Will Construction

The Honourable Justice Michael Meek

Succession and Elder Law Committee – NSW Bar Association Lecture Series Session 2

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Introduction

What of value can be said on the "elusive subject" of Will construction

1 When I was contacted late last year about participating in the Succession and Elder Law Committee's series of judges' talks it was suggested that within the planned program I might present under the topic "Will construction". There is considerable legal literature in relation to Will construction. Accordingly, one approaches with some degree of trepidation the task of adding in any meaningful way to the repository or store of knowledge regarding Will construction.

2 Edmond Cahn, writing in the Georgetown Law Journal in 1937, stated it would seem that nothing of value could be written on the "elusive subject" of Will construction for various reasons including the fact that generalities and maxims found in the textbooks are all linked with exceptions, qualifications and neutralising propositions[1].

3 The fact that there is such considerable literature dealing with the topic is, in itself, intriguing. That is so because it is also acknowledged that questions of construction are essentially fact-specific and, accordingly, no case can truly provide any precedent for construction of each new Will that comes before the Court for consideration[2].

[1] Edmond N Cahn, "Testamentary Construction: The Psychological Approach" (1937) 26 *Geo LJ* 17 (**Cahn**) at 18.
[2] *Gibb-Maitland v Perpetual Executors Trustees and Agency Co (WA) Ltd* (1947) 74 CLR 579; [1947] HCA 35 at 586 per Rich J.

4 The judicial task of Will construction is within the Supreme Court alive and well including at appellate level.

5 In 2007, the then Justice Michael Kirby, in writing a foreword to David M Haines QC's seminal work *Construction of Wills in Australia*, recited and lamented the decline of the High Court's appetite for consideration of issues of Will construction, his Honour stating:

> Reading through David Haines's book, I have come to the conclusion that the pendulum has swung too far. The High Court needs to rediscover the fascination and importance of the law of wills evident in earlier times and demonstrated in these pages. This is private law. Eventually it concerns most people living in Australia. It is a people-rich subject of law. The apex court needs to revisit it.

6 Whilst the High Court has regularly given leave on questions of statutory construction, Justice Kirby's expressed hope of the High Court's rediscovery of fascination for the law of Wills has over 15 years later not been realised.

7 I have proceeded accordingly on the basis that the main forums for advocacy for Will construction are within the Equity Division of the Supreme Court and the Court of Appeal.

The role of counsel – forensic considerations

8 The approach that I have taken is to address, initially, some basic principles regarding the task of Will construction within the introduction and then to address comments specifically by reference to the role of counsel in contentious Will construction litigation.

9 On the forensic task, I will identify and discuss:

(1) several preliminary considerations that counsel will need to address before undertaking an assessment of construction;

(2) aspects of admissibility of evidence relevant to both advising and appearing on the hearing;

(3) features of both text and context which bear upon both advising and appearing on the hearing; and

(4) some forensic considerations for the hearing.

What is Will construction?

What is the task?

10 Legal construction is the process of ascertaining the meaning of a written document: *Macquarie Dictionary*, online ed.

11 Different legal systems in the world throughout history have taken varied approaches to testamentary construction[3].

12 In New South Wales, the object of construction of a Will is to give effect to what can be ascertained, having regard to admissible extrinsic evidence, the testator intended by the words he used: e.g. *De Lorenzo v De Lorenzo* (**De Lorenzo**)[4].

13 The search is for meaning of the testator's ***expressed*** intentions, not what the testator subjectively intended or *meant* to say or do when making the Will, but what the testator *actually* said[5] by words in the Will.

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[3] Cahn at 23-25. Cahn noted that at the time (mid-1930s) the "extreme of liberty in testamentary construction" was be found under the Civil Code of France noting that except for a single minor provision, the Code was devoid of rules for the interpretation of Wills: at 28.

[4] (2020) 104 NSWLR 155; [2020] NSWCA 351 at [50] per White JA (Gleeson JA agreeing) citing *Fell v Fell* (1922) 31 CLR 268; [1922] HCA 55 at 273-274; *Perrin v Morgan* [1943] AC 399 at 406, 416. See also *Warton v Yeo* [2015] NSWCA 115 (**Warton v Yeo (CA)**) at [35] per Ward JA (as her Honour then was); David M Haines QC, *Construction of Wills in Australia* (2007, LexisNexis Butterworths) (**Haines**) at 34.

[5] *Middleton v Schofield* [2022] NSWSC 1454 (**Middleton v Schofield**) at [17] per Robb J citing *Farrelly v Phillips* (2017) 128 SASR 502 at 510; [2017] SASCFC 111 at [32] per Stanley J (with whom Kourakis CJ agreed at 504 [1]); *Carrington v Wallace* [2019] NSWSC 1301 (**Carrington v Wallace**) at [57] per Robb J quoting GE Dal Pont and KF Mackie, *Law of Succession* (2nd ed, 2018, LexisNexis Butterworths) at [8.4]. Another way the question is considered is by asking "What is the meaning of what the Will maker ***has written***?", not, "What did the Will maker mean to say or write? as suggested by Hallen J in *Ross v Sebek* [2022] NSWSC 1300 at [123] drawing on the question posed by Gummow and Hayne JJ in *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 (**Byrnes v Kendle**) at [53] in relation to construing a declaration of trust. See also Heydon and Crennan JJ in *Byrnes v Kendle* at [102]-[106].

14 It is not the meaning of the words alone, nor the meaning of the writer alone – rather, it is the meaning of the words as used by the writer[6].

What the task is not

15 The dialogue between Alice and Humpty Dumpty reflects the importance attached by a speaker or author to their own intentions:

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean--neither more nor less.'[7]

16 However, the search is not for the author's unexpressed intention. There is an important distinction between a testator's expressed intentions and a search for what the testator meant to say.

17 Further, the Court's focus on the words as expressed is not a mechanical exercise. The task of the Court is not merely, or ultimately, to apply "rules of construction", but to ascertain the intention of the testator: *Estate of JA Gilmore, deceased*.[8]

18 The Court's role is not to give a more *rational* meaning to the Will but rather to determine the intention as stated or interpret what has been expressed in the Will: *Re De Bruyn*.[9]

19 When a party seeks the construction of a Will, the Court must interpret it. The fact that parties consent to an agreed construction does not bind the Court[10].

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[6] *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60; [1925] HCA 18 (**Life Insurance Co**) at 85 per Starke J citing but not expressly adopting comments in Sidney L Phipson, "Extrinsic Evidence in Aid of Interpretation" (1904) 20(3) *Law Quarterly Review* 245 at 254. Starke J's comments were in the context of referring to a number of ways in which judges and authors have posed the question.
[7] Lewis Carroll, *Through the Looking Glass* (1934) Chapter 6, 205.
[8] [2014] NSWSC 1263 at [33] per Lindsay J.
[9] [2016] VSC 6 at [17] per McMillan J.
[10] Haines at 19 citing *Re Carrigan, deceased* [1967] Qd R 379 at 381 per Hoare J.

Legal instruments have one true construction

20 At least as far as legal principle is concerned, there is only one true construction of any legal instrument[11] including a Will: *Minister for Immigration & Border Protection v SZVFW* [12].

21 However, none of us should think for one moment that that is *exclusively* how life operates.

22 The realm of literature and film provide examples of where there is more than one true construction of literature or a film.

23 It is not uncommon for film or TV series' directors and producers to film an ending to a movie or a series but leave open for legitimate debate or simple preference the construction of the ending or outcome.

24 An example of that is the finale of the NBC TV series *Blindspot* aired in July 2020. Viewers were shown two endings after Kurt Weller and Jane Doe disarmed the ZIP bomb in Times Square. Creator Martin Gero shared his thoughts on the two endings with TV Guide, and, apparently, confirmed that one of the answers is correct but allowed viewers a choice[13].

> It's up to you to choose. I mean, I think it's pretty clear. But what's so incredible about it is that it is kind of designed to be a Rorschach test. it's been amazing. Like, half of the people really think, 'Oh, she died in Time Square,' and half of the people think, 'Oh, that's just a memory, or that's just an imagined possibility she's playing out in her head.'.

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[11] *Life Insurance Co* at 78-79 per Isaacs J. See, more recently, *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2022] WASCA 162 at [21] per Buss P, Beech and Vaughan JJA; *NTC Contracting Pty Ltd v Morton* [2022] WASCA 160 at [48] per Buss P, Murphy and Vaughan JJA; *Electricity Generation and Retail Corporation (trading as Synergy) v EIT Kwinana Partner Pty Ltd* [2022] WASCA 3 at [229] per Quinlan CJ, Mitchell and Vaughan JJA; *Sino Iron Pty Ltd v Mineralogy Pty Ltd* (2019) 55 WAR 89; [2019] WASCA 80 at [172] per Buss P, Murphy and Beech JJA citing, *inter alia*, *Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson trading as Holgerssons Complete Home Service* [2019] WASCA 114 at [47] per Buss P, Beech and Pritchard JJA.

[12] (2018) 264 CLR 541; [2018] HCA 30 at [154] per Edelman J.

[13] TV Guide (Liam Mathews), 'Blindspot Boss Says the Show's Ending Is Open to Your Interpretation' – Interview, accessible at https://www.tvguide.com/news/blindspot-series-finale-martin-gero-interview/

25 In the Bible, in various passages the reader will see a deeper meaning intended by God but not by the human author[14]. Biblical exegetical scholars describe this by use of the Latin phrase *sensus plenior* – meaning "fuller sense" or "fuller meaning"[15].

Approaches to construction

Approach to construing instruments in general

26 There is a broad uniformity regarding approaches to construction of legal instruments across a number of areas of the law[16].

27 Statutory construction and contractual construction involve the Court looking at text, context and purpose: see e.g. *Zhang v ROC Services (NSW) Pty Ltd* (**Zhang**)[17].

Approaches to Will construction – some history

28 Approaches to Will construction in the UK (or England) have generated striking judicial comment dating back centuries.

29 Many texts and articles refer to the comments of Coke CJ in 1613 making the following observation:[18]

> … wills and 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*: 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 …

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[14] See 2 Peter 1:20-21: [20] Above all, you must understand that no prophecy of Scripture came about by the prophet's own interpretation of things. [21] For prophecy never had its origin in the human will, but prophets, though human, spoke from God as they were carried along by the Holy Spirit. (New International Version).

[15] For example, the citation of Isaiah 7:14 in Matthew 1:22-23.

[16] See, e.g. *Marley v Rawlings* [2015] AC 129; [2014] UKSC 2 at [20]-[23] per Lord Neuberger of Abbotsbury PSC (as his Lordship then was) (Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath and Lord Hodge JJSC agreeing); *Al Dakhili v Al Kheurallah* [2023] NSWSC 47 at [356] (**Al Dakhili**).

[17] (2016) 93 NSWLR 561; [2016] NSWCA 370 at [86] per Leeming JA. See also *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 per Leeming JA at [35].

[18] *Roberts v Roberts* (1613) 2 Bulst 124; 80 ER 1002 at 1008.

30 The Latin is literally "[it] *went past the art of jurisprudence*" but a prosaically nice translation is "[it] *fell into a despair of jurisprudence*". The reason for exasperation expressed by his Lordship might itself be the subject of debate. Nonetheless, on one view, it was not merely a reference to the myriad of complex and perhaps conflicting guides but also the constancy with which such rules and guides are broken and maxims distinguished when cases arise for determination[19].

31 Differences in approach are commented upon by Haines who refers to commentary by Professor Roger Kerridge in *Hawkins on the Construction of Wills* distinguishing, in particular, between two approaches historically adopted by the Courts in the construction of Wills, describing them as:

(1) the *literal or grammatical approach* – which Haines describes as ascertaining the language used in the Will and construing the actual meaning of the words used as such, and which (according to Haines) judges seemingly acted upon on seven propositions offered by Sir James Wigram in *An Examination of the Rules of Law, Respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills* (1831)[20]; and

(2) the *intentional or inferential approach* – which Haines suggests is to ascertain the intention of the testator and give effect to it as encouraged by Sir Francis Hawkins, in his publication *Hawkins on the Construction of Wills* in 1893[21].

32 Haines suggests that the so-called *intentional* approach has not been uniformly adopted throughout history.

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[19] Cahn at 17.
[20] Haines at 35.
[21] Ibid referring to Roger Kerridge (ed), *Hawkins on the Construction of Wills* (5th edn, 2000, Sweet & Maxwell, London). See also Roger Kerridge, *Parry & Clark: The Law of Succession* (11th ed, 2002, Sweet & Maxwell, London) Ch 10.

33 Prior to the seminal decision of the House of Lords in *Perrin v Morgan*[22], many English judges in the decades prior to 1940 preferred a *literal* or *grammatical* approach. Others have commented that the prevailing thought in English legal thinking was to ascribe, at least in the realm of contractual law, what is described as the "plain and ordinary meaning" to words, making recourse to extrinsic evidence superfluous: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (**Codelfa**)[23].

34 Haines concludes that it is the *intentional* approach which has prevailed in the UK but more relevantly for our purposes in Australia[24]. This approach has been also described as the "pole star"[25] in the construction of Wills: *Thomson v Thomson*[26].

35 Haines states that the most general rule of construction is that a word or sentence in the Will must be construed according to the plain meaning of that word or the sentence which contains it referring to *Fell v Fell*[27].

36 However, even Issacs J, in directing attention to the *plain meaning*, qualified that comment by stating that one 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 its framer[28].

37 It has been acknowledged at the highest levels that there is more to the construction of words of written instruments than merely assigning to them their plain and ordinary meaning[29].

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[22] [1943] AC 399 (**Perrin v Morgan**).
[23] (1982) 149 CLR 337; [1982] HCA 24 at 347 per Mason J (as his Honour then was).
[24] Haines at 30, 35.
[25] Cited by Hallen J in, *inter alia*, *Warton v Yeo* [2014] NSWSC 494 at [48] and, more recently, in *Serwin v Dolso* [2020] NSWSC 370 at [51].
[26] [2008] VSC 375 at [11] per Vickery J citing American authority. In Michigan, the intention of the testator is the "polestar" in guiding the Court in Will construction.
[27] (1922) 31 CLR 268; [1922] HCA 55 at 273-274 per Isaacs J citing with approval *Leader v Duffy* (1888) 13 App Cas 294 at 301 per Lord Halsbury LC; *Ward v Brown* [1916] 2 AC 121 at 126-127 per Lord Shaw; *Kirby-Smith v Parnell* [1903] 1 Ch 483 at 489 per Buckley J.
[28] *Fell v Fell* at 273-274.
[29] See *Codelfa* at 348 per Mason J.

Is there a conflict between a grammatical approach and intentional meaning?

38 Speaking of grammatical approaches and intentional approaches might tend to suggest that there are necessarily some distinct and separate ways of analysing construction which are antithetical to one another and mutually exclusive.

39 This lecture is not the occasion to engage deeply in that debate.

40 I have found that a helpful way of considering the matter of construction of complex provisions within written instruments is guided by Leeming JA in *Zhang*.

41 His Honour noted that the construction of a complex (in that case contractual) provision involves the following considerations[30]:

(1) First, determine the literal or grammatical meaning or meanings of the clause.

(2) Secondly, determine the legal meaning of the clause.

(3) Thirdly, apply that legal meaning to the facts as found by the Court.

42 Whilst those considerations are described in a sequential way as phases[31], the actual process by which our minds work will in many cases involve some degree of crossover between those phases as those matters are assessed.

43 There is not a sharp line dividing the threshold stage of ascertaining grammatical or literal meaning and the subsequent stage of determining legal meaning[32].

[30] *Zhang* at [53].
[31] Ibid [54].
[32] Ibid [77].

44 That is at least partly recognised by the fact that, in many cases, there will be no great difficulty determining the literal or grammatical meaning. Indeed, Leeming JA observes that, in some cases of construction, this stage is omitted[33].

45 At least in relation to the construction of Wills, it is said that evidence of surrounding circumstances (being evidence of facts and circumstances known to the testator at the time the Will was created[34]) is always admissible[35].

46 More generally, in the task of construing written instruments, the task of assessing whether a phrase or expression is ambiguous or susceptible of more than one meaning does not need to be undertaken without regard to evidence of surrounding circumstances[36]. No anterior finding of ambiguity is a precondition to a consideration of surrounding circumstances as an aid to discovering or elucidating context and purpose[37].

47 However, a grammatical parsing of the contested clause may well provide utility in sifting and disposing of various of the parties' submissions[38].

48 Determining the literal or grammatical meaning is a matter of English, not a matter of law. It does not turn on evidence[39].

49 The legal meaning is not inevitably the most natural literal or grammatical meaning. This is why it is essential to have regard to context[40].

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[33] Ibid [54], [77].
[34] *King v Perpetual Trustee Co (Ltd)* (1955) 94 CLR 70; [1955] HCA 70 (**King v Perpetual Trustee Co (Ltd)**) at 78 per Dixon CJ, Williams, Webb, Fullagar and Taylor JJ; *James v Douglas* [2016] NSWCA 178 at [19] per Meagher JA (Leeming and Simpson JJA at [77]-[78] agreeing).
[35] See Haines at 40.
[36] *Zhang* at [79] per Leeming JA citing *Victoria v Tatts Group Ltd* [2016] HCA 5; 90 ALJR 392, and Barrett AJA (McColl JA and Sackville AJA agreeing) in *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297; (2016) 341 ALR 467 at [59] (**WIN Corporation**).
[37] *WIN Corporation* at [59] per Barrett AJA (McColl JA and Sackville AJA agreeing).
[38] *Zhang* at [55] per Leeming JA.
[39] Ibid [54] per Leeming JA.
[40] In the case of statutory and contractual construction, it is also essential to have regard to purpose: *Zhang* at [82] per Leeming JA.

50 However, there is an important distinction between giving legal meaning to a contractual provision and applying that legal meaning to the facts in a particular case.

51 As I note below, extrinsic evidence may be adduced at the application stage (i.e. the third stage identified by Leeming JA in *Zhang*), at least in some cases, not to alter the [Will[41]] but to identify its (relevant) subject[42]. An example being construing a legacy "to my nephew John" where the testator had two nephews named John: *Hope v RCA Photophone of Australia Pty Ltd*[43].

Sometimes the true legal construction is imperfect

52 Much is said in the law regarding a "counsel of perfection" in various matters. However, the reality of difficulties in construction need to be faced.

53 Sometimes, no construction of a clause will reconcile all aspects of its meaning. However, that does not stand in the way of the Court imputing to the disputed clause that which, even slightly imperfectly, best accords with the effect which the testator is taken to, or likely to, have intended: see *De Lorenzo*[44].

Some preliminary considerations before assessing construction

54 Usually when counsel is briefed to advise in relation to a Will construction suit there will be certain preliminary matters which counsel will consider prior to addressing the actual meaning of words or a clause within a Will.

Is the Will disputed?

55 Invariably, the first issue is whether the Will document is disputed.

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[41] The passage refers to contract – but this also applies to a Will.
[42] Ibid [78] per Leeming JA referring to comments of Isaacs J in *Bacchus Marsh Concentrated Milk Co Ltd (in Liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410; [1919] HCA 18 at 427.
[43] (1937) 59 CLR 348; [1937] HCA 90 at 356-357 per Latham CJ.
[44] At [37]-[40] per Leeming JA citing *Re Pulbrook; Pulbrook v Pulbrook* (1937) 37 SR (NSW) 345 at 351 per Jordan CJ; *Clerk v Equity Trustees Executors and Agency Co Ltd* (1913) 15 CLR 625; [1913] HCA 8 at 632-633 per Barton J .

56 It has been said that a Court should not construe a Will if there is some controversy in respect of its validity (in a probate suit) and there is still a possibility that it may be determined not to be the last testamentary instrument or may be varied or deemed void[45].

Is there a contest?

57 Essentially, the question of Will construction arises because there is a contest as to the meaning and effect of the Will, or more particularly, a provision or set of provisions in the Will.

58 A very legitimate initial question which counsel should consider is whether there truly is a contest as to meaning of the provisions of a Will.

59 In assessing that question counsel will be astute to consider the provisions of the Will and who might be affected by the question of construction posed.

60 In some cases, there may be questions of construction which may only affect a particular party or beneficiary.

61 More often, there will be questions of construction that impact a number of different beneficiaries and one question will be whether they have been contacted and what their attitude is to the matter.

62 In some cases, early contact with affected beneficiaries to alert them to different constructions and ascertaining their attitudes to the issues may be able to give rise to consensual outcomes without specifically resolving the question of construction.

63 In other cases, it may be that certain beneficiaries are unable to consent because they are under an incapacity in which case the matter might have to be determined by the Court.

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[45] Haines at 5 citing *Re Pearce (deceased); Stock v Pearce* (1973) 60 LSJS (SA) 654 at 656-657 per Sangster J.

64 Leaving aside cases where parties might contend spurious or untenable constructions, the matters which come before the Court invariably involve cases where there is a plausible contention on at least more than one side as to the meaning of the disputed words or clause.

What law applies?

65 There are statutory[46] and general law provisions[47] which bear upon the validity of a Will executed in a "foreign place"[48]. The statutory provisions[49] also address "International Wills" made in accordance with the requirements of the Annex to the *Convention providing a Uniform Law on the Form of an International Will 1973*[50].

66 In general, Will provisions regarding both movables and immovables are to be construed in accordance with the law intended by the testator which, in the absence of a contrary intention, is presumed to be the law of the testator's domicile at the date of the Will[51].

67 The construction of a Will is not altered because of a change in the testator's domicile after executing the Will[52].

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[46] *Succession Act 2006* (NSW) (**Succession Act**) ss 47-50.
[47] A helpful summary is set out in GL Certoma, *The Law of Succession in New South Wales* (4th ed, 2010, Thomson Reuters) (**Certoma**) at 22-25.
[48] An expression which is in the heading of s 48 but is undefined. There is no definition of "place" in the *Succession Act* nor in the *Interpretation Act 1987* (NSW). There is a definition of "internal law" referable to a "place". "Internal law" in relation to a place, means the law applying in a case where no question of the law in force in any other place arises: s 47 *Succession Act*.
[49] *Succession Act* ss 50A-50E.
[50] Signed in Washington, D.C. on 26 October 1973.
[51] Certoma at 25 citing, *inter alia*, *In re Cunnington; Healing v Webb* [1924] 1 Ch 68.
[52] *Succession Act* s 33. This accords with the general law position: see Certoma at 25 citing *In re Lungley, deceased* [1965] SASR 313.

What date is relevant?

68 A Will of its nature is *intended* by a testator to have legal effect only upon the testator's death, and its legal effect is thus dependent upon the testator's death[53].

69 There are general statements in texts to the effect that the relevant date for construction of disputed words in a Will is the date of the testator's *death*[54].

Date depends on the particular issue

70 However, determination of what date is relevant depends upon the precise question that is asked. Generally speaking, subject to the terms of a Will in any given case, as to questions regarding:

(1) what *property* is disposed of – a Will "speaks" (takes effect) with respect to the property disposed of by it as if it had been executed immediately before the *date of death* of the testator[55];

(2) ascertainment of a *beneficiary* – a reference to a person in a gift by Will is a reference to the person who satisfies that description at the *date of the Will*[56];

(3) the *surrounding circumstances* – the *date of the Will* is the relevant date, on the basis that those surrounding circumstances are present in the mind of the testator when intentions are finalised as to the disposition of his estate[57].

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[53] GE Dal Pont, *Interpretation of Testamentary Documents* (2019, LexisNexis Butterworths) (**Dal Pont, Interpretation of Testamentary Documents**) at 38 citing *Cock v Cooke* (1866) LR 1 P & D 241 at 243 per Sir J P Wilde: "whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary".

[54] See each of Haines at 36 and Dal Pont, *Interpretation of Testamentary Documents* at 38 citing *In re Heidenreich, deceased; Cole v Heidenreich* (1981) 27 SASR 455 at 459 per Cox J.

[55] *Succession Act* s 30; Certoma at 148.

[56] Certoma at 168.

[57] *Nicol v Chant* (1909) 7 CLR 569; [1909] HCA 4 at 580 per Griffith CJ citing with approval *In re Pyle; Pyle v Pyle* [1895] 1 Ch 724.

71 The republication of the Will, may, in some instances, affect the construction of the Will as to the persons entitled. For example, a person satisfying the description in a Will as at the date of a codicil (to the Will) is construed as the donee of the relevant gift[58].

Changes in word meaning over time

72 The use of words changes in meaning or nuance over time both in popular and in legal language[59]. The general position is that if there is more than one correct *grammatical* construction, the preferential construction is that which conforms with current usage[60]. Further, if the question is not one of grammar but of *style* and *lucidity* then it is said to be proper to lean towards the current usage of the words[61].

73 What is meant by *current* usage is usage at the date that the Will was ***made***[62] as distinct from the date of *death* or even the date that the case is *decided*.

74 Thus, if a word has had various different meanings over centuries and a Will is made in 1970, the deceased dies in 2005 and the case is heard and determined in 2023, the conventional position is the Court applies the meaning of the word as at 1970 when the Will was made.

Dictionaries

75 Even before one gets to choices amongst various options of meanings of words, there are a couple of challenges.

76 First, one is confronted with a choice of which dictionary the Court will have regard to.

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[58] Certoma at 169.
[59] Haines at 36 citing *In re Thurlow decd; Riddick v Kennard* [1972] Ch 379 at 383 per Sir John Pennycuick V-C; Haines at 43 citing *Perrin v Morgan* at 417-418; *Pigg v Clarke* (1876) 3 Ch D 672 at 674 where Sir George Jessel MR considered the word "family" in the context of its then modern usage.
[60] Haines at 43 citing *Bruyn v Perpetual Trustee Co Ltd* (1974) 131 CLR 387 (**Bruyn**) at 391 per Stephen and Jacobs JJ.
[61] *Bruyn* at 392 per Stephen and Jacobs JJ (Menzies J agreeing at 389).
[62] *Perrin v Morgan* at 417-418.

77 The Macquarie Dictionary was first published in Australia in 1981. Even from that year there are cases in which reference is made to that dictionary. For example, Rath J in *Walker v West*[63], in considering the meaning of the word "means" made reference to both the Macquarie Dictionary and the Shorter Oxford Dictionary.

78 In 1991, Kirby P (as his Honour then was) in considering use of the word "canal" stated that because of the nuances in language, it is generally safer to use the Macquarie Dictionary in preference to overseas dictionaries in providing meaning to words used in an Australian context[64].

79 Applying current usage (as at the time that the Will was written) will reflect changes in social attitudes and legislation of the contemporary society in which the Will was written[65].

80 Secondly, on the basis that one attempts to find the meaning of the word as at when the Will was made there is the challenge of finding an edition of the chosen dictionary published within the period covering the date of the Will, or at least an edition which provides comment in respect of that period.

81 There are many examples of changes of use. An example in the *Macquarie Dictionary*, online ed (as at 2023) helps explain this.

82 Suppose there is a 2023 Will which includes a gift to the testator's "gay nephew".

83 The Dictionary outlines various different meanings of the word "gay" as an adjective (and as a noun).

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[63] [1981] 2 NSWLR 570 at 583.
[64] *Provincial Insurance Australia Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 553B-C.
[65] See *Harris v Ashdown* (1985) 3 NSWLR 193 at 202C-E. There, the relevant Will was made in 1948 (apparently drafted by solicitor). The testator died in 1950. Thirty-five years later it became necessary for the Court to consider use of the words "child" and "children". There was debate over the reach of the expression "child". Was it confined to legitimate children or did it include ex-nuptial children, adopted children and stepchildren?

84 These are:

> *adjective* (**gayer**, **gayest**)
>
> **1.** (especially of a male) homosexual.
>
> **2.** of, relating to, or for homosexuals: *gay rights*; *a gay bar.*
>
> **3.** *Colloquial* (*mildly derogatory*) odd; eccentric.
>
> **4.** *Colloquial* unfashionable; unstylish: *that bag is really gay.*
>
> **5.** *Colloquial* irritating; annoying: *his fooling around is so gay.*
>
> **6.** having or showing a joyous mood: *gay spirits*; *gay music*; *gay scenes.*
>
> **7.** bright or showy: *gay colours*; *gay flowers*; *gay ornaments.*
>
> **8.** characterised by social or other pleasures: *a gay life.*
>
> **9.** *Obsolete* dissipated; licentious.
>
> **10.** *Obsolete* forward; impertinent; flirtatious. –*noun*
>
> **11.** a homosexual, especially male.

85 The Dictionary then gives a note regarding the *etymology* of the word:

> [Middle English, from Old French *gai*, of Germanic origin; defs **1**, **4**, **6**–**9** and **11** originally homosexual slang, from the earlier sense, `living by prostitution', a development of def. **9**; def. **4** from US derogatory slang (1970s) unappealing, unfashionable]

86 The Dictionary gives a specific note about *usage* of the word:

> The meaning `homosexual' (defs **1**, **2** and **11**) which has become current in mainstream English since the 1950s is now so established that the more traditional meanings (defs **6**–**8**) are now used less often. Many writers avoid using the word in these latter senses because of the possibility of confusion and because they are becoming dated.

87 Use of the Dictionary in this way provides assistance in clarifying what usage is current as at the date of the Will.

Admissibility of evidence

The "armchair principle"

88 The Court adopts the "armchair principle", putting itself in the position of the testator in considering all material facts and circumstances known to the testator with reference to how he is taken to have used the words in the Will[66].

Extrinsic evidence

89 As is evident from the discussion above there are limitations on the extent to which evidence of the testator's actual intentions are admissible.

90 Under the general law, direct extrinsic evidence of the testator's actual intentions is limited to *equivocations*[67].

91 An *equivocation* arises where the testamentary language may be applied equally to each of two or more persons or things and the Will as a whole and the available surrounding circumstances do not permit the Court to determine which of the alternatives was intended by the testator [68].

Surrounding circumstances

92 Evidence of surrounding circumstances (facts and circumstances known to the testator at the time the Will was created[69]) is directed to *context*.

93 Put another way, it is the difference between ascertaining intention by reference to wording expressed *within* the Will construed in context as distinct from enquiring into the testator's acts, feelings and intentions expressed *outside* the Will[70].

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[66] *Warton v Yeo* (CA) at [35] per Ward JA (as her Honour then was) citing *Allgood v Blake* (1873) LR 8 Exch 160 at 162 per Blackburn J.
[67] Dal Pont, *Interpreting Testamentary Documents* at 40.
[68] *Carrington v Wallace* at [66] per Robb J.
[69] *King v Perpetual Trustee Co (Ltd)* at 78 per Dixon CJ, Williams, Webb, Fullagar and Taylor JJ; *James v Douglas* [2016] NSWCA 178 at [19] per Meagher JA (Leeming and Simpson JJA at [77]-[78] agreeing).
[70] Dal Pont, *Interpreting Testamentary Documents* at 42.

94 The reason for admission of evidence as to the testator's *circumstances* as at the date of the Will is essentially for the purpose of construing the testator's *language* as expressed in the Will[71]. It not directed to the testator's dispositive *subjective intentions*[72].

95 Some further insight as to the approach of the common law regarding surrounding circumstances was given by Robb J in *Middleton v Schofield*[73] as follows:

> 31. In summary, the common law rules for the interpretation of wills gave paramountcy to the objective meaning of the words used by the testator. Within the four corners of the wording of the will, the common law entertained some flexibility because of the acceptance of the reality that the wording of wills was not always consistent, and accordingly an insistence on the application of the objective meaning of the words used might destroy the coherence of the will if the objective approach to construction was applied too rigidly. So, within the objective approach to construction, the common law permitted the Court to search for the testator's scheme where that appeared to be necessary, by reference to the wording of the will as a whole. In this way, the common law permitted the Court to give meaning to the words used in the will that was not consistent with their ordinary effect, while still proclaiming the intention to ascertain the objective intent of the testator. Additionally, the common law permitted the Court to 'sit in the testator's armchair' so that it could discern the meaning of the words used by the testator with the aid of knowledge of the testator's view of the world and the meaning that he or she attributed to words. The common law therefore permitted the objective meaning of the actual words used by the testator to be ascertained with knowledge of how the testator used those words and saw the context in which they may be applied in his or her will.
>
> 32. At common law, this was all a completely different process to determining the true subjective intention of the testator by reference to extrinsic evidence of what the testator intended. The stricture that a will must be in writing would be undermined if the Court assigned meaning to the words used that was too greatly influenced by contestable evidence as to what the true subjective intention of the testator was. As is its want, the common law allowed limited exceptions when evidence of the subjective intention of the testator was admissible, but those exceptions are not here relevant: see *Carrington v Wallace* at [66].

Equivocation

96 Equivocation has been said to be a special form of ambiguity, in that (as mentioned above) the term used in the Will applies equally to more than one

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[71] *King v Perpetual Trustee Co (Ltd)* at 78 per Dixon CJ, Williams, Webb, Fullagar and Taylor JJ.
[72] Dal Pont, *Interpreting Testamentary Documents* at 41.
[73] [2022] NSWSC 1454 at [31]-[32].

person or item of property and the wording of the Will and the available surrounding circumstances do not permit the Court to determine which of the alternatives was intended by the testator[74].

97 In that case, evidence can be admitted of the testator's subjective intention to enable the true meaning of the Will to be determined[75].

98 As noted earlier, extrinsic evidence can be used in the application stage to identify the object of an intended gift and to the subject matter of a gift in each case that does not, on the face of the Will, sufficiently identify a single object or subject[76].

Ambiguity

99 The noun "ambiguity"[77] and adjective "ambiguous"[78] are capable of having different meanings. "Ambiguous" is defined in the *Macquarie Dictionary*, online ed in the following terms:

> *adjective* **1.** open to various interpretations; having a double meaning; equivocal: *an ambiguous answer*.
>
> **2.** of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify: *a rock of ambiguous character*.
>
> **3.** lacking clearness or definiteness; obscure; indistinct.

100 Within the realm of Will construction, the adjective "ambiguous" is used at various times in all those senses.

101 However, for the purposes of considering evidence of intention under s 32 *Succession Act*, it has a particular meaning.

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[74] *Carrington v Wallace* at [66] per Robb J.
[75] Ibid.
[76] *Middleton v Schofield* at [22] per Robb J.
[77] *Life Insurance Co* at 78 per Isaacs J.
[78] *Carrington v Wallace* at [70].

102 Section 32 expressly applies to proceedings to construe the Will and modifies the general law regarding what evidence is admissible[79]. It was part of the original form of the *Succession Act* assented to on 27 October 2006 and which commenced on 1 March 2008. It applies to Wills made on or after that date[80].

103 Section 32 is in the following terms:

> (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.

104 Despite being operative for 15 years, s 32 has not received a significant amount of judicial attention. The Court of Appeal in *James v Douglas* referred to its effect in modifying the general law[81], but without discussing in detail its modifying effect.

105 Perhaps the most recent and helpful discussion regarding the operation of s 32 has been by Robb J in 2019 in *Carrington v Wallace*[82] and in 2022 in *Middleton v Schofield*[83].

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[79] *James v Douglas* [2016] NSWCA 178 at [19] per Meagher JA (Leeming and Simpson JJA at [77]-[78] agreeing).
[80] NSW Government Gazette No. 16, 15/2/2008, p.707.
[81] Meagher JA at [19] making reference to its predecessors in other jurisdictions: see *Administration of Justice Act 1982* (UK) s 21; *Wills Act 1968* (ACT) s 12B; *Morgan v Moore* [2000] VSC 94 at [19]-[32].
[82] At [67]-[81].
[83] At [25]-[37].

106 The term “ambiguous” in the sense used in s 32 means that the term has two possible *meanings*, when the testator could only have intended to adopt one of those meanings[84].

107 Robb J observed in *Carrington v Wallace* that it is necessary to distinguish between ambiguity and mere difficulty of construction stating:

> 79. The terms of a particular will may give rise to intense difficulty in construction because different aspects of the wording tend to direct the mind to different possible meanings. Different lawyers, including judges, may form inconsistent opinions about the true meaning of the words in a particular will. That does not necessarily mean that the will contains an ambiguity…
>
> …
>
> 81. The point is that a will is not ambiguous by reason only that it is difficult to determine its true construction. It is important that the distinction be carefully maintained because, otherwise, extrinsic evidence, including evidence of the actual subjective intention of the testator, will be too readily admissible to determine the testator’s testamentary intention, in a manner that is inconsistent with the fundamental requirement that the will be in writing, and the cardinal principle of construction that the testator’s intention is to be derived from the meaning of the words used in the will.

108 His Honour noted in *Middleton v Schofield* that consistency of operation of ss 6, 27 and 32 *Succession Act* may require the Court to take some care to distinguish cases where the extrinsic evidence of the testator's actual intention permits meaning to be given and ambiguity to be resolved, compared to cases where “in reality, the Court is asked to give a Will a meaning that depends upon a more probable than not conclusion about the contested effect of extrinsic evidence on so elusive a subject as the real subjective intention of a deceased person”[85].

109 It has been suggested by Dal Pont that the effect of s 32 is that evidence of surrounding circumstances is not admissible to create an ambiguity. The provision does not oust the “armchair principle” but supplements it[86].

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[84] *Carrington v Wallace* at [77].
[85] *Middleton v Schofield* at [35].
[86] Dal Pont, *Interpretation of Testamentary Documents* at 50.

Text

110 As noted above, one aspect of Will construction involves the text which at a fundamental level involves reading the Will as a whole[87].

What is mandated and what provides guidance?

111 An important part of reading the text involves ascertaining the framework in which one operates.

112 Obviously, there is the Will itself. However, within each jurisdiction there will be principles of interpreting or construing the text that may be mandated and other principles being presumptions or rules of guidance.

113 It is important to distinguish between the two and to have regard to both.

114 As with any case counsel must be alive to any legislative framework and legislative provisions that might impact upon the case.

115 There may be legislative provisions which mandate various approaches and outcomes in respect of how a Will is construed.

116 Without in any way attempting to be exhaustive, various statutory provisions bear upon Will construction. Within the *Succession Act* alone there are various provisions bearing upon construction including provisions as to:

(1) what property may be disposed of by will (s 4);

(2) what interest in property a Will disposes of (s 29);

(3) when a Will takes effect (s 30);

(4) the effect of failure of a disposition (s 31);

[87] Haines at 39-41.

(5) the effect of a change in a testator's domicile (s 33);

(6) income on contingent, future or deferred dispositions (s 34); and

(7) receipt of gifts being dependent upon survival of beneficiaries (s 35).

117 In these cases, counsel need to consider the effect of the statutory provisions and in particular whether they are rebuttable or not and whether they apply subject to the existence of any contrary intention in the terms of the Will.

The smorgasbord of presumptions

118 Within the general law, Will construction law has a smorgasbord of presumptions as to what is intended by a testator. Presumptions are, like all legal tools, of some use but are not, unless mandated, ideal ways to ascertain intention.

119 There are many presumptions. Some common and some less common presumptions include the following presumptions:

(1) *of gift* – namely the purpose of a testator is to give something to someone by way of disposition[88];

(2) *of complete disposal* – namely a testator intends to dispose of all his or her property[89];

(3) *against intestacy* – namely that an interpretation of a testator's Will should be adopted which does not lead to an intestacy or partial intestacy[90];

[88] Haines [2.19] at 37.
[89] Ibid.
[90] Ibid [2.20] at 37; [3.3] at 51.

(4) *of rationality* – namely a testator intends to act rationally and does not intend capricious consequences to follow from dispositions in the Will[91];

(5) *of legality* – namely that a Will is read so as to make it effective and without any consideration as to whether it contains a provision which is contrary to a rule of law such as lapse[92];

(6) *against disinheritance* – whilst there is no presumption that a testator intends to benefit relatives rather than other persons, if there is any ambiguity the Court construes the Will in a way as will most benefit heirs or immediate next of kin rather than more distant relatives or non-relatives[93];

(7) *of accurately named beneficiaries* – it is said that the accurate use of a beneficiary's name in the Will creates a strong presumption against any rival who or which is not the possessor of the name so mentioned[94]; and

(8) *of use of technical terms – prima facie*, technical legal words and expressions used in a Will are to be given their technical meaning[95], particularly so if the Will has been professionally drawn[96].

Vexed questions of construction – some practical observations

120 We have all experienced the really difficult cases of Will construction. Those times where ascertaining the true intention is elusive and counsel starts to doubt the utility of approaches, presumptions and submissions.

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[91] Ibid [2.21] at 37.
[92] Ibid [2.22] at 37.
[93] Ibid [2.23] at 38.
[94] Ibid [2.24] at 38.
[95] *King v Perpetual Trustee Co (Ltd)* at 78-79 per Dixon CJ, Williams, Webb, Fullagar and Taylor JJ; *De Lorenzo* at [51] per White JA (Gleeson JA agreeing) citing *Winter v Perratt* (1843) 6 Man & G 314; 134 ER 914.
[96] *De Lorenzo* per White JA at [51].

121 My first observation is that one should recognise that this is normal. The law reports are replete with cases of construction of instruments which are vexed.

122 Secondly, sometimes cases are decided on the slightest of considerations. It is accordingly helpful for counsel to be reminded that even though the competing considerations may seem slight and the answer elusive if, after careful forensic thought a submission is considered arguable, it ought to be put and might ultimately be accepted.

123 A particular example of this is evident in the obiter comments of Priestley JA in the interesting decision of the Court of Appeal in *Harris v Ashdown*.[97]

124 In that case there were various issues including the question as to whether the word "child" included both the natural child and an adopted child. It was unnecessary for Priestley JA to form a view regarding this having regard to his answer to another question regarding a life estate. However, his Honour observed that it could be material to some aspects of the administration of the estate and as it was argued in detail, he expressed his opinion on it.

125 His Honour stated:[98]

> It is a question which seems to me to be one of some difficulty. This is because the word "child" can quite readily in some contexts include both a natural child and an adopted child, and the context of the will in the present case does not to my mind give very much indication enabling a choice to be made between the two possibilities …
>
> [and a bit later after discussing possibilities]
>
> … The foregoing matters are slight. In the absence of anything more definite they lead me to conclude that the impression I get from reading the will as a whole is correct, that is that the testator was not using the word child in his will as including an adopted child.

126 Some insights in dealing with vexed questions of construction which I have found useful include the following:

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[97] (1985) 3 NSWLR 193.
[98] Ibid 202-203.

(1) A helpful starting point is to consider whether any basic *scheme* can be discerned as to the outcome intended by the testator as to the distribution of his estate. If the terms of the Will are perfectly clear such search may be of little use, but where the language is lengthy obscure or the effects of the literal reading and the reasoning impliedly underlying it are startlingly unlikely, the scheme of dispositions is very important[99]. The Court will, where it can, strive to interpret the wording of the Will to give effect to such a scheme where it is revealed[100].

(2) An aid to test meaning is to pose questions regarding the text describing the difficulties of the construction. In particular to ask "what work" the contested word or phrase does within the relevant provision[101].

(3) The utility of a grammatical analysis can be powerfully seen when it is performed well[102]. One should bear in mind that even commas can control meaning[103]. However, whilst the use of grammar should not be underrated, it should not be overstated[104].

(4) Lastly, an 'iterative process' of checking each of the possible alternatives or rival meanings against the other provisions of the Will as a whole is helpful. Particularly with an eye to whether the legal meaning reflects a measure of internal coherence or provides a congruent operation to the various components of the Will[105].

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[99] *Muir v Winn* [2009] NSWSC 857 at [24] per Bryson AJ.
[100] *Fairbairn v Varvaressos* (2010) 78 NSWLR 577; [2010] NSWCA 234 at [19] per Campbell JA (Macfarlan and Young JJA agreeing) citing Powell J in *Coorey v George* (Supreme Court (NSW), Powell J, 27 February 1986, unrep) at 14, in a passage approved by Bryson J in *Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18 at 33.
[101] *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83; (2020) 379 ALR 248 (**Hackett**) at [33] per Leeming JA.
[102] Caselaw is replete with examples of such analysis. Truly fine examples appear in Leeming JA's analysis of contractual provisions in *Zhang* at [52]-[76] and *Hackett* at [50]-[60].
[103] *Zhang* at [73].
[104] Ibid.
[105] Comments made by Leeming JA when discussing construction of commercial contract provisions are, nonetheless, at a general level applicable to Wills. See Leeming JA in *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 at [134] referring, *inter alia*, to what Lords Neuberger and Mance have described as an 'iterative process': see *Re Sigma Finance Corp (in administrative receivership)* [2009] UKSC 2; [2010] 1 All ER 571 at [12]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 at [28].

Context

127 Context as a practical matter will include both the four corners of the text in the sense of reading a document as a whole but will also include surrounding circumstances.

128 No one has ever made an acontextual statement. There is always some context to any utterance, however meagre: *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd*[106].

Marshalling evidence as to context

129 One of the tasks of the advocate at an early stage is to identify and advise on materials that may bear upon context.

130 This is another matter which is affected by time. Depending on when the brief is received there may be significant time to advise and allow an instructing solicitor to search out materials whether it be the Will file (if any) or other materials.

Forensic choices as to what material is placed before the Court

131 Once materials that may bear upon surrounding circumstances are identified and obtained forensic choices need to be made.

132 Sometimes, the parties by dint of adducing limited evidence restrict the scope of contextual considerations which may be considered by the Court in construing the relevant text in question. Making that observation is not necessarily a criticism of parties[107].

133 Rather, it may have more to do with the fact that in the outworking of life, little or no information may be recorded about circumstances surrounding the instrument or relevantly the Will in question or if recorded such recording may

[106] [2004] UKHL 46; [2005] 1 All ER 667 at 689 [64] per Lord Hoffmann.
[107] *Al Dakhili* at [396].

be no longer available because it is or has been unable to be located, lost or destroyed[108].

134 There may be very little known about the surrounding circumstances or context of the text and the absence of such materials in such cases has little to do with forensic choices made by a party or parties to place material before the Court[109].

135 In *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* (**Fenshaw**)[110], Leeming JA noted that the parties had chosen to restrict the scope of the contextual considerations which may be considered by the Court. His Honour simply observed that that decision should be respected, not least because of considerations of fairness[111].

Forensic considerations for the hearing

136 There is no precise checklist that a counsel must have regard to in approaching the task of preparing for the hearing of a Will construction suit. However, the following items of forensic consideration are suggested as matters which might be helpful.

Posing the right question

137 When difficult questions of Will construction arise it is important to pose the right question or frame the right question.

138 The law is replete with examples of Courts at the highest appellate structure commenting that a Court below has asked the wrong question. There are numerous examples of this in the realm of migration law and appeals to the High Court from Tribunal decisions.

[108] Ibid [398].
[109] Ibid [397].
[110] (2016) 92 NSWLR 128; [2016] NSWCA 207.
[111] Ibid [32].

139 However, it is not confined to the tribunal. Even as recently as last week[112] the High Court[113] made the observation that the Full Court of the Federal Court in a trade mark case had asked the wrong question[114] and in its reasoning conflated two elements of a statutory provision[115]. Factors relevant to one of those issues had no role to play in deciding the second issue[116].

What are the possibilities?

140 A very important part of construing written material, and, relevantly, Will construction, is identifying the possible meanings the words chosen by the testator can bear[117] or the range of potential meanings which the clause is capable of sustaining[118].

141 Further, it will be generally vital to have some appreciation for how natural or strained those potential meanings are, at the time one turns to or considers the balance of the Will and any surrounding circumstances[119].

142 Sometimes, text, context (and where relevant) purpose all point in the same direction, and, sometimes, in different directions. In either case, it remains necessary to assess the potentially available legal meanings against those matters[120].

143 Normally, though not exclusively, it is only once possible available meanings are identified and there is consideration of text and context that informed provisional views and, ultimately, conclusions can be derived regarding the meaning[121].

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[112] 15 March 2023.
[113] *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8 (**Self Care**).
[114] Ibid [59] per Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ.
[115] *Trade Marks Act 1995* (Cth) s 120(1).
[116] *Self Care* at [60] per Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ.
[117] *Fenshaw* at [32] per Leeming JA (McColl and Payne JJA agreeing) – the disputed words being in a lease.
[118] *Zhang* at [77].
[119] Ibid.
[120] Ibid [86].
[121] *Al Dakhili* at [396].

How is a judge persuaded?

144 A helpful insight in relation to how judges are persuaded in a construction suit is gleaned from a lecture given by Stephen Gageler (as his Honour then was) as Commonwealth Solicitor-General in 2009[122].

145 His Honour was speaking in the context of statutory construction. Whilst what his Honour said is self-evidently true of statutory construction it can, I think, be equally said to apply to Will construction. His Honour noted:

> .. the modern high level principles governing the interpretation of legislation are pretty much uncontroversial and pretty much universal:
>
> - It is all about giving meaning to the text.
> - It is about giving that meaning to the text which the legislature can be inferred to have intended.
> - To infer that intended meaning, the text is always to be read in its context.
> - Where two or more meanings are equally available, the meaning that best fits the apparent purpose of the legislature should prevail.[123]

146 Having made that observation, his Honour importantly stated that whilst those are all very high-level principles, they will almost never dictate the result. The reason being the process of argument before a Court about the interpretation of an instrument is an art not a science.

147 His Honour then stated that[124]:

> The best description of the process that I have heard used an artistic analogy. The description was given at a conference about five years ago by Frank Calloway, then a judge of the Victorian Court of Appeal. What he said was this: statutory interpretation in the hard case is like standing before an impressionist painting and trying to make sense of it. The painting looks different from different angles. Persuading a court to interpret it to have one meaning rather

[122] Stephen Gageler, "Australia-New Zealand Scrutiny of Legislation Conference Scrutiny and Accountability in the 21st Century – Conference Dinner" (Speech), Parliament House, Canberra, Australia, 7 July 2009, accessible at: https://www.aph.gov.au/About_Parliament/Senate/Whats_On/Conferences/sl_conference/papers/gageler.
[123] Ibid at 5.
[124] Ibid at 6.

> than another meaning, is really all about persuading the court to look at it from one angle rather than another angle.

148 His Honour then made the interesting observation that "the truth of the matter is that the choice between competing available interpretations is all about the angle" [125].

What is persuasive?

149 His Honour then addressed the critical question which is rarely if ever addressed in any of texts on construction but is all-important to the advocate namely "How does a court come to be persuaded to look at the [legislative] text from this angle not that angle?"[126].

150 His Honour stated[127]:

> One thing is clear. If you are trying to choose the best angle to look at the text: the choice of the angle can never be just about the text. Very much depends on what in art would be called aesthetics and what in law is called judgment. Whether it is called aesthetics or whether it is called judgment, it is very much about the values the interpreter brings to the task at hand.

151 An exercise of statutory construction involves an exercise of judgement by a Court about how best to look at a statutory text and can never be free of values drawn from outside the text. The same is true, I daresay, about Will construction.

152 Where do the values external to the text come from?

153 His Honour's answer was[128]:

> Sometimes they go unarticulated. But almost never are they idiosyncratic. They are values that are informed very much by history and tradition. They are, by and large, values that can be seen by a court to lie at some level within the broader legal framework in which the court operates.

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[125] Ibid.
[126] Ibid.
[127] Ibid at 6-7.
[128] Ibid at 7.

154 Whilst at first blush the proposition about angles and values might seem somewhat radical and accepting that they sometimes go unarticulated, it can be seen that his Honour immediately qualified his comments by noting that such values are almost never idiosyncratic.

155 In particular, his Honour indicated that angles are found by reference to what many lawyers describe as presumptions. His Honour stated that[129]:

> …More and more values drawn by courts from the broader legal framework in which they operate are being openly fashioned by courts to generate a kind of default position to be used by the courts in the interpretation of legislation. Those values give the court an angle from which it feels comfortable to start. And they give the court the angle to which to the court can comfortably return when none of the other available angles seems particularly compelling.
>
> What I am talking about here is the generation by courts of what are called "presumptions". A presumption, in essence, is a default position that a court declares it will take unless the court can be persuaded that there is some good reason to take some other position. It is called a presumption because the theory is that the legislature will be presumed to have taken the same position when enacting the statutory text or at least to have been aware when enacting the statutory text that a court would adopt that position when interpreting the text.

156 What his Honour has said is self-evidently true of statutory construction, but I think can reasonably be said to apply to Will construction.

157 There is, as a forensic reality, in the midst of using what textbooks and caselaw describe as presumptions, some scope for advocates to persuade a judge to a position that the text in question should be seen from one particular angle rather than another.

How to persuade?

158 Aristotle suggested that the art of advocacy or persuasion is built on three pillars – logos (the logic or reasoning supporting the speaker), ethos (the credibility of the speaker) and pathos (the emotional appeal of the speaker).

[129] Ibid 8.

159 That suggestion is as true today as it was circa 2,385 years ago.

160 Fleur Kingham, the President of the Land Court of Queensland, said in her lecture "Maximising your Impact as an Advocate: A View from the Bench"[130]:

> "Logos targets the brain; it is the logical rational aspect of argument. Pathos is about the heart; moving the listener to want to accept the proposition. Ethos appeals to the gut – the instinctual response to the person – that sense of whether we can trust what we are being told".

161 Whilst some people might think that logos is the main element within the advocate's arsenal in Will construction cases, ethos and pathos should not be ignored.

Time for reflection

162 It is important for counsel to reflect upon and mull over the argument and to test the argument.

163 Reflection has at least a couple of aspects.

164 First, it takes time. Counsel in any given case will have only as much time as circumstances permit. They may be briefed early with months of preparation time. They may be briefed the night before. However, whatever time for reflection is available should be taken.

165 Secondly, experience generally indicates that critical thoughts and insights occur during moments of relaxation. Archimedes' discovery of the principle of buoyancy is a classic example of this. Often when we are focusing on the task intently, we can only see what is immediately before us. The "Eureka" moment of insight usually occurs away from that intense focus.

[130] Lecture in the Queensland Law Society's Modern Advocate Lectures Series, 2 March 2017.

Conclusion

166 Hopefully, the considerations set out in this paper will give counsel pause for thought regarding advising and appearing at the various stages in Will construction cases.

167 The assistance of a capable instructor, and, in cases where senior counsel is briefed, a capable junior counsel as a sounding board will undoubtedly facilitate that task.

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