

Use of Extrinsic Evidence to Construe Wills

R. W. White*

- 1 The rules governing the admissibility of extrinsic evidence in aid of the construction of wills are necessarily connected to the question of how a will should be construed. There have been two competing approaches adopted by courts in the construction of wills – the literal approach and the intentionalist approach.¹ The first approach focuses on the literal meaning of the words used in the will, whilst the latter concentrates on the intention of the testator. The common law rules regarding the admissibility of extrinsic evidence in the construction of wills were established when the literal approach was dominant. The current dominance of the intentionalist approach (since *Perrin v Morgan* [1943] AC 399) has not resulted in any acknowledged change to rules of admissibility. But in most Australian States there has been statutory modification of those rules based on section 21 of the *Administration of Justice Act 1982* (UK) following a report of the English Law Reform Committee entitled “*Interpretation of Wills*”.²
- 2 The rules dealing with the admissibility of extrinsic evidence are not easy to apply and some of the decisions are not easy to reconcile.

* A judge of the Supreme Court of New South Wales, Equity Division. This paper was delivered to a conference on Succession Law organised by the Law Society of South Australia on 15 November 2011. Thanks are due to my tipstaff, Ms Wendy Green for her research and contribution to the paper.

¹ Francis V Hawkins, ‘On the Principles of Legal Interpretation, with Reverence especially to the Interpretation of Wills’ (1858-1863) 2 *Judicial Society Papers* 298, republished as Appendix C to Professor James Thayer, *Preliminary Treatise on Evidence at the Common Law* (Boston, 1898). For a detailed analysis of the two approaches see Roger Kerridge and Julian Rivers, ‘The Construction of Wills’ (2000) 116 *Law Quarterly Review* 287; Roger Kerridge (ed), *Hawkins on the Construction of Wills* (Sweet & Maxwell, 5th ed, 2000) ch 2; Sidney L Phipson, ‘Extrinsic Evidence in Aid of Interpretation’ (1904) 20 *Law Quarterly Review* 245.

² Law Reform Committee, *Interpretation of Wills*, 19th Report (1973) Cmnd 5301.

- 3 In this paper I will first address the changes from a literalist approach to an intentionalist approach to construction. Then I will address the settled but artificial distinction between two types of extrinsic evidence and the different rules at common law for the admission of each. I will address the criticisms of and justifications for the rules. Lastly, I will consider the statutory changes in all jurisdictions in Australia, except South Australia.

The literal approach: Wigram

- 4 Sir James Wigram was a great proponent of the literal approach. In his book entitled *An Examination of the Rules of Law, respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills*, first published in 1831, Wigram attempted to codify the principles which he thought should apply to the construction of wills into seven propositions. This book, which went to a fourth edition, had a huge influence on the understanding of the construction of wills in England for the greater part of a century. The propositions propounded by Wigram were in the main accepted by the legal profession as a correct statement of the rules applicable to the construction of wills and were mostly followed by judges, however, in a somewhat inconsistent manner. According to Kerridge and Rivers, “*the tendency was to begin with Wigram, but to stray from his approach when it produced results which seemed inconvenient.*”³ In addition, the English Law Reform Committee almost 150 years after the first edition of Wigram’s treatise was published recognised that although Wigram’s propositions had been “*eroded by time and judicial development [they*

³ Kerridge and Rivers, above n1, 293.

were] *the nearest approach to codification of this branch of the law ever achieved*' and were "*a useful, and indeed almost inevitable starting point*".⁴

5 For the literalist, the only and proper inquiry for a court of construction is "*What is the meaning of [the testator's] words*"?⁵ To answer this question Wigram formulated seven propositions to be applied to the exposition of wills.⁶ The central premise of Wigram's propositions is that the court interprets the words of the will, in the context in which they appear, according to their "*strict and primary*" meaning.⁷ That is, it is presumed that the testator used the words in his will in their "*strict and primary*" sense. This presumption is rebuttable in two circumstances. First, where it appears from the context of the will, for example from a definition clause, that the words have been used in a sense other than their strict and primary sense, the words may be so interpreted. Secondly, words can be given their "*secondary or popular*" meaning where, when applied to the particular extrinsic circumstances of the case, the strict and primary meaning of the testator's words appears not to make sense.⁸ However, where the words of a will, aided by evidence of the material facts of the case, are insufficient to establish the testator's meaning, no evidence will be admissible to prove the testator's intentions, and the will will be void for uncertainty.⁹

6 Accordingly, Wigram took a very restrictive approach to the admissibility of extrinsic evidence. He distinguished between two types of extrinsic evidence: evidence of

⁴ Law Reform Committee, above n2, [3]-[4].

⁵ James Wigram, *An examination of the rules of law, respecting the admission of extrinsic evidence in aid of the interpretation of wills* (Sweet & Maxwell, 5th ed by Charles Sanger, 1914) 9.

⁶ *Ibid.* Note: Proposition IV is concerned with wills written in foreign languages and is not discussed in the context of this paper.

⁷ *Ibid* 16 (Proposition I), 18 (Proposition II).

⁸ *Ibid* 47 (Proposition III – "*insensible*").

⁹ *Ibid* 91 (Proposition VI).

circumstances surrounding the testator and evidence of the testator's intention. Under Wigram's propositions, the former is admissible to establish reference, that is, to link the words in a will to its subject matter and to its objects.¹⁰ However, the latter could only be admitted in cases of equivocation,¹¹ a form of ambiguity where a subject of disposition or the object of a testator's bounty is described in a way that correctly identifies two or more objects or subjects. This restrictive approach was settled by *Miller v Travers*,¹² *Gord v Needs*,¹³ *Hiscocks v Hiscocks*¹⁴ and *Charter v Charter*.¹⁵ At least the latter is still the law except where statutory provisions apply.

The intentionalist approach: Hawkins

- 7 In 1863 Hawkins, after having given a lecture to the Juridical Society a few years earlier, published his *Concise Treatise on the Construction of Wills* as a challenge to the literal approach propounded by Wigram. Hawkins "*subjected Wigram's theory of interpretation to a vigorous impeachment*"¹⁶ and took "*emphatic exception*"¹⁷ to the literal approach, arguing that it was wrong and that the intentional approach should be preferred.
- 8 Hawkins, following Wigram's pattern, expressed his views on the general principles of construction in the form of four propositions. In contrast to the literal approach, Hawkins' first proposition provides that the object of a court in construing a will is to

¹⁰ Ibid 56 (Proposition V).

¹¹ Ibid 110 (Proposition VII).

¹² (1832) 8 Bing 244; 131 ER 395.

¹³ (1836) 2 M & W 129; 150 ER 698.

¹⁴ (1839) 5 M & W 363; 151 ER 154.

¹⁵ (1874) LR 7 HL 364.

¹⁶ Phipson, above n1, 245.

¹⁷ Ibid 247.

ascertain the expressed intentions of the testator, that is, what the testator intended by the words in his will, as opposed to what the testator intended in some general sense. Similarly to the literal approach, the second proposition states that the words and expressions used in a will are to be construed in their “*ordinary, proper and grammatical sense*”.¹⁸ However, if upon reading them in connection with the entire will, or upon applying them to the facts of the case an ambiguity or difficulty of construction arises Hawkins allows the primary meaning of the words to be “*modified, extended or abridged and words and expressions supplied or rejected, in accordance with the presumed intention, so far as to remove or avoid the difficulty or ambiguity in question, but no further.*”¹⁹ The third proposition provides that technical words and expressions must be taken in their technical sense, unless a clear intention can be established to use them in another sense and that other sense can be ascertained. Hawkins final proposition was the key to his intentionalist approach and it is worth setting it out in full:

*“Notwithstanding the last two propositions—the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of the particular words and expressions. The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in cases of difficulty or ambiguity.”*²⁰

¹⁸ Francis V Hawkins, *Concise Treatise on the Construction of Wills*, (Sweet & Maxwell, 1863) Proposition II

¹⁹ *Ibid* (emphasis in original).

²⁰ *Ibid* Proposition IV (emphasis in original).

A change in approach: Perrin v Morgan²¹

9 In general, during most of the nineteenth century and the earlier part of the twentieth century most judges followed the literal approach as propounded in Wigram's propositions and gave little attention to Hawkins's assertion that the literal approach was wrong and the intentionalist approach should be preferred.²² However, the decision of the House of Lords in *Perrin v Morgan*²³ marked a significant change in the approach taken to the construction of wills. Whilst the fundamental rule stated by Viscount Simon LC (quoted below) was well established and had been clearly stated long before 1943, *Perrin v Morgan* became something of a turning point in the construction of wills and the adoption of intentionalism.²⁴

10 In *Perrin v Morgan* the testatrix died leaving a homemade will which directed that "*all moneys of which I die possessed shall be shared by nephews and nieces now living.*" A problem arose with the construction of the word "*moneys*".²⁵ Previous case law had established a strict legal meaning of the word "*money*". It meant money held in cash, money in the bank and debts owed to the testator, but did not include the net residuary personalty. In this case the testatrix's estate consisted almost entirely of investments and the question arose as to whether the phrase "*all the moneys of which I die possessed*" included the investments and the whole personal estate, as intended by the testatrix, or only "*money*" within the strict legal meaning of

²¹ [1943] AC 399.

²² Kerridge and Rivers, above n1, 303.

²³ [1943] AC 399.

²⁴ *Hatzantonis v Lawrence* [2003] NSWSC 914, [8].

²⁵ There was no issue with the term "*my nephews and nieces*" as the testatrix was unmarried and did not have any nephews or nieces by marriage.

the word. If it were the latter, the testatrix would die almost wholly intestate. The House of Lords allowed the appeal and gave a wide reading to the word “*moneys*”.

- 11 The decision of the House of Lords was unanimous, however, two different approaches to the construction of the will were adopted. The majority, consisting of Viscount Simon L.C., Lord Atkin and Lord Thankerton, took a purely intentionalist approach deciding that the word “*moneys*” had no strict and primary sense. Viscount Simon L.C., with whom Lord Atkin agreed, held that:

*“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.”*²⁶

- 12 Viscount Simon L.C. took the approach that the duty of a judge who is called on to interpret a will containing ordinary English words is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator’s real meaning according to its actual language and circumstances. His Lordship said:

“I protest against the idea that, in interpreting the language of a will, there can be some fixed meaning of the word ‘money,’ which the courts must adopt as being the ‘legal’ meaning as opposed to the ‘popular’ meaning. The proper meaning is the correct meaning in the case of the particular will, and there is

²⁶ *Perrin v Morgan* [1943] AC 399, 406.

*no necessary opposition between that meaning and the popular meaning. The duty of the court, in the case of an ordinary English word which has several quite usual meanings which differ from one another is not to assume that one of several meanings holds the field as the correct meaning until it is ousted by some other meaning regarded as 'non-legal', but to ascertain without prejudice as between various usual meanings which is the correct interpretation of the particular document."*²⁷

13 Lord Thankerton recognised that the cardinal rule of construction of wills is that they "*should be so construed as to give effect to the intention of the testator*"²⁸ and found that the word "*money*" was capable of being used by a testator in one of various senses in conformity with the ordinary use of the English language, and that the paramount duty of the court is to decide on the sense in which the particular testator used the word in the particular will without any prior presumption as to the particular sense intended by the testator.²⁹ Accordingly, the majority held that the bequest of "*all moneys of which I die possessed*" included all the net personalty of the estate of the testatrix.

14 The minority, consisting of Lord Russell of Killowen and Lord Romer, gave the word "*moneys*" a wide interpretation by finding it in the "*context*" of the will, which according to Kerridge and Rivers "*was the standard way of appearing to follow Wigram, but escaping from the literal approach in the particular case.*"³⁰ Lord Romer held:

²⁷ Ibid 407-408.

²⁸ Ibid 416.

²⁹ Ibid 417.

³⁰ Kerridge and Rivers, above n1, 303.

“The rules of construction...should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the circumstances, whether or not the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning – whether or not, in other words, to use another familiar expression, the testator has been his own dictionary.”³¹

15 After examining the context and relevant circumstances of the case Lord Romer was satisfied that in this particular will the word “*moneys*” was used by the testatrix as meaning the whole of her residuary personal estate.

16 Lord Russell of Killoween, who agreed with the reasoning and conclusion of Lord Romer, said:

“...the meaning of the word ‘money’, when used by a testator...is not restricted by any hard and fast rule, but depends on the context in which it occurs, properly construed in the light of all relevant facts. In other words, given such a sufficient context, the word ‘money’ may include more than what

³¹ *Perrin v Morgan* [1943] AC 399, 421. This view does not accord well with the opening of Lord Romer’s speech (at 420) where he states that the cardinal rule of construction is that a will should be construed so as to give effect to the intention of the testator. The intention of the testator is determined from the language of the will read in the light of the circumstances in which the will was made and the court is entitled to sit in the “*testator’s armchair*” to understand the language employed by the testator: *Hatzantonis v Lawrence* [2003] NSWSC 914, [7].

*has been called the strict meaning, and may even include the whole residuary personal estate.*³²

17 The adoption of intentionalism following *Perrin v Morgan* was not met without reluctance by some lawyers and judges. This reluctance was clearly demonstrated in *Re Rowland*,³³ where only Lord Denning M.R. followed the approach of the majority. This case ultimately led to the English Law Reform Committee's examination into the rules governing the interpretation of wills and the introduction of sections 20 and 21 of the *Administration of Justice Act 1982* (UK), which are concerned with rectification and interpretation respectively and were the basis of statutory reform in Australia.

The general principles of construction

18 In Australia, there is no doubt that the object of the construction of wills is to ascertain the testator's expressed intention – the intention which the will itself declares either expressly or by implication.³⁴ That is to say, the court is concerned with determining what the testator meant by the words used in the will. But the court will not attribute to the testator an intention which has been arrived at by mere speculation and which cannot be deduced from the wording of the will itself.³⁵ Lord

³² *Perrin v Morgan* [1943] AC 399, 419.

³³ [1963] Ch 1.

³⁴ *Hatzantonis v Lawrence* [2003] NSWSC 914, [6]; *Public Trustee v Herbert* [2009] NSWSC 366, [27]; David Haines, *Construction of Wills in Australia* (LexisNexis Butterworths, 2007) [2.12]; John R Martyn et al. (eds), *Theobald on Wills* (Sweet & Maxwell, 17th ed, 2010) [15-003] ('*Theobald on Wills*'); E C Ryder, *Hawkins and Ryder on the Construction of Wills* (Sweet & Maxwell, 1965) 1; R F D Barlow et al. (eds), *Williams on Wills* (LexisNexis Butterworths, 9th ed, 2008) vol 1, [50.2] ('*Williams on Wills*').

³⁵ Ryder, above n34, 1; *Theobald on Wills*, above n34, [15-003]-[15-004].

Wensleydale, a devout literalist, warned against speculation by the court in *Abbott v Middleton*:

*“The use of the expression, that the intention of the testator is to be the guide, unaccompanied by the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means.”*³⁶

- 19 That warning must now be read with qualification. The question is not simply what the words mean, but what the testator intended them to mean. Where no evidence of intention exists, the court must give the words their ordinary meaning. It will usually be the case that that is what the testator intended.
- 20 The following principles are used to assist in the ascertainment of what the testator intended by the words he used. In construing a will, the words and expressions used by the testator are to be given the ordinary meaning they bear in the society in which he or she lived and at the time it was used by the testator.³⁷ Where a word or expression has more than one ordinary meaning, for example the word “*money*”, no presumption arises that it bears one particular meaning rather than another, and the court must determine the meaning the testator intended by considering the will as a whole in light of any admissible extrinsic evidence.³⁸ If a word or expression has only one ordinary meaning and no special meaning, then it is presumed that the

³⁶ (1858) 7 HLC 68, 114.

³⁷ *Re Barnes' Will Trusts* [1972] 1 WLR 587, 593; Haines, above n34, [2.26].

³⁸ *Perrin v Morgan* [1943] AC 399, 406-412, 414, 417.

word or expression bears that ordinary meaning. This presumption, however, may be rebutted in two ways. First, if it appears from an examination of all the provisions of the will in light of the surrounding circumstances in which it was made that the testator has used a word or expression in a different sense from its ordinary meaning, the word or phrase is to be construed in that different sense.³⁹ In such a case the testator is considered to have supplied his own dictionary. Secondly, where the ordinary meaning of a word or expression does not make sense when the will is read in light of the surrounding circumstances in which it was made, the court may attribute a meaning to it that does make sense.⁴⁰ If the presumption is not rebutted, the ordinary meaning of a word or expression prevails even if the disposition seems strange or capricious.⁴¹ Prima facie, technical legal words and expressions used in a will are to be given their technical meaning.⁴²

- 21 The intention of the testator is to be ascertained from an examination of the whole of the will, including any codicils, with the aid of any admissible extrinsic evidence. This “*overriding*” intention, when ascertained with reasonable certainty, must be given effect to, beyond, and even against, the literal sense of the words and expressions. It “*is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in cases of difficulty or ambiguity*”.⁴³ The testator’s overriding intention may serve to resolve ambiguity, to rebut the presumption in favour of the ordinary or technical

³⁹ *Hill v Crook* (1873) LR 6 HL 265, 285; *Re Jodrell*; *Jodrell v Seale* (1890) 44 Ch D 590, 606. *Theobald on Wills*, above n34, [15-013]-[15-015]; Haines, above n34, [2.39]

⁴⁰ *Re Smalley*; *Smalley v Scotton* [1929] 2 Ch 112.

⁴¹ *Re James’s Will Trusts* [1962] Ch 226.

⁴² *Winter v Perratt* (1843) 6 Man & G 314; 134 ER 914.

⁴³ Hawkins’ fourth proposition, quoted in *Re Haygarth* [1913] 2 Ch 9, 15; Ryder, above n34, 5; *Theobald on Wills*, above n34, 296.

meaning⁴⁴ and to justify the will being read as if certain words were supplied, omitted or changed.⁴⁵

Admissibility of Extrinsic Evidence

22 Common law principles governing the admissibility of evidence in relation to the construction of a will place strict limitations on the nature of evidence which may be put to a court and the purpose for which it may be used. The general rule at common law is that extrinsic evidence of the testator's intention is not admissible as direct evidence of his testamentary intention, except in very special cases.⁴⁶ Consequently, if the meaning of a will is clear and there is no ambiguity, its terms are absolute and no extrinsic evidence of the testator's intention is admissible to impugn the terms of the will.⁴⁷ However, evidence of the circumstances surrounding the testator is admissible to assist the court in the construction of a will. It is therefore necessary when considering the admissibility of extrinsic evidence in aid of the construction of wills to draw a distinction between two types of extrinsic evidence, which will be referred to as evidence of the circumstances surrounding the testator and evidence of the testator's intention.⁴⁸ In this context evidence of intention means direct evidence, such as a testator's statements about who he wishes to inherit. Evidence of surrounding circumstances is also led in order to ascertain a testator's probable intentions but is treated differently. Evidence of

⁴⁴ *Guy v Pearson* (1857) 6 HLC 61; *Perrin v Morgan* [1943] AC 399.

⁴⁵ *Key v Key* (1853) 4 De GM & G 73; 43 ER 435. See also, *Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18, 32-33; *Hatzantonis v Lawrence* [2003] NSWSC 914, [10].

⁴⁶ *Sherratt v Mountford* (1872-73) LR 8 Ch App 928.

⁴⁷ *McRobert v McRobert* (1920) 27 CLR 331, 333; *Re Fowler, deceased* [1963] VR 639, 642; *Higgins v Dawson* [1902] AC 1.

⁴⁸ Kerridge and Rivers considered these to be the most appropriate terminology to refer to the types of extrinsic evidence (above n1, 295-6).

circumstances surrounding the testator is generally admissible, whilst evidence of intention is not and is only admissible in cases of “equivocation”.

- 23 Evidence of the circumstances surrounding the testator relates to the circumstances of a testator at the date of the will, but not directly to his dispositive intentions, and is generally admissible for the purposes of interpreting a will. In essence, this type of extrinsic evidence encompasses evidence of the testator’s habits and knowledge of persons or things. For example, evidence of the testator’s knowledge of his family tree, of the status of family members or beneficiaries, of the existence of acquaintances of the same name and of the state of his property and the testator’s habits of referring to a person by nickname⁴⁹ is evidence of the circumstances surrounding the testator.
- 24 Evidence of the testator’s intentions is direct evidence that tends to prove what the testator’s actual dispositive intentions were. It consists of evidence of declarations made by the testator outside of his will which show his intention as to the meaning to be put on the language of his will, such as the testator’s instructions for his will and statements he may have made as to whom he wished to leave his estate.
- 25 The distinction between the two types of evidence is not always clearly discernible. In *Re Ofner*⁵⁰ the testator by his will gave legacies to Alfred Ofner and “my grand-nephew Robert Ofner”, and the testator had no relative named Robert Ofner, but had a grand-nephew named Richard Ofner, who was the brother of Alfred. The

⁴⁹ *Goodinge v Goodinge* (1749) 1 Ves Sen 231; 27 ER 1001; *Re Taylor* (1886) 34 Ch D 255; *Re Fish* [1894] 2 Ch 83; *Re Fowler* [1963] VR 639; *Edge v Salisbury* (1749) Amb 70; 27 ER 42; *Mostyn v Mostyn* (1854) 5 HLC 155; 10 ER 857; *Ricketts v Turquand* (1848) 1 HLC 472; 9 ER 842; *Re Glassington* [1906] 2 Ch 305.
⁵⁰ [1909] 1 Ch 60.

testator's written instruction to his solicitors for the preparation of his will, in which he referred to "*Robert Ofner*" as the brother of Alfred Ofner, were held to be admissible not as evidence of the testator's intention, but as evidence that the testator wrongly believed that Richard Ofner was called Robert Ofner. The court regarded these instructions just as admissible for this purpose as say a letter written by the testator to Richard addressing him as Robert.⁵¹ Consequently, extrinsic evidence which appears on its face to be evidence of the testator's intention may also be evidence of the circumstances surrounding the testator.

26 In *Sherratt v Mountford*⁵² the Court of Appeal in Chancery held that evidence that the testator was on unfriendly terms with certain persons was not admissible to show that he could not have intended those persons to benefit as it was evidence raising an improbability of intention, which was no more admissible than evidence of express intention. One writer⁵³ concludes from this that evidence of the acts and feelings of the testator which might by implication suggest that he did or did not intend to benefit a particular person is to be characterised as evidence of intention only admissible in a case of equivocation. This may be too wide. Much admissible evidence of surrounding circumstances would be of this character.⁵⁴

Evidence of the circumstances surrounding the testator: The armchair principle

⁵¹ Ibid 65.

⁵² *Sherratt v Mountford* (1873) LR 8 Ch App 928, 929-930.

⁵³ Haines, above n34, [5.13].

⁵⁴ See below at [35].

27 Evidence of the circumstances surrounding the testator at the date of his will is admissible for the purpose of assisting the court in the construction of the will.

“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 to be 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... the meaning of words varies according to the circumstance of and concerning which they are used.”⁵⁵

28 That is, *“you may place yourself, so to speak, in [the testator’s] arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you at arriving at his intention”*.⁵⁶ Such evidence is admissible as an aid to construction of a will because the court infers that the testator had his own surrounding circumstances in mind when made his will and used the words in his will with reference to those circumstances.⁵⁷

29 Evidence of the circumstances surrounding the testator is admissible under the armchair principle as an aid in the construction of a will. The question is how it may be used. The principles referred to below were largely adopted when the literal approach to construction held sway. They remain valuable because in most cases the literal meaning will be the intended meaning. But the questions will always be

⁵⁵ *Allgood v Blake* (1873) LR 8 Ex 160, 162.

⁵⁶ *Boyes v Cook* (1880) 14 Ch D 53, 56.

⁵⁷ *Theobald on Wills*, above n34, 278.

what the evidence shows as to what the testator intended by the words in the will. Even where a literalist approach to construction was adopted such evidence could be used in the following ways to elucidate the testator's meaning. First, and most obviously, evidence of the circumstances surrounding the testator was always admissible under the armchair principle to prove the existence of any person or property described in the will for "*you must always, of course, have evidence who are the persons mentioned, and you must also have evidence of what are the things bequeathed.*"⁵⁸ Such evidence is essential in order to establish the reference between the language in the will and the outside world.⁵⁹

30 Secondly, evidence of the circumstances surrounding the testator could be used to rebut the presumption that a word or phrase used in the will bears its ordinary, or technical, meaning. If, when the will is read in light of the circumstances surrounding the testator, it appears that the ordinary, or technical, meaning of a word or phrase does not make sense, the court may further "*look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to those circumstances, they are capable.*"⁶⁰ If so, the court may construe the words or phrase in that popular or secondary sense. Hence, evidence of the circumstances surrounding the testator could be used to displace the ordinary, or technical, meaning of a word or phrase in favour of some secondary, or popular, meaning. For example, where a testator by his will gives the residuary of his estate to "*my nephews and nieces*" evidence is admissible to show that, to the testator's knowledge, he did not have any nephews or nieces by blood, and there was no possibility of his having any, and that his wife

⁵⁸ *Sherratt v Mountford* (1873) 8 Ch App 928, 929; Wigram, above n5, 56 (Proposition V).

⁵⁹ Kerridge and Rivers, above n1, 295; *Theobald on Wills*, above n34, 277-8.

⁶⁰ *Re Glassington* [1906] 2 Ch 305, 313, quoting Wigram.

had nephews and/or nieces: this evidence shows that the testator did not use “*my nephews and nieces*” in its ordinary sense as meaning nephews and nieces by blood, but in the secondary or popular sense as including nephews and nieces by marriage.⁶¹

31 What, then, is required to satisfy the first requirement that the ordinary, or technical, meaning does not make sense when the will is read in light of the circumstances surrounding the testator? The answer to this question depends on the strength of the presumption in favour of the ordinary, or technical, meaning and the courts have differed as to when the provisions of a will should be regarded as not making sense with respect to the surrounding circumstances. Wigram required it to be proved that surrounding circumstances known to the testator at the date of the will made it impossible for the gift to take effect at his death if the words construed in their “*strict and primary sense*”. If impossibility was not satisfied, then, according to Wigram, it is “*an inflexible rule of construction*” that the words must be given their presumptive meaning.⁶² Whilst this approach had the advantage of producing certainty and uniformity in the constructions of wills, inevitably, it would in some cases operate to defeat the intention of the testator. A less stringent test was put forward in *Allgood v Blake*:

“...we are to...give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning), unless, when applied to the subject matter which the testator presumably had in his mind, they produce

⁶¹ See, for example, *Hill v Crook* (1873) LR 6 HL 265; *Dorin v Dorin* (1875) LR 7 HL 568; *Re Pearce* [1914] 1 Ch 254 concerning the meaning of “*children*” and whether evidence of surrounding circumstances suggests the testator used the word in its secondary sense as meaning illegitimate children.

⁶² Wigram, above n5, 18 (Propositions II), 47 (Proposition III). Proposition III was approved in *Re Glassington* [1906] 2 Ch 305.

*an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification...*⁶³

32 Also, in *Re Jebb*⁶⁴ it was found that a “strong”⁶⁵ or “complete”⁶⁶ improbability had the same effect as an actual impossibility and Danckwerts LJ pointed out that there was no reason why an actual impossibility was needed for the presumption in favour of the ordinary, or technical, meaning to be rebutted. Consequently, it appears that the presumption can be rebutted by proof of something less than an impossibility.

33 However, evidence of the circumstances surrounding the testator cannot be used to give words a meaning, which on the face of the will they are incapable of bearing. Such evidence is only admissible to elucidate which of two or more possible meanings the testator intended. The court is “*not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said*”.⁶⁷ The leading case on this point is *Higgins v Dawson*.⁶⁸ The testator after giving pecuniary legacies, specifically bequeathed the “*residue and remainder*” of certain mortgage debts “*after payment of my just debts and funeral expenses and the expense of proving this my will*”. Some beneficiaries sought to adduce evidence of the state of the testator’s property at the date of the will and, on the basis of that evidence, to argue that the gift was also charged with the payment of the pecuniary legacies as well as debts and expenses. The House of Lords

⁶³ *Allgood v Blake* (1873) LR 8 Exch 160,163.

⁶⁴ [1966] Ch 666.

⁶⁵ *Ibid* 672, per Lord Denning MR.

⁶⁶ *Ibid* 674, per Danckwerts LJ.

⁶⁷ *Perrin v Morgan* [1943] AC 399, 420.

⁶⁸ [1902] AC 1.

unanimously rejected this argument as a “*violent construction*”⁶⁹ and held that that evidence could not be used for that purpose.

34 Thirdly, evidence of the circumstances surrounding the testator will be relevant in construing a will where a word or phrase used by the testator has more than one ordinary meaning. As indicated above, where a word or phrase has more than one ordinary meaning there is no presumption that the word or phrase bears any particular meaning and the court determines the meaning the testator intended by considering the will as a whole in light of circumstances surrounding the testator.⁷⁰

35 Finally, in the case of a misdescription or ambiguity evidence of the circumstances surrounding the testator is admissible to establish what the testator meant. If a description used to denote a donee or the subject of the gift in a will is capable of being applied to more than one donee or subject, evidence of the circumstances surrounding the testator may be used to clarify the ambiguity and ascertain who or what the testator intended to refer to.⁷¹ Thus where a will contained a gift to “*my son Forster Charter*” and at the date of the will the testator had no son of that precise name, but had two sons named William Forster Charter (habitually called William or Willie, but never Forster) and Charles Charter the court looked to evidence of the circumstances surrounding the testator, including the circumstances, habits and state of the testator’s family and the closeness of his relations with his two sons at the time he made his will in order to ascertain which of the two sons the testator

⁶⁹ Ibid 8.

⁷⁰ *Perrin v Morgan* [1943] AC 399.

⁷¹ *Charter v Charter* (1874) LR 7 HL 364.

intended to benefit.⁷² It is very hard to distinguish this type of evidence from the evidence rejected in *Sherratt v Mountford* as being evidence of intention admissible only in the case of equivocation.

36 Similarly, where part of the description applies to one person or thing and another part applies to another person or thing, such that the description does not fit any actual person or thing, evidence of the circumstances surrounding the testator at the date of the will can be used to determine which person or thing the testator intended.⁷³ This occurred in the case of *Hiscocks v Hiscocks*⁷⁴ where the testator devised lands to his son John for life, with remainder to “*my grandson John Hiscocks, eldest son of the said John Hiscocks.*” The testator’s son John Hiscocks had been married twice and had by his first wife a son Simon and by his second wife an eldest son John and other younger children. The devise, therefore, did not apply both by name and description to either of the grandsons. Evidence of the circumstances of the testator, but not evidence of his intention was admissible to establish whom the testator intended to benefit.

37 It also appears that evidence of the circumstances surrounding the testator may be admissible to show that someone other than the person who completely satisfies the descriptions was meant.⁷⁵ However, there is a “*very strong presumption*” that

⁷² Ibid. Note: This case has been wrongly described on a number of occasions by both commentators and judges as being one where evidence was admitted to show that the testator habitually called Charles Charter by the name “Forster”. However, there was no such evidence and this was not the basis of the decision of the House of Lords. This case has also been considered in the context of latent ambiguities and exceptions to the general rule excluding extrinsic evidence of the testator’s intention. However, all members of the House of Lords were agreed that this was not a case of an equivocation, and thus no extrinsic evidence of the testator’s intention was admissible.

⁷³ *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154; *Public Trustee v Herbert* [2008] NSWSC 366.

⁷⁴ (1839) 5 M & W 363; 151 ER 154.

⁷⁵ *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207; see also *Grant v Grant* (1870) LR 5 CP 380 and 727.

the person who completely satisfies the description was meant and this presumption will only be rebutted by evidence in “*exceptional circumstances*”.⁷⁶ In *National Society for the Prevention of Cruelty to Children v The Scottish National Society for the Prevention of Cruelty to Children*⁷⁷ the testator, a Scotsman, gave a legacy “to the National Society for the Prevention of Cruelty to Children,” which was the exact name of the English society. The testator had lived all his life in Scotland, and the legacy was placed in the midst of a series of legacies to Scottish charities. The legacy was claimed by the Scottish National Society for the Prevention of Cruelty to Children, which had been brought to the attention of the testator shortly before he made his will. There was no evidence that the English society, which did not actively operate in Scotland, was known to the testator. The House of Lords, whilst accepting that evidence of the circumstances surrounding the testator was admissible to show that the testator meant the Scottish National Society for the Prevention of Cruelty to Children, held unanimously that the English society was entitled to the legacy. Such evidence was not found to be sufficient to overcome the “*very strong presumption*” that the testator meant the “*National Society for the Prevention of Cruelty to Children*”. Lord Loreburn stated that “*what a man has said [in his will] ought to be acted upon unless it is clearly proved that he meant something different from what he said.*”⁷⁸ It may be doubted whether the result was consistent with the approach later taken in *Perrin v Morgan*.⁷⁹

⁷⁶ *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207, 202, 216.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, 212-213.

⁷⁹ [1943] AC 399 (Kerridge and Rivers, “*The Construction of Wills*” (2000) 116 *Law Quarterly Review* 287 at 302).

Evidence of the testator's intention

- 38 As mentioned above, the general rule at common law is that direct extrinsic evidence of what the testator's actual testamentary intentions were is not admissible to show the meaning of the words of he has used in the will. The only recognised exception to this general rule is cases of equivocal descriptions. Evidence of the testator's intentions is also admissible to rebut equitable presumptions that may arise upon the will and the facts, but these are not rules of construction.⁸⁰
- 39 An equivocation arises where the words of the will, when considered in relation to the surrounding circumstances, apply accurately and equally to two or more persons or things. For example, an equivocation arises where a testator makes a gift to "*my nephew John Smith*" and the testator has two nephews of that name at the date of the will, or where the testator makes a gift of his manor of S and the testator has two manors of that name, North S and South S.⁸¹ In cases such as these, evidence of the testator's intention is admissible to resolve the equivocation. Hence, evidence of the instructions the testator gave for the will and of any declarations made by that testator as to what he intended to do will be admissible to show which person or thing was meant by the testator. However, if the equivocation cannot be resolved, the gift will fail for uncertainty.⁸² Evidence of the testator's intention is admissible in cases of equivocation because "*while it is forbidden to come into competition with the terms of the document on the same subject and*

⁸⁰ Ryder, above n34, 17; *Theobald on Wills*, above n34, 267.

⁸¹ *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154, 156.

⁸² *Richardson v Watson* (1833) 4 B & Ad 787; 110 ER 652.

possibly to prevail against the document, in the case of equivocation, no such result follows from resort to extrinsic evidence of intention."⁸³

40 There are three requirements that must be satisfied for an equivocation to exist.⁸⁴ First, the same description must apply to two or more persons or things. Where the whole of the description used by the testator is exactly applicable to two or more persons or things there is obviously an equivocation. However, the rule is not limited to cases of this type. An equivocation will also arise if part of the description does not apply to any person or thing, but the remainder of the description is applicable to two or more persons or things. In such a case, the part of the descriptions that is not applicable may be rejected, leaving the remainder of the description equivocal.⁸⁵ Accordingly, there will be an equivocation if by his will the testator makes a gift to "my nephew John Thomas Smith" and at the date of his will the testator had two or more nephews John Smith, but no nephew named Thomas Smith.⁸⁶ However, there will be no equivocation if the testator has a nephew John Smith and a nephew Thomas Smith as the description is not equally applicable to both even though there is a common element.⁸⁷ Similarly, an equivocation does not arise if part of the description applies to one person or thing and another part applies to another person or thing, as in the case *Hiscocks v Hiscocks* described above, because the description is not equally applicable to both persons or things.

⁸³ *Re Smith* [1939] VLR 213, 218. See discussion in Phipson, above n1, 268-271.

⁸⁴ *Theobald on Wills*, above n34, 270-273.

⁸⁵ *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154; *Bennett v Marshall* (1856) 2 K & J 740; 69 ER 980; *Re Ray* (1916) 1 Ch 461.

⁸⁶ *Re Ray* (1916) 1 Ch 461.

⁸⁷ See, eg, *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154; *Drake v Drake* (1860) 8 HLC 172; *Charter v Charter* (1874) LR 7 HL 364.

- 41 Secondly, the description must be sufficient to identify each of the persons or things with legal certainty if the other or others did not exist.⁸⁸ Thus, a description that is incomplete because it contains a blank but is equally applicable to two or more persons or things will be equivocal if the description is sufficient to identify them with legal certainty. For example, a gift to “*my grand-daughter ...*” will satisfy this requirement,⁸⁹ but a gift to “*Lady ...*” will be void for uncertainty.⁹⁰ Evidence that the testator said he meant to make the gift to “*Lady Hort*” is not admissible. Also, if part of the description is rejected as inapplicable to any possible person or thing, there will be an equivocation if the remainder is sufficient to identify each of the persons or things with legal certainty.⁹¹
- 42 Finally, the will, when construed as whole with the aid of any admissible evidence of the circumstances surrounding the testator, must not show which of the persons or things the testator was referring to. Consequently, if it appears from the evidence of the circumstances surrounding the testator that the description was intended to apply to only one of the persons or things which fall within its terms, there will be no equivocation and evidence of the testator’s intention will not be admissible.⁹² Evidence of the testator’s intentions is therefore only admitted as a last resort.
- 43 These rules are modified by statute in cases where a statute applies, but otherwise are applicable notwithstanding the ascendancy now held by the intentionalist approach to construction.

⁸⁸ *Re Ray* (1916) 1 Ch 461.

⁸⁹ *In the Estate of Hubbuck* [1905] P 129.

⁹⁰ *Hunt v Hort* (1791) 3 Bro CC 311; 29 ER 544.

⁹¹ *Re Ray* (1916) 1 Ch 461.

⁹² *Re Mayo* [1901] 1 Ch 404.

Dissatisfaction with Common Law Rules

- 44 The common law principles requiring the exclusion of extrinsic evidence are one example of a general common law rule that parole evidence cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.⁹³ A number of policy reasons are given in support of the exclusion of evidence of the testator's intentions in the construction of wills but there are powerful arguments to the contrary that attracted the attention of the English Law Reform Committee.
- 45 The first reason put forward in support of the exclusion of extrinsic evidence is that the admission of such evidence would thwart the formal statutory requirement that a will must be in writing.⁹⁴ Secondly, it is argued that the law, by requiring a will to be in writing, in effect makes it the only legitimate evidence of the writer's intention.⁹⁵ Thirdly, it is argued that extrinsic evidence of the testator's intention should be excluded because declarations of intention tend to supersede the document and in effect make a new a will for the testator.⁹⁶ These objections would tend to exclude not only evidence of the testator's intention, but also evidence of the circumstances surrounding the testator and have in fact been advanced for the exclusion of circumstantial, as well as direct, evidence of intention.⁹⁷ Phipson, however, asserts that:

⁹³ A L Cordiner, 'Admissibility of Extrinsic Evidence in Aid of the Interpretation of Wills,' (1911-12) *Juridical Review* 266, 266.

⁹⁴ Phipson, above n1, 252; I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Co, 2nd ed, 1989) 272.

⁹⁵ *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154, 156; Phipson, above n1, 252.

⁹⁶ Phipson, above n1,252; *Hubbard v Hubbard* (1850) 15 QB 241, 243.

⁹⁷ *Higgins v Dawson* [1902] AC 1, 6; Phipson, above n1, 252.

*“These reasons... wholly mistake the function and purpose of such evidence, which is not the competitive one of giving to the oral words some independent or hostile dispositive effect, but the purely subordinate and auxiliary one of giving the written text some meaning it can properly bear. It is, of course, common ground that one cannot set up an oral will in competition with a written one, or contradict the latter by parol. But where nothing of the kind is attempted, where the declarations are neither tendered with those objects nor, if admitted, would have those effects, the present objection is wholly inapplicable.”*⁹⁸

46 Phipson concludes that extrinsic evidence of the testator’s intention are excluded not because they constitute “*evidence of intention*”, or do not legitimately aid in elucidating the text, but because special reasons, which are partly historical and partly precautionary, but wholly arbitrary, have caused them gradually and generally to be excluded by the courts.⁹⁹

47 The fourth reason, alluded to by Phipson, propounded for the exclusion of evidence of this type is that such evidence is regarded as notoriously untrustworthy and unreliable. Evidence of declarations of the testator’s intention may be fabricated, retracted or misreported and any discrepancy between those declarations and the written document has been met with mistrust from the court, and justifiably so.¹⁰⁰ It may be said that courts are not unaccustomed with dealing with evidence of this nature and this should be a consideration in determining what weight should be

⁹⁸ M N Howard, Peter Crane and Daniel A Hochberg (eds), *Phipson on Evidence*, (Sweet & Maxwell, 14th ed, 1990) [1049] (*‘Phipson on Evidence’*); Phipson, above n1, 252.

⁹⁹ Phipson, above n1, 253.

¹⁰⁰ *Phipson on Evidence*, above n98, [1050].

given to the evidence, rather than a reason for exclusion. Nonetheless the fact-finding process is inherently flawed because of the absence of the deceased. The ability of judges to decide truth from falsehood will vary according to circumstances. A healthy scepticism is in order.

48 Fifthly, it is argued that drafters, testators and beneficiaries rely upon the will's interpretation in accordance with fixed principles and a more generous admission of evidence of the testator's intention would result in a lack of certainty and increase litigation.¹⁰¹ If a testator ensures that he drafts his will to express his dispositive intentions and gives careful thought to the provisions of his will he is entitled to rely upon its interpretation in accordance with its terms and not by reference to statements he may make (or be said to have made) in the period between the execution of his will and the time of his death.

49 On the other hand, it has been suggested, that declarations of the testator's intention are properly receivable in aid of interpretation simply because no evidence logically probative of intention should be shut out.¹⁰² The object of the construction of wills is to ascertain what the testator intended by the words in his will. Provided that extrinsic evidence of the testator's intention is used to shed light on the meaning of the written text of the will and not to set up an oral will in competition with a written one, and that the evidence is met the requisite caution, it was said to be difficult to maintain the restrictive position of the common law.

¹⁰¹ Hardingham, Neave and Ford, above n94, 273.

¹⁰² Phipson, above n1, 253.

50 The justification for the limiting the use of evidence of testator's intention to cases of equivocation is questionable. The modern reasons for making an exception in cases of equivocation have been expressed as follows:

*"...although the words do not ascertain the subject intended, they do describe it. The person held entitled has answered the description in the will. The effect of the evidence has only been to confine the language within one of its natural meanings."*¹⁰³

*"...the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the Court to reject one of the subjects, or objects...and to determine which of the two the deviser understood to be signified by the description."*¹⁰⁴

*"...the intention shews what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he used, which, in their ordinary sense, may properly bear that construction."*¹⁰⁵

51 Hawkins provides what some suggest to be a conclusive answer to these explanations. He argues that it is difficult to understand how the statute could be satisfied by a written description, which was insufficient to determine the identity of the person intended, since to define that which is indefinite is to make a material

¹⁰³ Wigam, above n5, 126 (emphasis in original).

¹⁰⁴ *Gord v Needs* (1836) 2 M & W 128; 150 ER 698, 703.

¹⁰⁵ *Hiscocks v Hiscocks* (1839) 5 M & W 363; 151 ER 154, 156.

addition to the will.¹⁰⁶ This, he says, is precisely what happens in the case of equivocations and that the case of two persons or things bearing the same name is a case where language is imperfect and where some “*additional mark*” is needed to distinguish between the two.¹⁰⁷ “*It is not true to say...that when you know what the writer meant to do, you immediately perceive that he has done it: on the contrary, you perceive that some Morgiana, as it were, has come in to defeat his intention, and has succeeded in defeating it,*”¹⁰⁸ unless a new and additional mark is supplied to distinguish the intended object from the others similarly marked. That is to say, what occurs in cases of equivocation is the same as that which occurs in all cases of interpretation: a defining of the indefinite, and so making a material addition to the will.¹⁰⁹ Hawkins concludes that it is only an historical anomaly that evidence of the testator’s intention is admissible in cases of equivocation and not admissible generally.¹¹⁰

52 Further, the restrictive common law rules governing the admissibility of evidence may often operate to defeat the testator’s intention, particularly in cases of ambiguity or misdescription. For example, the use of extrinsic evidence in two prominent in the House of Lords, *Charter v Charter*¹¹¹ and *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*¹¹², is somewhat unsatisfactory. In *Charter v Charter* a mistake or error was made in the use of the Christian name of the testator’s son (Forster Charter) and the erroneous description contained in the will could have applied to

¹⁰⁶ Phipson, above n1, 269.

¹⁰⁷ Ibid.

¹⁰⁸ Hawkins, above n1, 321, quoted in Phipson, above n1, 269.

¹⁰⁹ Phipson, above n1, 269-270.

¹¹⁰ Hawkins, above n1, 219-24.

¹¹¹ (1874) LR 7 HL 364.

¹¹² [1915] AC 207.

the either of the testator's surviving sons. Evidence showed that the elder surviving son (William Forster Charter, called William or Willie, but never Forster) had left home and settled and started a business some 100 miles from the testator, only visiting occasionally and that the younger son (Charles Charter) had always lived with the testator, with the exception of a short period, and assisted him with the farm business. On this evidence, supported by textual indications that the testator assumed the beneficiary would reside with the testator's widow (as Charles was doing), two of four of the Law Lords inferred that the testator intended to benefit the younger son (Charles) with whom he had lived. This was what the testator in fact intended.¹¹³ But why in cases such as these should the court not be able to use evidence of the testator's actual intention to ascertain the meaning of the erroneous description? The testator may have intended to benefit the older son in order to reunite the family and have both sons involved in the farm business.

53 *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*¹¹⁴ is an example of where the testator's intention may have been defeated by the restrictive common law principles governing the construction of wills. The circumstances surrounding the testator, as outlined above (at [37]), strongly suggested that the testator intended to benefit the Scottish, not the English, society. There was no evidence to indicate that the testator was aware of the existence of the English society and the fact that it bore the exact name the testator used in the will may have been nothing more than coincidental. However, the circumstances did not overcome the "very strong presumption" that the English society, which completely satisfied the description,

¹¹³ *Charter v Charter* (1871) LR 2 P & M 315.

¹¹⁴ [1915] AC 207.

was meant by the testator. The use of evidence of the testator's actual intentions (if admissible) may have allowed the court to construe the will satisfactorily and conclusively ascertain that the testator intended to benefit the Scottish society.

Statutory Reform in Australia

54 All jurisdictions in Australia, except for South Australia, have enacted legislative provisions that deal with the admission of certain extrinsic evidence, including evidence of the testator's intention in cases of construction. These provisions are essentially identical in form and in substance and are based on the English equivalent, section 21 of the *Administration of Justice Act 1982* (UK). Section 21 of the *Administration of Justice Act 1982* (UK) was enacted as a result of English Law Reform Committee's report entitled *Interpretation of Wills*.¹¹⁵ The Committee unanimously agreed that the intentionalist approach to the construction of wills should be preferred to the literal approach, but there was a difference of opinion as to the extent of the admissibility of evidence of the testator's intention. The majority of the Committee took the view that all extrinsic evidence bearing upon the construction of a will should be admissible, except for evidence of the testator's intention. The minority, however, went further. They recommended that all extrinsic evidence, including evidence of the testator's intention, should be admissible as an aid to construction in all cases where there was a legitimate dispute about the language of the will. The provision ultimately enacted lies somewhere between these two views. It permits the acceptance of extrinsic evidence, including evidence of the testator's intention, only in so far as any part of the will is meaningless; in so

¹¹⁵ Law Reform Committee, above n2.

far as the language used in any part of the will is ambiguous on the face of it; and in so far as evidence, other than evidence of the testator's intention shows that the language used is ambiguous in light of surrounding circumstances.¹¹⁶

55 The provisions enacted in the various jurisdictions in Australia are substantially the same as the English provision and have different commencement dates.¹¹⁷ In New South Wales, for example, section 32 of the *Succession Act 2006* (NSW) applies to wills made on or after 1 March 2008. It 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).

¹¹⁶ *Administration of Justice Act 1982* (UK), s 21.

¹¹⁷ *Wills Act 1968* (ACT), s 12B; *Succession Act 2006* (NSW), s 32; *Wills Act 2000* (NT), s 31; *Succession Act 1981* (Qld), s 33C; *Wills Act 1992* (Tas), s 46; *Wills Act 1997* (Vic), s 36; *Wills Act 1970* (WA), s 28A.

(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.*

56 The legislative provisions essentially extend the admissibility of evidence of the testator's intention in the construction of language used in a will to all forms of ambiguity and not solely cases of equivocation.¹¹⁸ This raises the question of what constitutes an ambiguity. Haines, in the context of the common law principles governing the admissibility of extrinsic evidence, citing *Higgins v Dawson*,¹¹⁹ states "*an ambiguity exists only when it is determined that no interpretation can be given to a will after a full consideration of the document*".¹²⁰ In the context of the statutory provisions this is arguably too restrictive. A will is ambiguous whenever it is susceptible, on its face or in light of the surrounding circumstances, to two or more possible constructions. Thus, in any case where it is possible to say that the word of will may mean A, B or C, direct extrinsic evidence of the testator's intention is admissible to resolve whether the testator intended A or B or C.¹²¹ The provisions, however, do not permit the admission of extrinsic evidence of the testator's intention to establish the surrounding circumstances or to establish the ambiguity because it was thought this would compromise the policy behind the legislative requirement that a will be in writing.¹²² This means that extrinsic evidence of the testator's intention "*is admissible, not to show that the language is ambiguous, but to assist in the interpretation of language which other evidence shows is ambiguous in the light*

¹¹⁸ Note: the equivalent provision in the Australian Capital Territory Act uses the terms "*ambiguous or uncertain*".

¹¹⁹ [1902] AC 1, 10.

¹²⁰ Haines, above n34, [5.8].

¹²¹ Standing Committee of Attorneys-General, *The Law of Wills* (1997) 71.

¹²² New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No 85 (1998) [6.20ff].

of the surrounding circumstances.”¹²³ Thus where a testator leaves his estate to “my nephew” evidence that he said “I have left (or want to leave) my estate to Bill”, where Bill is not a nephew, would be inadmissible if the testator had a blood nephew and there was no evidence from the circumstances surrounding the testator to indicate that the testator referred to Bill as “my nephew”.¹²⁴ On the other hand, if there were such evidence, the evidence of the testator’s intention would be admissible to show it was more likely the testator meant Bill than his blood nephew, even though it would not be a case of equivocation.

57 The legislative provisions that have been enacted generally are not a comprehensive statement on the admissibility of evidence and expressly provide that they do not prevent the admissibility of extrinsic evidence that is admissible at common law. The common law principles discussed above continue to be relevant.¹²⁵ Further, the common law principles will solely govern the admissibility of extrinsic evidence in cases involving wills to which the legislative provisions do not apply. Consequently, the common law principles outlined above continue to have substantial operation in most jurisdictions in Australia.

¹²³ *Theobald on Wills*, above n34, p249.

¹²⁴ G L Certoma, *The Law of Succession in New South Wales* (Lawbook Co, 4th ed, 2010), 145.

¹²⁵ *Succession Act 2006* (NSW), s 32(3); *Wills Act 2000* (NT), s 31(3); *Succession Act 1981* (Qld), s 33C(3); *Wills Act 1992* (Tas), s 46(3); *Wills Act 1997* (Vic), s 36(3); *Wills Act 1970* (WA), s 28A(3). There is no equivalent provision in the Australian Capital Territory.