, the testator’s intention was that the project should provide some benefit for disabled students, and could also provide benefit for non-disabled students.

***Kean v Murphy*⁷³ – scheme of division**

35. Sister Eileen Kean died in 2011, aged 94. Her last Will was made in 2011, using a standard form which she filled in by hand. The construction dispute arose in relation to the following clause:

“5. Residuary/Residue of my Estate

I direct my Executor(s) to pay all my debts and then I give the ~~residue~~ *whole* of my estate ~~to~~ *that I may possess at death to be divided evenly among the children of my brothers John Francis (dec), Thomas James (dec) and my sister Doreen Phyllis – the house to be sold. Should any of the family desire possessions in the house – they may take them – otherwise they should be sold. A small a/c is located in the St George Bank.*

All property, goods and money to be divided into three equal parts – then divided evenly amongst the groups of my three siblings.”⁷⁴

⁷³ [2012] NSWSC 948.

36. The issue to be determined was whether the deceased left the whole of her estate to be divided equally between the children of her three named siblings, or whether she left the estate to be divided into three equal parts with each part to be divided equally between the respective children of the named siblings. There would be a practical difference in the outcome because the two named brothers each had three children, whereas the sister had five children.
37. One of Doreen's children, the first defendant, sought to admit extrinsic evidence of two types, under s 32 of the *Succession Act 2006* (NSW):
- (a) direct evidence of statements said to have been made by the deceased either some time before, or after, she made the Will, concerning what she intended to do or the effect of what she had done; and
 - (b) evidence concerning the closeness of the relationship between the deceased and a number of Doreen's children.

Ball J admitted that evidence on a provisional basis, but ultimately determined that it was inadmissible because there was no ambiguity in clause 5.

38. The first defendant also sought to argue that the basic scheme of the Will was evident from the first paragraph of clause 5, which provided for an equal division. The second paragraph should be given an interpretation consistent with that, by reading it as “[a]ll property, goods and money” should be divided evenly among the identified beneficiaries.
39. His Honour considered that it was sufficiently clear that:
- (a) by “evenly”, the deceased meant “equally”;
 - (b) the reference to “[a]ll property, goods and money” was a reference to the whole of the deceased's estate; and
 - (c) the reference to “my three siblings” was a reference back to the three siblings named in the previous paragraph.
40. His Honour found as follows:⁷⁵

⁷⁴ The italicised words were hand written by the testatrix. The words that have been struck through were crossed out by the testatrix. The non-italicised words were the pre-printed part of the form.

⁷⁵ At [20].

“In my opinion, it is clear that Sister Eileen included the second paragraph as an explicit statement of how she intended the first paragraph to operate. In my opinion, that explicit statement is clear. First, the paragraph states that Sister Eileen’s estate is to be divided into three equal parts. Then (to use Sister Eileen’s word), the result is to be divided equally among the identified groups. What Sister Eileen must have intended was that each one third part would be divided equally between the members of one of the three identified group. If what she had intended was that the whole be divided, there would have been no purpose in providing first for the division into three equal parts.”

41. On the question of costs, the position taken by the first defendant was found to be arguable. An order was made that the costs of the plaintiff and the first defendant assessed on an indemnity basis be paid out of the estate. No order was made as to the costs of the second defendant, on the basis that the position taken by her was no different from that taken by the first defendant, and the estate should not be liable for the two sets of costs.

***Rogers v Rogers Young*⁷⁶ – whether interest vested**

42. In this case, Master Sanderson considered the proper construction of a ‘homemade’ will. The judgment commences:

“On numerous occasions when dealing with so-called homemade wills, I have observed they are a curse. Homemade wills which utilise what is sometimes known as a ‘will kit’ are not much better. This case proves the point. The disposition effected by the will is not complicated and no doubt the testator had clearly in mind what she intended to achieve. But the way the will is drafted is difficult, and the parties have been put to the trouble and expense of coming to the court seeking directions as to its proper interpretation. If the will had been drafted by a competent legal practitioner, this problem would not have arisen and the parties would have been spared a great deal of trouble and expense.”

43. The clauses that posed the construction issue were as follows:

Residuary Estate

I give the residue of my estate to my daughter Alexandra Rogers Young, wholly. If she or their incidental beneficiaries predecease me, I give the residue of my estate to my nieces and nephews, whether in utero or born in equal shares.

Incidental Beneficiaries

If any of my children do not survive me then that benefit which they would have received shall be divided equally amongst such children of theirs as survive them. If there are no such children, their share shall return the residuary estate.

Trust for Minors

⁷⁶ [2016] WASC 208.

The share of any beneficiary/ies who are under the age of 18 years shall be held in trust and be administered by the trustee for the purpose of support, welfare and education until he/she/they reach the age of 25.

If any minor beneficiary/ies should die prior to receiving all their share, then their share shall be held in trust and paid equally amongst their children. If there are no such children, their share shall return to the residuary estate.”

44. Alexandra was 16 years of age at the time of the testator’s death, but turned 18 in October 2015. The issue that needed to be resolved was whether, under these clauses of the Will, she acquired a vested interest upon reaching the age of 18, or upon reaching the age of 25. This was important because, under the rule in *Saunders v Vautier*,⁷⁷ a beneficiary of full age who has an absolute vested and indefeasible interest may require the termination of a trust.
45. There was evidence that the testator had told the plaintiff (her executor) that she did not want Alexandra to inherit the estate until she was 25 years of age. However, as Master Sanderson found, that was not the way the Will read. The terms of the Will were sufficiently clear that the whole of the estate was to pass to Alexandra, postponed only until she reached age 18. The ‘Trust for Minors’ clause was found, as a matter of construction of the Will, not to qualify or change the construction of the preceding clauses headed ‘Residuary Estate’ and ‘Incidental Beneficiaries’. Accordingly, Alexandra was entitled to the estate, and to an order to vest the trust pursuant to the rule in *Saunders v Vautier*.
46. A further useful authority, in respect of the construction of Wills that have been prepared by a testator without professional knowledge or assistance is *Re Crocombe*,⁷⁸ in which Mayo J summarised the following principles:
 - (a) The testator is taken as having been *inops consilii* (without counsel), and on that ground a greater latitude is allowed in construction of legal terms: *Lewis v Rees*.⁷⁹
 - (b) It is not assumed that the testator had knowledge of, and relied upon, some principle of construction for the use of some word or phrase, or the omission of some explicit direction on provision.

⁷⁷ (1841) 4 Beav 115; 41 ER 482; (1841) Cr & Ph 240; 41 ER 482.

⁷⁸ [1949] SASR 302.

⁷⁹ (1856) 3 K & J 132 at 147; 69 ER 1052 per Page Wood V-C.

- (c) If the testator is illiterate, rules of grammar and the usual meaning of technical language may be disregarded in construing the Will. However, words that have a clear and definite operation in the disposal of the testator's property cannot be struck out: *Hall v Warren*.⁸⁰
- (d) Imperfect powers of expression and of the use of language may be treated as a kind of illiteracy, for this purpose. But words are not to be introduced, nor is a construction to be given to a clause that is contrary to what the plain words import, unless to do so is absolutely necessary because of an intention declared or evinced in some other part of the Will: *Eden v Wilson*.⁸¹

***Re Yu*⁸² – the meaning of ‘cash’**

47. The case of *Re Yu*⁸³ (the ‘iPhone Will’ case) attracted considerable interest. It marked the first occasion on which a Will written on an iPhone was admitted to probate, under the ‘dispensing power’. Perhaps unsurprisingly, the terms of the Will were uncertain, and a construction application was required.

48. The Will contained specific gifts of certain chattels to named persons, and a gift of the testator's townhouse to his parents. It then stated:

“I grant my executor all power required to deal with my affairs in the event of my death. This include all powers to sell any part of my estate not mentioned below at his discretion and be given the proceeds after any associated fees that requires paying off.”

A further clause provided:

“After all debt has been paid off including hotel bills, credit card bills etc. as well as expenditure required to execute my will from my savings account at both Westpac and Ubank, as well to cover my share of rent at 22/121 Thynne street Bruce ACT until the conclusion of the lease in late December, I would like the remainder of my cash equally apportioned between five parties: Jason Yu, Kinson Yu, Steffen Aufsatz and Dominic Clarke.” [underlining added]

The Will stated that should any of them decline, their share was to be divided equally amongst the remaining. There was then a provision dealing with residue:

“Anything else I own that has not been named is to be handled by my executor at his discretion. And any proceeds will go to him as stated above.”

⁸⁰ (1861) 9 HLC 420 at 427; 11 ER 791, per Lord Campbell LC.

⁸¹ (1852) 4 HLC 257 at 284; 10 ER 461, per Lord St Leonards LC.

⁸² [2015] QSC 373.

⁸³ [2013] QSC 322.

49. The construction application was required because of uncertainty regarding the meaning of ‘cash’, in the gift to the named beneficiaries. Amongst the assets of the estate were:
- (a) two bank accounts, total amount \$61,677.41;
 - (b) the proceeds of a BT Financial Group superannuation policy in the amount of \$23,761.70;
 - (c) superannuation and death benefits payable from a life insurance policy under the Public Sector Superannuation Accumulation Plan (PSSap), total amount \$274,366.71 (the death benefits being approximately \$259,000); and
 - (d) employee entitlements of \$8,853.05, including wages of \$634 paid after the deceased’s death.
50. Ann Lyons J referred to the general principles for the construction of Wills, including the ‘usual meaning rule’, and noted that the surrounding circumstances could also be taken into account, as Cullinane J had observed in *Kruize v Chung*:⁸⁴

“In all cases it is the meaning of the term as used in the particular Will taken with the context that appears and such surrounding circumstances as can be taken into consideration which will determine the meaning.”

51. Her Honour found that:
- (a) The deceased was a young man, in his twenties. It was most likely that he was not aware that, on his death, there could be an amount in the order of \$259,000 paid to his estate from the insurance policy. This was a significant amount of money and, had he been aware of it, he would have made a specific reference to it in his Will. It was something he did not turn his mind to, and it should therefore fall within the gift to the executor, of anything that the deceased did not specifically make provision for.
 - (b) The deceased intended the word “cash” to comprise the money from his two bank accounts.
 - (c) The amount of \$634, which was paid by his employer as wages after his death, and which, in the mind of the deceased, would have been owing to him and paid

⁸⁴ [2008] QSC 156 at [31].

after his death would have ended up in his bank account. That amount could be considered to be “cash”.

- (d) The superannuation, and the cashed up employment benefits for holidays and leave, were not “cash”. Those amounts formed part of the residue of the estate, to be distributed to the executor.

***Blyth v Wilken*⁸⁵ – ‘my de facto wife’**

52. The Will of Wayen Stewart Scott, who died on 28 August 2014, contained a residuary gift upon trust:

“for my de facto wife KATHRINE MARY MURRAY absolutely provided she survives me for a period of twenty-eight (28) days ...”

with a default gift in favour of Kathrine’s sons, or their children.

53. Kathrine had been the deceased’s de facto wife at the date the Will was made (2 December 2003) but their relationship had ended in December 2011.

54. The Court was asked to determine the following question of construction:

“Was the gift in clause 3 of the Will of [the deceased] signed on 2 December 2003 to Kathrine Mary Murray dependant or conditional on her being the de facto of the deceased at the date of his death?”

55. Master Sanderson, somewhat surprisingly, found as follows:⁸⁶

“The argument advanced by [Kathrine] was to the effect the phrase ‘my de facto wife’ was descriptive and nothing else. The important reference was to Kathrine Mary Murray. It was submitted it was plain Ms Murray was the intended recipient of the gift and the descriptor could be conveniently ignored.

In my view to read the will in that way ignores the reality of the relationship. The deceased bequeathed the property to Ms Murray because she was his de facto wife. Once that ceased to be the case it seems to me the intended disposition should fall away. The position can be contrasted with a gift to ‘my son John’. If after the signing of the will the testator and his son became estranged it would not alter the fact that the phrase ‘my son John’ would still describe a particular person and a particular relationship.

It must also be borne in mind that pursuant to s 26(1)(a) of the *Wills Act* the will of the deceased is said to speak from the date of death. As at the date of death of the deceased he and Ms Murray had gone their separate ways. It is difficult to imagine the deceased would have wished his property to go to Ms Murray from whom he had been separated for a number of years. That was a point made by the first defendants who, although they did not appear at the hearing, made written submissions to that effect.”

⁸⁵ [2015] WASC 486.

⁸⁶ At [8] to [10].

56. There is a difficulty apparent in this reasoning: s 26(1)(a) of the *Wills Act 1970* (WA) is a statutory rule of construction, which provides that a Will is to be construed, with reference to the property comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator, unless a contrary intention appears by the Will.⁸⁷ This particular rule is concerned with the *subject matter* of a gift; it does not mean that “a will speaks from death” for all purposes; see *McBride v Hudson*.⁸⁸
57. His Honour made reference to s 28A of the *Wills Act 1970* (WA), which concerns the admissibility of extrinsic evidence, although it is not clear how that section may have assisted on the particular facts because none of the pre-requisites for the admission of extrinsic evidence, as stated in s 28A(1), was met: the clause was not meaningless, or ambiguous on the face of the will, or (so far as appears in the judgment) ambiguous in the light of surrounding circumstances.
58. Arguably, a preferable approach to the construction of this clause would have been as follows:
- (a) The Court’s general approach in construing the will should be to “give effect to the intention of the testator, such intention to be gathered from the language of the will read in the light of the circumstances in which it was made”: *Perrin v Morgan*.⁸⁹
 - (b) There was a single person (Kathrine) who fulfilled the description stated in the clause, at the time the Will was made.
 - (c) Only in limited circumstances can the Court have regard to extrinsic evidence, under s 28A(1). None of those circumstances was applicable, in this case. Nor should evidence be admitted under the ‘armchair principle’ to alter the clear and unambiguous words used in the Will.

Under this approach, the gift to Kathrine would have been construed as *not* dependant or conditional on her being the de facto wife of the deceased at the date of his death.

⁸⁷ See, similarly, s 24 of the *Wills Act 1968* (ACT) and s 30 of the *Succession Act 2006* (NSW).

⁸⁸ (1962) 107 CLR 604 at 616.

⁸⁹ [1943] AC 399 at 420.

Rectification distinguished

59. In New South Wales, the statutory power of rectification is found in s 27 of the *Succession Act 2006* (NSW):

“27 Court may rectify a will

- (1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator’s intentions because:
 - (a) a clerical error was made, or
 - (b) the will does not give effect to the testator’s instructions.
- (2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.
- (3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if:
 - (a) the Court considers it necessary, and
 - (b) the final distribution of the estate has not been made.”

60. The operation of the corresponding Queensland provision, s 33 of the *Succession Act 1981* (Qld), was considered in *Public Trustee of Queensland v Smith*,⁹⁰ where Atkinson J outlined a four-stage approach:⁹¹

“Under s 33, if it is alleged that the will does not carry out the testator’s intentions, the court engages in a four stage process:

- (1) has a clerical error been made?
- (2) does the will fail to give effect to the testator’s instructions?
- (3) if either or both of the above has occurred, has this caused the will not to carry out the testator’s intentions?
- (4) if so, then the court may make an order to rectify a will to carry out the testator’s intentions.”

61. The following further principles were stated by Philippides J in *Palethorpe v The Public Trustee of Queensland & Ors*:⁹²

- “(a) There is a difference between ascertaining the testator’s intention as to the effect of the words used in the Will and ascertaining the testator’s intention as to whether or not those words should appear in the Will. It is the latter enquiry which is relevant: *Hinds v Collins* [2005] QSC 362; [2006] 1 Qd R 514 at 516. It is not sufficient for the purpose of an order for rectification to establish that the testator would not have wanted property to go in a way

⁹⁰ [2009] 1 Qd R 26; [2008] QSC 339.

⁹¹ At [47].

⁹² [2011] QSC 335 at [22].

that, in the events which have happened, a particular clause results in property going: *Re Dippert* [2001] NSWSC 167 at [17]; *ANZ Trustees Ltd v Hamlet* [2010] VSC 207 at [14].

- (b) The due execution of a will raises the presumption that the testator knew and approved of its contents: *Re Bryden* [1975] Qd R 210 at 212-3, *Public Trustee of Queensland v Roberts* [2004] QSC 199, *McCorley & Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa & Ors* [2005] QSC 83 at [6].
- (c) Although the standard of proof is the civil standard, to rebut this presumption the applicant must discharge “a heavy burden” by means of “clear and convincing proof” of the testator’s actual intention: *Hinds v Collins* [2005] QSC 362; [2006] 1 Qd R 514 at 516⁹³ and *Ashton v Ashton* [2010] QSC 326 at [31].
- (d) As the Court’s enquiry is directed to whether the will does not carry out the testator’s intentions because a clerical error was made or whether the will did not reflect the testator’s instructions, evidence of statements made by the testator about intentions earlier or later than the giving of the instructions is generally inadmissible: see *Public Trustee of Queensland v Smith* at [64].⁹⁴ This was also the position under the repealed s 31: see *McCorley & Lewis* per Fryberg J at [6]:

“It is not appropriate for a court to entertain general evidence of the testator’s intentions at earlier stages or subsequently to the completion of the will.”

In a similar vein, Wilson J observed in *Public Trustee of Queensland v Roberts* [2004] QSC 199 at [6]:

“The best (if not only) evidence on which the Court will act is that of the person who took instructions for the will. Generally it will not receive evidence of the testator’s actual intentions at an earlier stage or subsequently to the completion of the will.”

62. In *Palethorpe*, an extension of time was granted, but rectification was refused. On the evidence, her Honour found that there was no ‘clear and convincing proof’ that the Will did not give effect to the deceased’s instructions.

Applications for judicial advice

63. Section 63 of the *Trustee Act 1925* (NSW) enables a trustee or executor⁹⁵ to apply to the Court “for an opinion advice or direction on any question respecting the

⁹³ The same approach is taken in other jurisdictions: to the same effect is *Hamlet* at [14] regarding the Victorian provision and *Rawack v Spicer* [2002] NSWSC 849 at [30] to [31] regarding the NSW legislation.

⁹⁴ In it also the approach taken in other jurisdictions, see for example *Lockrey v Ferris* [2011] NSWSC 179 at [67]-[68]

⁹⁵ “trustee” is defined in s 5 of the *Trustee Act* as including a legal representative, which in turn is defined as meaning an executor or administrator.

management or administration of the trust property, or respecting the interpretation of the trust instrument”.

64. This type of application should not be confused with an application for construction. See, for example, *Arnott v Kiss*.⁹⁶
65. In *Re Estate Late Chow Cho-Poon; Application for judicial advice*,⁹⁷ the trustees of a testamentary trust applied by summons for judicial advice under s 63, as to the proper construction and operation of a clause in the Will that provided for a gift of property to a class of beneficiaries which, they apprehended, had closed. The summons named no defendant, and no orders had been made for service on any person, or for the representation of any other interested persons. Lindsay J observed that proceedings commenced as an application for judicial advice might evolve into a construction suit, and that:⁹⁸

“The concept of a “construction suit” is ordinarily associated with partial administration proceedings (under UCPR Part 54) which involve joinder of all interested parties or the making of orders (under UCPR Part 7 or the inherent jurisdiction of the Court) for the representation of otherwise absent interests. However, the procedure for which s 63 provides is sufficiently adaptable to accommodate, within the framework of the section, the provision of an “opinion, advice or direction”, in proceedings in the nature of a construction suit, on notice to all interested persons and safeguarding, by representative orders, absent, affected interests.”

Conclusions

66. Wills, particularly ‘home-made’ Wills, often require construction. The resolution of these issues requires a methodical application of the principles of construction, with careful regard to the question of whether the Court may, in the particular case, have regard to extrinsic evidence.

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May 2017

⁹⁶ [2014] NSWSC 1385 at [1]-[4].

⁹⁷ [2013] NSWSC 844.

⁹⁸ At [21].

Appendix 1 – Principles of Construction

In *Fell v Fell* (1922) 31 CLR 268 at 273 to 276 Isaacs J outlined the following ten ‘incontestable principles’ for the construction of wills (citations omitted here, and emphasis as in the original):

- (1) Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence, as is necessary in order to enable us to understand the words which the testator has used.
- (2) The instrument ... must receive a construction according to the plain meaning of the words and sentences therein contained. But ... you must look *at the whole instrument*, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole *in order to give effect, if it be possible to do so, to the intention of the framer of it.*
- (3) If the will shows that the testator must necessarily have intended an interest to be given *which there are no words in the will* expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has *on the whole will*, sufficiently declared.
- (4) An inference cannot be made that did not necessarily result from all the will taken together. A necessary inference is one the probability of which is so strong that a contrary intention cannot reasonably be supposed.
- (5) The Court cannot give effect to any intention which is not expressed or plainly implied in the language of the “will”. “You have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but *which could hardly stand, if at all*, in the will, without that implication being made. That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication.”
- (6) If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made.
- (7) When the will is in itself incapable of bearing any meaning unless *some words* are supplied, so that *the only choice is between an intestacy and supplying some words*; but even there, as in every case, the Court can only supply words if it sees *on the face of the will itself clearly and precisely what are the omitted words*, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy.

- (8) There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense ...), that you should rather lean towards that construction which preserves, than towards that which destroys. ...
- (9) If on reading the will you can see *some mistake* must have happened, that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself.
- (10) The mind never inclines towards intestacy; it is a *dernier ressort* in the construction of wills. ...