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of a substantial part of his estate to his wife or other member of his family and then leaves the residue to some stranger or charitable organization. If the wife or member of the family predeceases him and no change is made in the will, it would be hard to assume in the majority of cases that his intention was that the lapsed gifts should go to the residuary legatee to the detriment of his heirs at law. Second, it is just as reasonable to suppose that the testator would have intended for all of his heirs to share in such property rather than to allow only one or two to receive a windfall.

The Kentucky statute requiring lapsed legacies and devises to go to the heirs at law, thus contradicting the presumption against intestacy, seems to this writer to state a reasonable policy. The truth in this type case is that the testator lacked sufficient foresight to anticipate such an event, otherwise he surely would have made provision for it. Where no provision is made or intention is clearly expressed, it is reasonable for the legislature in furtherance of the public interest to provide for the distribution of such property and for the court to give full effect to that provision.

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ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN AMBIGUITIES IN WILLS

A valid will may exist, yet, when the will is probated, it may be discovered that because of the surrounding facts or circumstances, or because of the wording upon the face of the will itself, the disposition of the testator's property is uncertain. The purpose of this note is to attempt a clarification of the rules governing the admissibility of evidence to explain ambiguous terms in wills. Problems of admissibility where fraud, mistake or undue influence is alleged will not be considered.

Where it is sought to employ parol evidence to explain a word or term in a will, major policy considerations come into conflict. On the one hand is the policy of giving effect to the testator's intentions; on the other, the policy against writing the will for the testator or giving effect to an oral will. Where a devise or bequest is such that two meanings may equally apply, it is reasonable to suppose that the testator intended one of the two rather than neither; therefore, the court should admit extrinsic evidence to determine and give effect to the testator's intention. This, however, comes into conflict with the

parol evidence rule, which represents an effort by the courts to prevent fraud and perjury.[1]

I. *Unambiguous Wills*

In general parol evidence is inadmissible to vary or contradict a written instrument.[2] However, since the rule is so harsh in its application, many exceptions to it have been developed by the courts.[3] An exception exists where the instrument is ambiguous. It follows that where the will is unambiguous, it must be construed according to its terms without the aid of extrinsic evidence.[4] The instrument is unambiguous when the words of the will are clear in themselves and remain clear when applied to the subject-matter to which the will relates.

Even though the language may seem ambiguous, no extrinsic evidence is admissible where the will, under legal construction, could have only one effect. Thus, where the testator provides for his "children" and it is discovered that he has illegitimate children as well as legitimate, no ambiguity exists because legally "children" means legitimate children.[5] Or, if the testator leaves property to his "heirs," parol evidence is not admissible to explain the term since "heirs" has a common-law technical meaning which includes only those persons who would have taken the real property had the testator died intestate.[6] However, if it appears on the face of the will that a word is used other than in its legal sense, as where a will drawn by a layman makes specific bequests to several people and then provides that the "above heirs" shall share equally any funds remaining, and all of the above named people are not heirs, the intention of the testator must prevail, and the instrument will be construed in its popular sense.[7]

II. *Ambiguous Wills*

The courts have divided ambiguities into two categories,[8] latent and patent. It is well established as a general rule that a latent

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[1] Although research on this note was confined largely to cases involving wills, it is generally held that the same rules are applicable to contracts and other written instruments. 57 AM. JUR. 676 (1939). However, some courts may apply a stricter rule to wills. For example, see Smith v. Holder, 58 Kan. 535, 50 Pac. 447 (1897).

[2] 3 WILLISTON, CONTRACTS 1816 (Rev. Ed. 1938).

[3] For general exceptions see MCKELVEY, EVIDENCE 480-491 (4th ed. 1932).

[4] 2 JONES, EVIDENCE 861, 907 (4th ed. 1938).

[5] Marquette v. Marquette's Ex'rs, 190 Ky. 182, 227 S.W. 157 (1921).

[6] Cambron v. Pattinger, 301 Ky. 768, 193 S.W. 2d 412 (1946).

[7] Jennings v. Jennings, 299 Ky. 779, 187 S.W. 2d 459 (1945).

[8] Difficulty arose in so many cases in determining whether an ambiguity was latent or patent that a third category called "intermediate" was resorted to by some courts. 20 AM. JUR. 1011 (1939).

ambiguity may be explained by extrinsic evidence, while a patent ambiguity may not.[9]

A latent ambiguity arises when the writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning ambiguous; that is, the ambiguity does not appear upon the surface of the document but arises when inquiry is made as to its application.[10] When an attempt is made to apply words to existing facts, it may be found that the words refer equally to two or more persons or objects. Thus, where a devise was to "the granddaughter of my brother," and the brother had several granddaughters, parol evidence that testator knew of only one granddaughter was admissible.[11] In *Tudor* v. *Terrell*,[12] where the testator left to his widow a number of slaves and from the list of names it appeared that there were two named Phillis when in fact there was only one, extrinsic evidence was admissible to show that there was a Phillip and that it was testator's intention to give the widow both slaves. Similarly, in *Hurst* v. *Standard Oil Co.*,[13] where the testator devised "all that piece and parcel of land . . ." and the land referred to therein was in two tracts, extrinsic evidence was admitted to show that testator intended only one of the two tracts. The reason for allowing a latent ambiguity to be explained by parol evidence seems to be that since the ambiguity is raised by extrinsic circumstances, the same kind of evidence should be admitted to remove the ambiguity.[14]

A patent ambiguity is one apparent on the face of the instrument and arises by reason of inconsistency, obscurity, or an inherent uncertainty of the language, so that the effect of the words is to convey either no definite meaning or a double one.[15] Where the words of a document are in themselves indeterminative, the ambiguity is said to be patent. Under the classic definition this was merely another way of expressing the fact that the document was void upon its face for uncertainty and no interpretation could be given to the words since there was nothing to interpret.[16] However, the courts have not followed this but instead have misused the term patent ambiguity and applied the term to instruments where the words were uncertain yet

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[9] 32 C.J.S. 915 (1942).

[10] For various ways that the courts have described latent ambiguities in wills see 24 W. & P. 305-306 (Perm. Ed. 1940).

[11] Abbott v. Lewis, 77 N.H. 94, 88 Atl. 98 (1913).

[12] 32 Ky. (2 Dana) 47 (1834).

[13] 308 Ky. 779, 215 S.W. 2d 962 (1948).

[14] 2 JONES, EVIDENCE 904 (4th ed. 1938); 32 C.J.S. 916 (1942); Cases cited 22 C.J. 1194, n. 12 (1920).

[15] For definitions of patent ambiguities in general see 31 W. & P. 418-419 (Perm. Ed. 1940).

[16] 9 WIGMORE, EVIDENCE 241 (3rd ed. 1940).

not too vague to be void for want of certainty. A devise to testator's two sons "and at their death to their legal heirs" was said to constitute a patent ambiguity since it was uncertain whether a fee or life estate was intended to be devised.[17] Similary, a devise in "fee simple" to testator's wife "to hold and possess during her natural life" was held to constitute a patent ambiguity as to the status of the wife's estate.[18] It has also been held that a devise to plaintiff of five acres of land in the north-west corner of the testator's farther field is an ambiguity arising from the words of the will since it is not certain how the five acres of the plaintiff is to be laid out.[19] Cases have suggested that the reason extrinsic evidence in excluded in case of a patent ambiguity is that since the ambiguity appears upon the face of the instrument it raises no question for the jury or for the aid of witnesses, but is a matter of interpretation for the court.[20] This reasoning in itself indicates that the courts have not followed the classic idea of patent ambiguity; instead, the courts have thought of it as including any uncertainty appearing upon the face of the instrument. One can readily see the great hardship encountered in applying the strict rule of not permitting parol evidence in those cases where the ambiguity was minor and not so uncertain that it could not be resolved. The fact that the courts have not used the term patent ambiguity as it was at first intended to be used may well suggest one reason why the rule has not only been modified by the courts but also repudiated in a great number of jurisdictions.

Even though, as a general rule, extrinsic evidence is not admissible to explain a patent ambiguity, extrinsic evidence is admissible to place the court in the testator's shoes to show circumstances surrounding him at the time of the making of the will.[21] Thus, the true rule as to patent ambiguities is that if the ambiguity cannot be disposed of by a construction of the will *taking into account facts and circumstances surrounding the testator at the time of execution,* then the devise must fail since *other* evidence may not be introduced to show the testator's intention.

> [E]ven the courts which insist most strenuously upon the distinction admit evidence of the surrounding facts and circumstances which tend to put the court in the position of the testator.[22]

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[17] Cummings v. Nunn, 290 Ky. 609, 162 S.W. 2d 213 (1942).
[18] Smith v. Smith, 24 Ky. L. Rep. 1964, 72 S.W. 766 (1903).
[19] Pickering v. Pickering, 50 N.H. (2 Shirley) 349 (1870).
[20] Pickering v. Pickering, 50 N.H. (2 Shirley) 349 (1870); Nevius v. Martin, 30 N.J.L. (1 Vroom.) 465 (1864).
[21] Com. v. Manuel, 183 Ky. 48, 208 S.W. 329 (1919); Smith v. Smith, 24 Ky. L. Rep. 1964, 72 S.W. 766 (1903); 2 JONES, EVIDENCE 864 (4th ed. 1938).
[22] 4 PAGE, WILLS 653 (3rd ed. 1941). See also cases cited in 22 C.J. 1199 (1920).

III. *Limitations on Admissibility--Purpose and Character of Evidence*

In case of a latent ambiguity, any evidence which in its nature and effect simply *explains* what the testator *has* written, including evidence of testator's declarations of intent, is admissible. Evidence is not admissible to show what the testator intended to say, but did not say.[23] If the will, when applied to the subject matter in the light of the surrounding circumstances, is free from ambiguity, extrinsic evidence is not admissible to create an ambiguity or to create a doubt as to the intention of the testator, or to raise an argument in favor of any particular construction. The purpose of the evidence is not to contradict the meaning but to enable the court to place itself in the testator's shoes and see things as he saw them when the will was made.[24] The function of the court is to interpret and not to correct mistakes or to create a new will. Where parol evidence is admitted to explain a latent ambiguity, its function is limited in that it may only be used to explain the doubtful expressions.[25]

Even though an ambiguity exists, no extrinsic evidence will be admitted if the court can interpret the meaning from all the language in the will.[26] In the case of *Muth* v. *Goings*,[27] the testator bequeathed property to the "children of my late wife" and to the "children of my present wife" and then provided that a farm be sold "and proceeds divided equally amongst my present wife and children." If he had said "my present wife and *her* children," no difficulty would have arisen. As it was, however, the court held that the word "children" constituted an ambiguity since the word was qualified elsewhere throughout the will as children "of my late wife" or "of my present wife." Extrinsic evidence was not admitted to show that the testator was on unfriendly terms with the children of his first wife since if the testator had intended only the children of his second wife to have the proceeds from the sale of the farm, the natural thing to have done would have been for him to have used the word "her" before the word "children." Since the testator had not done this the court held that all the children should share in the proceeds.

Where the words in a will clearly apply to a particular person or thing, no latent ambiguity can be established by showing an intention

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[23] Deboe v. Brown, 231 Ky. 682, 22 S.W. 2d 111 (1929).

[24] 4 PAGE, WILLS 655 (3rd ed. 1941).

[25] Stephen v. Walker, 47 Ky. (8 B. Mon.) 600 (1848); 2 JONES, EVIDENCE 908 (4th ed. 1938).

[26] Parrott v. Crosby, 179 Ky. 658, 201 S.W. 13 (1918).

[27] 199 Ky. 321, 250 S.W. 995 (1923). For other cases where the Kentucky Court cleared up the ambiguity by other language in the will see Ratliff v. Yost, 263 Ky. 239, 92 S.W. 2d 95 (1936); Threlkelds' Ex'rs v. Synodical Presbyterian Orphanage of Anchorage, 307 Ky. 235, 210 S.W. 2d 766 (1948).

that the words apply to another person or object of a different description or name. Thus, where a bequest was made to "the Seaman's Aid Society" and there was a society of that exact name in the testator's city, extrinsic evidence could not be introduced to show that the testator had no knowledge of the Seaman's Aid Society, but did know of the Seaman's Friend Society.[28] But, if a bequest is made to the "Old Lady's Home" and there is no "Old Lady's Home", extrinsic evidence is admissible to identify the institution intended to be described.[29] Where a bequest is made to "Ollie", extrinsic evidence is admissible to show that "Viola" was known to the testator as "Ollie."[30] In *Eichhorn* v. *Morat*,[31] where there was a devise to "he" without indication as to which "he" was intended, the court admitted proof that the testatrix was a German woman and that German women habitually refer to their husbands by the masculine personal pronoun and therefore that "my husband" was the unexpressed antecedent of "he."

Generally, the declarations of the testator are not admissible.[32] However, in case of a latent ambiguity declarations are admissible to show which property was intended to be conveyed or to whom it was intended to go.[33] An excellent statement of the rule appears in *Carroll* v. *Cave Hill Cemetery Co.* where the court said:

> When a latent ambiguity exists in a will, it is permissible to prove the declarations of the testator made at the time or about the time of the execution of the will for the purpose of identifying the objects or persons upon which it is intended that the will should operate, and the facts and circumstances, which surround the testator at the time of the making of the will, in order to explain the language of the will and to assist the court in determining his intentions.[34]

The tendency of the courts has been to abolish the distinction between latent and patent ambiguities altogether and to admit parol evidence of testator's intentions to explain the ambiguity whether latent or patent.[35] In some jurisdictions this has been accomplished

[28] Tucker v. Seaman's Aid Soc., 7 Met. 188 (Mass. 1843).

[29] Ladies Benev. Soc. v. Orrell, 195 N.C. 405, 142 S.E. 493 (1928). Some courts may go further than this as did the court in the case of Mosely v. Goodman, 138 Tenn. 1, 195 S.W. 590 (1917), where parol evidence was admitted to show that a devise to "Mrs. M" was intended for "Mrs. T," whom the testator generally called "Mrs. M," even though there was a claimant who really bore the name of Mrs. M.

[30] Wilson v. Stevens, 59 Kan. 771, 51 Pac. 903 (1898).

[31] 175 Ky. 80, 193 S.W. 1013 (1917).

[32] White v. Ponder, 180 Ky. 386, 202 S.W. 867 (1918).

[33] 2 JONES, EVIDENCE 915-916 (4th ed. 1938); 9 WIGMORE, EVIDENCE 233 (3rd ed. 1940).

[34] 172 Ky. 204, 213, 189 S.W. 186, 190 (1916).

[35] 2 JONES, EVIDENCE 917 (4th ed. 1938); 20 AM. JUR. 1009, 1011 (1939); 32 C.J.S. 919 (1942).

by statute.[36] Williston believes that the distinction restricting admissibility of evidence in case of a patent ambiguity may be disregarded except possibly in the case of wills.[37] As early as 1861 the Georgia Court in the case of *Armistead* v. *Armistead* expressed its dissatisfaction with the distinction when the court said:

> [T]he distinction between latent and patent ambiguities, when examined, is wholly unphilosophical, and founded upon a scholastic quibble of Lord Bacon. . . .[38]

Page, in his treatise on wills says:

> [I]t undoubtedly would be a step in advance in the development of our law to discard the distinction entirely.[39]

The Kentucky court, at a time when Kentucky was still recognizing the distinction, said in *Eichhorn* v. *Morat*:

> The cardinal rule which should always guide the courts in their investigations of controversies is to ascertain the facts and apply the law applicable thereto. The modern tendency is toward relaxing the ancient strict technical rules with their hampering effects, and to lift the curtains of the court house so as to let in the light of truth. . . .[40]

The 1933 Kentucky case of *Thomas' Ex'r* v. *Marksbury*[41] involved a devise to the testator's daughter which provided that a home should be bought for her and deeded to her. Since the amount to be paid for the home was not stated, the will was held to be ambiguous. However, the court spoke only of it as an ambiguity and labeled it neither latent nor patent. Such an ambiguity on the face of the will was clearly patent; nevertheless, the court not only admitted evidence of the testator's surroundings but also considered evidence that the testator had frequently declared that he wanted $3,000 or $4,000 invested in a home for his daughter. Thus, the Kentucky court in the *Thomas* case reached the better result inadvertently, since at that time the latent and patent distinction was still being recognized in Kentucky, and, if the question had been put in issue, the court would most likely have excluded the evidence as to the testator's declarations. In 1949, the Kentucky court in *Hoge* v. *Street*[42] admitted parol evidence to explain an ambiguity in a will, saying that it was unnecessary to determine whether the ambiguity was latent or patent. Thus,

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[36] See, McMillan v. McCoy, 175 Ga. 699, 165 S.E. 604 (1932).
[37] WILLISTON, CONTRACTS 1800 (Rev. Ed. 1936).
[38] 32 Ga. 597, 601 (1861).
[39] 4 PAGE, WILLS 654 (3rd ed. 1941).
[40] 175 Ky. 80, 86, 193 S.W. 1013, 1015 (1917).
[41] 249 Ky. 629, 61 S.W. 2d 282 (1933).
[42] 310 Ky. 370, 220 S.W. 2d 830 (1949).

it would seem that the Kentucky court had abandoned the distinction. However, in 1950, the Kentucky court in the case of *Miller* v. *Trigg County Farmers Bank*[43] excluded evidence on the ground that no latent ambiguity existed. At first glance such language might leave one with the impression that the Kentucky court had regressed to the old distinction between latent and patent ambiguities. Still, the above case did not involve a patent ambiguity; rather, the problem involved was whether the children of a devisee who had received an option to purchase part of the remaining property could exercise the option.

It is suggested that the courts should avoid using labels as patent and latent and make it clear that ambiguities, regardless of character, may be explained, if explanation is possible, by parol evidence. It is suggested that the courts take a firm stand whenever possible to repudiate the distinction between the types of ambiguities. The Kentucky court has laid a firm foundation for such a stand by refusing to recognize the distinction in the *Hoge* case. It is merely suggested that the language employed in the *Miller* case should be avoided lest some be led to believe that extrinsic evidence may be considered only when a latent ambiguity is present. If the words in a will are so vague as to be held void for want of certainty then the court should so state; if not, any extrinsic evidence, including declarations of the testator made at or about the time of the drawing of the will, should be admitted to resolve any minor uncertainty which might be present.

It is submitted that the modern treatment of the question by the Kentucky court is the correct approach. No conflict with the parol evidence rule will be encountered since that rule excludes evidence tending to *vary* or *contradict* a written instrument; whereas the rule contended for here would merely admit evidence in order to *explain* rather than contradict the instrument. The policy of giving effect to the not-too-clear intent of the testator seems to outweigh the slight risk of fraud or perjury. Where the true intention of the testator in an ambiguous will can be clarified by otherwise acceptable proof there is no reason, either in law or logic, to exclude that proof.

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[43] 312 Ky. 321, 227 S.W. 2d 429 (1950).