

Michigan Law Review

Volume 49 | Issue 8

1951

WILLS-CONSTRUCTION-USE OF EXTRINSIC EVIDENCE

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Recommended Citation

John A. Hellstrom S. Ed., *WILLS-CONSTRUCTION-USE OF EXTRINSIC EVIDENCE*, 49 MICH. L. REV. 1262 (1951).

Available at: <https://repository.law.umich.edu/mlr/vol49/iss8/29>

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WILLS—CONSTRUCTION—USE OF EXTRINSIC EVIDENCE—An action for a declaratory judgment was brought by William C. Borah, Jr. against the Lincoln Hospital Association and William H. H. Moore. In July 1912, Robert E. Moore made a will bequeathing \$10,000 each to his nieces, Gertrude and Julia Byerly. Gertrude had been married but her husband and only child died in 1908. Julia was married and had a son, the plaintiff. In June 1916, testator visited the nieces and the plaintiff and in December 1916, he added a codicil to his will reducing the bequests to the nieces to life estates with remainder to "the child of Gertrude Byerly." In June 1919, the testator, by codicil, increased the bequests to \$15,000 with the same conditions as before. The Lincoln Hospital Association was residuary legatee and W. Moore was successor trustee. The purpose of the action was to determine whether the plaintiff or the residuary legatee was vested with the remainder. The trial court found for the residuary legatee and plaintiff appealed. *Held*, plaintiff is entitled to the legacy. Extrinsic evidence can be used to aid in the interpretation of the will. *Borah v. Lincoln Hospital Assn.*, (Neb. 1951) 46 N.W. (2d) 166.

A court is always permitted, in the interpretation of a will, to hear such extrinsic evidence of the circumstances as will put it in the place of the testator, for, until this is done, the court cannot deduce the testator's intent nor discover whether the instrument is ambiguous.¹ Among these circumstances is the condition of the testator's property and the relationship between the testator and the beneficiary.² The intent of the testator is to be garnered from the whole will as explained by circumstances and will be given effect if possible.³ Where the instrument is ambiguous extrinsic evidence will be heard to explain the ambigu-

¹ 2 PAGE, WILLS §1415 (1926); 94 A.L.R. 52 (1935); 5 WIGMORE, EVIDENCE §2470 (1923).

² *In re Painter's Estate*, 150 Cal. 498, 89 P. 98 (1907); *In re Kurtz's Estate*, 190 Cal. 146, 210 P. 959 (1922); *Smith v. Garber*, 286 Ill. 67, 121 N.E. 173 (1918).

³ Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 (1936); 2 PAGE, WILLS §1414 (1926).

ity.⁴ However, a distinction is often made between patent and latent ambiguities, but it is believed this is an unprofitable one; the better view is that extrinsic evidence is always admissible except for direct statements of the testator's intent which are permitted only in the case of an equivocation.⁵ Inaccurate words may also be interpreted by the doctrine of *falsa demonstratio non nocet*⁶ which strikes out erroneous and non-essential words in the description and gives effect to the remainder if that is sufficient.⁷ However, it is often stated that a clear meaning cannot be disturbed by extrinsic evidence but this has been rejected by the modern authorities and is believed no longer to be the law.⁸ The will in the principal case, read in the light of the circumstances, clearly was ambiguous as was conceded by defendant. The expression "the child of Gertrude Byerly" was inaccurate and described no one. By striking the erroneous word "Gertrude"⁹ enough would be left, aided by extrinsic evidence, to give effect to the testator's intent. This has been the effect of the decisions in several closely analogous cases.¹⁰ It is sometimes criticized as reforming a will for mistake, which clearly cannot be done,¹¹ but this is not reformation, as the expression in the will still stands and is given effect through interpretation.¹² Therefore, it is submitted that the decision of the court in the principal case is correct and in harmony with modern authority although it is regrettable that the court felt it necessary to continue the distinction between latent and patent ambiguity.

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⁴ 5 WIGMORE, EVIDENCE §2470 (1923); 94 A.L.R. 44 (1935).

⁵ Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 (1936); 2 PAGE, WILLS §1419 (1926); 5 WIGMORE, EVIDENCE §2470 (1923); THAYER, PRELIMINARY TREATISE ON EVIDENCE 445 (1898).

⁶ BROOM'S LEGAL MAXIMS 426 (1939). Mere false description does not vitiate, if there be sufficient certainty as to the object.

⁷ Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 at 699 (1936); 5 WIGMORE, EVIDENCE §2476 (1923).

⁸ Warren, "Interpretation of Wills," 49 HARV. L. REV. 689 at 690 (1936); 5 WIGMORE, EVIDENCE §2461-63 (1923).

⁹ Estate of Donnellan, 164 Cal. 14, 127 P. 166 (1912). There is no rule in the construction of wills which prefers a name to a description.

¹⁰ In the Goods of Boehm, [1891] L.R. 16 P. 247; Norton v. Jordan, 360 Ill. 419, 196 N.E. 475 (1935); Re Whitty, 30 Ont. Rep. 300 (1899); Mohr v. Harder, 103 Neb. 545, 172 N.W. 753 (1919).

¹¹ Warren, "Fraud, Undue Influence, and Mistake in Wills," 41 HARV. L. REV. 309 at 329 (1927); Dissenting opinion, Patch v. White, 117 U.S. 210 (1886).

¹² Gray, "Striking Words out of a Will," 26 HARV. L. REV. 212 (1912).