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Words Matter –

Determining Intent When Drafting and Reading Wills

A Will is a most personal document as it is more than a legal document. It is a human document in which one gives away oneself.¹ In examining the text of a Will, one must search for the voice of the decedent to determine the connection between the words used and the person and the property to which the words refer.

Legislative and judicial guidance are in place to certify that construction proceedings are only sought when that voice, *i.e.*, the intent of the decedent, remains invisible. The difficulty lies in the reality that the decedent's voice is interpreted through the words and style of the attorney-draftsperson. Therefore, it is important to remember that in crafting a Will or Trust, one must carefully consider the words chosen (or omitted), and the impact such words will have when the document is finally construed by the fiduciary, interested parties, or even the courts.

The interpretation of a Will begins initially by the executor and all the interested parties of the estate. It is in this initial period that the stage is set as each provision must be construed

before any action is taken. When an initial issue arises in the interpretation of a Will or Trust, or where clarification is necessary, legislative guidance is provided to assist one in navigating the quagmire of estates and trusts language.



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Interpretation Issues: Start with EPTL

The power to dispose of property in New York is governed by the Estates, Powers and Trusts Law (EPTL). For example, Wills and Trusts contain technical language specific to the practice of trusts and estates. And where such terms of art are utilized, it is ascribed its natural meaning because upon reading a Will or a Trust, an

assumption must be made that the testator considered the reasonable and natural meaning of the language used.

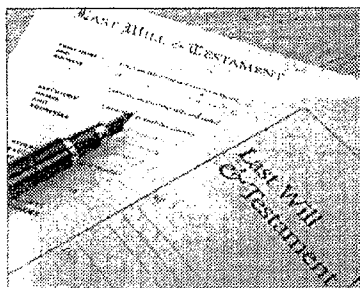
However, there are times when the context dictates otherwise. Therefore, Article 1 of the EPTL contains definitions for certain frequently used terms in the event that the document fails to provide definitions or requires clarification.

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tion.² In addition, Article 3 of the EPTL provides rules governing testamentary dispositions. For example, pursuant to EPTL §3-3.3, unless the Will provides otherwise, dispositions to a testator's issue or siblings do not lapse if the issue or siblings predecease the testator but are survived by issue.³



Additionally, when guidance is needed to understand the rules governing Wills that have a nexus to other jurisdictions, EPTL §3-5.1 provides the answers. For example, interpretation and validity of dispositions of real property and the manner in which it is disposed of when it does not pass by the decedent's Will are determined by the law of the jurisdiction in which the real property is located.⁴ Personal property, on the other hand, and the interpretation and validity of such dispositions and the subsequent manner in which it passes, if not by the decedent's Will, is determined by the law of the jurisdiction of the decedent's domicile at death.⁵

It is important to remember that when one needs to interpret testamentary dispositions of personal property, one must determine the domicile of the testator at the time of the execution of the Will since the interpretation of those dispositions shall be made in accordance with local law of that jurisdiction.⁶ Of course, the testator can always direct to have the law of this state govern the dispositions of his property, even if the testator is not domiciled in New York at his death.⁷

Article 7 of the EPTL provides rules for trusts,⁸ including the inalienability of a beneficiary's right to income. Guidance under Article 7 of the EPTL is distinguishable from Article 8 of the EPTL which focuses on charitable trusts and provides for *cy pres*, which is a rule of judicial construction that assists courts in carrying out the general charitable intent of the testator.⁹

There are explicit rules of construction for the rules of perpetuities,¹⁰ as well as rules governing accumulations¹¹ set forth under Article 9 of the EPTL. In addition, Article 10 of the EPTL provides interpretative and construction guidance when the issue involves powers of appointment.¹² And Article 13 of the EPTL addresses those "other provisions affecting estates" such as payment of estate obligations and statute of frauds.¹³ It is important to examine these guidelines before proceeding to court, as many concerns or presumed ambiguities can be resolved quickly.

More Rules of Construction

One must always remember that "words are never meaningless or repugnant if by reasonable construction they can be made consistent and significant."¹⁴ Occasionally, however, the intent of the decedent remains obscure or the language utilized creates an ambiguity that cannot be resolved, such that there may be a present necessity for a construction proceeding.

While there has been a multitude of judicial construction cases, the courts have continually stated that precedents are valueless. There is no twin to a Will. Rather, each document must be viewed as distinct as the individual who signed it.

It is important to understand that terms and provisions cannot be viewed within a vacuum, but instead are dependent on the person to whom it relates and the circumstances at play at the time of the signing. For example, when there are two or more possible interpretations of a Will provision, the interpretation that favors one's descendants will usually control over the one that favors strangers unless it is evident that the testator would not have favored

his descendants.¹⁵

The court's examination is predicated on the plain meaning of the document.¹⁶ The plain meaning rule provides "that where a testator's intent is clear from the plain language of the document there is no need to admit extrinsic evidence or resort to rules of construction to advance [the] interpretative process."¹⁷ However, where the intent of the decedent remains obscured because of ambiguities, mistake or drafting language, the court may rely on the exceptions to the plain meaning rule to "illuminate by extrinsic evidence the testator's intent."¹⁸ One exception to the plain meaning rule is the existence of a patent ambiguity.

A patent ambiguity is an ambiguity that is apparent on the face of the document, such as when a Will contains directly conflicting provisions.¹⁹ This is demonstrated when a Will provides multiple residuary clauses, or leaves a specific bequest to a grandchild named Max and the decedent had multiple grandchildren named Max.

Another type of issue which permits courts to examine extrinsic evidence is a latent ambiguity that is not apparent until the terms of the Will are applied to the property or beneficiaries. This arises when a testator devises and bequeaths different property to different beneficiaries, but during the administration it becomes clear that the "different property" is really the same.²⁰

While these exceptions provide flexibility to the court to examine extrinsic evidence, the court will not consider circumstances that occurred subsequent to the execution of the document. Judicial interpretation or construction of the document is limited to those issues that played a role in the testator's expressed intent during the document preparation and execution. The goal is to ensure that the Will is not rewritten; there is no second guessing or speculation. Rather, the main tenet of judicial construction is to guarantee that the intent of the testator, as expressed within the four corners of the document, is allowed to receive paramount attention. The focus of the court is always harmonization of the perceived intent of the decedent within the boundaries of justice and reason.²¹

Wills and Trusts Must be Tailored to Client

This is why the drafting of Wills and Trusts are more than "fill-in-the-blank" forms. It is essential for the attorney-draftsperson to consider the individual before him or her and seek to draw a connection between the words used in this individual's Will or Trust and the actual persons and property to which those words refer. When this connection is accomplished, any subsequent interpretation, whether by the fiduciary, interested parties or the court, should provide clarity to the testator's estate plan.

Words matter, both in life and in death. Remembering this essential component to an individual's estate plan ensures that the decedent's testamentary provisions will accurately reflect the testator's final declaration of self and all that embodied his or her in life.

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1. Karen J. Sneddon, "Speaking for the Dead: Voice in Last Wills and Testaments," 85 St. John's L. Rev. 683, 698 (2011) (citing Harry Hilschman, "Whimsies of Will-Makers," 66 US L. Rev. 862, 862 (1953)).
2. EPTL §§ 1-2.1 - 1-2.20.
3. EPTL § 3-3.3.
4. EPTL § 3-5.1(b)(1).
5. EPTL § 3-5.1(b)(2).
6. EPTL § 3-5.1(e).
7. EPTL § 3-5.1(h).
8. EPTL §§ 7-1.1 - 7-1.19.
9. EPTL §§ 8-1.1-8-1.8.
10. EPTL §§ 9-1.1 - 9-1.8.
11. EPTL §§ 9-2.1 - 9-2.3.
12. EPTL §§ 10-1.1 - 10-10.8.
13. EPTL §§ 13-1.1 - 13-4.12.
14. *Matter of Buchner*, 226 N.Y. 440, 443 (1919).
15. Warren's Heaton on Surrogate's Courts (7th ed.) §187.
16. *Id.* at §187; Andrea W. Cornelison, "Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule," 35 Real Prop. Prob. & Tr. J. 811, 814 (2001); see also Richard F. Storrow, "Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction," 56 Case Western Law Rev. 65, 70 (2005).
17. Storrow, *supra*, at 70.
18. Cornelison, *supra*, at 818.
19. Warren's Heaton on Surrogate's Courts (7th ed.) §187.01[5].
20. *Id.*
21. Warren's Heaton on Surrogate's Courts (7th ed.) §187.01.