Interpretation of Wills: The Use of Extrinsic Evidence

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What is Extrinsic Evidence?

Put plainly, extrinsic evidence is evidence that is outside the ambit of the will. This includes all evidence that is not included within the will document, or any associated documents, such as codicils. The way such evidence can be used by the court to interpret a Will has evolved over time. However, to understand the evolution, we must look at the two principle areas of thought regarding the use of extrinsic evidence.

The Two Sides of the Spectrum: Wigram and Hawkins

Sir James Wigram and the Literal Approach

In the beginning, there was a book written by Sir James Wigram, *An Examination of the Rules of law, respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills* (1831). This book set out what was referred to as the "literal approach". This approach seeks to avoid the use of any extrinsic evidence in interpreting wills. Such evidence can only be used in very particular circumstances, and then only for specific purposes.

Wigram set out his seven propositions in the above book, but only six of them were generally applied in the interpretation of wills. Wigram's fourth proposition dealt with Wills written in foreign languages, and is not applicable to this paper. The six propositions are:

1. The court interprets the words of the will: in the context in which they appear
2. This interpretation is done according to the strict and primary meaning of those words
3. The court may refer to the secondary meaning of the words when, in the particular situation, the primary meaning does not make sense
5. Circumstances surrounding the testator are admissible evidence to determine a link between the words in a will to its subject matter and to its objects

6. Where the words of the will, aided by evidence of the material facts, are insufficient to determine the testator's meaning, no evidence is admissible to determine the intentions of the testator, and the will is void for uncertainty
7. Evidence of the testator's intention is only admissible in cases of equivocation

Wigram was very restrictive in admitting extrinsic evidence when interpreting a will, and split such evidence into two separate kinds: Evidence of circumstances, and evidence of intention. As per point 5 above, circumstances evidence can be used to determine a link between the words in a will and the objects disposed of in that will. Such evidence was distinct from intention evidence, in that it was usually evidence of the knowledge the testator possessed regarding his relations and his assets.

Intention evidence is a different story, as it is evidence of the direct testamentary intentions of the testator expressed outside the will document. Wigram's principles make it clear that intention evidence may only be used in circumstances of equivocation, (under point 7), a very specific set of circumstances when the words of the will identify two different pieces of property, or beneficiaries. These concepts will be dealt with later in this paper.

Francis Hawkins and the Intentionalist Approach

Hawkins appeared in the 1860's with a new pair of shoes and new set of ideas, ready to take the courts of equity by storm. It is unfortunate therefore that his method was ignored for some time in those same courts. However, his four propositions, in addition to being much shorter than Wigram's seven, demonstrate the other end of the spectrum when dealing with extrinsic evidence. Those propositions are:

1. The object of the court is to ascertain the intentions of the testator
2. The words of the will are to be interpreted in their ordinary, proper and grammatical sense
3. Technical words are to be used in their technical sense, unless another sense can be established
4. Intention, when proved, fixes ambiguous words, and *controls the sense of clear words, and supplies the place of express words* if there is difficulty or ambiguity.

It is this fourth proposition that specifically sets Hawkins apart from Wigram, as it specifies that evidence of the intention of the testator, if proven by admissible evidence, can "control the sense of clear words". No longer is extrinsic evidence only of importance specifically in cases of equivocation. This openness to extrinsic evidence of intention was not picked up by the lawyers of the day, and

took some time before it was considered by any court as a valid approach to interpretation.

The primary reason against the admissibility of extrinsic evidence of the testator's intention is that to do so would undermine the statutory requirement that a will must be in writing[1], and that therefore the will document is the only valid expression of the testator's intentions. Secondly, it has been argued that allowing such extrinsic evidence of intention would in effect cause the testator to re-write their will each time any such a statement was made.[2] Thirdly, extrinsic evidence of the testator's intention can often be regarded as untrustworthy and unreliable, especially if the evidence includes statements made to only a single witness, or if the witnesses purporting to have heard such statements stand to gain from the admission of such evidence.[3]

Lastly, concerns were raised that allowing such evidence to become admissible would result in a lack of certainty when interpreting wills, and that this lack of certainty would result in a substantial increase in litigation.[4]

The Common Law Compromise

Although decided after the *Succession Act 2006* (NSW) was amended, it is helpful for the purposes of this paper to list the first six principles of will construction as set out by Lindsay J in the case of *Estate Polykarpou; Re a Charity*[5]:

1. As confirmed by Bryson J in *Hatzantonis v Lawrence Cox* [2003] NSWSC 914 at [6]-[8], the starting point is the following statement in *Perrin v Morgan* [1943] AC 399 at 406:

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

2. As remarked by Powell J in *Coorey v Coorey* (NSW Supreme Court, 22 February 1986, unreported), repeated by Bryson J in *Perpetual Trustee Co Limited v Wright* (1987) 9 NSWLR

[1] Sidney L Phipson 'Extrinsic Evidence in Aid of Interpretation' (1904) 20 Law Quarterly Review 245 at 252.
[2] *Hubbard v Hubbard* (1850) 15 QV 241, 243.
[3] *Phipson on Evidence* (Sweet & Maxwell, 14th ed, 1990) at [1050].
[4] IJ Hardingham, MA Neave and HAJ Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Co, 2nd ed 1989) 273.
[5] [2016] NSWSC 409 at [64]. Principles 7-9 are in regard to charities and are not applicable for this paper.

18 at 33 and adopted in subsequent cases (as illustrated by *Hatzantonis v Lawrence Cox* [2003] NSWSC 914 at [10] and *Lockrey v* Ferris [2011] NSWSC 179; 8 ASTLR 529 at [44]-[45]), the Court's "task is, first, if it be possible, to ascertain what was the basic scheme which the deceased had conceived for dealing with his estate and then, so to construe the will as, if it be possible, to give effect to the scheme so revealed".

3. Evidence of the circumstances surrounding the deceased is admissible to assist in construction of her will so that the Court can place itself in her "arm-chair" when she made the will: *Boyes v Cook* (1880) 14 ChD 53 at 56. The Court is entitled to put itself in the position of the deceased, and to consider all material facts and circumstances known to her with reference to which she is to be taken to have used the words used by her in her will: *Allgood v Blake* (1873) LR 8 Exch 160 at 162. Accordingly, the Court may admit evidence of the deceased's habits and knowledge of persons or things: *Parry v Haisma* [2012] NSWSC 290 at [11].

4. The will must be construed as a whole: *Fell v Fell* (1922) 31 CLR 268 at 273-274.

5. By section 32 of the *Succession Act* 2006 NSW, evidence extrinsic to the will can be admitted to assist in interpretation of the language used in the will if that language makes the will, or any part of it, meaningless, ambiguous on the face of the will, or ambiguous in the light of surrounding circumstances.

6. The Court leans against an intestacy, and does not presume that a testator meant to die intestate if, on a fair construction, there is reason for saying the contrary: *Fell v Fell* (1922) 31 CLR 268 at 275-276.

Lindsay J's fifth principle derives from the amendment to the *Succession Act 2006* (NSW) that allowed extrinsic evidence of the testator's intention to be admissible in a wider range of circumstances. The case does demonstrate that the court still considers extrinsic evidence to come in two broad categories, evidence of circumstances, and evidence of intention. I will explore both of these categories now.

Evidence of Circumstances

This kind of extrinsic evidence is more often referred to by the court when interpreting a will, and will generally include the following kinds of knowledge the testator held at the time he or she made their will:

- Knowledge of their own family tree
- Status of family members and other beneficiaries under the will
- The existence of persons with the same name
- The state of the future testamentary property
- What nicknames were used by the testator to refer to certain beneficiaries.

This evidence can be used for a variety of purposes, including:

- Proving the existence of any person or property described in the will document
- Rebutting the presumption that a word used in the will bears its ordinary or technical meaning. (However, how strong this evidence must be to rebut this presumption is a subject of debate).
- Determining the meaning of a word or phrase were it has more than one commonly used meaning, and the meaning cannot be determined from examining the will document alone
- Determine what the testator meant when there is a incorrect description in the will of a beneficiary or an asset, or the wording used by the testator is ambiguous.

In the author's opinion, such evidence is best described through the use of examples.

Lutheran Church Of Australia South Australia District Incorporated V. Farmers' Co-Operative Executors And Trustees Ltd (1970) 121 CLR 628

In this case the testatrix had specified that she would give *"all her Commonwealth Bonds"* to her son Frank Stapleton, one of the respondents in the proceedings.

The Testatrix's estate included a large amount of Commonwealth Treasury bonds and Commonwealth Inscribed Stock. While the Commonwealth Treasury Bonds clearly fell within the definition of "Commonwealth Bonds" in the Will, there was a question as to whether the Commonwealth Inscribed Stock also fell within this definition. If the Inscribed Stock did not, it would have fallen within the definition of "shares in companies". These shares were bequeathed to the Lutheran Mission in Adelaide.

The Court ultimately ruled that the Commonwealth Inscribed Stock fell within the definition of "Commonwealth Bonds", and therefore fell within the gift to Frank Stapleton. Evidence of hand written documents of the Testatrix listing her investments were admitted. In these lists, the Testatrix described the Commonwealth Inscribed Stock as "Commonwealth Bonds", or alternatively as "Commonwealth Loans", which in turn covered the definition of bonds. The Testatrix never used the terms "stock" or "inscribed stock". As the terms "stock" and "Commonwealth Bonds" were neither

technical nor easy to define terms, these lists were used to determine the meaning of the Testatrix when she made the gifts in her will.

Hiscocks v Hiscocks (1839) 151 ER 154

A case that involved the interpretation of the phrase: *"I leave my lands to my grandson John Hiscocks, eldest son of John Hiscocks".*

The testator's son (John) had been married twice, and both relationships had resulted in children. John had a son with his first wife, who was called Simon. With the second wife, the testator's son had a number of children, including an eldest son named John Hiscocks. As the description applied partially to both grandchildren, evidence of the testator's knowledge of who he referred to as "John Hiscocks" was used to determine who benefitted under the will.

Re Ofner [1909] 1 Ch 60

The testator gave a substantial legacy to his grandnephew Robert Ofner. The difficult in this case was that the testator had no grandnephew of that name. The testator did, on the other hand, have a grandnephew named *Richard Ofner*, who had a brother named Alfred Ofner.

Evidence of the circumstances surrounding the Testator, specifically his knowledge of his own family was admitted to resolve the confusion. The Testator hard provided instructions to his solicitor in order to prepare his will. In those instructions the Testator had referred to *Robert Ofner* as the brother of Alfred Ofner. It was therefore determined the Testator was mistaken as to the name of his grandnephew. The mistake was rectified and the legacy given to Richard.

Re Coghlan; Merriman v Attorney-General for the State of Victoria [2020] VSC 392

In this case, the deceased had left one third of his $23.7M estate to the "Diabetes Australia of 26 Arundal Street Glebe New South Wales". No such entity existed. "Diabetes Australia" was the entity named, but did not operate from the above address, "Diabetes NSW" operated from the above address, and the deceased had spent much of his life in contact with and was a member of "Diabetes Australia – Victoria". These three societies vied for their third share in of the deceased's substantial

estate. Sadly, due to the complete lack of any evidence of the testator's intention as to which of the above charities the third share should go to, the gift failed for uncertainty.

Evidence of Intention

This evidence is distinct from evidence of circumstances. It seeks rather to demonstrate the testator's intention directly as to how they wished their estate to be distributed. Often this evidence includes statements made by the testator to friends or family members regarding how they intended to distribute their assets upon death, or in letters of instruction to their solicitor regarding how the will is to be drafted.

However, under the principles of Wigram and the common law until statutory change, such evidence could only be admitted in circumstances of *equivocation*. Equivocation is very difficult to demonstrate, and requires three requirements be satisfied:

1. The description contained in the will must apply equally to two or more beneficiaries or assets (hereafter "entities").
    a. This includes circumstances where one part of the description applies to no entities, while the remainder applies to two or more entities.
2. The description must be sufficiently precise to identify that entity with certainty if the other entity (or entities) did not exist.
3. The will construed as a whole and with the assistance of any admissible evidence of circumstances must be insufficient to determine which of the entities the testator was referring to.

An example where equivocation would occur is where a testator bequeaths a portion of their estate to "my nephew John Thomas Smith", and at the date of the will the testator had two nephews named John Smith, neither of whom had the middle name Thomas.[6] However, no equivocation would occur should the testator have two nephews, one named John Smith and the other named Thomas Smith, as the description does not apply to both people in the same way.[7]

Equivocation would also arise should a testator make a gift of "my house in Bathurst" to a specific beneficiary, when at the date of their death they held two separate free standing houses in Bathurst. In this example it would be presumed that no evidence of the testator's circumstances would

[6] *Re Ray* (1916) 1 Ch 461
[7] *Hiscocks v Hiscocks* (1839) 151 ER 154.

indicate which of these two houses was the house referred to in that particular gift. Furthermore, it must be kept in mind that if an equivocation occurs, and the extrinsic evidence of the testator's intention is unable to resolve this equivocation, the gift will fail due to uncertainty.[8]

Perrin v Morgan [1943] AC 399

This case marked the beginning of the decline of the strict application of Wigram's propositions in the interpretation of wills, and the principles applied by the majority bear more resemblance to the method proposed by Hawkins. The Testatrix had left her "moneys" to be distributed evenly between her various nieces and nephews. Previous case law had interpreted the word "moneys" to include only cash, money held in bank accounts and debts owed to her. The vast majority of the Testatrix's estate was composed of investments, which fell outside this restrictive definition. As a result, had the restrictive definition been applied she would have died almost wholly intestate. The majority resolved the question by referring to the intentions of the testatrix, as determined by wording of her will, that the word "money" had a much wider definition in the English language. Viscount Simon LC also discussed that the Testatrix must have either "intended to die intestate in respect of her stocks and shares" or she must have intended for the word "moneys" to include her investments[9].

The minority in that case limited their consideration to the will document itself, and found that in the context of that will, the term "moneys" extended to the residuary personal estate. By this different approach, the decision to extend the definition of 'moneys' to include investments was unanimous.

Day v Perpetual Trustee Co Ltd [1999] NSWSC 149

In this case, the plaintiff was Jill Day's only daughter and the defendant was the executor. The Testatrix had had multiple children with two different husbands, but stated in her will that Jill Day was her "only child". The clauses of the will in question were:

> *4. I GIVE DEVISE AND BEQUEATH the residue of my real and personal estate whatsoever wheresoever unto my Trustee UPON TRUST to pay thereout all my debts funeral and testamentary expenses and all duties and taxes payable in consequence of my death and I direct my Trustee TO HOLD the residue thereof (herein called my*

[8] *Richardson v Watson* (1833) 4 B & Ad 787; 110 ER 652.
[9] *Perrin v Morgan* [1943] AC 399, (per Viscount Simon LC).

"residuary estate") upon the following trusts:
A. TO PAY the income arising from three-fifths of my residuary estate to my said daughter JILL ANNE DAY during her lifetime and TO HOLD the capital comprising the said three-fifths of my residuary estate, subject to the said life interest of my said daughter UPON TRUST for such of my grandchildren as shall survive me and attain the age of twenty one (21) years if more than one in equal shares absolutely.
B. To hold two-fifths of my residuary estate UPON TRUST for such of my grandchildren as shall survive me and attain the age of twenty one (21) years, if more than one, in equal shares absolutely.

Apart from the plaintiff, there were six other grandchildren, the children of the two children of the testatrix and her first husband. The plaintiff sought to admit extrinsic evidence including evidence that the solicitor, when drafting the will, was unaware of the Testatrix's other children, and that a second will had been drafted by the Testarix (but not signed by her) which left the entirety of the estate to Jill Day and the plaintiff. Young J had to determine if this evidence could be admitted.

Young J found that in this case, the will and the admissible evidence of the testatrix's circumstances did not clarify the question of whether the testatrix meant Jill Day's children, or all her grandchildren when referring to "grandchildren". As a result, an equivocation had arisen and evidence of the testator's intention was admissible.

However, even with such extrinsic evidence, his honour was unable to find in the plaintiff's favour, and all seven grandchildren of the testatrix split the residue of the estate evenly.

<u>*Parry v Haisma* [2012] NSWSC 290</u>

This case involved the interpretation of the following clause in a will:

*4. **I GIVE** the whole of my estate to such of my nephews and nieces as survive me by 90 days, and if more than one in equal shares.*

The Plaintiff was the executor and the Defendants included fourteen separate nieces and nephews,. There were seven nephews and nieces of the whole blood, five of the half-blood, and two children of a brother of the testatrix's partner (a niece and nephew by affinity). The plaintiff sought determination as to which of these nieces and nephews benefited under the fourth clause of the will. It was easily determined that both the nieces and nephews of the full and half-blood were

included within the natural meaning of "nieces and nephews", and this question resulted in little controversy.[10]

The main argument here was whether the last two defendants, the children of the deceased's defacto partner's brother, could be considered "nephews and nieces". Evidence was admitted that the deceased had referred to the last two defendants as nephews and nieces in social settings, once before the will was made, and a few times after the will was made. However, there was also evidence that the deceased had referred to the two defendants as "(the defacto's brother's) children. In addition, the deceased's defacto had made a will on the same day as the deceased. In his will, he had left the residue of his estate specifically to the last two defendants, to the exclusion of the deceased's nieces and nephews.[11] White J indicated that this difference could demonstrate that the deceased may have had an intention to gift her residue only to blood relations.

His honour was of the opinion that the evidence before him was insufficient to override the common interpretation of "nephews and nieces" as including only those of the whole and half-blood. The residue of the estate was therefore split between only the first twelve defendants.

Statutory Reform: The Legislature saves us all from ourselves

Dissatisfaction with the long standing rules regarding the use of extrinsic evidence prompted legislative change, allowing extrinsic evidence regarding the intention of the testator to be admitted in circumstances of ambiguity, beyond only those cases where the court found equivocation between persons or things in the will document.

In the United Kingdom, this legislative change was the amendment to section 21 of the *Administration of Justice Act* 1982 (UK). The changes made in Australian jurisdictions are broadly similar to the United Kingdom's amendment. For example section 32 of the *Succession Act 2006* (NSW), reads:

(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*

[10] *Parry v Haisma* [2012] NSWSC 290 at [6] – [7].
[11] *Parry v Haisma* [2012] NSWSC 290 at [26] – [28].

(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.*

The New South Wales legislation applies to wills made on or after 1 March 2008. The other states and territories of Australia have broadly similar provisions[12] with regard to the admissibility of extrinsic evidence. These sections have varying commencement dates. The admissibility of extrinsic evidence when interpreting wills made prior to the commencement dates will still be governed by the common law rules.

Recent Cases under the Amended Succession Act

Gregory Joseph Mills as trustee v Julie Elizabeth Mills and Ors [2018] NSWSC 363

In this case the plaintiff was seeking judicial advice as to the interpretation of the following clauses in the testator's will:

> 3(a): "I APPOINT GREGORY JOSEPH MILLS (hereinafter called my "trustee") to be the executor of this will and trustee of my Estate."
>
> 4 "To my Daughter, Leisa Gaye MURPHY, I give, bequeath and devise one part, but to be held on trust and to be used only to assist in purchasing either a house or a home unit in which she is to live."

The main questions raised by these clauses were[13]:

1. When does the Trust vest?
2. In whose name should the Trust purchase the property for Ms Murphy to reside in?
3. What happens to the property if Ms Murphy chooses to move out of the property?
4. What happens to the property in the event of Ms Murphy's death?

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[12] *Wills Act 1986* (ACT), s 12B; *Wills Act 2000* (NT), s 31; *Succession Act 1981* (Qld), s 33C; *Wills Act 1992* (Tas), s 46; *Wills Act 1997* (Vic), s 36; *Wills Act 1970* (WA), s 28A.

[13] *Gregory Joseph Mills as trustee v Julie Elizabeth Mills and Ors* [2018] NSWSC 363 at [11].

5. Can the trustee apply the trust funds to the maintenance and outgoings of any property purchased by the Trust?
6. If the trustee cannot do so, what the trustee has the power to do with any funds remaining in the trust after the purchase of a property for Ms Murphy to reside in?

Sackar J answered these questions in the following way, and using the following extrinsic evidence:

> 1, 2 & 3: The Trust vests when the property is bought, and that property should be bought in Leisa's name. Extrinsic evidence of the deceased's statements to the executor, asking the executor "make sure the money will go towards buying a house".[14]
>
> 4: as a result of the property being bought in Leisa's name, the property will become part of Leisa's estate and therefore be distributed on her death for the benefit of her children. This intention was found in caluse 3(b) of the will document.
>
> 5 & 6: Any excess money should be contributed towards "rates, repairs and renovations to the property". Sackar J made reference to conversations between the deceased and Leisa where the deceased made it clear that any excess money should be put towards "whatever she needed".[15]

Estate Polykarpou; Re a charity [2016] NSWSC 409

The plaintiff in this case was the executor, and the defendants included the NSW Attorney General and the deceased's parents. This case involved the interpretation of the following clauses of the testatrix's will:

> 4. MY EXECUTORS [sic] shall hold the rest and residue of my Estate to divide as follows:-
> 4.1 As to a 50% part or share thereof to be used for research into the causes of and cures for MULTIPLE SCLEROSIS, the distribution and use of such funds, whether to any hospital, medical practitioner, scientist or research facility to be at the discretion of the Executor;
> 4.2 As to the remaining share thereof to 'OPRAH ANGEL NETWORK' 110N Carpenter Street, Chicago, Illinois 60607 United States of America.

The main complication in these proceedings was that the Oprah Angel Network was no longer in existence at the date of the testatrix's death in 2015, as it had been closed by the talk show star some five years earlier in 2010.The testatrix had neither a spouse nor issue and therefore, if the gift

[14] *Gregory Joseph Mills as trustee v Julie Elizabeth Mills and Ors* [2018] NSWSC 363 at [41].
[15] *Gregory Joseph Mills as trustee v Julie Elizabeth Mills and Ors* [2018] NSWSC 363 at [45] – [46].

at clause 4.2 failed, 50% of her estate would pass to her parents under section 128 of the *Succession Act 2006* (NSW).

Hence, the main question was whether the will and the admissible extrinsic evidence the testamentary gift in the will was a gift for charitable purposes, and whether it manifested a general charitable intention to require the gift to be administered *cy pres.*

The creation of charitable trusts is somewhat complex and not necessary for the purposes of this paper, but Lindsay J was able to use extrinsic evidence of "*a statutory declaration made contemporaneously with the will in which the deceased recorded (perhaps unfairly to her family) that, in the 14 years since she had left the home of her parents, there had been no domestic or financial interdependency between herself, on the one hand, and, on the other hand, her parents and siblings".* His honour also took into account evidence of the testatrix's sister regarding the influence that Oprah Winfrey had had on the testatrix during her life, especially those stories of people rising above adversity.[16]

This led his honour to an inference that the deceased intended to "*give that part of her estate the subject of the gift to the charitable objects for which OAN [Oprah's Angel Network] was a vehicle, not an end in itself*".[17] This resulted in the court ordering the creation of a charitable trust by the NSW Attorney General, to be administered and distributed in line with the charitable purpose expressed in the articles of incorporation of the now defunct charity.

<u>*Kemi v Wood* (2013) NSWSC 180:</u>

This case involved the interpretation of these clauses of a will:

> *5. I HAVE advanced to my son JUKKA PEKKA KEMI the sum of Two Hundred Thousand Dollars ($200,000.00) to assist in the purchase of a home for him and his wife and Twenty Five Thousand dollars ($25,000.00) to assist in the purchase of a car.*
>
> *7.4* [I give one-quarter share of my estate to] *JUKKA PEKKA KEMI PROVIDED THAT the sum of Two Hundred and Twenty Five Thousand Dollars ($225,000.00) advanced by me to JUKKA PEKKA KEMI shall to the extent that it has not been repaid by him be treated for the purposes of calculating his entitlement as having been paid as part of the gift to him under this Clause.*

[16] *Estate Polykarpou; Re a charity* [2016] NSWSC 409 at [99].
[17] *Estate Polykarpou; Re a charity* [2016] NSWSC 409 at [100].

The plaintiff in this case was the son of the testatrix, Jukka, who is referred to in the above clauses. The Defendant was the executor of the will. However, the primary proceedings were a family provision case, in which Jukka sought provision from his mother's estate. The question of construction arose from a cross-summons filed by the defendant, seeking a determination as to whether certain money given by the testatrix to Jukka could be considered an advance on his inheritance or a loan.

The defendant primarily sought to have this money characterised as a loan, increasing the size of the estate. Extrinsic evidence was admitted of previous wills made by the testatrix, where she had referred to the sum being "given" to Jukka, rather than loaned to him.[18] Furthermore, the solicitor's notes when he was preparing the will explicitly state that the majority of the sum given to Jukka, (some $200,000) was "not a loan".[19] Furthermore, Lindsay J found that though the remaining amount ($25,000)was initially referred to as a loan by the deceased, by including it within clause 7.4 of the will, she intended it to be treated the same way as the $200,000 gift, and that therefore the whole amount was to be treated as a gift.[20]

In the Est of Rummer [2017] ACTSC 277:

Firstly, it is important to note that this case was determined in accordance with section 12B of the *Wills Act 1968* (ACT), which is drafted in similar terms to section 32 of the *Succession Act 2006* (NSW). The plaintiff in these proceedings was the executor of the will, who was the defacto partner of Peter Clack. The defendant was Judith Allison. The clause of the will the subject of the proceedings was:

> 11. I give most of the rest and residue of my estate to my friend Judith Allison ... With a regular income; And amounts as directed to my executor to my friends Pat Italiano of Griffith and *Peter Clack* of Hoskinstown

[18] *Kemi v Wood* (2013) NSWSC 180 at [26] – [29].
[19] *Kemi v Wood* (2013) NSWSC 180 at [30].
[20] *Kemi v Wood* (2013) NSWSC 180 at [35].

The above clause had been inserted in the early hours of the morning of the day the testator died. The testator dictated these amendments to the plaintiff from his deathbed and signed the will, which was witnessed by a registered nurse.

The plaintiff sought to rely on extrinsic evidence of what the testator had said to her while he dictated the codicil of the will. She gave evidence that the testator had told her to give *half* of the residue to the defendant, and to split the remainder at her discretion between Pat and Peter.[21] The plaintiff sought order that half the residue be given to Judith, and that Pat and Peter each receive a quarter of the residue each.

McWilliam AsJ was unimpressed by the evidence of the plaintiff, and found that the plaintiff's evidence was insufficient to override the general meaning of the word "most", which does not equate to "half", as alleged in her evidence. Evidence of the "pedantic or particular" nature of the testator was also admitted, and an inference was drawn that had the testator determined the defendant should receive half the residue, that word would have been used.[22] Her honour found the gifts to Pat and Peter failed for uncertainty. The clause was rectified to give both Pat and Peter certain equal amounts, and the residue to the defendant.

Re estate of the late Stasha Berger [2020] NSWSC 750

This case dealt with the distribution of 80% of a $10M estate, which was bequeathed upon trust for the "Shrine of Saint Anthony of Padua Capuchin Friars Minor Hawthorn – Melbourne Victoria". There is such a shrine in Hawthorn, and it is administered by the Capuchin Friars. The question was, was this gift specifically for the upkeep of the shrine itself, or a more general gift to the Capuchin Friars to use both for the upkeep of the shrine, and community and pastoral work associated with the shrine. Evidence was presented by the Capuchin Friars that a Friar known to the deceased had counselled her and others, who intended to make a general gift to the Capuchin Friars, to make their gift out to the Shrine. Evidence was also given that such gifts to the Shrine had in the past been used for more general purposes by the Capuchin Friars. Ward CJ in Equity found this evidence was insufficient to displace the words of the Will which confined the gift to the maintenance of the Shrine itself, and for that reason the bequest was so limited to only that purpose. Here, interestingly, the evidence relied on was not evidence of the deceased's intention, but rather evidence of what

[21] *In the Est of Rummer* [2017] ACTSC 277 at [49].
[22] *In the Est of Rummer* [2017] ACTSC 277 at [81].

the deceased had been advised, and inferences of the deceased's intention were sought to be derived from the fact that she had received that advice.

Conclusion

The rules regarding admissibility of extrinsic evidence have changed significantly over the last two hundred years, and the Courts of Equity have come a long way from implementing Wigram's seven principles. But though legislative reform has now opened the door for evidence as to the intention of the testator to be admitted more readily than before, the fact is that such reform will only apply to wills made after the commencement date (in the case of NSW, 2008). We cannot know how many testamentary documents may be floating around out there that were executed during the dark, pre-statute times. So the principles of Wigram, and his desire to limit the use of evidence of intention will remain for some time.