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JUDICIAL DISCRETION AND THE DISAPPEARING DISTINCTION BETWEEN WILL INTERPRETATION AND CONSTRUCTION

Richard F. Storrow

INTRODUCTION

The law is no stranger to disputes over the meaning of language. Though legal documents generally "ought to be so plain as not to require interpretation," lawyers tend to agree that language is essentially an imperfect tool for the task to which it is put. Despite their meticulous planning, preparation, and attention to detail, drafters of wills, contracts, and even statutes know intimately how difficult it is to foresee the future and plan for all possible eventualities. These same drafters express surprise when a court construes their carefully crafted language as reflective of an intention that was never contemplated. On the one hand, language is imperfect because it fails as a tool of prognostication. On the other hand, language is imperfect because it fails to live up to a role it should play—to serve as a set of signs capable of representing an author’s intention. Given the paramount importance of intention in the law of wills, this latter imperfection of language makes responsible estate planning a perilous undertaking.

The role of the judiciary in interpreting and construing wills has undergone a radical transformation in recent years. At the end of the nineteenth century, treatises on will interpretation were crowded with

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² Id.
ultraspecific rules of construction, seemingly geared to establishing the meaning of any turn of phrase a testator might use in the course of designing his estate plan. As if meaning to codify the correct interpretation of every conceivable combination of words that might appear in a will, these tomes embodied the epitome of formalistic will interpretation by elevating the concept of plain language almost to the level of high art.

Because of a growing distrust and dissatisfaction with the application of hidebound interpretive rules to testamentary documents, the law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator’s intention. Courts today, seeking to temper technical rigidity, contemplate a reduced role for the application of rules of construction in the wills context, with the trend toward admitting extrinsic evidence to cure a multiplicity of ills in wills. In the course of this evolution, the use of will interpretation manuals has fallen from favor and the rules governing the admission of extrinsic evidence have been increasingly relaxed and refined. Modern codifications of will interpretation methods are remarkably brief and appear to have abandoned any pretense that a will’s meaning can be divined through the mere application of a series of formalistic rules. Reflecting this new understanding, some courts have gone as far as to announce that precedent is not controlling in will interpretation matters. Without stare decisis as a guide, and without semantics as an unassailable benchmarking tool, the quest to locate a testa-

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4 See DUKEMINIER & JOHANSON, supra note 3, at 421 (describing "the modern development of rules governing interpretation").


6 See In re Estate of Sylors, 671 N.E.2d 905, 908 (Ind. 1996) ("Although [the court] may be aided by previous cases, the meaning of each will is determined by its own particular facts."); In re Estate of Thompson, 511 N.W.2d 374, 377-78 (Iowa Ct. App. 1994) ("[P]rior cases are normally of limited value in will-construction cases. . . . [Since] each will-construction case normally involves a fact situation peculiar unto itself."); Myers v. Kan. Dep’t of Soc. & Rehab. Serv., 866 P.2d 1052, 1058 (Kan. 1994) ("[A]lthough there are certain guiding principles and rules to be applied by any court, in the final analysis each case depends upon its own particular facts and language."); Theodore Short Trust v. Fuller, 7 S.W.3d 482, 488 (Mo. Ct. App. 1999) ("The infinite variety of expressions and the differing shades of meaning . . . make prior decisions construing similar words or phases of far less value as precedent than those of other fields of litigated controversies."); Darragh v. Barmore, 242 S.W. 714, 716 (Tex. Comm’n App. 1922) (noting that during the construction of wills, adherence to precedent shall not be rigid unless it is "in every respect directly in point").
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ator's intent through the words of her testament becomes particularly perplexing.\(^7\) Paradoxically, though, will interpretation is approaching a legitimacy it did not possess in the past, because this new flexibility appears to inspire greater confidence in the judiciary's role in will interpretation.

At the same time, with this shift in interpretive approach comes increasing confusion as to what the judiciary's role is or should be. In short, a unified notion of what approach should be taken in interpretation matters is becoming increasingly elusive. Despite the need for greater clarity in this area, the American Law Institute (ALI), in the recently completed Restatement (Third) of Property, Wills and Other Donative Transfers, determines that the distinction between will interpretation and will construction is no longer tenable. Arguing that the current judicial practice is to consider actual and presumed intention simultaneously, the new Restatement rejects the view that interpretation and construction are discrete parts of a sequential process. It proposes a one-step process in which courts will consider extrinsic evidence and rules of construction simultaneously.

Positing that too flexible interpretive rules and limitless discretion tempt courts to ignore ambiguities in wills and unjustifiably streamline the interpretive process, this Article calls for a renewed understanding of the distinction between interpretation and construction and for a curb on the abusive discretion courts are leveling in will construction cases. Part I of this Article discusses the process of interpreting wills as it is carried out today. In particular, this Article explores the continuing vitality of the plain-meaning rule and the role of extrinsic evidence in resolving problems in identification. The resort of the courts to rules of construction where extrinsic evidence has failed to illuminate the intent of the testator is also discussed. Part II examines the conflation of interpretation and construction in the recently updated Restatement with a view toward reinscribing these functions as distinct processes. Part III of this Article undertakes to explore what can go wrong in will construction matters where, as a rule, there is great judicial discretion. A recent will construction matter involving community property and successive life estates in minerals will serve as a platform from which to comment on the value of the Restatement's proposed reforms. This Article concludes that the distinction between interpretation and construction should be reaffirmed. Without this distinction, courts are vested with excessive discretion that virtually invites them to flout the principle that, in every

I. THE INTERPRETATION AND CONSTRUCTION OF WILLS

When overseeing the administration of an estate, probate courts are primarily concerned with ascertaining and carrying out the testator’s intent. Courts have used a multiplicity of adjectives to express the importance of this task, describing it variously as “paramount,” “fundamental,” “cardinal,” “primary,” “overarching,” “control-

8 See, e.g., Read v. Legg, 493 A.2d 1013, 1016 (D.C. 1985) (“The court’s function is to ascertain the testator’s intent.”); In re Estate of Grulke, 546 N.W.2d 626, 627 (Iowa Ct. App. 1996) (“It is not the court’s function to remake or improve a will; rather, our sole purpose and justification for construing a will is the development of the intent of the testator.”); San Antonio Area Found. v. Lang, 35 S.W.3d 636, 639 (Tex. 2000) (“In construing a will, the court’s focus is on the testatrix’s intent.”).

9 Professor Larry Waggoner, a renowned authority on wills and trusts law, once declared that he would be rich if he were given a nickel for each time a court announced that the primary goal of wills law is to determine and carry out the intention of the testator. Lawrence W. Waggoner, Interpreting Different Texts, ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL MEETING, Section on Legislation, 1999 (panel discussion).


ling," basic," proper," and even as "the cornerstone," "the touchstone," or "the polestar" driving their duty, regardless of the unreasonableness or eccentricity of the will's terms. Whether they call it interpretation, construction, or something else, most courts agree that, in dealing with the contents of a will, the initial step is to determine the testator's intent at the time the will was executed. That determination employs the presumption that the testator knew the law in force at the time of such execution. After determining the testator's intention, the court's duty is to carry out that intention unless it is illegal, violates public policy, or is unconstitution-

15 In re Estate of Snyder, 2 P.3d 238, 240 (Mont. 2000) ("The testator intent controls the distribution of assets pursuant to a will."); Wright v. Brandon, 863 S.W.2d 400, 402 (Tenn. 1993); Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1, cmt. a (2003).
16 Daugherty v. Daugherty, 784 S.W.2d 650, 653 (Tenn. 1990).
18 Janney, 446 A.2d at 1266.
22 Unborn Beneficiaries of Kreigh Family Trust v. Kreigh, 554 N.E.2d 1167, 1168 (Ind. Ct. App. 1990) ("[T]he court cannot 'interpret' an unambiguous trust or will; a court can construe such a document to determine the testator's intent only if there is ambiguity in need of interpretation.").
23 See San Antonio Area Found. v. Lang, 35 S.W.3d 636, 639 (Tex. 2000); Read v. Legg, 493 A.2d 1013, 1016 (D.C. 1985); Hobson v. Shelton, 302 S.W.2d 268, 271 (Tex. Civ. App. 1957) ("The primary rule in the construction of wills is to ascertain and follow the intention of the testator. All other rules of construction are of secondary importance, and are but auxiliaries in the practical application of this cardinal rule.").
24 See Legare v. Legare, 490 S.E.2d 369, 371 (Ga. 1997); In re Estate of Lind, 734 N.E.2d 47, 50 (Ill. App. Ct. 2000); Boston Safe Deposit & Trust Co. v. Wilbur, 728 N.E.2d 264, 267 (Mass. 2000); In re Estate of Flynn, 606 N.W.2d 104, 106 (N.D. 2000); Cent. Trust Co. of N. Ohio v. Smith, 553 N.E.2d 265, 269-70 (Ohio 1990); In re Estate of Sneed, 953 P.2d 1111, 1115 (Okla. 1998); In re DiBiasio, 705 A.2d 972, 973-74 (R.I. 1998); Carmichael v. Heggie, 506 S.E.2d 308, 310 (S.C. Ct. App. 1998); In re Estate of Klauzer, 604 N.W.2d 474, 477 (S.D. 2000); Allen v. Talley, 949 S.W.2d 59, 60 (Tex. App. 1997); In re Estate of Elmer, 959 P.2d 701, 703 (Wash. Ct. App. 1998). But see Mitchell v. Mitchell, 244 S.W.2d 803, 806 (Tex. 1951) ("Where the meaning of the language used in the will has been settled by usage and sanctioned by judicial decisions, it is presumed to be used in the sense that the law has given to it, and should be so construed, unless the context of the will shows a clear intention to the contrary.") (quoting 69 Corpus Juris Wills § 1136 (1934))).
This governing framework continues to be vaunted in recent will-interpretation jurisprudence as serving donative freedom, one of the core values of Anglo-American property law.27

A. Plain Meaning

The plain-meaning rule states that where a testator's intention 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 interpretive process.28 This rule has various justifications, including the prevention of fraudulently proffered or unreliable evidence of the testator's intent and the testator's own reliance that the rule will be applied to his will.29 The plainness of the meaning is revealed by "employ[ing] the generally accepted literal and grammatical meaning of words used in the will,"30 and, "assum[ing] that the maker of the will understood [the] words stated in the will,"31 from any dominant plan of distribution32 found within its four corners.33 Courts appear

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26 See In re Estate of Smith, 694 A.2d 1099, 1102 (Pa. Super. Ct. 1997); cf. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1, cmt. a (2003) ("[T]he donor's intention is given effect to the maximum extent allowed by law."); id. § 11.2 cmts. b, n, r. Note that effectuation of a testator's intention by judicial actors would not in itself be unconstitutional; however, the chosen avenue for effectuation, for example, management of a segregated park by state actors, might be. See also Shapira v. Union Nat'l Bank, 39 Ohio Misc. 28, 31-32, 315 N.E.2d 825, 827-828 (Ct. Com. Pl. 1974).


28 See Wilkins v. Garza, 693 S.W.2d 553, 556 (Tex. App. 1985) (ruling it was no error for the court to exclude evidence of circumstances existing when the will was executed when terms of the will were unambiguous).


30 In re Estate of Walker, 402 N.W.2d 251, 256 (Neb. 1987).

31 See In re Estate of Johnson, 615 N.W.2d 98, 99 (Neb. 2000).


33 See Born v. Clark, 662 So. 2d 669, 671 (Ala. 1995) ("To determine the intent of a testa-
especially comfortable taking a strict plain-meaning approach in cases involving disputes over the meaning of technical legal terms in wills drafted by attorneys. Such terms might include descriptions of the quantum of estates and powers bequeathed to the beneficiaries. Professor Atkinson calls a rigid application of plain-meaning principles “strict construction,” which “places emphasis upon the written word, its usual and indeed its technical meaning.” Strict construction focuses on plain meaning, rules of construction, precedent, and the document’s four corners.

The plain-meaning rule has been the subject of considerable derision, with no less an authority than Professor Wigmore branding it a fallacy: “In truth there can be only some person’s meaning: and that person, whose meaning the law is seeking, is the writer of the document. . . . [T]he ‘plain meaning’ is simply the meaning of the people who did not write the document.” Estates and trusts scholars, too, have challenged the notion that wills ever contain plain language. Any language, they claim, “is so colored by the circumstances surrounding its formulation that evidence regarding the donor’s intention is always relevant.”

34 See In re Estate of Kime, 193 Cal. Rptr. 718, 728 (App. Dep’t Super. Ct. 1983) (“Technical words are to be taken in their technical sense unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.”) (internal quotation marks omitted); Mitchell v. Mitchell, 244 S.W.2d 803, 806 (Tex. 1951) (noting that where a testator uses well-established legal terms in his will, particularly where an attorney has drafted the will, the court must interpret the will in accordance with the meaning of those terms, in the absence of a clear intention to the contrary); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 146, at 811 (2d ed. 1953) (“If the testator employed a draftsman skilled in the use of technical words, these must be given their technical meaning.”); cf. Bergin v. Bergin, 315 S.W.2d 943, 946 (Tex. 1958) (“[A]s a layman rather than a lawyer, [Mr. Bergin] cannot be deemed to have used words in the same technical sense that the words might have if they were used by an attorney.”); Sanderson v. First Nat’l Bank in Dallas, 446 S.W.2d 720, 725 (Tex. App. 1969) (noting that courts “‘relax[] . . . rules of construction . . . when the will is written by a layman’” (quoting Huffman v. Huffman, 339 S.W.2d 885, 889 (Tex. 1960))).

35 See Mitchell, 244 S.W.2d at 806-07; Jones’ Unknown Heirs v. Dorchester, 224 S.W. 596, 601 (Tex. App. 1920); cf. White v. Brown, 559 S.W.2d 938, 940-41 (Tenn. 1977) (employing rules of construction to help interpret holographic will ambiguous as to the quantum of estate devised).

36 ATKINSON, supra note 34, at 808. 
37 See id.
Despite the lack of confidence some authorities bear toward the plain-meaning rule, some helpful guideposts have developed to assist courts in ascertaining plainness of meaning, at least when it comes to wills. Justice Holmes, for example, posited that the quest for plain meaning is not so much a quest for some meaning of words enshrined and fixed for all time but something more flexible: "[W]hat those words mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used . . . . [T]he normal speaker of English is . . . our old friend the prudent [person] . . . ."\(^{40}\)

At first blush, Holmes' formulation does little to rebut Wigmore. His invocation of the normal, prudent speaker of English raises problems concerning the elusive reasonable person that plague so many areas of the law. But Holmes also emphasizes that the words must be interpreted in the light of the circumstances in which they were used. At the very least, this suggests that the plain-meaning rule, qua no-extrinsic-evidence rule, does not exist, since the formulation itself invites the admission of extrinsic evidence of the circumstances in which the words were used in every case. At the very least, then, this formulation swallows up the function of the plain-meaning rule, which is to exclude extrinsic evidence.

The perplexing and contested nature of the plain-meaning rule is perhaps the reason why the Restatement (Third) of Property rejects it altogether as long discredited.\(^{41}\) Citing Wigmore, whose view was that "words always need interpretation," it dubs the rule "archaic because it unduly stresses a supposed ordinary meaning of the words employed."\(^{42}\) As such, the Restatement holds that "[e]xtrinsic evidence of the circumstances surrounding the execution of the donative document . . . may always be considered."\(^{43}\) The Reporter's Note adds that such an approach, although seemingly in conflict with the plain-meaning rule, is already well established.\(^{44}\)


\(^{41}\) Restatement (Third) of Prop.: Wills and Other Donative Transfers §§ 10.2 cmt. b, 12.1 cmt. d, reporter's note 5 (2003).

\(^{42}\) Id. § 10.2 cmt. b.

\(^{43}\) Id. § 10.2 cmt. d.

\(^{44}\) See id. § 10.2 reporter's note. Indeed, very few courts admit evidence of "all" the circumstances surrounding the execution of the will as a matter of course. See, e.g., In re Estate of Russell, 444 P.2d 353, 360 (Cal. 1968) ("We think it is self-evident that in the interpretation of a will, a court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made."); In re Estate of McGahee, 550 So. 2d 83, 86 (Fla. Dist. Ct. App. 1989) ("Whether or not the will is ambiguous on its face, the court is required to receive and consider evidence of the circumstances surrounding its execution in determining testamentary intent."); Legare v. Legare, 490 S.E.2d 369, 371 (Ga. 1997) ("Proof of the situation and circumstances of a testator and his family, of his property and legatees, and the like, is always admissible to aid in the construction of a will." (quot-
B. Extrinsic Evidence and Identifications

In spite of the discredit under which the plain-meaning rule has fallen, it continues to have wide appeal in will construction matters. 45 Starting less than a hundred years ago and continuing to the present day, courts have remained steadfast against the admission of extrinsic evidence, in particular evidence that would be used to contradict the words of the will. 46 However, if there is uncertainty about the testator’s intentions after applying principles for the discovery of plain meaning, extrinsic evidence 47 of the circumstances existing when the will was made 48 (exclusive of the testator’s direct oral declarations of

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45 See Cornelison, supra note 29, at 814 n.13 (collecting cases).

46 Aycock Pontiac, Inc. v. Aycock, 983 S.W.2d 915, 919 (Ark. 1998); In re Estate of Weaver, 572 A.2d 1249, 1256 (Pa. Super. Ct. 1990); Lehman v. Corpus Christi Nat’l Bank, 668 S.W.2d 687, 688 (Tex. 1984) (“The intent must be drawn from the will, not the will from the intent.”) (quoting Huffman v. Huffman, 339 S.W.2d 885, 888 (Tex. 1960)); Odeneal v. Van Horn, 678 S.W.2d 941, 942 (Tex. 1984) (“[W]hen the testator’s intent is apparent on the face of the will, extrinsic evidence is not admissible to show a contrary meaning.”); Kirk v. Beard, 345 S.W.2d 267, 273 (Tex. 1961) (“No extrinsic testimony would be admissible to show an intention otherwise than as plainly expressed.”); Wilkins v. Garza, 693 S.W.2d 553, 556 (Tex. App. 1985) (ruling it was no error for the court to exclude evidence of circumstances existing when the will was executed when terms of will were unambiguous); Dukeminier & Johnson, supra note 3, at 409-10 (“A plain meaning in a will cannot be disturbed by the introduction of extrinsic evidence that another meaning was intended.”) (emphasis added); Cornelison, supra note 29, at 817 n.27 (collecting cases).

47 See Patch v. White, 117 U.S. 210, 217 (1886); Read v. Legg, 493 A.2d 1013, 1016-17 (D.C. 1985) (“Only if the intent of the testator cannot be discerned from the four corners of the will may the court examine extrinsic evidence to determine intent.”); In re Estate of Romero, 847 P.2d 319, 322 (N.M. Ct. App. 1993) (“Where the intent of a testator is not crystal clear from the will itself, the scheme of distribution, circumstances surrounding the testator, and other existing facts should be a subject of judicial inquiry.”); In re Estate of McCabe, 703 N.Y.S.2d 559, 561 (N.Y. App. Div. 2000) (“If... a provision of the will is ambiguous, extrinsic evidence is properly considered in discerning the testator’s true intent.”).

48 See In re Estate of Pouser, 975 P.2d 704, 708 (Ariz. 1999); Bennett v. Young, 510 S.E.2d 521, 522 (Ga. 1999); In re Estate of Thompson, 511 N.W.2d 374, 377 (Iowa 1994); In re Trust of Killian, 459 N.W.2d 497, 499 (Iowa 1991) (“That intent is to be determined from the language of the instrument, the scheme of distribution, and the facts and circumstances surrounding the document’s execution.”); Succession of Williams, 608 So. 2d 973, 975 (La. 1992); Boston Safe Deposit & Trust Co. v. Wilbur, 728 N.E.2d 264, 267 (Mass. 2000); Shawmut Bank, N.A. v. Buckley, 665 N.E.2d 29, 34 (Mass. 1996); Pruss v. Pruss, 514 N.W.2d 335, 344 (Neb. 1994); In re Estate of Branigan, 609 A.2d 431, 436 (N.J. 1992); In re Bieley, 695 N.E.2d 1119, 1122 (N.Y. 1998); In re Estate of Neshem, 574 N.W.2d 883 (N.D. 1998); Cent. Trust Co. of N. Ohio v. Smith, 553 N.E.2d 265, 269 (Ohio 1990); Estate of Rosenfield v. Dep’t of Pub. Welfare, 679 A.2d 767, 772 n.3 (Pa. 1996) (“Only when intent is not clear will a court consider external matters, and then only matters closely related to the execution of the document.”); Wright v. Brandon, 863 S.W.2d 400, 402 (Tenn. 1993); Haag v. Stickley, 389 S.E.2d 691, 694 (Va. 1990). “The most important of these ‘surrounding circumstances’ are ‘the recipients of testator’s bounty, their relations to him and associations with him, his uniform affection for them, or any interruption thereof.’” Legare v. Legare, 490 S.E.2d 369, 371 (Ga. 1997) (quoting Olmstead v. Dunn, 72 Ga. 850(1)(b) (1884)); see also Cent. Carolina Bank & Trust Co. v. Wright, 478
intent), may be admitted and no resort had to rules of construction. Atkinson describes this approach as “liberal construction,” which emphasizes the testator’s intention and the extrinsic evidence required to reveal it. Liberal construction shuns rules of construction and precedent, declaring that no will is like any other and should be evaluated in the light of surrounding circumstances. Such circumstances might include the donor’s occupation, the property she owned at the time she executed her will, and the relationships she had with her family or others. In the words of one court, “[i]t is only where

S.E.2d 33, 37 (N.C. Ct. App. 1996) (“The ‘circumstances attendant’ include ‘the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of the testator’s property.’” (quoting Pittman v. Thomas, 299 S.E.2d 207, 211 (N.C. 1983))).

See In re Estate of Snyder, 2 P.3d 238, 240 (Mont. 2000). This seems to be a concern about the Dead Man’s statute, dealt with in diverse ways by different states. See, e.g., In re Estate of Fabian, 483 S.E.2d 474, 477 n.2 (S.C. Ct. App. 1997) (“Because this issue will come up again on retrial, the trial court may wish to consider the following principles in determining which testimony is or is not admissible under the Dead Man’s Statute.”). Dukeminier and Johanson assert that direct expressions of intent are admissible to resolve equivocations and that oral declarations made to the scrivener are generally admissible in all cases of latent ambiguity. See DUKEMINIER & JOHANSON, supra note 3, at 426.

See Newman v. Wells Fargo Bank, 926 P.2d 969, 973 (Cal. 1996) (“Only if the terms are ambiguous will the court resort to presumptions which create a legal presumption of intent.”); In re Trust of Killian, 459 N.W.2d 497, 499 (Iowa 1991) (“Courts should resort to technical rules of construction only if ambiguous language in the will or trust creates uncertainty about the maker’s intent.”); In re Estate of Cline, 898 P.2d 643, 646 (Kan. 1995) (noting resort is not necessary to either extrinsic evidence or to rules of construction when intention is clear on document’s face); Estate of Straube v. Barber, 990 S.W.2d 40, 44 (Mo. Ct. App. 1999); Watson v. Smoker, 530 S.E.2d 344, 346 (N.C. Ct. App. 2000); Pittman v. Thomas, 299 S.E.2d 207, 211 (N.C. 1983); In re DiBiasio, 705 A.2d 972, 973-74 (R.I. 1998); Allison v. Wilson, 411 S.E.2d 433, 435 (S.C. 1991); McGill v. Johnson, 799 S.W.2d 673, 676 (Tex. 1990) (“If the language used is not free from doubt or ambiguity, then canons of construction may be resorted to . . . .”); Shriner’s Hosp. for Crippled Children of Tex. v. Stahl, 610 S.W.2d 147, 151 (Tex. 1980) (“All rules of construction must yield to the basic intention and purpose of the testator as reflected by the entire instrument.”); Frost Nat’l Bank of San Antonio v. Newton, 554 S.W.2d 149, 153 (Tex. 1977) (“No speculation or conjecture regarding the intent of the testatrix is permissible where, as here, the will is unambiguous, and we must construe the will based on the express language used therein.”); Wilkins v. Garza, 693 S.W.2d 553, 556 (Tex. App. 1985) (“If the words used by the testator are clear and unambiguous, construction of the will is unnecessary . . . .”); Sanderson v. First Nat’l Bank in Dallas, 446 S.W.2d 720, 723 (Tex. App. 1969); Hobson v. Shelton, 302 S.W.2d 268, 271 (Tex. App. 1957) (“The primary rule in the construction of wills is to ascertain and follow the intention of the testator. All other rules of construction are of secondary importance, and are but auxiliaries in the practical application of this cardinal rule.”). But see In re Estate of Grulke, 546 N.W.2d 626, 628 (Iowa Ct. App. 1996) (stating that if a simple reading of the will “does not unmistakably reveal the maker’s intention, the court may resort to certain accredited canons of construction”).

At least one court does not define determining the testator’s intent from the plain language of the document as an act of interpretation. See In re Succession of Czindula, 751 So. 2d 986, 989 (La. Ct. App. 2000) (“If the terms of a will are clear and unambiguous, no interpretation is needed to ascertain the testator’s intent.”).

See ATKINSON, supra note 34, at 808.

See id.

See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS
testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning." 54 Such lack of clarity is commonly referred to as latent ambiguity, 55 latency referring, of course, to the fact that the ambiguity "is not apparent on the face of the will but is disclosed by some fact collateral to it," 56 and ambiguity referring to "more than one reasonable interpretation." 57 Although "direct evidence of intention contradicting the plain meaning of the text does not establish a latent ambiguity," 58 if the ambiguity consists of the lack of clarity described above, extrinsic evidence may be introduced to resolve it. 59

The foregoing articulation of the rule of extrinsic evidence is easier to describe than to apply. As a practical matter, there are several instances in which courts routinely admit extrinsic evidence even when the language of a will is plain. Extrinsic evidence is admissible, for example, to show that the will was executed without the required testamentary intent, as in cases of sham wills. 60 Another simple example, relevant to the current discussion, is the necessity of making identifications in all wills cases. Evidence scholar John Wigmore himself once asserted that the words in documents always need interpretation, if only because a court cannot realistically carry out their expressed intent until it considers extrinsic evidence allowing it to make connections between the words and the actual persons and property to which they refer. As a challenge to the notion that there is

54 Mahoney v. Grainger, 186 N.E. 86, 87 (Mass. 1933) (emphasis added), quoted in DUKEMINIER & JOHANSON, supra note 3, at 411.
57 In re Estate of Brown, 559 N.W.2d 818, 822 (N.D. 1997).
59 See Schultheis, 747 A.2d at 923 ("Where a latent ambiguity exists, the court may resort to parol evidence (such as testimony of the scrivener) to determine the decedent's true intent.").
any such thing as plain language, this theory is not particularly difficult to accept. As applied to wills, it simply means that extrinsic evidence of intention must always be admitted in probate cases because some linkage between the words on the page as symbols of the objects to which they refer and the objects themselves must be made. Since making connections between the symbols on the page and the property and beneficiaries to which those symbols refer lies at the very heart of carrying out a testator's duly executed estate plan, no great harm should arise from understanding extrinsic evidence to be essential in any process of identification. Nevertheless, Professor Thayer saw it a little differently, characterizing identifications as "the fatal necessity of looking outside the text [that] tends to steadily destroy" the illusion of a "fixed, precisely ascertained meaning."

Thayer may simply have been referring to the fact that much can go wrong in the process of making identifications, but more than likely he was illustrating the truth of Wigmore's assertion that language always requires interpretation. To carry out the directions, even of a text remarkable for its plainness of meaning, then, requires identifications to be made that tend to undermine the view that the plain-meaning rule is altogether hostile to extrinsic evidence. Under traditional law, for the purposes of making identifications of persons and property, extrinsic evidence has had and continues to have a significant role to play.

Just as extrinsic evidence is required to make identifications, it is also required where identifications fail in so-called equivocation and personal usage cases. Equivocation is a species of latent ambiguity that occurs "where a description fits two or more external objects equally well," as where a testator bequeaths property ""to my niece Alicia,"" but has two nieces named Alicia. Identification problems arise where a testator's habit to refer to a person or property in an idiosyncratic manner or in a way divergent from the ordinary meaning of the reference carries over into his will. He may have for example, used terms, such as "family" or "money," that today lack any fixed legal meaning. He may have referred to his car as a cart,

61 THAYER, supra note 1, at 428-29, quoted in DUKEMINIER & JOHANSON, supra note 3, at 413.
62 DUKEMINIER & JOHANSON, supra note 3, at 426; see also Buchanan, supra note 60, at 943 (two nieces named Jane). For this reason, equivocations also have been called "pure" ambiguities. See, e.g., id.
63 DUKEMINIER & JOHANSON, supra note 3, at 413.
64 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 cmt. r (2003); see also id. § 11.2 cmt. t. For examples of the use of extrinsic evidence of personal usage to reveal and resolve ambiguities, see id. § 11.2 cmts. t-u, illus. 21-25.
65 See, e.g., Paul v. Ball, 31 Tex. 10, 10 (Tex. 1868) (meaning of "money" and "family").
buggy, or bucket. In such cases, extrinsic evidence may be used to show that the testator always referred to the person or object in that peculiar way to clarify "the subjects and the objects intended to be embraced in the disposition of his property by the testator." Some are comfortable grouping matters of equivocation with other latent ambiguities and personal usage cases in the more general but distinct category of mistaken descriptions. I, however, prefer to treat both equivocation and personal usage cases as matters pertaining to identification specifically, given the readiness with which courts admit extrinsic evidence in both types of cases. In personal usage cases in particular, there is no sense that the testator has made a mistake. The extrinsic evidence required is only that which is sufficient to show what the words meant to the testator and, as such, conforms favorably to Justice Holmes's admonition that, in construing a will, the task of a court is to determine not what a testator meant but failed to say but, rather, to determine what he has said.

Problems in identification may also arise in cases of misdescription, also referred to as mistaken description. Indeed, ambiguous description is said to be the "prototype" of all latent ambiguities. This statement is reflective of the large degree of overlap between problems relating to identification and latent ambiguities generally. The Restatement itself equates latent ambiguities in large measure with identification problems arising from misdescriptions and personal usage and provides copious illustrations of these.

Even the term "child" might be considered vague today, but it was not always so. See THAYER, supra note 1, at 448-49 ("Facts tending very strongly to show that the testator meant to include illegitimate children are generally irrelevant, because, prima facie, the legal definition of the term children excludes illegitimates, and therefore a contrary interpretation is not in general legally allowable.").

DUKEMINIER & JOHANSON, supra note 3, at 413 (idiosyncratic reference to a person) (citing Moseley v. Goodman, 195 S.W. 590 (Tenn. 1917)); Buchanan, supra note 60, at 947 (idiosyncratic reference to a chattel).

Paul v. Ball, 31 Tex. 10, 13 (Tex. 1868).

See, e.g., Buchanan, supra note 60, at 944, 947.

Id. at 947.

See Holmes, supra note 40, at 418; accord Shriner's Hospital for Crippled Children of Tex. v. Stahl, 610 S.W.2d 147, 151 (Tex. 1980); Kirk v. Beard, 345 S.W.2d 267, 273 (Tex. 1961) ("The question is not what the testator intended to write but what is the meaning of the words he actually used."); White v. Taylor, 286 S.W.2d 925, 926 (Tex. 1956); Kokernot v. Deman, 708 S.W.2d 921, 924 (Tex. Civ. App. 1986) ("The question is not what the testator intended to write, but the meaning of the words she actually used.").

DUKEMINIER & JOHANSON, supra note 3, at 437.


See id. §§ 11.1 cmt. c, 11.2 cmt. h, illus. 2-9 (2003).
Misdescription cases, unlike cases of personal usage or pure ambiguity, arise when the testator has actually committed an oversight making identification impossible or somehow erroneous. The classic case in this vein is *Patch v. White*, in which the owner of lot number 3 in square 406 bequeathed "lot number 6 in square 403." Although identification was not rendered impossible by the oversight, the fact that the testator did not own the property he described rendered his will powerless to bequeath it to anyone. The misdescription in *Patch*, then, is less like an ambiguity than it is an outright mistake, and as a general matter, courts refuse to correct mistakes in wills. Nevertheless, misdescriptions fall under the maxim of *falsa demonstration non nocet* (a false description causes no harm), an exception to the mistake rule. A court may simply strike the erroneous language. In *Patch*, this meant that the "lot" that extrinsic evidence revealed the testator owned and intended to devise through his will passed to the intended beneficiary.

A trickier case of misdescription arose in *Breckheimer v. Kraft*. In that case, the testator bequeathed property to her nephew Raymond and "Mabel Schneikert his wife, of Plymouth, Wisconsin." At the time the will was executed, Raymond was divorced from Mabel and had married Evelyn. Mabel had moved away from Plymouth. Unlike in *Patch*, identification failed altogether because no one satisfactorily met the description in the will. Extrinsic evidence of sur-

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74 117 U.S. 210 (1886).
75 Id. at 213.
76 Id. at 215 (stating that the testator did not own lot 6 in square 403 and that there were no improvements on that lot).
77 See id. at 218 ("In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity . . . .") (quoting SIR JAMES WIGRAM, WIGRAM ON EXTRINSIC EVIDENCE 53 (1853)). But see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 cmt. j, illus. 6 (2003) (reasoning that "evidence that the donor did not own the described property . . . usually suffices to prove that the text ambiguously describes the intended property").
79 Author's translation; see also BLACK'S LAW DICTIONARY 635, 1073, 1076 (8th ed. 2004) (defining "falsa demonstratio" as "a false designation," "non" as a term that "negates," and "nocent" as "[i]njurious" or "harmful").
80 DUKEMINIER & JOHANSON, supra note 3, at 437.
81 Id. For a list of cases applying this doctrine, see In re Estate of Goldstein, 363 N.Y.S.2d 147, 150 (N.Y. App. Div. 1975), aff'd, 382 N.Y.S.2d 743 (1976).
82 See DUKEMINIER & JOHANSON, supra note 3, at 427.
84 Id. at 469.
85 See id.
86 See id.
87 See id.
rounding circumstances tended to show that the testator had misedcribed Evelyn.  
Ignoring "Mabel" was all that was needed to effectuate the intended bequest.

It bears noting here that Breckheimer did not involve a scrivener's error. The testator there, simply directed the attorney to draft her will according to the terms she herself provided. The attorney was unacquainted with the details of the testator's personal circumstances. Apart from the exceptions to the plain-meaning rule discussed above, scriveners' mistakes in drafting have inspired little sympathy in the courts. This is particularly true in disputes over the meaning of technical legal terms in wills drafted by attorneys. Mahoney v. Grainger and San Antonio Area Foundation v. Lang are examples. In Mahoney, the testator directed her attorney to draft a will bequeathing her residual estate to her first cousins. The attorney read the will to the testator, and she executed it, but the will as drafted bequeathed the residuary to the testator's "heirs at law," who as a legal matter were her aunt and not her first cousins. Given the lack of ambiguity in the will, the fact that the drafter made an error in carrying out the testator's instructions was of no consequence. Had the testator "habitually referred to her twenty-five first cousins as her 'heirs,'" the case might have qualified for the personal-usage exception.

In San Antonio Area Foundation v. Lang, the testator devised her "real property" to her niece and nephew Lang and the residuary of her

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88 See id. at 471.
89 See id.; see also Cornelison, supra note 29, at 824 (suggesting a similar result when a will listed a "nonexistent address").
90 See Breckheimer, 273 N.E.2d at 470.
91 See id.
92 See Dukeminier & Johanson, supra note 3, at 427-38 (describing cases where scriveners' errors resulted in patent ambiguity); see also Scarlett v. Hopper, 823 P.2d 435, 437 (Or. Ct. App. 1992) (refusing reformation of will).
93 See In re Estate of Kime, 193 Cal. Rptr. 718, 728 (App. Dep't Super. Ct. 1983) ("Technical words are to be taken in their technical sense unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.") (internal quotation marks omitted); Bergin v. Bergin, 315 S.W.2d 943, 946 (Tex. 1958) ("[A]s a layman rather than a lawyer, [Mr. Bergin] cannot be deemed to have used words in the same technical sense that the words might have if they were used by an attorney."); Sanderson v. First Nat'l Bank in Dallas, 446 S.W.2d 720, 725 (Tex. Civ. App. 1969) (noting that courts relax rules of construction "when the will is written by a layman" (quoting Huffman v. Huffman, 339 S.W.2d 885, 889 (1960)))).
94 186 N.E. 86 (Mass. 1933).
95 35 S.W.3d 636 (Tex. 2000).
96 Mahoney, 186 N.E. at 86.
97 Id.
98 Id.
99 Id.
100 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 illus. 23 (2003).
estate to a charity.\textsuperscript{101} At some point between the execution of her will and her death, some of the testator's real property, originally part of a large family-owned tract, was sold and became the subject of cash and promissory notes still held by her at her death.\textsuperscript{102} The Langs claimed that the testator meant "real property" to include the cash and promissory notes because she considered all of that property to be part of a single real estate development scheme from which she wished the Langs to benefit.\textsuperscript{103} Noting the well-established legal meaning of "real property,"\textsuperscript{104} the Supreme Court of Texas rejected the Langs' proffered extrinsic evidence and held that the cash and promissory notes passed to the charity under the residuary clause of the will.\textsuperscript{105} Although the result may have been different had the testator drafted her own will,\textsuperscript{106} the presence of a scrivener in the will execution process made it unlikely that the testator had herself inserted a new and altogether unfamiliar definition of "real property" in her last will and testament.\textsuperscript{107}

\textit{C. Resorting to Construction When Interpretation Fails}

Most courts call the basic principles I have outlined above—"discovering the meaning or the intention of the testator from permissible data"\textsuperscript{108}—the process of will interpretation. This approach parallels the standard approach to statutory interpretation wherein courts must presume a statute means what it says and ignore secondary markers of legislative intent unless the statutory language is ambiguous.\textsuperscript{109} As such, it is a familiar method of interpretation. What is less well known is what a court must do when even the admission of extrinsic evidence is insufficient to disclose the testator's actual intent. At this juncture, the court will resort to will construction,\textsuperscript{110} the process of attributing intention to the words used by the testator with the

\textsuperscript{101} 35 S.W.3d 636, 638 (Tex. 2000).
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 639.
\textsuperscript{104} Id. at 640, 641.
\textsuperscript{105} Id. at 642.
\textsuperscript{106} See, e.g., In re Estate of Kime, 193 Cal. Rptr. 718 (App. Dep't Super. Ct. 1983).
\textsuperscript{107} See Cornelison, supra note 29, at 825 (opining that contemporary practices in estate planning may have eliminated personal usage problems). But see Buchanan, supra note 60, at 960 (suggesting that the will in \textit{San Antonio Area Foundation} contained "testator code").
\textsuperscript{108} ATKINSON, supra note 34, at 809.
\textsuperscript{110} \textit{RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS} § 11.3 cmt. c (2003) ("The process of interpretation is sometimes thought to occur first, followed by construction only when interpretation fails.").
aid of rules of construction and constructional preferences. By resorting to construction, a court is essentially declaring the testator’s intent itself to be ambiguous. The application of rules of construction, then, is calculated to endow the conveyance with some legal effect, albeit in favor of imputing an intent as the state identifies it.

Rules of construction are highly specific, rebuttable presumptions that dictate the meaning of particular terms in the will or the application of those terms to well-defined factual scenarios, and they determine “the construction which the Courts are bound, in the absence of a sufficiently declared intention to the contrary, to put upon particular words, expressions, and forms of disposition occurring in wills.” Any rule of construction has the effect of presuming that certain words or expressions shall mean X rather than Y. Such rules act externally on the will to disclose, as Justice Holmes put it, “not what this man meant, but what those words would mean in the mouth of a normal speaker of English.” Rules of law, on the other hand act independently of intention and are not rules of construction. Some examples of rules of law, as opposed to rules of construction, are “the rule in Shelley’s Case, the rules as to perpetuity, mortmain, lapse, &c.” Use of the rules of construction often arises in the wills context in cases involving the effect of conditions, revocation by subsequent instruments, ademption, abatement, election, exoneration,

\[\text{111} \text{Allen v. Shea, 665 P.2d 1041, 1044 (Idaho 1983) (stating that rules of construction are not used unless testator’s intent is unclear); Hintze v. Black, 873 P.2d 909, 912 (Idaho Ct. App. 1994) (‘‘In the absence of extrinsic evidence of intent, the court may apply rules of construction to interpret the instrument.’’); Harris Trust & Sav. Bank v. Beach, 513 N.E.2d 833, 834 (Ill. 1987); In re Estate of Grimm, 705 N.E.2d 483, 496 (Ind. Ct. App. 1999); In re Estate of Grulke, 546 N.W.2d 626, 628 (Iowa Ct. App. 1996) (‘‘[C]anons of construction permit us to impute a meaning conforming to the testator’s probable intention and one that is most agreeable to reason and justice.’’); B. M. C. Durfee Trust Co. v. Franzheim, 207 N.E.2d 913, 916 (Mass. 1965); Straube v. Barber, 990 S.W.2d 40, 44 (Mo. Ct. App. 1999); Pittman v. Thomas, 299 S.E.2d 207, 211 (N.C. 1983); Watson v. Smoker, 530 S.E.2d 344, 346 (N.C. Ct. App. 2000); In re Estate of Weaver, 572 A.2d 1249, 1256 (Pa. Super. 1990); In re Estate of Klauser, 604 N.W.2d 474, 477 (S.D. 2000); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (2003) (‘‘Construction’ refers to the process of attributing intention from constructional preferences and rules of construction.’’).

\[\text{112} \text{See Mary Louise Fellows, In Search of Donative Intent, 73 IOWA L. REV. 611, 612 (1988).}

\[\text{113} \text{FRANCIS VAUGHAN HAWKINS, A CONCISE TREATISE ON THE CONSTRUCTION OF WILLS vii (1885).}

\[\text{114} \text{Id.}

\[\text{115} \text{Holmes, supra note 40, at 417-18.}

\[\text{116} \text{Id. Although it is a rule of construction, the rule of convenience, closing a class ‘‘whenever any member of the class is entitled to possession and enjoyment of his or her share,’’ has been described as closer to an unbending rule of law than any other rule of construction.}

\[\text{DUKEMINIER & JOHANSON, supra note 3, at 778.}

\[\text{117} \text{HAWKINS, supra note 113, at vii.}

\[\text{118} \text{In Wasserman v. Cohen, 606 N.E.2d 901 (Mass. 1993), the court suggested that ademption cases do not require use of rules of construction given that the focus in such cases ‘‘is}
lapse, and future interests. An example of a rule of construction is as follows: where the heirs of X are given a remainder interest in property, the identity of those heirs must be determined as of the date of death of X and not as of the date of death of the holder of the previous estate.\textsuperscript{119}

Constructional preferences, by contrast, are very general, rebuttable presumptions that merely guide the court toward the resolution of an ambiguity.\textsuperscript{120} An example of a constructional preference is the preference for resolving ambiguities in a will in favor of family members over nonfamily members.\textsuperscript{121} Both rules of construction and constructional preferences contribute uniformity and predictability to the law of wills, but of course, as rebuttable presumptions, they yield to evidence of a testator's contrary intention.

II. THE DISAPPEARING DISTINCTION BETWEEN INTERPRETATION AND CONSTRUCTION

Most courts hew to the view that the plain-meaning rule applies to the interpretation of unambiguous wills. This begs the question, of course, of how a court should arrive at the conclusion that a will is unambiguous. The trouble for some courts may lie in a lack of understanding of the distinction between interpretation and construction. Wills scholar Thomas Atkinson defines interpretation as "discovering the meaning or the intention of the testator from permissible data."\textsuperscript{122} By contrast, construction signifies "assigning meaning to the instrument when the testator's intention cannot be fully ascertained from proper sources."\textsuperscript{123} Seen in this light, construction is necessary only when interpretation fails.\textsuperscript{124}

At present, the law of most states makes a clear distinction between will interpretation and will construction. There does, however, seem to be some dispute about when the process of interpretation on the actual existence or nonexistence of the bequeathed property, and not on the intent of the testator."


\textsuperscript{120}See \textit{RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS} § 11.3 cmt. b (2003).

\textsuperscript{121}See id. § 11.3(c)(3).

\textsuperscript{122}ATKINSON, \textit{supra} note 34, at 809.

\textsuperscript{123}Id. at 809-10. At least one court defines determining the testator's intent from the plain language of the document as not an act of interpretation. \textit{See In re} Czindula, 751 So. 2d 986, 989 (La. Ct. App. 2000) ("If the terms of a will are clear and unambiguous, no interpretation is needed to ascertain the testator's intent.").

\textsuperscript{124}See ATKINSON, \textit{supra} note 34, at 810.
actually begins. To the extent that plain language is permissible data, Professor Atkinson would hold that interpretation begins as soon as a probate court begins to analyze the language of a will in search of the testator’s actual intent and that construction is necessary only when this quest fails. Other scholars describe interpretation as not commencing until the plain-meaning approach has failed.\(^{125}\)

The ALI, however, has decided that will interpretation and will construction are not discrete parts of a sequential process but are, in fact, simply components of a single process known as construction.\(^{126}\) The ALI dispenses with the term interpretation in favor of the term construction and suggests that “interpretation” be limited to references to the construction of contracts.\(^{127}\) Henceforth, courts will consider actual intention (interpretation) and presumed intention (construction) simultaneously.\(^{128}\) This approach to construction will result in “the final product of the process of determining the meaning of a donative document.”\(^{129}\)

The ALI justifies its rejection of the well-established distinction between the interpretation and construction—a distinction embodied not only in the Restatement of Property but also in the Restatement (Second) of Conflicts of Laws\(^{130}\)—by claiming that courts analyzing wills already analyze actual and presumed intention simultaneously.\(^{131}\) But the examples given for that claim are examples of the judicial practice of resorting to rules of construction and constructional preferences in cases where there is some evidence of actual intention, but that evidence is not “sufficiently persuasive.”\(^{132}\) Such cases do not reinforce departure from the sequential process that is so familiar in the wills context. The ALI’s own justification for blurring

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\(^{125}\) See, e.g., Hawkins, supra note 1, at 577, 578, 584, 585.

\(^{126}\) See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (2003) (“Interpretation and construction are not completely distinct processes . . . nor are they applied sequentially. Interpretation and construction are part of a single process.”); RESTATEMENT (FIRST) OF PROP. § 241(2) (1950) (referring to construction as a process), quoted in RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 reporter’s note 1 (2003).

\(^{127}\) See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 reporter’s note 1 (2003).

\(^{128}\) See id. § 11.3 cmt. c.

\(^{129}\) Id. § 10.1 cmt. b.

\(^{130}\) See id. § 11.3 reporter’s note 1 (stating that the first Restatement “misdescribe[d] the process”).

\(^{131}\) See id. § 11.3 cmt. c (“[T]he process of construction requires all factors to be brought to bear simultaneously and conflicting factors to be considered against each other. This is a single process . . . . [T]he constructional preference or rule of construction is considered together with any evidence of actual intention.”).

\(^{132}\) See id., § 11.3 cmt. c (“It would misdescribe the process to say that the constructional preference or rule of construction ought to be consulted only if there is no evidence of actual intention.”).
the distinction, then, actually supports recognition, not rejection, of the distinction, because it emphasizes that courts should resort to rules of construction only when they have found sufficient evidence of actual intent wanting. This clear principle continues to be expressly recognized in recent state supreme court cases. Moreover, the ALI itself adheres to the view that "[a]ctual intention, when sufficiently established, always overcomes attributed intention."133

It is unclear why the ALI rejects the traditional two-step interpretive process. One reason may be the Restatement's exceedingly general definition of interpretation and construction as nothing more than tools for the ascertainment of the meaning of language. Given the imprecision of this definition, and its lack of any account of the different objectives of interpretation and construction,134 it is understandable why the Restatement would characterize judicial analysis of wills as much less methodical than is suggested by Atkinson's description of a structured, sequential process. Finally, the Restatement itself appears to resist the ALI's attempted erasure of the interpretation-construction distinction, given the numerous statements it contains that conflict with the notion of a single-step interpretive process.135 The following case discussion is meant to serve as an illustration of the danger of blurring the line between interpretation and construction.

133 Id. (emphasis added).

134 See id. ("[I]nterpretation' refers to the process of searching for the donor's actual intention by looking to the text of the document and extrinsic evidence. 'Construction' refers to the process of attributing intention from constructional preferences and rules of construction.").

135 See, e.g., id. § 11.2 cmt. b (2003) ("To the extent that the donor's intention is not established by a preponderance of the evidence [even after admitting extrinsic evidence], techniques of construction may be applied to give effect to intention to the extent possible."); id. § 11.2 cmt. f (noting the resort to constructional preferences or rules of construction in cases where extrinsic evidence does not resolve ambiguity); id. § 11.2 cmt. j, illus. 6 (noting that without extrinsic evidence of intention, one may resort to constructional preferences); id. § 11.2 cmt. k ("[I]n rare cases of ambiguity, the evidence does not adequately establish the donor's intention by a preponderance of the evidence. If a constructional preference or a rule of construction applies to the ambiguity, the ambiguity is resolved by the constructional preference or rule of construction."); id. § 11.3 cmt. e ("When relevant, a rule of construction or a constructional preference assists the trier of fact in ascertaining the particular donor's intention in circumstances in which evidence of actual intention is inadequate or altogether missing."). Even the Restatement's demonstration of a benign use of constructional preferences to "reinforce[] evidence of [actual] intention" suggests a two-tiered interpretive process. Id. § 11.2 cmt. a; see also id. § 11.2 cmt. j, illus. 6 (noting that a constructional preference may support an outcome already reached by way of the admission of extrinsic evidence).
A. Facts

John and Carrie Maddox owned vast quantities of oil-rich land in Texas and held it as their community property. John leased some of the land for the purposes of oil production in the 1920s, but at his death in 1933, the land was only just beginning to be exploited. The standard oil lease at the time conveyed to the lessee a fee simple determinable in the mineral estate, thereby allowing the lessee to retain the fee simple as long as oil was produced in paying quantities.

The Maddoxes had ten children. When he died, John devised his one-half of the community interest to his wife for life followed by remainders for life to his ten children and successive remainders in fee to his children’s children. If any of his children died childless, John provided that the remainder in fee would be distributed among the children of John and Carrie surviving at the time of distribution.

In addition to her life estate, John gave Carrie the following powers and authority: (1) full power and authority to manage, control, and lease for all purposes the real and personal property given during her lifetime; (2) full power and authority to extract therefrom all oil, gas, and other minerals during her lifetime; and (3) full power and authority to collect and have the rents and revenues during her life. In addition to her remainder in a life estate in four specific parcels, John gave to his daughter Martha Lou Hughes the power to “make leases of whatever nature ... and to extract therefrom all oil, gas and/or other minerals ... during ... her lifetime.”

After her husband’s death, Carrie executed two oil and gas leases (Maddox ## 2 and 3) in favor of Martha Lou’s husband, Dan. Each was in the standard form and covered one of the tracts in which Martha Lou held her remainder for life under the will of her father. Upon her own death, Carrie devised to Martha Lou her entire interest

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137 See id. at 363.
138 See id. at 364.
139 See id. at 365.
140 See id. at 364.
141 See id. at 364 n.2.
142 See Will of John W. Maddox, ¶ 6, 8, 9 (May 17, 1933) (on file with author).
143 See Steger, 134 S.W.3d at 364 n.2 (reproducing Will of John W. Maddox, supra note 142, ¶ 6).
144 See id. at 365 & n.3 (reproducing Will of John W. Maddox, supra note 142, ¶ 19).
145 See id. at 365 n.3 (reproducing Will of John W. Maddox, supra note 142, ¶ 8).
146 See id. at 365.
147 See id. at 365-66.
in the same tracts to which John had given Martha Lou a remainder in a life estate.148 This included both the surface rights and mineral rights to the tracts in question, with the stipulation that other family members would receive a share of bonuses and royalties arising from the production of oil, gas, and other minerals.149 After Carrie's death, Martha Lou, in 1977, executed an oil and gas lease, employing fee simple determinable language, in favor of Dan (Maddox # 4), covering a tract as to half of which she was a tenant for life under the will of John and the other half of which she owned outright under the will of Carrie.150 This lease had a primary term of twenty years and "as long thereafter as oil and/or gas is produced in paying quantities."151

When Dan died, he devised his interest in the Maddox ## 2, 3, and 4 leases he had procured from Carrie and from Martha Lou to Martha Lou.152 Martha Lou continued to operate the wells Dan had opened. Martha Lou died on May 7, 1993, terminating her life estate in the four tracts she had inherited from John.153 Since she died without issue, the tracts she had inherited from her father became vested in fee in her sister Marjorie Maddox Steger, John's sole surviving child.154 In her will, Martha Lou devised "all of the oil, gas, and mineral interests . . . that I inherited from my deceased mother" to Marjorie's sons John and William Steger.155 The executors of Martha Lou's estate purported to assign to Muenster Drilling Co. the Maddox ## 2, 3 and 4 leases on September 1, 1994.156 Marjorie then filed suit to eject Muenster, claiming that neither Carrie nor Martha Lou had the power to execute oil and gas leases that extended beyond the period of their lifetimes on the property they received under John Maddox's will.157

148 See id. at 366; Will of Carrie T. Maddox, § 9 (Nov. 7, 1958) (on file with author).
149 See Will of Carrie T. Maddox, supra note 148, § 9.
150 See Steger, 134 S.W.3d at 366.
151 See id.
153 See Steger, 134 S.W.3d at 366.
154 See id.
155 See id.
156 Will of Martha Lou Hughes, item IX.C (Mar. 12, 1993) (on file with author); Steger, 134 S.W.3d at 366.
John and William Steger brought a separate action to eject Muenster, claiming unsuccessfully that, with respect to their interest in the tracts, the leases had been extinguished when they merged, at the death of Dan Hughes, with the greater estate held by Martha Lou Hughes. See Steger, 134 S.W.3d at 367. Marjorie Maddox Steger unsuccessfully raised the same claim in her suit. See id. at 367, 375-78. The doctrine of merger of estates is beyond the scope of this Article.
As such, the leases in favor of Dan Hughes were cancelled, at the latest, as of Martha Lou's death.\textsuperscript{158}

At trial, it was stipulated that John's will expressly and clearly granted to Carrie and Martha Lou the right to execute oil leases even on tracts where, up to that time, there had been no drilling for oil. It was likewise undisputed that, without that express authorization, under the law of waste neither Carrie nor Martha Lou would have been entitled to open new wells.\textsuperscript{159} The question before the court became one of will interpretation: were the powers granted to Carrie and Martha Lou to lease for oil such as would permit them to grant leaseholds for terms that would continue beyond their own deaths?\textsuperscript{160}

The trial court ruled that Marjorie took the remainder subject to the leases, a ruling that was affirmed by the Court of Appeals.\textsuperscript{161} What is most intriguing about these rulings is that they interpret the language of the will in very different ways. Without a great deal of elaboration, the trial court made alternative determinations: first, that the will's plain meaning authorized leases that could extend beyond the death of the life tenant; and second, that the will was ambiguous, but that in the light of extrinsic evidence it became clear that the will authorized the leases in question. The relevant extrinsic evidence was the circumstances surrounding the execution of the will and the practices of the oil industry with which John was familiar. The Court of Appeals appeared convinced by the plain-language argument and provided reasoning to bolster it. Its analysis proceeded in the following nearly syllogistic manner: (1) (a) "[the] will gave Carrie 'full[] power and authority' to 'manage, control and lease' [the property] 'for all purposes . . . during her life time and to extract therefrom all oil, gas and or other minerals'";\textsuperscript{162} (b) "[the] will gave Martha Lou power, 'during . . . her life time,' to 'make leases of whatever nature' on [the property] 'and to extract therefrom all oil, gas and/or other minerals . . . over which . . . she may have control'";\textsuperscript{163} (2) (a) "[t]he word 'all' means 'every,' and 'purpose' means 'something set up as an object or

\textsuperscript{158} See Steger, 134 S.W.3d at 367.

\textsuperscript{159} The law of waste protects remaindermen against overexploitation of the land by the life tenant's opening up new mines or wells. It states that the life tenant of real property may not authorize drilling for oil. See Swayne v. Lone Acre Oil Co., 86 S.W. 740, 742 (Tex. 1905) (stating that it is not waste for a life tenant to work an open mine, but it is waste to open a new mine); MCZ, Inc. v. Smith, 707 S.W.2d 672, 679 (Tex. App. 1986) (asserting that mining dissipates the corpus of an estate); see also Moore v. Vines, 474 S.W.2d 437, 439 (Tex. 1971) (stating that mineral rights are not part of the rights afforded to one with a life estate). The law applicable in Moore will be further developed infra in Part III.B.

\textsuperscript{160} See Steger, 134 S.W.3d at 367.

\textsuperscript{161} Id. at 377.

\textsuperscript{162} Id. at 373 (second alteration in original) (omission in original) (citation omitted).

\textsuperscript{163} Id. (omissions in original) (citation omitted).
end to be attained: INTENTION’'";\textsuperscript{164} (b) ‘’[w]hatever’ means ‘of any kind at all’’\textsuperscript{165} and ‘’[n]ature’ means ‘a kind or class usu[ally] distinguished by fundamental or essential characteristics’’;\textsuperscript{166} (3) therefore,

we hold that J.W.’s will unambiguously authorized Carrie to lease his half of the community for every end that she sought to attain, including the end of making oil and gas leases that extended beyond her lifetime, and gave Martha Lou the power to execute oil and gas leases of any kind of class at all, including those that extended beyond her lifetime.\textsuperscript{167}

Although this syllogism is itself a complete plain-language analysis, the court ventured further for support of a different sort. It stated that were it not to interpret the will in this way, leasing for oil and gas might in some cases be stymied:

   Indeed, if a life tenant is granted the power to lease, but cannot bind future interests, “there is very little utility to the power because of the natural reluctance of any lessee to accept a lease which might be terminated by the death of the lessor.”\textsuperscript{168}

My objective in raising Steger as a decision that merits further examination is not to argue that the decision in Steger was wrong. Reasonable minds will certainly disagree about the proper outcome. When examined in the light of the law applicable to cases like Steger, though, it becomes a particularly good lens through which to criticize the new Restatement’s blurring of the line between interpretation and construction.

**B. Applicable Law**

The issues in Steger required an examination of (1) the scope of a life tenant’s entitlement to exploit property and (2) what the law requires for the creation of powers that authorize a life tenant to exploit the property in additional ways. The specific issue presented was whether a legatee given a life tenancy and the power to extract oil and gas from real property may execute oil and gas leases that extend beyond the period of her own lifetime.

\textsuperscript{164} Id. (citation omitted).
\textsuperscript{165} Id. at 373-74 (citation omitted).
\textsuperscript{166} Id. at 374 (alteration in original) (citation omitted).
\textsuperscript{167} Id.
\textsuperscript{168} Id. (quoting I EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 8.1, at 214 (1987)).
1. Life Estates

No particular words are necessary to create a life estate. The basic rights of a life tenant are those of possession, management, and control, including the right to reap the profits and income accrued during the tenancy. The specific mention that the life tenant has the power to "manage and conserve" or to "possess and control" the property is no enlargement of the ordinary powers of a life tenant. This grant entitles the life tenant to "all the ordinary uses to which the property is accustomed to be put or to which it is adapted," but it does not entitle him to sell or dispose of the property.

The grant of a life estate carries with it "the privilege of leasing the property . . . for any use that does not amount to waste," for a life tenant's right to lease the property is simply part of his entitlement to derive income from the property and to commit it to all ordinary uses. Any lease executed by a life tenant, though, is limited to the period of his own lifetime. More specifically,

a lease given by a life tenant is terminated with his death and

170 34 TEX. JUR. 3D Estates § 32 (1984) (explaining that a life tenant's rights are restricted to possession, management, and control unless the deed or will states otherwise); WILLIAM A. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 2.11, at 59-60 (2000) (explaining the rights and duties of a life tenant); Medlin v. Medlin, 203 S.W.2d 635, 639 (Tex. Civ. App. 1947) (stating that the words "use and benefit" are sum and substance of a life estate), cited in 34 TEX. JUR. 3D Estates § 32 n.65; Brown v. Wood, 239 S.W.2d 195, 201 (Tex. Civ. App. 1951) (citing Medlin, 203 S.W.2d at 639) (same).
171 See Murphy v. Slaton, 273 S.W.2d 588, 595 (Tex. 1954) (stating that life tenants are entitled to the income, rents, revenues, and benefits accruing during their life); Wagnon v. Wagnon, 16 S.W.2d 366, 370 (Tex. Civ. App. 1919) (holding that life tenants are entitled to all profits and income absent a contrary restriction).
172 74 TEX. JUR. 3D Wills § 240 (2000); Wagnon, 16 S.W.2d at 367, 370 (holding that the bequest of residue to husband "to use, possess and control as his own individual property so long as he may live" passed life estate with no power of disposition).
174 Hobson v. Shelton, 302 S.W.2d 268, 272 (Tex. Civ. App. 1957); Wagnon, 16 S.W.2d at 369; see also Swayne v. Lone Acre Oil Co., 86 S.W. 740, 742 (Tex. 1905) (finding buyers of a life tenant's property interest were not entitled to any part of the proceeds of oil extracted from the land).
175 STOEBUCK & WHITMAN, supra note 170, § 4.8.
177 See MCZ, Inc. v. Smith, 707 S.W.2d 672, 680 (Tex. App. 1986) (noting that a life tenant has power to lease, but only to the extent of her life estate); see also Steger v. Muenster Drilling Co., 134 S.W.3d 359, 373 & n.37 (Tex. App. 2003) (stating that a life tenant cannot convey an estate that is greater than the one tied to her life); Benson v. Greenville Nat'l Exch. Bank, 253 S.W.2d 918, 922 (Tex. Civ. App. 1952) (holding a life tenant's transfer of her estate effects the transfer of a life estate for the life of the grantor); Osborne v. Osborne, 138 S.W. 1062, 1063 (Tex. Civ. App. 1911) (holding a lease granted by a life tenant expires upon the death of the life tenant); Morris v. Eddins, 44 S.W. 203, 204 (Tex. Civ. App. 1898) (holding a life tenant may convey only a life estate measured by his own life).
the right of possession of his lessee is likewise terminated for
the reason that a life tenant has no power to grant an interest
in the property greater than that which he himself holds and
because the lessee of a life tenant is charged with notice of
the extent of his landlord's title.178

Such a limitation prevents the life tenant from dissipating the
corpus of the estate, which would impinge upon the interests of the re-
maindermen and constitute waste.179 In addition to his rights and
privileges, the life tenant possesses the responsibility to maintain the
property,180 including payment of taxes and mortgage interest.181

Despite a life tenant's broad powers, the position of the life tenant
is essentially that of a quasi-trustee who must preserve the corpus of
the estate for the remainderman.182 The temptation not to do so is
great. "A life tenant will have an incentive to maximize not the value
of the property . . . but only the present value of the earnings stream
obtainable during his expected lifetime."

This temptation is especially strong where the property is valuable
for uses the life tenant is prohibited from exercising, for instance
the mining of minerals. The law of waste addresses this temptation, for
example, by forbidding the life tenant from "inaugurat[ing] exploita-
tion of the minerals in the land" unless he and the remainderman do
so together.184 This is so even though the right to lease the property is

178 Annotation, Life Tenant's Death as Affecting Rights under Lease Given by Him, 14
A.L.R.4th 1054 § 2 (1982) [hereinafter Annotation, Life Tenant's Death]; see also Montgomery
v. Browder, 930 S.W.2d 772, 778 (Tex. App. 1996) ("The general rule in Texas is that one who
buys property must, at his peril, ascertain the ownership of the property.") (citing Kimbell Mill-
ing Co. v. Greene, 162 S.W.2d 991, 996 (Tex. Civ. App. 1942), aff'd, 170 S.W.2d 191 (Tex.
1943)).


181 See STOEBUCK & WHITMAN, supra note 170, § 2.11; Conn. Gen. Life Ins. Co. v. Bry-

182 See Clyde v. Hamilton, 414 S.W.2d 434, 439 (Tex. 1967) ("A life tenant may not dis-
pose of the corpus of the estate. It is to be preserved for the remaindermen."); Wagnon v.

183 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 83-84 (5th ed. 1998), quoted in
JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 224 (4th ed. 1998); cf. DUKEMINIER &
JOHANSON, supra note 3, at 929-36 (illustrating trustee's duty to manage corpus so as to "pro-
duce a reasonable income while being preserved for the remainderman") (reproducing Dennis v.
R.I. Hosp. Trust Nat'l Bank, 744 F.2d 893 (1st Cir. 1984)).

184 55 TEX. JUR. 3d Oil and Gas § 24 (1987); RICHARD W. HEMINGWAY, THE LAW OF OIL
AND GAS § 5.2(B), at 214-15 (3d ed. 1991) ("Where the ownership of the mineral estate is
divided between a life tenant and a remainderman, although neither may . . . drill for oil and gas
separately, they may do so jointly."); see also Swayne v. Lone Acre Oil Co., 86 S.W. 740, 742
(Tex. 1905) (noting that tenant of a life estate who is punishable for waste has no right to initiate
oil extraction): MCZ, Inc. v. Smith 707 S.W.2d 672, 679 (Tex. App. 1986) (noting life tenant of
real property may lease to the extent of her life estate but may not authorize drilling for oil).
subsumed within the life tenant’s right to draw income from the property because mining dissipates the corpus of an estate rendering the life tenant liable to the remainderman for waste.\textsuperscript{185}

2. Powers to Consume

The foregoing description of life estates reveals that a life tenant may not inaugurate oil production without the consent of the remaindermen. A life tenant would be impeachable for waste for so doing. Moreover, oil and gas leases traditionally pass a fee simple determinable, and a life tenant may not convey a fee simple no matter how much he desires to,\textsuperscript{186} even by will, because his own life estate is of a lesser quantum than a fee simple.\textsuperscript{187} If a life tenant purports to convey a fee, the conveyance is good only to the extent of his life estate.\textsuperscript{188}

The grantor of a life estate may grant the life tenant the power to consume the corpus of the estate, to execute leases that extend beyond her own lifetime, or even to convey fee simple title in the estate.\textsuperscript{189}

\textsuperscript{185}See 55 TEX. JUR. 3D Oil and Gas § 98 (1987) ("The general rule that neither a life tenant nor a remainderman, without the joinder of the other, may develop oil and gas on or remove it from the property subject to their successive estates prevents either from executing along a valid mineral lease."). The open mine doctrine is an exception to this rule. Moore v. Vines, 474 S.W.2d 437, 439 (Tex. 1971). It holds that where "mines were opened by the grantor before he created the life estate, it is presumed that the grantor intended the life tenant to be able to continue mining. But if the mines were not open before the life estate was created, the life tenant cannot open them." DUKEMINIER & KRIER, supra note 183 at 225 n.23; see also Swayne v. Lone Acre Oil Co., 86 S.W. 740, 742 (Tex. 1905) (describing open mine doctrine as "well settled").


\textsuperscript{187}See Montgomery, 930 S.W.2d at 776 (explaining that a life estate is not converted to a fee simple estate even when the life tenant has full powers of disposition); First Nat'l Bank of Amarillo, 531 S.W.2d at 907 (explaining that a life estate is an insufficient interest to establish a grant of an easement beyond the duration of the life estate); Mitchell v. Mitchell, 235 S.W.2d 744, 746 (Tex. Civ. App. 1951) ("The life tenant owns the estate only for life, which is a lesser estate than the fee or inheritance which belongs to the remaindermen."). rev'd on other grounds 244 S.W.2d 803 (Tex. 1951); Morris v. Eddins, 44 S.W. 203, 204 (Tex. Civ. App. 1898) (stating that a grantor possessing life estate cannot grant greater estate than that limited by his own life); 55 TEX. JUR. 3D Oil and Gas, § 95 (1987) ("The extent to which a mineral owner may grant oil and gas rights to another by lease is necessarily controlled for the nature of the interest owned by the grantor or by the person whom he legally represents.").

\textsuperscript{188}Zambrano v. Olivas, 490 S.W.2d 218, 220 (Tex. Civ. App. 1973); see also Strong v. Garrett, 224 S.W.2d 471, 475 (Tex. 1949) (holding that a life tenant’s title is a “limitation title”); MCZ, Inc., 707 S.W.2d at 680 (holding that surviving spouse who inherited life estate in her husband’s one-half of the community property estate had power to lease only to the extent of her life estate but could not authorize drilling for oil); Benson v. Greenville Nat’l Exch. Bank, 253 S.W.2d 918, 922 (Tex. Civ. App. 1953) (explaining that the effect of conveying a life estate is to “create in the grantee an estate for the life of the grantor”).

But this does not enlarge the life estate to a fee. This sort of power is not even an estate but a mere authority to dispose of the fee.

There is no doubt that the exercise of such a power threatens the diminution of the remaindermen’s interest. The power, though, is not itself repugnant to the remainder but merely defeats it if exercised.

The power described above is a departure from the legal definition of a life estate. Without express and very clear language granting this additional power, courts refuse to construe wills as bestowing them. This is primarily because the powers allow the life tenant to derogate from the powers already vested in him, and there is no such thing as a power of sale by implication. In the extensive litigation over ambiguous language in this context, courts narrowly construe any language purporting to grant these powers. For example, a conveyance granting a life tenant the express right to open new mines or to execute leases that would normally continue beyond the period of the life tenancy permits the life tenant to lease for a period in excess of her own lifetime. By contrast, a will granting a life tenant merely “all

be expressly granted the power and right to drill wells after the inception of his estate by the instrument creating the estate.”; DUKEMINIER & KRIER, supra note 183, at 226 (“The person creating a legal life estate can draft the instrument so as to give the life tenant a power to sell or mortgage a fee simple or to lease beyond the duration of the life estate. A life estate can be coupled with any number of powers to do specific acts not otherwise permitted the life tenant.”).

See Montgomery, 930 S.W.2d at 777; TEX. JUR. 3D Wills § 240 (1990) (citing Edds v. Mitchell, 184 S.W.2d 823 (Tex. 1945)).

See Edds, 184 S.W.2d at 825.

Id.; see also In re Lewis, 749 S.W.2d 927, 930 (Tex. App. 1988) (citing Edds, 184 S.W.2d at 823); cf. Sterner v. Nelson, 314 N.W.2d 263 (Neb. 1982), reprinted in DUKEMINIER & JOHANSON, supra note 3, at 677-80 (applying rule of repugnancy nullifying attempt to reduce by subsequent language a fee simple already granted); White v. Brown, 559 S.W.2d 938, 941 (Tenn. 1977).

See Glass, 469 S.W.2d at 241 (holding that oil and gas leases executed by life tenants were valid when the will which created the life estate clearly conveyed the right to execute such leases); Amarillo Oil Co., 67 S.W.2d at 1101 (upholding will provision that any lease executed by life tenant would “remain in the lessee, his heirs and assigns,” with rents and royalties payable to the remaindermen); EUGENE O. KUNTZ ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 408 (3d ed. 1998) (citing Moore v. Vines, 474 S.W.2d 437 (Tex. 1971)).

A life estate tenant . . . cannot dispose of the corpus of the estate unless expressly authorized to do so. An implied power to dispose of the corpus by the life tenant of an express life estate does not exist in Texas. And words that confer a right to use, possess, and control the property do not confer any authority to expend, sell, or dispose of it.

See DUKEMINIER & JOHANSON, supra note 3, at 681.

See, e.g., Daniels v. Moore, 712 S.W.2d 621, 622 (Tex. App. 1986) (holding that life tenant with power of sale has no power to divest herself of the property by gift); Ellis v. Bruce, 286 S.W.2d 645, 648 (Tex. Civ. App. 1956) (discussing a will granting one life tenant the power to consume but granting another life tenant no such power).
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rents, revenues and income of every kind and character [derived] from the real estate” and the right to execute “leases . . . [for] oil and gas” does not because it lacks the requisite clarity. Likewise, “if the life tenant has the power to sell the property and grant title in fee simple, [he may], a fortiori . . . lease the property for a term that . . . extend[s] beyond his death.” But, if the standard is that consumption is limited to the maintenance and support of the life tenant, then the power to consume may not extend beyond his lifetime, since the standard itself is applicable only while the life tenant lives. Furthermore, even a life tenant with the power to dispose of the corpus may not convey the mineral interest to herself by conveying it first to third parties so that they may reconvey it to her. In sum, the power to lease beyond one’s own lifetime exists only when the life tenant is expressly given this right, has the power to dispose of the estate, or has the consent of the remaindermen.

Under the foregoing principles, mineral leases conveyed by life tenants are especially vulnerable to attack. Even when the life tenant is granted the power to consume the corpus, a court may determine that, in the context of a mineral lease, the lease nonetheless terminates upon the death of the life tenant. In many jurisdictions, the common lease form establishes a fee simple determinable by conveying to the lessee a working interest in the mineral estate for a primary term “and as long thereafter as oil and gas or other hydrocarbons are being produced.” Although this is a standard form lease, a grantor may

198 Annotation, Life Tenant’s Death, supra note 178, § 2 (emphasis added); see, e.g., Anderson v. Kenyon, 353 S.W.2d 241, 245 (Tex. Civ. App. 1961) (holding that life tenant had power to mortgage, sell, and convey without limitation); Guest v. Bizzell, 271 S.W.2d 472, 473 (Tex. Civ. App. 1954) (holding that the will authorized wife “to sell and convey any part of such property”); Amarillo Oil Co., 67 S.W.2d at 1099 (holding that grantee had express right to “receive therefrom all the benefits as completely as though he had a fee simple title” and to execute oil and gas leases to extend beyond his lifetime); Annotation, Life Tenant’s Death, supra note 178, § 2 (“The court acknowledged the general rule that a life tenant has no authority to execute a lease for a term longer than his lifetime but deemed the rule inapplicable in this case because the life tenant also possessed a power of disposition with respect to the property.” (discussing Givens v. Givens, 387 S.W.2d 851 (Ky. 1965))); 55 TEX. JUR. 3D Oil and Gas § 98 (1984).
200 See Anderson, 353 S.W.2d at 245.
201 See Annotation, Life Tenant’s Death, supra note 178, § 2; JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 102-03 (3d ed. 1995).
203 EUGENE O. KUNTZ, ET AL., FORMS MANUAL TO ACCOMPANY CASES AND MATERIAL ON OIL AND GAS LAW 12 (3d ed. 1998) (Texas oil and gas lease). In Texas, the law is that an oil and gas lease containing this language conveys a fee simple determinable. See 51 TEX. JUR. 3D Mines and Minerals § 29 (2000); 55 TEX. JUR. 3D Oil and Gas § 163 (2000) (listing cases).
“transfer to another an interest in the oil and gas therein which may be a mere license, option, estate for life, or for years, as certainly as it may be a fee simple or determinable fee estate.” This, of course, means that oil and gas leases are not necessarily fees simple determinable, but can be made the subject of a lesser interest, even a life estate.

C. Analysis

The Steger case is a remarkable illustration of the awkward fashion in which courts approach matters of will interpretation. The trial court, apparently flummoxed about whether to describe the will as ambiguous or unambiguous, proceeded to make alternative rulings, one based on the view that the will’s language was plain, and the other based on the view that it was not. At the very least, making alternative rulings was itself a radical departure from will interpretation principles. When the words of a will are not ambiguous, a court must interpret a will on the basis of its express language alone, must not introduce extrinsic evidence, and must not resort to artificial rules of construction. If the trial court does consider the instrument ambiguous, it must make that determination as a matter of law before admitting extrinsic evidence on the question of the testator’s intent. This approach, of course, does not prevent a court from attempting to make identifications and, in that way, exposing latent ambiguities in the will. As stated above, such an exercise is central to the will interpretation process. The purpose behind requiring a court to make a determination as to ambiguity after making identifications, but before ruling on intent, is to prevent a court from using extrinsic evidence to concoct an ambiguity in a will where none otherwise exists.

205 See id.
206 Henderson v. Parker, 728 S.W.2d 768, 770 (Tex. 1987).
207 Odeneal v. Van Horn, 678 S.W.2d 941, 942 (Tex. 1984).
208 Perry v. Hinshaw, 633 S.W.2d 503, 505 (Tex. 1982).
210 See id.
211 See supra notes 67-107 and accompanying text (discussing identifications); Dukeminier & Johanson, supra note 3, at 424-25 (“A latent ambiguity is an ambiguity that does not appear on the face of the will but appears when the terms of the will are applied to the testator’s property or designated beneficiaries.”).
212 See supra p. 76 (“[M]aking connections between the symbols on the page and the property and beneficiaries to which those symbols refer lies at the very heart of carrying out a testator’s duly executed estate plan . . . .”).
The clear import of the foregoing principles is that, when a court determines provisions in a will to be unambiguous, that court is no longer in the position to declare the very same provisions ambiguous. As such, the court must declare the intent of the testator using the terms of the will alone and without the aid of extrinsic evidence. In *Steger*, the trial court did not follow this well-established approach. Instead, it declared that, from the four corners and in light of extrinsic evidence, John Maddox’s will authorized Carrie and Martha Lou to execute oil and gas leases that would continue in force beyond their deaths.\(^{214}\) The trial court was not merely making alternative rulings, as a court might when resolving a dispute using different bodies of applicable law. Rather, the court was announcing inconsistent legal positions regarding the questions of the will’s clarity or ambiguity and, in this way, departed from the well-settled law of will interpretation. In ruling that the will was unambiguous, the trial court was, under settled legal principles, foreclosed from declaring it in the same breath to be ambiguous.

In contrast to the trial court, the Court of Appeals, certain of the will’s clarity, attempted a straightforward plain-meaning analysis, complete with dictionary definitions.\(^{215}\) But as if admitting it had taken too easy of a way out, the court then sought shelter in a purported constructional preference for “utilitarian” outcomes.\(^{216}\) In essence, then, the court leapt from plain meaning all the way to construction, completely sidestepping the use of extrinsic evidence to resolve ambiguity. Its decision is a good example of the one-step interpretive method advocated by the ALI. Although it champions the testator’s intention throughout, the Restatement very nearly invites courts to employ whatever interpretive method offers the most efficacious route to a satisfactory outcome. This method insufficiency cabins judicial impulses to pursue administrative efficiency in all cases. In the *Steger* case in particular, the effect of this muddling of interpretive approaches—using rules of construction to confirm a plain-meaning analysis—calls the very integrity of the decision into question. Indeed, the court itself, in casting about for a rationale, seems somewhat uncertain about how best to dispose of the matter.

One of the primary reasons the Court of Appeals’ decision fails to inspire confidence is that, once it undertakes to attribute utilitarian intention to the language of the will through the use of a purported constructional preference, it should address other rules of construction

\(^{214}\) *See supra* p. 88.

\(^{215}\) *See supra* notes 162-67 and accompanying text.

that have more obvious applicability. For example, a primary rule of will construction is that all parts of a will shall be harmonized if possible,217 and "a latter clause in a will must be deemed to affirm, not to contradict, an earlier clause in the same will."218 Additionally, "[e]very sentence, clause and word must be considered in construing a will and, if possible, effect must be given to all its provisions."219 Consistent with these principles, a predominant clause does not swallow a subsidiary clause where the subsidiary clause "clearly or expressly modifies the former."220 Finally, "a clearly expressed intention of the testator contained in one part of the will should not yield to a doubtful construction in any other portion thereof."221

In his will, John Maddox expressly granted Carrie the right to extract oil and gas from the property "during said period of her life estate" and granted Martha Lou the right to extract oil and gas from the property "during . . . her life time."222 These words alone, as seen above, are insufficient to grant these life tenants the right to extract oil and gas from the property after their deaths.223 In fact, the will states in plain language that the power to extract oil and gas is limited to the period of the life tenants' respective lifetimes. The court's neglect of relevant rules of construction that would have required reversal of the lower court's decision makes it appear particularly geared toward a predetermined outcome. Moreover, the decision has the effect of rendering meaningless John Maddox's grant of a limited power to extract oil and gas from the property. To read the words "for all purposes" and "of whatever nature" as granting Carrie and Martha Lou full power to invade the corpus of the estate and bind the remaindermen—in essence, full power to commit waste against the interests of the remaindermen—requires contradicting entirely the clear expression that permits them to extract oil and gas only during their respective lifetimes. The result is to set them apart from the other language of the provisions and to give them a life of their own.

In fairness to the Steger court, it should be noted that the case did not involve problems with identification of persons or property. We saw above how the law of will interpretation, in particular the law governing the admissibility of extrinsic evidence, was developed largely through the lens of cases where identifications had gone

218 Id.
221 Id.
223 See supra note 197 and accompanying text.
somehow awry. Cases like Steger, though, where it is the quantum of present possessory estates and future interests devised that is in question, are distinct. As stated above, courts tend to view descriptions of the quantum of estates and powers bequeathed to the beneficiaries as examples of technical legal terms with fixed meanings. In leaping from plain meaning to construction, the Steger court was simply following the lead of other courts. In White v. Brown, for example, a testator executed a will devising her house to her sister-in-law Evelyn “to live in and not to be sold.” A dispute ensued about whether Evelyn received a life estate or a fee simple absolute. The trial court held the language plainly devised a life estate and refused to admit extrinsic evidence to interpret its meaning. The Tennessee Supreme Court reversed, holding the language was ambiguous. But instead of admitting extrinsic evidence, as we might expect, of the testator’s relationship with her surviving relatives, the court introduced statutory presumptions in favor of fee simple estates and against intestacy to hold that the devise was of a fee simple absolute followed by a repugnant and, thus, invalid restraint on alienation. Since the testator had not clearly described a life estate, the law presumed she conveyed a fee. Although her will made it look as if the testator wished to restrain the alienation of the fee conveyed to Evelyn, the law forbade it.

White illustrates that in cases involving questions about the quantum of estates, locating and carrying out the testator’s actual intent is not a priority. References to ambiguity in such cases often have nothing to do with clarifying a testator’s actual intent. Rather they deal with standardizing or categorizing conveyances based on the reality that the “law will enforce as property only those interests that conform to a limited number of standard forms.” This “numerus clausus,” or fixed-number principle, has long been characteristic of the Anglo-American system of estates in land and future interests.

224 See supra notes 61-107 and accompanying text.
225 See supra notes 45-46 and accompanying text.
226 559 S.W.2d 938 (Tenn. 1977).
227 Id. at 938.
228 Id. at 939.
229 Id.
230 Id. at 941.
231 Id. at 939.
232 Id. at 939-41.
233 Id. at 940.
234 Id. at 941.
236 See id.
It is thought to be a particularly effective way to promote marketability through "optimal standardization."\textsuperscript{237} In will interpretation matters, it is understandable that such a system of technical rules is frequently intent defeating.\textsuperscript{238} The legal presumptions and rules of law established to prevent tampering with the system virtually prevent any description of an estate in land from being equivocal. The same rules would seem to foreclose a finding that an estate was somehow misdescribed, since, as \textit{White} illustrates, the law channels awkwardly phrased estates in the direction of marketability. And given that testators infrequently refer with any specificity to the categories that make up the system of estates—as they might refer to other legal concepts such as heirs or even real property—personal usage evidence would be of little assistance in these cases. In the absence of the will's posing some problem relating to the identification of persons or property, courts simply do not interpret the will at all. Consequently, any claim of ambiguity in such cases serves less to indicate that a court is pursuing a testator's actual intent than it does to indicate that a court is undertaking to force the conveyance into an inflexible legal framework, which may in fact result in the testator's intent being defeated.\textsuperscript{239}

As for \textit{Stieger}, it is true that the facts are not completely analogous to \textit{White}. Unlike the testator in \textit{White}, John Maddox had a lawyer draft his will, and nothing about its language causes us to question the quantum of estates he wished to devise to his family. Nonetheless, as we saw above, the legal approach to powers is as inflexible in the context of legal life estates as is the system of estates itself.\textsuperscript{240} The court, though, did not mention the rule of law requiring all grants of powers that derogate from the legal parameters of a life estate to be express and clear. Its resort to and selective use of 1994 dictionary definitions to reveal the "plain language" of a will that took effect in 1933 reveals that the language of the will did not meet the legal standard.

At the risk of violating the interpretive approach courts employ in disputes over the quantum of estates, I would like to engage in a bit of speculation about how the court might have reacted had it found John Maddox's will ambiguous and had resorted to extrinsic evidence. One possible rendition of the opinion would have posited that without question, as an entrepreneur in oil production, John was familiar with the workings of the oil industry and knew that oil and gas leases customarily contained not only a primary term but also a secondary term.

\textsuperscript{237} See id. at 8.
\textsuperscript{238} See \textsc{Dukeminier \& Johanson}, supra note 3, at 710.
\textsuperscript{239} See Merrill \& Smith, supra note 235, at 7.
\textsuperscript{240} See supra notes 169–75 and accompanying text.
in the nature of a fee simple determinable.\footnote{See, e.g., \textit{Guess v. Harmonson}, 4 S.W.2d 124, 127 (Tex. Civ. App. 1928); \textit{Guinn Inv., Inc. v. Ridge Oil Co.}, 73 S.W.3d 523 (Tex. App. 2002).} The trial court concluded from this fact that John must have intended for Carrie and Martha to have the power to execute oil and gas leases that would endure beyond the period of their respective lifetimes. A careful study of John's will discloses a definite plan to provide first for his wife during her life and thereafter for his children for their lives. The creation of these successive life estates followed by a remainder in fee for his grandchildren or surviving children is characteristic of a testamentary scheme to preserve the corpus of the estate for future generations. Since mining dissipates the corpus of an estate,\footnote{See \textit{Moore v. Vines}, 474 S.W.2d 437, 439 (Tex. 1972).} it is plausible that John would wish to grant life tenants only limited powers to extract oil and gas from the property. He did this, as explained above, by expressly granting Carrie and Martha Lou the right to extract oil and gas from the property during their lives alone.

Another rendition of the decision might sound like the following: John Maddox was an oil entrepreneur and knew the standard form lease in Texas was beyond the power of life tenants to execute absent the grant of special powers. He knew that the Nocona oil field was vast and that its exploitation was only beginning to take place. It makes sense that in discussing oil leases in the context of life estates in his will, he would contemplate granting powers that the life tenants would not otherwise have, while keeping the land in his family. This suggests that in granting his surviving spouse and daughter the power to open new wells, he was in fact authorizing each to execute leases in the standard form, despite what would otherwise be the limitations of her life interest.

The foregoing speculations are admittedly rather fanciful. As a practical matter, given the type of case it was deciding, the court was not bound to admit extrinsic evidence and engage in fact-specific analysis of actual intent. Moreover, under the Restatement's new one-step interpretive approach, the court could undertake a search for actual intent or attributed intent or neither at its option, given that it had determined the language to be plain on its face. But even alluding to the possibility that John was attempting to preserve his estate for future generations would have strengthened the analysis more than relying on authorities that did not exist at the time John wrote his will and would not have been binding upon his testamentary act even if they had. What is significant is that the story the court did feel compelled to tell was the one relating to certain utilitarian practices of the oil
industry. Although unclear from the reported decision, in the course of the litigation, Muenster Drilling had argued in favor of just such a "utilitarian interpretation" of the will. The claim appeared to be that, given John's knowledge of the oil business, he would have been foolish not to have conformed the terms of his will in favor of more rather than less production. While this may in fact be true of John, the interpretive method employed flies in the face of Holmes's admonition that, in construing a will, the task of a court is to determine not what a testator meant but failed to say but, rather, to determine what he has said. This means that the court should, at the very least, have examined John's will not through the lens of what the oil industry wishes he had said but, after removing the overlay of utilitarianism, with an eye to interpreting what he did say. Insofar as the court was claiming that John's will was meant to be read to conform with and support common practices of the oil industry, it succeeded in treading on the paramount concern of wills law—the freedom of testation.

The foregoing analysis underscores how little confidence the decision in Steger inspires. Sometimes people do write wills that are unreasonable, quirky, idiosyncratic, and even antisocial. Not everyone devising or bequeathing property has in mind its highest and best or most economically efficient use. None of these considerations seem to matter much when courts are analyzing language describing the quantum of estates. If this is so, courts should forthrightly state that it is not their mission to vindicate testatorial intention in such cases so much as it is to fit the language within the limited number of categories within the system of estates in land and future interests, a system many testators have never contemplated and many lawyers misunderstand.

The ALI should reconsider its proposal to adopt wholesale the streamlined, one-step approach to will interpretation that, in quantum of estates cases, is so useful for pursuing the standardization policy.
unique to that context. The ALI should reaffirm the two-step sequential approach to will interpretation in cases involving ambiguous identifications so as to bring that body of cases back into better alignment with the policy of vindicating the testator's intent. Such a reaffirmation would result in more careful estate planning by inspiring estate planners, at the drafting stage, to keep careful records of the circumstances surrounding the execution of the will and to ensure that those records reflect the intention the drafter hopes to convey through plain language. The law of will construction should impress upon estate planners the need for a contingency plan. To develop such a plan responsibly, drafting attorneys must familiarize themselves with the rules of construction and constructional preferences that will be employed if the will they are drafting is deemed ambiguous. It is good practice to assume such rules will control the language of the document unless the rules themselves are plainly rejected. Without an understanding of the different objectives of interpretation and construction and of their application in sequence, an estate planner's methodical drafting techniques and conviction that language is seldom, if ever, plain, could easily give way to the reckless use of familiar verbal formulas and the abandonment of careful contingency planning. Such would be the undesirable product of conflating actual with attributed intent. The blurring of the line between interpretation and construction may be conceptually interesting to academics, but perceiving the bright line between them better guides the activities of estate planners in their struggle to safeguard testatorial intent.

CONCLUSION

The meaning of the words of one's will is determined by a complex process of evaluation made up of, at stage one, interpretation, and, at stage two, construction. It has long been recognized that interpretation is the search for the actual intent conveyed by the language of a legal instrument and that construction, by contrast, is the imposition of presumed intent upon the instrument when interpretation has failed. If the language of the will is not plain and could be clarified by the admission of extrinsic evidence, or where a latent ambiguity in the language would be revealed and possibly resolved, the court will consider extrinsic evidence of the circumstances existing at the time of

246 See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 cmt. c (2003) ("'Interpretation' refers to the process of searching for the donor's actual intention by looking to the text of the document and extrinsic evidence. 'Construction' refers to the process of attributing intention from constructional preferences and rules of construction.").
the execution of the will. Unlike other areas of the law, precedent is of limited usefulness in will interpretation, the theory being that the peculiar factual circumstances surrounding the execution of a will render it unlike any other.

The ALI's new Restatement governing wills and other donative transfers rejects the distinction between will interpretation and construction. Arguing that the current judicial practice is to consider actual and presumed intention simultaneously, the new Restatement rejects the view that interpretation and construction are discrete parts of a sequential process. To replace the old approach, the Restatement proposes a one-step process in which courts will consider extrinsic evidence and rules of construction simultaneously.

The Restatement's new formulation raises several matters of concern. Foremost among these is that evidence of a judicial practice to conflate interpretation and construction is lacking. Case law from a multiplicity of states continues to make a clear distinction between the two and to embrace the sequential process that has been and remains an important component of the American legal tradition of will interpretation. The judicial practice cited in justification of the new formulation is employed primarily in cases involving disputes over the quantum of estates—cases that because of their peculiar context have historically received different treatment from those involving problems with identification that the law of will interpretation was designed to address. To adopt this particularized approach in cases of will interpretation generally would vest courts with excessive discretion and virtually invite them to ignore the tenet that, in every wills case, discerning and executing the testator's intention is the primary and paramount concern.