JUDICIAL TREATMENT OF AMBIGUOUS, MISTAKEN, AND UNCERTAIN TESTAMENTARY DISPOSITIONS: AN ANALYSIS OF IOWA CASES

> It will be remembered that the intention of a testator is the polar star guiding the courts in the interpretation of wills . . . .[1]
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> When we are groping for the testator's intent we receive but little help from decisions . . . .[2]

The Iowa wills statute reserves to all persons "of full age and sound mind" the right to choose the manner in which their accumulated wealth will be divided after death.[3] This right is extremely broad, admitting of only specified exceptions.[4] However, to avail oneself of the benefit of the wills statute, certain formalities must be observed, chief among them being the requirement that the testator arrange his plans and intentions for the disposition of his estate and thus arranged, reduce them to a tangible, permanent form. The medium chosen by law for this form of expression is the written word.[5] It is repeatedly held that the intent of the testator, *as expressed in the writing*, is the overriding consideration for the courts in cases calling for interpretation of wills.[6]

However, the written word, being susceptible of varying shades of meaning depending upon the circumstances in which it is used and in which it is read, is an imperfect conduit for the intentions of the testator.[7] This fact clashes with the statutory requirement that the testator's intentions be in writing,[8] and gives rise to cases in which the parties attempt to show by evidence extrinsic to the will itself what they believe to be the true intentions of the testator.[9]

The courts, in such cases, are called upon to determine whether extrinsic evidence is to be allowed, and what effect it is to be given. The results reached

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1. Covert v. Sebern, 73 Iowa 564, 567, 35 N.W. 636, 638 (1887).
2. Odens v. Veen, 234 Iowa 1029, 1032, 14 N.W.2d 705, 706 (1944).
3. IOWA CODE § 633.264 (1975).
4. For example, the right is subject to the right of the surviving spouse to elect against the will, and to debts and charges on the estate. *Id.* It is also subject to some limitation under the mortmain statute. IOWA CODE § 633.266 (1975).
5. IOWA CODE § 633.279 (1975).
6. *See, e.g.*, Hollenbeck v. Gray, 185 N.W.2d 767, 769 (Iowa 1971); *In re* Estate of Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504 (1964); Miller v. Unknown Claimants, 246 Iowa 1070, 1072-73, 70 N.W.2d 560, 562 (1955); Covert v. Sebern, 73 Iowa 564, 567, 35 N.W. 636, 638 (1887); 4 W. PAGE, LAW OF WILLS § 30.6 (4th ed. W. Bowe & D. Parker rev. ed. 1961) [hereinafter cited as PAGE].
7. *In re* Estate of Staab, 173 N.W.2d 866, 872 (Iowa 1970) (Becker, J., concurring specially). Justice Holmes has had occasion to observe that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).
8. "However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution." *In re* Lepley's Estate, 235 Iowa 664, 672, 17 N.W.2d 526, 529 (1945) *quoting* McCoy v. Bradbury, 290 Mo. 650, 658, 235 S.W. 1047, 1049 (1921).
9. *See, e.g.*, Annot., 94 A.L.R. 26 (1935).

in these inquiries are not entirely consistent.[10] This Note will examine the process of judicial interpretation employed by the Supreme Court of Iowa, classify and analyze the Iowa case law, and highlight some recurring patterns.

The court, in the cases herein discussed, is faced with the issue of deciding what the testator meant when he chose to include a certain provision in his will. It is presupposed that he intended some testamentary disposition. Thus, to be distinguished are cases which turn upon the issue of whether a certain document was intended as a will, that is, whether the requisite *animus testandi* was present at the execution.[11] Also, in some cases, intent is an issue, but is of moment because it bears upon some time other than execution. These cases are also excluded.[12]

I. Policy and Theory: The Problem

The courts, in resolving disputes which involve contested will provisions, are called upon to heed the call of two masters. An examination of each is warranted.

The requirement that all wills be in writing[13] has long been the law of Iowa.[14] The courts have recognized and applied the requirement without significant discussion of the policies underlying it.[15] It has been stated that the danger of perjury is one rationale.[16] It is also arguable that the rather formal writing and execution of the document heightens the solemnity of the act and assures that it will be entered into with sufficient reflection.[17]

Juxtaposed to the writing requirement is the rule, long-standing and oft-repeated, that the courts are duty bound to carry out the intentions of the testator,[18] the important proviso being that this intent must be in some fashion expressed in the will.[19] The corollary rule is that intention, no matter how clearly it may be proved, will be given no effect if it is not found expressed in the will.[20]

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10. *Compare In re* Miller's Estate, 243 Iowa 920, 54 N.W.2d 433 (1952) *with* Wright v. Copeland, 241 Iowa 447, 41 N.W.2d 102 (1950).

11. *See, e.g., In re* Mathews' Estate, 234 Iowa 188, 12 N.W.2d 162 (1943); *In re* Bybee's Estate, 179 Iowa 1089, 160 N.W. 900 (1917).

12. *See, e.g.*, Heileman v. Dakan, 211 Iowa 344, 233 N.W. 542 (1930) (intervivos gift as in satisfaction of legacy); Anderson v. Anderson, 181 Iowa 578, 164 N.W. 1042 (1917) (intent that wills of husband and wife be mutual); Scott v. Scott, 137 Iowa 239, 114 N.W. 881 (1908) (intent as to necessity of life tenant's bond to protect estate in remainder).

13. Iowa Code § 633.279 (1975).

14. Act of January 25, 1839, § 2, Statute Laws of the Territory of Iowa, at 503.

15. *See, e.g.*, Bankers Trust Co. v. Allen, 257 Iowa 938, 135 N.W.2d 607 (1965); *In re* Lepley's Estate, 235 Iowa 664, 17 N.W.2d 526 (1945); *In re* Estate of Lyon, 70 Iowa 375, 30 N.W. 642 (1886).

16. Restatement of Property § 241 comment *a*, at 1191 (1940). *See* 4 Page § 32.9, at 271.

17. *Cf. In re* Mathews' Estate, 234 Iowa 188, 12 N.W.2d 162 (1943).

18. Wagg v. Mickelwait, 165 N.W.2d 829 (Iowa 1969); Odens v. Veen, 234 Iowa 1029, 14 N.W.2d 705 (1944); *In re* Huston's Estate, 224 Iowa 420, 275 N.W. 149 (1937).

19. Wagg v. Mickelwait, 165 N.W.2d 829 (Iowa 1969); *see In re* Estate of Larson, 256 Iowa 1392, 131 N.W.2d 503 (1964). *See also In re* Estate of Thompson, 164 N.W.2d 141 (Iowa 1969).

20. Gilmore v. Jenkins, 129 Iowa 686, 106 N.W. 193 (1906). In *Bankers Trust Co. v. Allen*, 257 Iowa 938, 135 N.W.2d 607 (1965), the court emphasized this point: "The question is not what the testator meant to say but what he meant by what he did say . . . ." *Id.* at 944, 135 N.W.2d at 610-11.

In light of the foregoing, it follows that when the court must judicially ascertain the testator's intent, it looks first to the will itself, stating frequently that if the provision attacked is not ambiguous, intent must be ascertained without resort to extrinsic evidence.[21] The rule, known as the "clear meaning rule," has been stated thusly:

> The intention of the testator must be ascertained from the will itself and from nothing else, if its language is plain and unambiguous. Where the intention is thus clearly and unequivocally expressed there is no need for judicial construction or extrinsic evidence, and all other rules of testamentary interpretation are inapplicable and must yield.[22]

The threshold question is thus whether the will, considered apart from the facts and circumstances surrounding it, is ambiguous. This initial inquiry involves obvious difficulties. The terms of the will cannot be carried into effect without resort to facts extrinsic to the will.[23] Beneficiaries must be identified, assets of the estate must be found and marshalled. Further, even the most explicit wills cannot be understood without reference to the circumstances of the testator at the time of execution.[24] Finally, analysis suggests that the appellation "ambiguity" represents not a style of reasoning, but only a bare conclusion.[25]

Historically, a distinction was drawn between an ambiguity which is apparent on the face of the will (i.e., patent)[26] and one which becomes apparent only when applied to the facts of the case (i.e., latent),[27] with extrinsic evidence being admissible to clarify the latter but not the former.[28] Although the distinction is occasionally referred to in the Iowa cases,[29] the court has usually referred simply to "ambiguities" without differentiating between the two forms,[30] and has said that the distinction is disappearing.[31]

This development does not greatly clarify the analysis used by the court in such cases, for the "clear meaning rule"[32] remains to be invoked whenever

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21. *In re* Estate of Staab, 173 N.W.2d 866 (Iowa 1970); *In re* Welter's Estate, 253 Iowa 87, 111 N.W.2d 282 (1961); Moore v. McKinley, 246 Iowa 734, 69 N.W.2d 73 (1955); *In re* Finch's Estate, 239 Iowa 1069, 32 N.W.2d 819 (1948); Knox v. Gray, 230 Iowa 1095, 300 N.W. 279 (1941).

22. Palmer v. Evans, 255 Iowa 1176, 1183, 124 N.W.2d 856, 860 (1963). The quoted rule is disapproved by the *Restatement of Property*. *See* RESTATEMENT OF PROPERTY § 241, comment *a*, at 1190 (1940).

23. 4 PAGE § 32.3; *see* Power, *Wills: A Primer of Interpretation and Construction*, 51 IOWA L. REV. 75, 79 (1965).

24. *Cf. In re* Estate of Winslow, 259 Iowa 1316, 147 N.W.2d 814 (1967); Harvey v. Clayton, 206 Iowa 187, 220 N.W. 25 (1928).

25. *See* text at note 33 *infra*.

26. 4 PAGE § 32.7.

27. *Id.*

28. *Id.*

29. *See* Hollenbeck v. Gray, 185 N.W.2d 767 (Iowa 1971); *In re* Lepley's Estate, 235 Iowa 664, 17 N.W.2d 526 (1945); Chambers v. Watson, 60 Iowa 339, 14 N.W. 336 (1882).

30. *See, e.g., In re* Estate of Thompson, 164 N.W.2d 141 (Iowa 1969); Bankers Trust Co. v. Allen, 257 Iowa 938, 135 N.W.2d 607 (1965); *In re* Welter's Estate, 253 Iowa 87, 111 N.W.2d 282 (1961).

31. Widney v. Hess, 242 Iowa 342, 352, 45 N.W.2d 233, 239 (1950). One Iowa case accepts extrinsic evidence of intent even though the ambiguity is clearly patent. *In re* Estate of Thompson, 164 N.W.2d 141 (Iowa 1969).

32. *See* note 22 *supra* and accompanying text.

the court is satisfied that the face of the will is susceptible of only one meaning. Thus, a jurisprudential "catch-22" is reached: An unambiguous will cannot be be aided by parol proof, but only in the rare case can it be shown to be ambiguous without it.[33]

II. The Two Approaches: Strict and Liberal

The tension resulting from the interplay between the writing requirement of the wills statute and the express desire of the courts to find and to give effect to the intentions of the testator creates two lines of cases.[34] The stricter one tends to stress the writing requirement, to exclude extrinsic evidence, and to rely on technical rules of construction.[35] The more liberal line tends to rely more heavily on the intent of the testator, to accept evidence of that intent, and to recite that precedents are of little value since each case must turn on its own facts.[36]

Two cases will illustrate the point. In the 1970 case of *In re Estate of Staab*, testatrix left her residuary estate equally to four named charities, one of which had ceased operations, and another of which had changed its charitable purpose.[38] Appellant Catholic Charities contended that the two shares should go to a newly organized home which had served the same charitable purposes as the two named beneficiaries.[39]

The court held, however, that the bequest to the defunct organization lapsed, and that the other still received its share despite its completely changed purpose.[40] The court reasoned:

> If the language of the will is unambiguous, plain and certain, the intention of the testator must be ascertained from the will itself and nothing else. . . . Extrinsic evidence to show testator's intent may be resorted to only in the event there is determined to be ambiguities in the provisions of the will. . . . We perceive no ambiguity in the testator's will before us here.[41]

In *Hollenbeck v. Gray*,[42] the court faced a somewhat similar fact pattern

33. *Compare* Whitehouse v. Whitehouse, 136 Iowa 165, 170, 113 N.W. 759, 760-61 (1907) ("A latent ambiguity arises dehors the will. To establish it the courts must listen to extrinsic evidence, not for the purpose of adding to or detracting from the will, but to ascertain the existence or nonexistence of the latent ambiguity.") *with In re* Lepley's Estate, 235 Iowa 664, 671, 17 N.W.2d 526, 529 (1945) ("But such evidence would not indicate any ambiguity. It might indicate that the testator did not intend to say what he did say in the will, but the courts cannot draw his will for him.").

34. *See* Eckford v. Eckford, 91 Iowa 54, 58 N.W. 1093 (1894). *Compare* cases cited at note 35 *infra*, *with* cases cited at note 36 *infra*.

35. *See In re* Estate of Staab, 173 N.W.2d 866 (Iowa 1970); *In re* Estate of Fairley, 159 N.W.2d 286 (Iowa 1968); Mann v. Seibert, 209 Iowa 76, 227 N.W. 614 (1929).

36. *See* Hollenbeck v. Gray, 185 N.W.2d 767 (Iowa 1971); *In re* Zang's Estate, 255 Iowa 736, 123 N.W.2d 883 (1963); *In re* Durham's Estate, 203 Iowa 497, 211 N.W. 358 (1926).

37. 173 N.W.2d 866 (Iowa 1970).

38. *Id.* at 868.

39. *Id.* at 868-69.

40. *Id.* at 871-72.

41. *Id.* at 871 (citations deleted).

42. 185 N.W.2d 767 (Iowa 1971).

but employed a markedly different analysis. Testatrix there also left her residuary estate to four named charities, but it appeared that in three of the four, no organization existed exactly corresponding to those named in the will.[43] The court defined its task as finding and giving effect to the intent of the testatrix, and announced these principles:

> (1) [T]he testator's intent is the polestar and must prevail; (2) the intent must be gathered from a consideration of all the language of the will, the scheme of distribution, and the facts and circumstances surrounding the making of the will; and (3) technical rules of construction should be resorted to only if the language of the will is clearly ambiguous or conflicting or the testator's intent is for any reason uncertain.[44]

Thus, invoking the rule that charitable bequests are to be upheld if at all possible,[45] the court found that the testatrix had intended certain local charities whose names roughly corresponded to those named in the will, but that she had merely identified them erroneously in her will.[46]

The two decisions cannot be adequately reconciled. Under the test enunciated in *Hollenbeck*, the court in *Staab* should have allowed extrinsic evidence, found a general charitable intent, and applied the doctrine of cy pres. The strict mode of analysis used by the *Staab* court prompted a concurrence from Justice Becker, who complained that the court is clearly using two sets of rules in cases calling for judicial interpretation of wills.[47]

III. A Functional Analysis

That the reasoning used by the court in dealing with the constant variety of testamentary provisions coming before it does not lend itself to clarity of analysis is evident. It is inherent in the nature of the process itself. Where the preliminary inquiry turns on whether a certain passage is or is not ambiguous, certainly reasonable minds will differ. That which is crystal clear to the first reader may be obscure to the next. Thus, any attempt to analyze the cases and formulate a litmus paper test for ambiguity must fail. Indeed, the position taken by the Iowa court on the issue could itself be characterized as an ambiguity. One meaning given the word "ambiguity" is an "inconsistency resulting from vacillation between two opposing views."[48] Although no single test can embrace the variety of reported decisions in which a dispositive provision of a will is called into question, patterns do emerge as the court faces recurring types of problems.

A. *A Case of Misdescription*

Frequently a will describes in the clearest of terms that specified property

43. *Id.* at 770-71.
44. *Id.* at 769.
45. *Id.* *See In re* Durham's Estate, 203 Iowa 497, 211 N.W. 358 (1926); *In re* Stuart's Estate, 184 Iowa 165, 168 N.W. 779 (1918); Chapman v. Newell, 146 Iowa 415, 125 N.W. 324 (1910).
46. Hollenback v. Gray, 185 N.W.2d 767, 770-71 (Iowa 1971).
47. *In re* Estate of Staab, 173 N.W.2d 866, 872-73 (Iowa 1970).
48. Webster's Third New International Dictionary 66 (1961).

is to be disposed of in a certain manner, yet upon examination it may appear that the testator did not own the property described, but did own similar property.[49] In such cases it is obvious that a mistake has been made; the testator surely did not intend to dispose of property not his own. He has misdescribed it.

In the early cases, the court struggled with the issue of whether to allow extrinsic evidence to show the correct property.[50] On one side, it was argued that the will, read on its face was perfectly clear and that no evidence aliunde could be admitted to vary it.[51] In cases so holding, the result was that the devise in question was void, and the decedent was intestate as to the misdescribed property. On the other side, it was argued that the fact that the testator did not own the property described rendered the provision ambiguous and allowed the admission of evidence to show the correct description.[52] Various theories were advanced under which the court could allow the needed evidence,[53] and these finally carried the day.[54]

The court now regularly terms cases of false description as "ambiguities" and receives evidence to render the description correct.[55] In so doing, the court is often able to reach the true intent of the testator, but at the expense of preserving the rule which requires that an ambiguity be shown before receiving extrinsic evidence.

The court has been unwilling to apply the reasoning of the misdescription cases to cases in which changed conditions render the provision incorrect. In *In re Estate of Stonebrook*[56] the devise was of "our homestead property located in Bowman Subdivision . . . ."[57] However, after execution, the testator sold that property and acquired a new homestead, so that when offered for probate, the will incorrectly stated his homestead to be in Bowman's Subdivision. In the usual misdescription case, the court would have ignored the false part of the description and received evidence of the correct location of the home-

49. *See, e.g.*, Eckford v. Eckford, 91 Iowa 54, 58 N.W. 1093 (1894); Wilmes v. Tiernay, 187 Iowa 390, 174 N.W. 271 (1919); Chambers v. Watson, 56 Iowa 676, 10 N.W. 239 (1881).

50. *See* Christy v. Badger, 72 Iowa 581, 34 N.W. 427 (1887); Chambers v. Watson, 60 Iowa 339, 14 N.W. 336 (1882); Chambers v. Watson, 56 Iowa 676, 10 N.W. 239 (1881); Fitzpatrick v. Fitzpatrick, 36 Iowa 674 (1873).

51. Eckford v. Eckford, 53 N.W. 345 (1892), *rev'd on rehearing*, 91 Iowa 54, 58 N.W. 1093 (1894). Fitzpatrick v. Fitzpatrick, 36 Iowa 674 (1873).

52. Eckford v. Eckford, 91 Iowa 54, 58 N.W. 1093 (1894).

53. *See* Fitzpatrick v. Fitzpatrick, 36 Iowa 674 (1873) (If the description is correct in part and erroneous in part, court may ignore the erroneous part and admit evidence to fully identify the correct part.); Whitehouse v. Whitehouse, 136 Iowa 165, 113 N.W. 759 (1907) (If description contains an assertion of ownership by the testator, e.g., "all my lands," the court may consider evidence of his land holdings to determine the intended subject matter of the devise.).

54. *See* Hoefling v. Borsen, 190 Iowa 645, 180 N.W. 750 (1921); Wilmes v. Tiernay, 187 Iowa 390, 174 N.W. 271 (1919); Pring v. Swarm, 176 Iowa 153, 157 N.W. 734 (1916).

55. *See, e.g.*, Hollenbeck v. Gray, 185 N.W.2d 767 (Iowa 1971).

56. 258 Iowa 1062, 141 N.W.2d 531 (1966).

57. *Id.* at 1064, 141 N.W.2d at 532.

stead.[58] However, here the court refused parol, distinguishing prior cases on the ground that the testator did not own the new homestead at the time he executed the will and thus could not have intended to devise it.[59] The decision may be criticized for ignoring the equally probable hypothesis that his intent was merely to devise his homestead, wherever situated.

B. *Mistake in Drafting—Failure of Expression*

In contrast to its liberal treatment of misdescriptions, the court has taken a much stricter view in cases of failure of expression. A failure of expression may be said to occur when, by oversight or otherwise, matter is omitted from the final executed draft of the will.[60]

For example, where the will bequeathed certain sums to several persons, then disposed of the residuary estate "to the above named legatees," the scrivener of the will was not allowed to testify that the quoted phrase should correctly read: "to the *last* above named legatees,"[61] the attorney having mistakenly omitted the word "last." The court found the will unambiguous, stating: "In the case at bar the testator spoke in writing. We may not add thereto . . . ."[62]

In such cases, the court often admits that its decision is contrary to what was probably intended, but stresses that intent is of no moment if not somehow expressed in the will.[63]

C. *"Contrary Intent" Cases*

In certain situations, the substantive law of wills, either by statute or common law, decrees that certain results must follow if certain facts are shown, unless a contrary intent appears in the will.[64] For example, the antilapse statute[65] provides that if a devisee predeceases the testator, the heirs of the devisee inherit the property so devised, "unless from the *terms of the will*, the intent is *clear and explicit* to the contrary."[66] When the issue of contrary intent is raised, the

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58. *See* cases cited at notes 53-54 *supra*.

59. *In re* Estate of Stonebrook, 258 Iowa 1062, 1071-72, 141 N.W.2d 531, 536 (1966); *cf. In re* Estate of Staab, 173 N.W.2d 866 (Iowa 1970).

60. *See, e.g., In re* Estate of Fairley, 159 N.W.2d 286 (Iowa 1968); Bankers Trust Co. v. Allen, 257 Iowa 938, 135 N.W.2d 607 (1965); Gilmore v. Jenkins, 129 Iowa 686, 106 N.W. 193 (1906).

61. *In re* Estate of Winslow, 259 Iowa 1316, 147 N.W.2d 814 (1967).

62. *Id.* at 1323, 147 N.W.2d at 818.

63. *In re* Estate of Fairley, 159 N.W.2d 286, 289 (Iowa 1968); Gilmore v. Jenkins, 129 Iowa 686, 693, 106 N.W. 193, 195 (1906).

64. *See, e.g.*, IOWA CODE § 633.267 (1975) (Pretermitted heir takes intestate share, unless contrary intent shown.); IOWA CODE § 633.268 (1975) (Devise to spouse presumed to be in lieu of intestate share unless contrary intent shown.); IOWA CODE § 633.269 (1975) (Will passes after-acquired property unless contrary intent shown.).

"Contrary intent" may become an issue under common law decisions as well. A renounced legacy passes under the residuary clause unless the clause shows a contrary intent. Myers v. Smith, 235 Iowa 385, 392, 16 N.W.2d 628, 632 (1944).

65. IOWA CODE § 633.273 (1975).

66. *Id.* (emphasis supplied).

court is less likely to allow resort to extrinsic evidence to show it.[67] Although not alluded to in the opinions, this reluctance may arise because of the wording of the statute involved requiring that the intent be shown from "the terms of the will."[68] This conclusion is supported by negative implication in the case of *In re Huston's Estate.*[69] There, the rule of law, that a class gift lapses as to a predeceased member of the class unless a contrary intent is shown, arose under common law rather than statute.[70] The court admitted an antenuptial contract which, though not a part of the will, was relied upon to show an intent that the class gift should not lapse.[71]

D. *Cases Interpreting the Nature of the Estate Sought to be Created*

Perhaps the most difficult cases with which the court is confronted are those in which it must determine the nature of the estate intended to be created in the beneficiary. Simple logic suggests that this would be so. A description of the subject matter of the bequest or the beneficiary may be quickly clarified by reference to the facts of the case.[72] However, the estate to be created is more a matter of pure intent, upon which extrinsic facts may shed little light, and may depend on technical rules of property law of which the layman testator is ignorant. Indeed, in practice, the testator will rely on his legal advisor to draft the appropriate language and thus may in fact have *no intent* as to the exact nature of the estate he creates in his beneficiary.

The principle conclusion that can profitably be drawn from the decisions in this area is that "hard cases make bad law." Although the court may on occasion admit extrinsic evidence to show intent,[73] the tendency is to exclude it,[74] and to rely on technical rules of construction and prior precedents.[75]

E. *Miscellaneous Types of Cases*

Several types of cases recur with sufficient frequency that a trend can be discerned, but do not warrant extended discussion. The court regularly considers extrinsic evidence to clarify the designated beneficiaries in cases of chari-

67. *In re* Warner's Estate, 249 Iowa 339, 86 N.W.2d 881 (1957); Fischer v. Mills, 248 Iowa 1319, 85 N.W.2d 533 (1957); *In re* Fintel's Estate, 239 Iowa 475, 31 N.W.2d 892 (1948).

68. IOWA CODE § 633.273 (1975).

69. 224 Iowa 420, 275 N.W. 149 (1937).

70. *Id.*

71. *Id. But see In re* Loranz' Estate, 256 Iowa 818, 128 N.W.2d 224 (1964).

72. *See* notes 49-54 and accompanying text *supra.*

73. *See* Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937).

When the court does consider extrinsic evidence in such cases, it is usually admitted, not to show intent directly, but to show the circumstances surrounding the testator at the time of execution, so that the court may as nearly as possible place itself in the position of the testator. *See* Harvey v. Clayton, 206 Iowa 187, 220 N.W. 25 (1928). In *Shoberg v. Rock,* 230 Iowa 807, 298 N.W. 838 (1941), the court expressly rejected testimony of the testator's intent, but did take note of his circumstances.

74. *See* Moore v. McKinley, 246 Iowa 734, 69 N.W.2d 73 (1955); Sick v. Rock, 240 Iowa 584, 37 N.W.2d 305 (1949); Mann v. Seibert, 209 Iowa 76, 227 N.W. 614 (1929).

75. Moore v. McKinley, 246 Iowa 734, 69 N.W.2d 73 (1955).

table gifts.[76] It has indicated that the rule allowing such evidence in cases of ambiguity is especially germane to charitable organizations, since their true names are often not known and they are usually referred to colloquially.[77]

Where the will was drafted by the layman testator, the court has indicated that it will construe liberally.[78] If the intention of the testator turns on the meaning to be ascribed to a given word or phrase, the court will often allow evidence to show what he intended by its use.[79]

IV. Evidence Received

When the decision is made that extrinsic evidence is to be received and considered as bearing on the proper interpretation to be given the language used in the will, the court has allowed a wide range of testimony, seemingly limited only by the bounds of relevancy and the ingenuity of counsel.

Perhaps the most frequently received evidence is that tending to show the circumstances surrounding the testator at the time of execution of the will.[80] It is felt that by taking cognizance of matters known to the testator, the court can better understand what is meant by the language chosen. In this endeavor, the court may allow testimony of the family relationships among the decedent and the various claimants,[81] the extent of his property holdings,[82] and other germane facts.[83] When ascertaining the meaning of words used, it is competent to show that the testator or the community at large commonly used such words in a particular fashion.[84]

Statements made by the decedent are often received into evidence, as related by the scrivener of the will,[85] or witnesses to it,[86] or by parties to the ac-

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76. *See* Hollenbeck v. Gray, 185 N.W.2d 767 (Iowa 1971); Widney v. Hess, 242 Iowa 342, 45 N.W.2d 233 (1951); *In re* Stuart's Estate, 184 Iowa 165, 168 N.W. 779 (1918); Chapman v. Newell, 146 Iowa 415, 125 N.W. 324 (1910). *But see In re* Staab's Estate, 173 N.W.2d 866 (Iowa 1970); Moran v. Moran, 104 Iowa 216, 73 N.W. 617 (1897).

77. *In re* Stuart's Estate, 184 Iowa 165, 171, 168 N.W. 779, 782 (1918).

78. *In re* Estate of Miguet, 185 N.W.2d 508 (Iowa 1971); Flynn v. Holman, 119 Iowa 731, 94 N.W. 447 (1903).

79. *See* Wright v. Copeland, 241 Iowa 447, 41 N.W.2d 102 (1950) ("legal heirs"); *In re* Ellis' Estate, 225 Iowa 1279, 282 N.W. 758 (1938) ("children" as including illegitimates); Westerfelt v. Smith, 202 Iowa 966, 211 N.W. 380 (1926) ("lawful heirs"); International Harvester Company of America v. Bye, 184 Iowa 1053, 169 N.W. 382 (1918) ("homestead" used in popular or legal sense).

80. *See, e.g., In re* Estate of Thompson, 164 N.W.2d 141 (Iowa 1969); McCulloch's Estate v. Conrad, 243 Iowa 449, 52 N.W.2d 67 (1952); Child v. Smith, 225 Iowa 1205, 282 N.W. 316 (1938); Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937).

81. *See, e.g., In re* Zang's Estate, 255 Iowa 736, 123 N.W.2d 883 (1963); Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937); Harvey v. Clayton, 206 Iowa 187, 220 N.W. 25 (1928); Westerfelt v. Smith, 202 Iowa 966, 211 N.W. 380 (1926).

82. *See In re* Estate of Thompson, 164 N.W.2d 141 (Iowa 1969).

83. *See In re* Zang's Estate, 255 Iowa 736, 123 N.W.2d 883 (1963) (services rendered to testatrix by claimant); *In re* Canterbury's Estate, 226 Iowa 586, 284 N.W. 807 (1939) (prior contributions to claimant church).

84. *See In re* Stuart's Estate, 184 Iowa 165, 168 N.W. 779 (1918); Covert v. Sebern, 73 Iowa 564, 35 N.W. 636 (1887).

85. *See* Odens v. Veen, 234 Iowa 1029, 14 N.W.2d 705 (1944); *In re* Canterbury's Estate, 226 Iowa 586, 284 N.W. 807 (1939); Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937).

86. Boehm v. Rohlfs, 224 Iowa 226, 276 N.W. 105 (1937).

tion.[87] At times, quite direct statements of the testator's intent are received.[88] In *Boehm v. Rohlfs*,[89] the issue was whether a nephew of the testator was given a vested or contingent remainder in a farm. The court there considered testimony of the executor and the scrivener that it was the intent of the testator that the nephew was to have the farm ultimately, but that he should not have control over it until he gained some experience. It was thus held that the remainder was vested.[90]

Although not a part of the will under scrutiny by the court, other writings by the testator may be accepted as evidence of his intent. An antenuptial agreement, though not referred to in the will, has been held admissible as tending to show an intent that a class gift should not lapse.[91] In *McAllister v. Mc Allister*,[92] an attempt by the testator to revise his will by handwritten interlineations was ineffective due to non-compliance with the statutory execution requirements, but it was considered as bearing on intent.[93] Prior wills may likewise be admissible.[94]

V. Conclusion

The process of judicial interpretation of challenged will provisions is not consistent. This inconsistency arises as a result of the conflicting policies of the writing requirement and duty to follow a testator's intent. The court must recognize this inconsistency and deal with it. The "clear meaning rule" must be discarded, and the position of Justice Becker's concurrence in *In re Estate of Staab*[95] must be adopted, so that at a minimum, courts will have the aid of the surrounding circumstances of the testator to better understand the meaning of his words.

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87. *See* Odens v. Veen, 234 Iowa 1029, 14 N.W.2d 705 (1944).
88. *See In re* Barnes' Estate, 256 Iowa 1043, 128 N.W.2d 188 (1964); *In re* Durham's Estate, 203 Iowa 497, 211 N.W. 358 (1926).
89. 224 Iowa 226, 276 N.W. 105 (1937).
90. *Id.* at 235, 276 N.W. at 110.
91. *In re* Huston's Estate, 224 Iowa 420, 275 N.W. 149 (1937).
92. 191 Iowa 906, 183 N.W. 596 (1921).
93. *Id.* at 915, 183 N.W. at 600.
94. *In re* Stuart's Estate, 184 Iowa 165, 168 N.W. 779 (1918).
95. *In re* Estate of Staab, 173 N.W.2d 866, 872 (Iowa 1970) (Becker, J., concurring specially).