TAB 5

In the Court of Appeal of Alberta

Citation: Lubberts Estate (Re), 2014 ABCA 216

Date: 20140625
Docket: 1303-0121-AC
Registry: Edmonton

**In the Matter of the Estate of Johanna Frederika Lubberts
also known as Johanna F. Lubberts**

Between:

**Irene Hanson (Executor and beneficiary) and
Paul Lubberts (beneficiary)**

Appellants
(Applicants)

- and -

Marijke Mercredi and Johanna Lubberts

Respondents
(Respondents)

The Court:

**The Honourable Madam Justice Ellen Picard
The Honourable Madam Barbara Lea Veldhuis
The Honourable Mr. Justice Thomas W. Wakeling**

Memorandum of Judgment of the Honourable Mr. Justice Wakeling

**Memorandum of Judgment of the Honourable Madam Justice Picard and
the Honourable Madam Justice Veldhuis
Concurring in the Result**

Appeal from the Order by
The Honourable Madam Justice J.M. Ross
Dated the 2nd day of August, 2012
Filed on the 16th day of April, 2013

(2012 ABQB 506; Docket: ES03 131589)

Memorandum of Judgment
of the Honourable Mr. Justice Wakeling

I. Introduction

[1] This case[1] is about the meaning to be attached to two sentences[2] of the April 8, 2008 holograph will[3] of Johanna Frederika Lubberts[4]:

---

[1] The *Wills and Succession Act*, S.A. 2010, c. W-12.2 came into force on February 1, 2012. It does not apply to this case. The *Wills Act*, R.S.A. 2000, c. W-12 does, on account of s. 8(1) of the *Wills and Succession Act*. Ms. Lubberts died on December 20, 2009. The opinions expressed in parts III and IV. G of this judgment about the principles governing the interpretation of a will apply with equal force to a will subject to the new *Wills and Succession Act*.

Most appeals do not call upon the court to reconsider the merits of the governing standard. In this subset of appeals, the court's task is to apply an agreed upon governing standard to the facts. The disposition of the appeal does not alter the nature of the governing standard. This appeal does not fit squarely within this subclass. It gives the Court the opportunity to explain why the governing standard and related rules are sound. This is not a task which this Court, to my knowledge, has recently undertaken. The fact that the *Wills and Succession Act*, S.A. 2010, c. W-12.2 came into force only recently and adopts many of the norms at play in this appeal, warrants a fresh restatement of the values these norms promote. A knowledge of the underlying values, as Justice Cardozo has observed, "will count for the future". The Nature of the Judicial Process 165 (1921). See also Holmes, "The Path of the Law", 10 Harv. L. Rev. 457-469 (1897) ("a body of law is more rational ... when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated ... in words").

[2] The Court appreciates that it must read the entire will before attaching a meaning to this portion of the will. *Re Tyhurst Estate,* [1932] S.C.R. 713, 716 ("In construing a will the duty of the court is to ascertain the intention of the testator, which intention is to be collected from the whole will taken together"); *Re Blackstock Estate,* 10 D.L.R. (2d) 192, 196 (Sask. C.A. 1957) ("the duty of the court is to ascertain the intention of the testator from the entire will"); *Marchuk v. Marchuk,* 52 W.W.R. 652, 655 (Sask. Q.B. 1965) ("where a judge is asked to consider a particular portion of a will, it is his duty to look at the whole will"); *Re Mitchell Estate,* 2004 NSCA 149, ¶19 ("Regard must be had, not only to the whole of any clause in question, but to the will as a whole, which forms the context of the clause"); *Higgins v. Dawson*, [1902] A.C. 1, 3 (H.L. 1901) ("where you are construing a will ... you must look at the whole instrument ... and you cannot rely on one particular passage in it to the exclusion [of the rest of the will]"; *Re Donovan Estate,* 20 A. 3d 989, 992 (N.H. 2011) ("the clauses in a will are not read in isolation; rather their meaning is to be determined from the language of the will as a whole") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) ("The entirety of the document thus provides the context for each of its parts").

[3] "A testator may make a valid will wholly by the testator's own handwriting and signature, without formality, and without the presence, attestation or signature of a witness". *Wills Act*, R.S.A. 2000, c. W-12, s. 7. Some jurisdictions do not give legal force to holograph wills. E.g., *Wills Act*, 1837, 1 Vict., c. 26, s. 9 (U.K.) ("No will shall be valid unless ... it is in writing and signed by the testator ... and ... the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and ... each witness ... attests and signs the will ... in the presence of the testator"); 12 Conn. Gen. Stat. §45a-251 (2011) ("a will or a codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing to the testator's presence; but any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state") & S.C. Code Ann. §62-2-502 (2013) ("every will shall be ... (1) in writing; (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and (3) signed by at

> My entire estate – cash, my house ... and my quarter section of land ... if it is then still in my possession, I leave to my son Paul Johan Lubberts[5] and to my youngest daughter Irene Lubberts Hanson to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or of one of my grandchildren – as for instance medical expenses. Irene and Paul will make these decisions together and without yielding to any pressure applied by possible recipients.

[2] Justice Ross, the motions judge, held that the testator intended to create a trust[6]. She rejected the argument that the testator intended to give her estate to Paul, the testator's son, and Irene, the testator's daughter, or give them a power of appointment. The parties had agreed that if their mother intended to create a trust, it failed due to uncertainty of its objects.

[3] Paul and Irene appeal this judgment.

II. Questions Presented

[4] What is the objective of a court asked to review a will?

[5] What are the best means of achieving this objective?

[6] Is Justice Ross' conclusion that the testator intended to create a trust correct? Or did the testator intend to make a gift of her estate or give a power of appointment to Paul and Irene?

III. Brief Answers

[7] A testator drafts a will to increase the likelihood that on her death property which she has a right to dispose will be transferred to the persons she chooses at the time and in accord with the terms she selected.

[8] It is the court's role to give effect to the testator's intention. This is an indispensable function the exercise of which perfects the transferal process the testator commenced when she signed her will.

---

least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will").

[4] Sometimes I will refer to Ms. Lubberts as the testator. The *Wills and Succession Act*, s. 1(1)(j) states that a "'testator' means an individual who makes a will. The term "testatrix" is "archaic". Black's Law Dictionary 1613 (9th ed. B. Garner ed. 2009). See generally M. Asprey, Plain Language for Lawyers 169 (4th ed. 2010) (the author opposes the use of gender-specific words such as actress, manageress and waitress).

[5] To increase readability, this judgment, other than portions which reproduce passages from the testator's wills or codicils, refers to Paul Johan Lubberts as "Paul" and Irene Lubberts Hanson as "Irene".

[6] 2012 ABQB 506, ¶40.

[9] To be faithful to the testator's will, a court must identify the meaning the testator wished to convey by her choice of words. This can only be done, in many cases, if the court has access to relevant evidence which records information, in existence at the time the testator signed her will, about the testator's family and the nature of various family relationships, close friends, interests and many other facts which might influence the testator when engaged in the will-making process. A court, aware of important information about the testator, must carefully read the entire will, giving the words she selected or approved their ordinary meaning. This assumption is made because the testator probably intended to attach the ordinary meaning the community of which she is a part gives to these words. If the will and the context within which it is made reveals that the testator had a different intention, a court must adjust its linguistic standards and give the will a meaning consistent with the testator's language values.

[10] Ascertaining the testator's will is a subjective – as opposed to an objective – enterprise. Values foreign to interpreting contracts and laws are paramount in interpreting wills. A will incorporates a series of choices, which are unilateral acts, and plays a role in our society completely different from that performed by legal instruments which are the product of multiple actors – such as contracts or laws. Subject to public policy concerns, there is no good reason to give a testator's last will and testament a meaning not completely faithful to her wishes.

[11] Parties who advance a claim to property the testator disposes under her will and others with a legitimate interest in ensuring that the testator's intentions are honoured may present to the court information about the life of the testator which may assist the court allocate the testator's property in the manner she wished. There is one qualification which must be stated. Because Ms. Lubberts made her will on April 8, 2008, the Court may not review evidence that relates to the intention of the testator with respect to specific dispositions. But this is not the case for wills made after January 31, 2012. Section 26(c) of the *Wills and Succession Act*, S.A. 2010, c. W-12.2 states that a court "may admit ... evidence of the testator's intent with regards to the matters referred to in the will".

[12] Ms. Lubberts did not intend to give her entire estate to Paul and Irene and leave nothing to her other two children. The words in the April 8, 2008 will and other relevant information disclose that the testator intended to create a trust for the benefit of her children and grandchildren. As the parties have agreed that she failed to create a valid trust, it follows that her estate will be distributed in accordance with governing intestacy principles.

[13] Justice Ross came to the correct conclusion.

IV. Applicable Statutory Provisions

[14] Sections 8 and 126 of the *Wills and Succession Act*, S.A. 2010, c. W-12.2 are as follows:

> 8(1) Except as expressly provided otherwise in sections 23 or 25 or in another enactment of Alberta

> (a) this Part applies to wills made on or after the day this section comes into force,
>
> (b) the former Act continues in force, as if unrepealed, in respect of wills made under that Act,
>
> ...
>
> (2) Despite subsection (1), sections 26 and 37 to 40 apply to a will or other writing, a marking or an obliteration regardless of when the will, writing, marking or obliteration was made, if the testator died after the coming into force of this section.
>
> ...
>
> 126 This Act comes into force on Proclamation.

[15] The *Wills and Succession Act* was proclaimed on February 1, 2012.

[16] Section 7 of the *Wills Act,* R.S.A. 2000, c. W-12 is as follows:

> 7. A testator may make a valid will wholly by the testator's own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

V. Statement of Facts

A. Ms. Lubberts Made Her Last Will on April 8, 2008

[17] Ms. Lubberts, the mother of the appellants and respondents, died on December 20, 2009. She was eighty-four years old.

[18] The testator's April 8, 2008 holograph will reads as follows:

> I, Johanna Frederika Lubberts ... revoke all previously made wills and especially so the will made under the advice of Mr. Chris Head, lawyer. ... That Will has outlived its purpose which I had hoped would inspire my grandchildren to save at an early age and develop the habit to add to their savings regularly so that they would be independent financially throughout their lives. To assist them I started giving every grandchild as well as my children financial presents on their birthdays. Some of them, knowing that the money came out of a not-so-large pension income, refused accepting it and started saving on their own; others "demanded" it. I started my own savings account in "Ing". This present will names as my executrix my youngest daughter Irene Lubberts Hanson. A second account in "Ing" was started in joint names: my name and Irene's. Every month I deposit in that account $500.00. Irene can access that money at my death to pay for her personal expenses, as for instance to replenish her salary if it is necessary for her to take time off from her job to look

> after my interests, – medical care and disposal of my body etc. – described in another letter.
>
> My entire estate – cash, my house ... and my quarter section of land at Whitecourt ... if it is then still in my possession, I leave to my son, Paul Johan Lubberts and to my youngest daughter, Irene Lubberts Hanson, to jointly manage it and use it for their own benefit as salary for instance, or for the benefit of one of their siblings or one of my grandchildren – so for instance for medical expenses. Irene and Paul will make all those decisions together and without yielding to any pressures applied by possible recipients.

[19] The will referred to in the first sentence was made on August 13, 2002.[7] It made Irene, the testator's youngest daughter, the executor and trustee. The August 13, 2002 will also contained specific bequests, including a gift of $4000 to each of her grandchildren alive at her death. The residue of the estate went in equal shares to her four children.

[20] Ms. Lubberts made changes to the August 13, 2002 will.

[21] On June 21, 2004, in a holograph codicil, she declared that one of her grandsons "will not benefit in any way from my will" (emphasis in the original).

[22] She also made changes through holograph codicils dated June 24, 2005 and December 2, 2007.

[23] Part of the June 24, 2005 codicil was in this form:

> While I had hoped that my son Paul Johan Lubberts would live in my home after my death and leave it to his son eventually, I see myself forced to change these expectations. Under no conditions will I want to allow Paul's "girlfriend" Laurie Semenovich to live in my house or to allow her to obtain any interest in my house, whether she and Paul are to get married or not. In a letter addressed to my four children, I will explain the reasons for my decision. The above-mentioned "Laurie" has been and still is a disruptive influence in our family relations.

[24] The important part of the December 2, 2007 codicil follows:

---

[7] A party may submit extraneous evidence which it asserts will assist the court in ascertaining the intention of the testator. With one important qualification, the court may rely on relevant evidence which it concludes assists it to identify the testator's intention. A court cannot rely on extrinsic evidence that, in substance, conveys this message: the testator intended to give property A to BW. The parties agreed that the motions judge was entitled to take into account other testamentary instruments besides the April 8, 2008 holograph will. Reference to this evidence is appropriate. *Paton v. Ormerod*, 66 Law T.R. 381, 382 (Prob. 1892) ("Parol evidence is admissible to show what documents exist to which the recital may refer") & *Tassone v. Pearson,* 2012 BCSC 1262, ¶89 (the court admitted helpful evidence setting out the relationship between the testators and family members). I discuss the admissibility of extrinsic evidence below.

> Changes to be made -- no cash amount will go to my grandchildren ($4000.00 per grandchild was left to each of my grandchildren, since I have on the birthdays of my grandchildren given each of them amounts of money) and no cash money to be left to any other persons mentioned in the will, since these gifts have been carried out already in the last number of years.
>
> My house ... will become the property of my son, Paul J. Lubberts and my daughter Irene Lubberts-Hanson, my son to live in the house and take care of it – he cannot rent or sell the house to non-family members. He may – with Irene's consent sub-let part of the house (e.g. the basement suite) but only to members of the immediate family. My ¼ section at Whitecourt will have to be sold – with competent legal advice from a trustworthy advocate and from a real estate person whom I plan to name when I will rewrite my whole will.

[25] The December 2, 2007 codicil was the last revision to her August 13, 2002 will before she prepared the April 8, 2008 holograph will.

B. Justice Ross Concluded That the Testator Intended To Create a Trust

[26] Justice Ross issued a well-written and carefully-reasoned decision. 2012 ABQB 506.

[27] She concluded that Ms. Lubberts' holograph will did not reveal an intention to make a gift of her estate to Paul and Irene, the appellants: "The overall import of the Holograph Will is, in my view, not consistent with a transfer of ownership of the estate to Paul and Irene" 2012 ABQB 506, ¶22. See also 2012 ABQB 506, ¶28.

[28] Having eliminated the gift concept, the motions judge then asked whether the testator intended to make Paul and Irene trustees under a trust or appointors under a power of appointment. Justice Ross concluded that the testator intended to make the testator's two children trustees:

> [40] In my view, the language employed by the [testator] ... indicates that she intended to impose an obligation on Paul and Irene. [They] ... are required to make all decisions in relation to the estate together: "Irene and Paul will make all those decisions together and without yielding to pressure applied by possible recipients". They are directed to jointly "manage" the estate and "use it" to benefit themselves, their siblings or the grandchildren, with examples of such benefits provided. They are not merely empowered to dispose of the estate to any or all of those persons. There is no provision in the Holograph Will regarding disposition of the estate should Paul and Irene not exercise their joint power of appointment. While this is not determinative (property not disposed of reverts to the estate ...), it is a further indication that the [testator] ... considered that Paul and Irene would be obliged to act as she directed.

VI. Analysis

A. The Standard of Review Is Correctness

[29] An appeal court reviews legal determinations made by the court appealed from on a correctness standard. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 247. The "primary role of appellate courts is to delineate and refine legal rules" so that similar fact patterns within the jurisdiction have similar legal consequences. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 247-48.

[30] More than forty years ago the Supreme Court of Canada, in *Alberta Giftwares Ltd. v The Queen*, [1973] S.C.R. 584, 588, held that "in construing a will, deed, contract, prospectus or any other commercial document, the legal effect to be given to the language employed is a question of law". This is still the case. No subsequent decision of the Supreme Court of Canada has abandoned this position. See *Housen v Nikolaisen*, [2002] 2 S.C.R. 235, 261.

[31] There is no reason for an appeal court to ignore a fact-finder's work unless it is clearly wrong. *Housen v Nikolaisen*, [2002] 2 S.C.R. 235, 253. Trial judges have considerable institutional advantages which, in most cases, must be recognized.

B. A Person May Transfer a Property Interest to Another by Gift

[32] A person may make a gift of real or personal property in which she has a legal or equitable interest by *inter vivos* gift or testamentary disposition. J. MacKenzie, Feeney's Canadian Law of Wills § 1.1 (4th ed. looseleaf issue 49 April 2014) & A. Oosterhoff, Oosterhoff on Wills and Succession 113 (7th ed. 2011). An *inter vivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift. See *Standard Trust Co. v Hill*, [1922] 2 W.W.R. 1003, 1004 (Alta. Sup. Ct. App. Div.) ("A gift of a chattel *per verba de presenti* united with possession in the donee makes a perfect gift, whether the possession proceeds, accompanies or follows the words"); *Cochrane v Moore*, 25 Q.B.D. 57 (C.A. 1890) (there is no gift of a chattel capable of manual transfer without delivery from the donor to the donee); J. MacKenzie, Feeney's Canadian Law of Wills §1.4 ("there must be evidence of a donative intent of the donor to be unconditionally bound by the transfer coupled with the delivery of either the subject matter of the gift or some appropriate indicator of title") & W. Raushenbush, Brown on Personal Property 77-78 (3d. ed. 1975) (the donor must intend to give the property; the donor must transfer the property to the donee; and the donee must accept the property).

[33] A gift by testamentary disposition exists if the testator clearly intended to transfer unconditionally legal title to the property on her death to a specific donee. *Re Walker*, 56 O.L.R. 517, 524 (C.A. 1925) (an unequivocal gift by the testator to his wife deprived the testator of the right to make any other disposition of the same property) & *Re Freedman*, 41 D.L.R. (3d) 122, 127 (Man. Q.B. 1973) (the testator gave "an absolute gift [to the donee] ... with all the rights incident to ownership"). A testator may revoke a testamentary gift. See J. MacKenzie, Feeney's Canadian Law of Wills § 1.7 (4th ed. looseleaf issue 49 April 2014). Or the estate may not be able to honour

the testator's intention if the testator's debtors' interests cannot be met without disposing of the property in another manner.

C. A Power of Appointment Gives a Donee or an Appointor the Authority To Determine Who Will Receive the Property the Subject of the Power of Appointment

[34] A testator may give to a person named in her will a power[8] of appointment. The holder of this power is called either the donee, to distinguish the holder of the power from the owner of the property who gave the power, or the appointor, to distinguish the holder of the power from the person who benefits from the exercise of the power, the appointee. A power of appointment gives the donee the authority to determine who will receive the testator's property. E. Gillese, The Law of Trusts 24 (3d ed. 2014). The donee is not the legal owner of the property. But the donee does have a power which if exercised affects the donor's property. E. Gillese, The Law of Trusts 24 (3d ed. 2014).

[35] A donee is under no legal obligation to exercise a power of appointment. E. Gillese, The Law of Trusts 28 (3d ed. 2014) ("Donees of a power of appointment need not exercise the power"); Waters, Water's Law of Trusts in Canada 98 (4th ed. 2012) ("a power merely *enables* the ... [donee] to act in the enumerated fashion, it does not require him so to act") & Gray, "Powers in Trusts and Gifts Implied in Default of Appointment", 25 Harv. L. Rev. 1, 3 (1911) ("Equity never compels a donee to exercise a power of appointment"). If the donee declines to exercise the power, the property will pass to those entitled to it in the event of default or will revert to the testator's estate. E. Gillese, The Law of Trusts 25 (3d ed. 2014).

[36] In *Higginson v Kerr*, 30 O.R. 62, 67 & 68 (H.C.J. 1898) Justice Ferguson characterized the following provision in a wealthy bachelor's will as a power of general appointment:

> 1. I ... appoint ... my friends ... executors and trustees of ... my last will and testament ... .
>
> ...
>
> 10. I also give my ... executors power and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good and deserving.

---

[8] A "power is the authority that the owner of property can invest in another which gives the non-owner the legal right to use the property – in short, a power is the authority to deal lawfully with the property of another". E. Gillese, The Law of Trusts 22 (3d ed. 2014). See also D. Waters, Waters' Law of Trusts in Canada 97 (4th ed. 2012) ("A power is the authority to handle or dispose of property which one does not own beneficially") & Gray, "Powers in Trust and Gifts Implied in Default of Appointment", 25 Harv. L. Rev. 1, 1 (1911) ("A power is an authority to deal with property apart from ownership. It is generally an authority to deal with property owned by some person other than the donee of the power").

[37] The High Court explained why below:

> No estate or property is directly given to the executors ... by the tenth [paragraph] ... of the will. What they are given is a power, and a power only. There is nothing in ... tenth ... [paragraph] to indicate a trust. A full power is given, and all else seems to be left at large, undefined, and in the entire discretion of the executors. Powers are either general or limited. General powers are such as the donee of the power can exercise in favour of such person or persons as he pleases. Limited powers are such as the donee of the power can exercise only in favour of certain specified persons or classes. ... I am clearly of the opinion that the power given by... [the] tenth ... [paragraph] to the executors is a general power. There is then ... a general power and no trust in respect of the residue of the estate ... .
>
> The executors are ... given an absolute power of appointment in respect of the residue of the estate. ... Being in possession of this absolute, general, and unqualified power of appointment, the executors may appoint in favour of themselves ... or any other person or persons ... .

[38] The fact that the testator referred to his executors as "trustees" in the first paragraph of the will did not cause the High Court to conclude that the testator intended to create a trust. 30 O.R. 62, 68 (H.C.J. 1898). See *Gibbs v. Rumsey,* 35 Eng. Rep. 331, 332 (Ch. 1813) ("The first words of the residuary clause amount clearly to an absolute gift to them; as the mere circumstance of giving them the description of trustees and executors cannot make them trustees as to that part of her property expressly bequeathed to them") & *In re Hawley,* 10 N.E. 352, 356 (N.Y. 1887) ("Merely calling an executor or guardian a trustee does not make him such").

D. The Benchmarks of a Valid Power of Appointment

[39] A power of appointment relating to land and interests in land must comply with the *Land Titles Act,* R.S.A. 2000, c. L-4, s. 115. A power of attorney must be in writing and meet certain criteria.

[40] All powers of appointment relating to personal property must identify the property which the donor has made the subject of a power of appointment with sufficient precision. A court must be able to conclude on a balance of probabilities whether it is or is not power property. Suppose that A declares that she gives to B to donate to any publicly-funded Canadian art gallery her Dorothy Knowles paintings which were painted while Robert Hurley, another well-known Saskatchewan landscape painter, was alive. Suppose also that Knowles signs and dates her paintings. The date of Hurley's death is beyond doubt. These facts would allow an adjudicator to identify with sufficient certainty the paintings subject to the power.

[41] But suppose that A declares that she gives to B to donate to the Art Gallery of Alberta her Dorothy Knowles' paintings which the famous painter William Perehudoff, Knowles' husband, thought were the ten best Knowles' paintings A owned. And suppose that there is no evidence that

Perehudoff ever expressed such an opinion. This standard would be far too imprecise to identify the power property.

[42] There is one other criterion. The objects of two types of powers must pass a certainty test.

[43] To understand this criterion, one must know that there are three types of powers of appointment. There are general, special and hybrid powers of appointment. E. Gillese, The Law of Trusts 24 (3d ed. 2014).

[44] A general power of appointment authorizes the donee to give the donor's property to any person with no restrictions on the power whatsoever. E. Gillese, The Law of Trusts 25 (3d ed. 2014). A gives B a general power of appointment in this example: B may give my Dorothy Knowles' landscape paintings to anyone she wants to. *Re Nichols,* 34 D.L.R. (4th) 321, 330 (Ont. C.A. 1987) ("I direct my executor to follow the dictates and directions given to him from time to time by Carson Cowan, as to the distribution of the rest and residue of my Estate"); *Re Hays,* [1938] 3 D.L.R. 757 (Ont. Sup. Ct.) aff'd [1938] 4 D.L.R. 775 (Ont. C.A.) ("with absolute power and authority to ... [my executors] to distribute and divide the same amongst such persons, objects or benevolences as to them may seem best, this power to my executors to be unrestricted"); *Meagher v. Meagher,* 22 D.L.R. 733 (Ont. Sup. Ct. App. Div. 1915) ("To hold all my property ... and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they ... in the meantime have all rents and profits therefrom") & *Tassone v. Pearson,* 2012 BCSC 1262, ¶75 ("the provisions of Mrs. Pearson's will create a general power of appointment in her favour and that accordingly, on the face of the will, she is entitled to exercise her discretion as she wishes").

[45] Special and hybrid powers of appointment exist if the donor identifies potential appointees by describing their traits.

[46] A special appointment restricts the class by listing those who are potential appointees. *McEwen v. Day,* [1955] N.Z.L.R. 575, 578 (Sup. Ct.) ("a special power ... is a power to appoint property amongst a limited class of persons") & E. Gillese, The Law of Trusts 25 (3d ed. 2014). For example, A declares that B may give A's Dorothy Knowles' landscape paintings to either the Art Gallery of Alberta in Edmonton or the Norman MacKenzie Art Gallery in Regina guided only by her assessment of the use each institution would make of the collection.

[47] A hybrid power of appointment describes an appointment which reduces the class of potential appointees by expressly designating noneligible appointees. See E. Gillese, The Law of Trusts 26 (3d ed. 2014). A hybrid appointment restricts the class by listing those who may not be potential appointees. See *McEwen v. Day,* [1955] N.Z.L.R. 575, 581 (Sup. Ct.) ("Certainty can be secured either by an inclusive definition or by an exclusive definition, though it is difficult to treat the exclusion of only one person, or comparatively few persons, as affecting sufficient certainty"). For example, A states that B may give A's Dorothy Knowles' landscape paintings to anyone except the Art Gallery of Ontario and the National Gallery of Canada.

[48] To ensure that the lawfulness of the appointor's conduct can be ascertained, equity insists that a workable standard be in place to measure lawful appointor conduct in instances of specific and hybrid powers of appointment. This is the second mark of a valid power of appointment. Justice Gillese describes it in the following passage:

> In creating ... [special and hybrid powers of appointment], the description of the class must be crafted in such a way that it passes the certainty of objects test. Certainty of objects means that the description of the class of possible appointees must be sufficiently clear for the donee to be able to properly exercise the power, if the donee so chooses. In the case of [hybrid] ... powers, it is the class of excepted persons who must be sufficiently clearly described.
>
> ...
>
> The question of certainty of objects is to be determined as of the effective date of the document that declares the donor's intention.

The Law of Trusts 33-34 (3d ed. 2014). See also *Re Gulbenkian's Settlement Trusts,* [1970] A.C. 508, 521 (H.L. 1968) (there must be no doubt about whether a person is an eligible appointee).

E. The Benchmarks of a Valid Trust

[49] An express trust[9] exists if A, the settlor, declares an intention to transfer ascertainable property to B, the trustee, for the benefit of C, an identifiable person or object, the beneficiary, and A conveys the trust property to B.

[50] An express trust will unequivocally demonstrate an intention to create a trust, and clearly identify the trust property so that it can be ascertained and the objects of the trust so that the permitted use may be determined. E. Gillese, The Law of Trusts 41-47 (3d ed. 2014) & *Morice v. Bishop of Durham,* 32 Eng. Rep. 947, 952 (Ch. 1805) ("If neither the objects nor the subjects are certain, then the recommendation or request does not create a trust").

---

[9] There are many definitions of a trust. E. Keeton & L. Sheridan, The Law of Trusts 3 (12th ed. 1993) ("A trust is a relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust"); G. Bogert, Trusts 1 (6th ed. 1987) ("A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another") & Underhill, Trusts and Trustees 1 (4th ed. 1888) ("a trust is an equitable obligation, either expressly undertaken or constructively imposed by the Court, under which the ... trustee ... is bound to deal with certain property over which he has control (and which is called the trust property) for the benefit of certain persons (who are called the beneficiaries ...) of whom he may or may not himself be one").

F. There Are Significant Differences Between a Trust and a Power of Appointment

[51] Justice Gillese, in The Law of Trusts 23-24 (3d ed. 2014), explains the differences between a trust and a power:

> A trustee must perform the terms of a trust, whereas a donee of a power need not exercise the power at all. Trustees of a discretionary trust decide who is to take and how much, whereas a donee must also decide whether anyone is to take. If a trustee fails to perform the terms of the trust, the court will replace the trustee or complete the trust itself. Completion can take the form of equal distribution of the trust property among the beneficiaries, or in such proportions as is appropriate in the circumstances.
>
> In short, failure to perform renders a trustee liable for breach of trust. Failure to exercise a power is not, and cannot be, a breach, because the essence of the power is that its holder has a discretion whether to exercise the power. This fundamental distinction has important consequences not only for the trustee/donee but also for the beneficiaries/appointees. Potential appointees under a power of appointment have no proprietary power in the subject matter of the power unless and until the donee exercises it in their favour. The beneficiaries of a trust, on the other hand, have a proprietary interest in the trust property.

See also D. Waters, Waters' Law of Trusts in Canada 88 (4th ed. 2012) & Peithmann, "A Look at the Principles and Uses of Powers of Appointment", 132:8 Tr. & Est. 38, 39 (1993) (a person who may benefit from the exercise of a power of appointment has no legal interest in the property until the appointor exercises the power of appointment in his favour); *Tassone v. Pearson,* 2012 BCSC 1262, ¶29 ("It is the true discretionary nature of a power of appointment that distinguishes it from a trust") & *McEwen v. Day*, [1955] N.Z.L.R. 575, 583 (Sup. Ct.) ("There is no duty to exercise a discretionary power; it is not a trust).

G. The Court Must Review the Will and Other Relevant Evidence To Determine Whether the Testator Intended To Create a Trust or a Power of Appointment or Gift Her Estate to Two of Her Children

[52] To determine whether the testator intended to create a trust or a power of appointment or gift her estate the Court must identify the meaning the testator attached to the words of her will, taking into account[10] any other relevant evidence which may assist the Court to ascertain the testator's intention. A court must assume that the testator intended to give the words which appear

---

[10] *Marley v. Rawlings,* [2014] UKSC 2, ¶¶19 & 20 (a court must study the words "in their documentary, factual and commercial context") & *San Antonio Area Foundation v. Lang,* 35 S.W. 3d 636, 639 (Tex. 2000) ("Determining a testatrix's intent ... requires a careful examination of the words used").

in her will their ordinary meaning unless the will and the context rebuts this assumption.[11] This assumption is made because our experience reveals that most people in a community will express themselves in language to which others in the community attach the same sense as the speaker. A court should not be reluctant to bring its common sense to bear.[12] This is especially so if the person who drafted the will is not a lawyer.[13]

[53] A court must never forget that a testator drafts a will for a specific purpose.[14] She does it so that on her death property which she has the right to dispose will be transferred to the persons she chooses on the terms she desires. When she completes her will she can take no other steps to increase the likelihood her intentions will be implemented on her death.

[54] Giving effect to a testator's wishes is the task of the executor and, in some cases, the court. A court plays an indispensable and complementary role in ensuring that a testator's wishes are respected. It is this activity, when taken in conjunction with the act of will drafting, which results in the transfer of the testator's property to her heirs. 9 J. Wigmore, Evidence in Trials at Common Law §2458 (J. Chadbourn rev. 1981) ("wills, if they are not to remain empty manifestoes, must be enforced"). Her will drafting begins a process which, once completed, produces a binding order that supersedes[15] the decisions made by the legislators enacting intestacy succession[16] rules affecting her property. Stark, "Extrinsic Evidence and the Meaning of Wills in Texas", 31 Sw. L.J. 793, 794 (1977) ("the implicit justification for permitting property to pass by will is that a policy exists in favor of permitting the testator ... to determine to whom and how his property will pass on his death") & Betts, "Misdescriptions in Wills", 9 Can. B. Rev. 579, 585 n. 12 (1929) ("In the Courts both in England and the United States, it is recognized as a natural and reasonable assumption, that when a testator makes a will he does not intend to die intestate").

---

[11] *Re Tyhurst Estate,* [1932] S.C.R. 713, 716 ("Every word is to be given its natural and ordinary meaning ... unless from a construction of the whole will it is evident that the testator intended otherwise") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 70 (2012) ("one should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise").

[12] *Marley v. Rawlings,* [2014] UKSC 2, ¶¶19 & 20 & *Sealy (Western) Ltd. v. Upholsterers' International Union of North America, Local 34*, 20 L.A.C. 3d 45, 48 (Wakeling 1985) ("The parties expect us to read fairly that to which they have agreed").

[13] *Davis v. Anthony*, 384 S.W. 2d 60, 62 (Tenn. Ct. App. 1964) ("where the will ... was drafted by the testator himself who was not versed in the law and without legal assistance the court in arriving at the intention of the testator should construe the language of the will with liberality to effect what appears to be the testamentary purpose").

[14] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012) ("words are given meaning by their context, and context includes the purpose of the text").

[15] Ecclesiastical courts promoted testamentary disposition of personal property since the Norman conquest in 1066 and perhaps earlier. A person could not devise real property by will until the passage in 1540 of the *An Act how lands may be willed by Testament,* 32 Hen. 8, c.1. A. Oosterhoff, Oosterhoff on Wills and Succession 3 & 7 (7th ed. 2011).

[16] *Wills and Succession Act*, S.A. 2010, c. W-12.2, Part 3.

[55] Canadian[17], English[18] and American[19] courts accept that it is their role to ascertain a testator's wishes and to give effect to them.[20]

[56] Ascertaining the testator's intention is a subjective undertaking.[21]

---

[17] *National Trust Co. v. Fleury,* [1965] S.C.R. 817, 829 ("the primary purpose is to determine the intention of the testator"); *Re Tyhurst,* [1932] S.C.R. 713, 716 ("in construing a will the duty of the court is to ascertain the intention of the testator"); *Estate of Martini v. Christensen,* 172 D.L.R. 4th 367, 371-72 (Alta. C.A. 1999) ("in interpreting a will a court should ... give effect to the testator's intentions as ascertained from the expressed language of the [will] ... and the surrounding circumstances"); *Haidl v. Sacher*, 106 D.L.R. 3d. 360, 368 (Sask. C.A. 1979) ("ascertaining the testator's true intention is the real and only purpose of the whole exercise"); *Rondel v. Robinson Estate,* 337 D.L.R. 4th 193, 201 (Ont. C.A. 2011) ("the task ... [of] a court of construction ... [is] to give effect to the testator's intentions"); *Re Bucovetsky,* [1943] 1 D.L.R. 208, 210 (Ont. H.C. 1942) ("The intention of the testator must always be the guide to the interpreter of wills") & J. MacKenzie, Feeney's Canadian Law of Wills § 10.1 (4th ed. looseleaf issue 49 April 2014) ("the objective ... should be to determine the disposition of the property intended by the testator")

[18] *Re Jebb*, [1966] Ch. 666, 672 (C.A. 1965) ("In construing this will, we have to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at the time. Then we have to ask ourselves this question: 'What did he intend?' We ought not to answer this question by reference to any technical rules of law. Those technical rules have only too often led the courts astray in the construction of wills"); *Marley v. Rawlings,* [2014] UKSC 2, ¶20 ("whether the document ... is a commercial contract or a will, the aim is to identify the intention of the party or parties ... by interpreting the words used in their documentary, factual and commercial context"); *Perrin v. Morgan*, [1943] A.C. 399, 414 (H.L.) ("The sole object is ... to ascertain from the will the testator's intentions") & Kerridge & Rivers, "The Construction of Wills", 116 Law Q. Rev. 287, 292 (2000) ("The only question when interpreting a will, is what the testator intended by the words he used").

[19] *Smith v. Bell,* 31 U.S. 68, 84 (1832) ("the intention of the testator [is] the polar star ... in the construction of wills"); *Re Donovan Estate,* 20 A. 3d 989, 992 (N.H. 2011) ("the testator's intent is our principal guide"); *Stewart v. Selder,* 473 S.W. 2d 3, 7 (Tex. 1971) ("The sense in which the words were used by the testator is the ultimate criterion"); *Chew v. Sheldon,* 108 N.E. 552, 553 (N.Y. 1915) ("his will should receive the most favorable construction to accomplish the purpose intended") & Stark, "Extrinsic Evidence and the Meaning of Wills in Texas", 31 Sw. L.J. 793, 794 (1977) ("the cardinal rule of law ... remains ... to effectuate the testator's expressed intent").

[20] A survey of related foreign law often promotes a better understanding of the law of one's own jurisdiction. *See Marley v. Rawlings,* [2013] Ch. 271 (C.A. 2012) (the Court reviewed the law in Canada, Australia, New Zealand, New York and South Africa before concluding that "[w]hilst I have found a review of those international authorities illuminating, nothing in them causes me to change my provisional view") rev'd [2014] UKSC 2, ¶85 ("As frequently happens, the law north [Scotland] and south of the border [England and Wales] have something to learn from the other").

[21] Dean Wigmore explained why the meaning of a unilateral act – which is what a will is – must be ascertained by use of a subjective standard: "When a person takes part in a bilateral act – i.e. a transaction in which other persons share – he must accept a common standard; he cannot claim to enforce his individual standard of meaning ... . The other party or parties are entitled to charge the speaker with the standard accepted in common. ... The principle is applicable, not only to deeds and contracts, but also to all bilateral transactions, including notices and demands – though not of notices or other writings having a purely individual significance, to which rather the principle for wills ... would apply. ... But a unilateral act may be interpreted by the individual standard of the actor ... ; that is, after resorting to the ordinary sense of words, and the local sense of words. ... The will is the typical and almost the only instance of a unilateral act. The sense of the testator is therefore the ultimate criterion of interpretation." 9 J. Wigmore, Evidence in Trials at Common Law §§2466 & 2467 (J. Chadbourn rev. 1981). An objective analysis, on the other hand, is adopted when

[57] The consensus which has developed regarding the proper role of the court breaks down when the court must decide whether circumstances which justify consideration of decisional aids other than the will exist. Canvassing these sources may provide the court with valuable information about the testator's family[22] and the nature of various family relationships[23], close friends[24], occupation, interests, property, lifestyle, philanthropic tendencies[25] and a host of other facts which might influence the decisions a person contemplating a will[26] needs to make.[27] The

---

attributing meaning to contractual terms which are the product of conscious choices made by more than one person. S. Waddams, The Law of Contracts 105 (6th ed. 2010) ("The principal function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee") & K. Lewison, The Interpretation of Contracts 19 (2004) ("the court is concerned to ascertain, not what is the intention of the actual parties to a contract, but what would have been the intention of the hypothetical reasonable parties, placed in the same position as the actual parties, and contracting in the words used by the actual parties"). Multiparty documents cannot have multiple meanings which are a function of the subjective understanding of each party. This is an unworkable legal condition. There must be an enforceable meaning attached to the oral or written language which the parties acknowledge captures their consensus. It must be the product of an objective inquiry. *Hobbs v. Esquimalt and Nanaimo Railway*, 29 S.C.R. 450, 468-69 (1889) ("it appears incredible that a ... land company ... would reasonably suppose that in dealings with third persons for the sale of land, the word 'land' means land with reservation of minerals"); *Gutheil v. Rural Municipality of Caledonia No. 99,* 48 D.L.R. (2d) 628, 636 (Sask. Q.B. 1964) (the court ordered the municipality to convey title to surface rights and minerals because the municipality sales offer objectively assessed covered both); *Hallmark Pool Corp. v. Storey,* 144 D.L.R. 3d 56, 65 (N.B.C.A. 1983) ("we are not concerned [in contract interpretation] with the real intention or mental state of Hallmark") & *Rickman v. Carstairs,* 110 Eng. Rep. 931, 935 (K.B. 1833) ("in ... cases of construction of written instruments [the question] is not what was the intention of the parties, but what is the meaning of the words used"). See also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 30 (2012) ("Objective meaning is what we are after"). I am convinced that a will is a fundamentally different legal document than a multiparty legal document. This determination accounts for the commitment to a subjective analysis of the testator's intention. But it does not mean that most principles of interpretation do not apply to wills. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 51 (2012).

[22] *Stewart v. Selder*, 473 S.W. 2d 3, 7-11 (Tex. 1971) (the Supreme Court extracted from extrinsic evidence the testator's family structure and the quality of these relationships).

[23] *Moore v. Wardlow,* 522 S.W. 2d 522, 558-59 (Tex. Civ. App. 1975) (the court properly relied on extrinsic evidence which documented that the testator's "love for her grandsons continued without interruption until her death").

[24] *Siegley v. Simpson,* 131 P. 479, 481 (Wash. 1913) (the Supreme Court relied on extrinsic evidence to determine that one claimant was a business associate and friend and the other claimant a person unknown to the testator).

[25] *Eisert-Graydon Estate,* 2003 ABQB 40 (extrinsic evidence that the testator was a conservationist led to the conclusion that she intended to establish a wildlife sanctuary).

[26] The correct time is the date the testator made her will. *Boyes v. Cook*, 14 Ch. D. 53, 56 (1880 C.A.) ("You may place yourself ... in his arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention").

[27] *Doe v. Dring,* 105 Eng. Rep. 447, 450 (K.B. 1814) ("If the Court were at liberty to look to extrinsic circumstances ... to the situation in which the testator stood with regard to his family, in order to see what disposition of his property he probably intended to make, they would undoubtedly be inclined to say that he must have intended to pass his real estate").

factual backdrop against which the will was created may be very telling.[28] It may explain the meaning the testator attached to words in her ordinary speech. It may provide helpful guidance in understanding who the important people in the testator's life were and why. Reference to this background information may reveal the persons the testator most likely regarded as persons whom she would like to assist. A testator's intention is more likely to be accurately established if the court has a solid grasp of the essential features of the testator's life at the time she made her will.

[58] One school of thought approves resort to extraneous material only if a plain reading of the will supports more than one plausible answer to the question presented to the court for adjudication.[29] Adherents to this viewpoint may believe that the law gave words fixed meanings[30] and that language may have a sufficient level of certainty independent of the context which produced the text.[31] *Tottrup v. Patterson,* [1970] S.C.R. 318, 322 (1964) ("if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon the meaning"); *Re Tyhurst Estate*, [1932] S.C.R. 713, 719 ("where [the testator's language] ... is ambiguous, we are entitled to consider not only the provisions of the will, but also the circumstances surrounding and known to the testator at the time when made the will"); *Marchuk v. Marchuk,* 52 W.W.R. 652, 657 (Sask. Q.B. 1965) (applied *Tyhurst)*; *Higgins v. Dawson*, [1902] A.C. 1, 8 (H.L. 1901) ("the will is ...

---

[28] *Allgood v. Blake,* [1873] 8 Exch. 160, 162 ("the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will") & *Blake v. Hawkins*, 98 U.S. 315, 324 (1878) ("The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended").

[29] There is general agreement that in some cases extraneous evidence is needed to identify more precisely an object or person referred to in a will. *Furlong Estate v. Memorial University of Newfoundland,* 169 Nfld. & P.E.I.R. 99, 103 (Nfld. Sup. Ct. Tr. Div. 1998) (the court reviewed a radio address given by the testator to gain some insight into his understanding of the time frame described by the words "relating to the discovery and early colonization of Newfoundland" which identified his books, maps and charts he wished the university to have on his death); *Kell v. Charmer,* 53 Eng. Rep. 76 (Ch. 1856) (the court admitted extrinsic evidence to ascertain the true meaning of jeweller trade symbols the testator used in his will) & *Goblet v. Beechy,* 57 Eng. Rep. 910 (Ch. 1829) (the court relied on the extrinsic evidence of eminent sculptors to ascertain the meaning of a trade word appearing in a sculptor's will).

[30] *Re Powell*, 5 D.L.R. (2d) 67 (Ont. H.C. 1956) (the court declined to consider extrinsic evidence disclosing the expanded meaning the testator gave to the word "cousin" because the word had a clear meaning at law); *Re Gale,* [1941] Ch. 209 (the court held that the mother of the testator's children was not entitled to the gifts made to her in the will of the man with whom she cohabited but to whom she was not married because the gift only came into effect "during her widowhood" which never occurred) & *Doe v. Dring,* 105 Eng. Rep. 447, 450 (K.B. 1814) (even though the court acknowledged that the testator intended the words "all and singular my effects" to bequeath his real property to the mother of his children, it declined to give legal effect to this wish because "effects" at law means personal effects).

[31] Courts which applied this theory sometimes acknowledged that its application thwarted the execution of the will of the testator: "In the present case, if I were asked my private opinion as to what this testator really meant when he made use of the word [effects], I must suppose that he meant, that which his duty prescribed to him, to convey all his property for the maintenance of his family; *but* sitting in a Court of Law I am not at liberty to collect his meaning from matter dehors, but only from the expressions used on the face of the will". *Doe v. Dring,* 105 Eng. Rep. 447, 450 (K.B. 1814).

unambiguous and ... no proof in reference to the amount of the testator's estate at the date of the will can affect its construction"); *San Antonio Area Foundation v. Lang,* 35 S.W. 3d 636, 640 (Tex. 2000) ("When a testatrix's intent is apparent on the face of the will ... extrinsic evidence is not admissible to show a contrary meaning") & *Heinatz v. Allen*, 217 S.W. 2d 994, 995 (Tex. 1949) ("in view of the simple and plain terms of the will, the intention of the testatrix as to what is devised is to be ascertained without aid from evidence as to the attending circumstances"). This is not a viewpoint I share.

[59] A second school of thought is willing to explore extraneous material without demanding that an initial assessment of the clarity of the words of the will be undertaken.[32] It encourages a court to review profferred extrinsic evidence and reserve its ruling on its admissibility until it rules on the merits of the case.[33]

[60] Supporters of this school believe that the meaning of words a testator has used may not be accurately divined without a grasp of the context in which they were expressed and an

---

[32] *Re Krezanosky Estate,* 136 A.R. 317, 319 (Q.B. 1992) ("evidence of surrounding circumstances is admissible to assist in the interpretation of a will, although the words used may not produce an ambiguous result"); *Re Connolly,* [1935] 2 D.L.R. 465, 472 (N.S. Sup. Ct.) (the motions judge properly admitted extrinsic evidence which demonstrated that the testator's reference to "children" meant stepchildren per Hall J.); *Long's Estate v. Long,* 61 A.P.R. 234, 241 (Nfld. Sup. Ct. Tr. Div. 1979) ("Where it is contended that a latent ambiguity exists, the court must admit the evidence for the purpose of making a ruling upon and where it appears that the evidence may be material, the practice of equity is to admit it in the first instance and deal with its materiality upon the conclusion of the case"); *Re Theimer Estate,* 2012 BCSC 629, ¶50 ("the modern judicial approach ... is to admit all the evidence regarding the surrounding circumstances at the start of the hearing and then construe the will in light of those surrounding circumstances"); *Bergey v. Cassel,* 103 Man. R. 2d 202, 204 (Q.B. 1995) (the court rejected the argument that a court may resort to extrinsic evidence only if there is an ambiguity); *Paton v. Ormerod,* 66 Law T.R. 381, 382 (Prob. Div. 1892) ("Parol evidence of existing facts and circumstances outside the will is admissible, and in truth is in every case necessarily, though informally, admitted in order to apply the terms of the will to that to which they are intended to refer"); *Doe v. Martin,* 110 Eng. Rep. 645 (K.B. 1833) ("It may be laid down as a general rule that all facts relating to the subject matter and object of the devise ... are admissible to aid in interpreting what is meant by the words"); *Doe v. Holtom,* 111 Eng. Rep. 716, 718 (K.B. 1835) ("Some extrinsic evidence is necessary for the explanation of every will"); *Stewart & Selder,* 473 S.W. 2d 3, 8 (Tex. 1971) ("The extrinsic evidence set out below will be considered by us without regard to whether the will is ambiguous"); 9 J. Wigmore, Evidence in Trials at Common Law §2470 (J. Chadbourn rev. 1981) ("a free resort to extrinsic matters for applying and enforcing the document [is inevitable]") & J. MacKenzie, Feeney's Canadian Law of Wills §10.54 (4th ed. looseleaf issue 49 April 2014) ("the most recent trend in Canadian cases seems to indicate that evidence of surrounding circumstances should be taken into account in all cases before a court reaches any final determination of the meaning of words"). If the testator selected words which manifest her intention with precision, the likelihood that extraneous evidence will assist the court give effect to the testator's intention is reduced. *Stewart v. Selder,* 473 S.W. 2d 3, 19 (Tex. 1971).

[33] A. Oosterhoff, Oosterhoff on Wills and Succession 491 (7th ed. 2011) ("Under this approach the court admits evidence of surrounding circumstances immediately, that is, when it starts to interpret the will").

understanding that the same words may bear different meanings in different contexts.[34] To my mind, this is a compelling position.

[61] Words in a will are just part of the message. A court may consider additional data before giving them legal effect. 9 J. Wigmore, Evidence in Trials at Common Law §§2458 & 2470 (J. Chadbourn rev. 1981) ("The process of interpretation ... though it is commonly simple and often unobserved, is always present, being inherently indispensable" and "words always need interpretation"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 53 (2012) ("Any meaning derived from signs involves interpretation, even if the interpreter finds the task straightforward"); *Stewart & Selder,* 473 S.W.2d 3, 6 (Tex. 1971) ("words always need interpretation"); Kerridge & Rivers, "The Construction of Wills", 116 Law Q. Rev. 287, 291 (2000) ("words get their meaning from the way in which they are used"); Stark, "Extrinsic Evidence and the Meaning of Wills in Texas, 31 Sw. L.J. 793, 797 (1977) ("words used in a will ... are only imperfect symbols for physical objects, people or concepts") & F. Lieber, Legal and Political Hermeneutics 17-18 (2d ed. 1839) ("the same rules which common sense teaches everyone to use, in order to understand his neighbor, are necessary likewise, although not sufficient for the interpretation of documents or texts of the highest importance").

---

[34] *Marks v. Marks*, 40 S.C.R. 210, 212 & 220 (1908) ("we are bound to read his language in light of all the circumstances that surrounded, and were known to him when he used it and gave effect to the intention it discloses when so read" and "I prefer to read the ordinary meaning ... of the words used ... in light of surrounding circumstances in accordance with common sense" per Idington J); *Matheson v. Norman,* [1947] 1 D.L.R. 71, 73 (B.C. Sup. Ct. 1946) ("where the ambiguity is latent it must often be the case that its very existence can only be made apparent by the reception of parol evidence"); *Haidl v. Sacher,* 106 D.L.R. 3d 360, 368 (Sask. C.A. 1979) ("the learned Chambers Judge ... did not err in admitting evidence of the testator's relationship to the beneficiaries named in the will ... as part of the surrounding circumstances, in the light of which he then sought to interpret the testator's language by applying the 'ordinary meaning' rule"); *Therres v. Therres,* 2005 SKQB 209, ¶13 ("In determining the intention of the testator, the court examines the will and the surrounding circumstances as of the date of the execution of the will"); *Re Burke,* 20 D.L.R. (2d) 396, 398 (Ont. C.A. 1959) ("Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate ... on the circumstances ... which might reasonably be expected to influence the testator in the disposition of his property"); *Re Kaptyn Estate,* 2010 ONSC 4293, ¶35 ("Due weight should be given to such circumstances as were known to the testator insofar as they bear on the intention of the testator"); *Re Harmer*, 40 D.L.R. (2d) 825, 832 (Ont. H.C. 1963) (the Court considered the nature of the testator's relationship with her husband's children to conclude that "grandchildren" referred to her husband's grandchildren, as she bore no children); *Furlong Estate v. Memorial University of Newfoundland,* 169 Nfld. & P.E.I.R. 99, 103 (Nfld. Sup. Ct. Tr. Div. 1998) (the court admitted opinion evidence of historians to establish a latent ambiguity in the description of a gift – "books, maps and charts relating to the discovery and early colonization of Newfoundland"); *Kiren-Amgen Inc. v. Hoechst Marion Roussel Ltd.*, [2005] 1 All E.R. 667, 689 (H.L. 2004) ("No one has ever made an acontextual statement. There is always some context to any utterance, however meager"); *Re Wohlgemuth's Will Trusts,* [1948] 2 All E.R. 882, 886 (Ch.) (the court examined extraneous evidence to justify its conclusion that the testator's reference to "children" meant his illegitimate children"); *In re Ofner,* [1909] Ch. 60 (C.A. 1908) (the Court of Appeal's consideration of extrinsic evidence enabled it to conclude that the testator had misdescribed a grandnephew) & *In re Smith's Will,* 172 N.E. 499 (N.Y. 1930) (the Court of Appeals relied on extrinsic evidence to conclude that the testator's use of an unequivocal revocation clause did not apply to an earlier will regarding her New York property). See generally *McCullough v. Maryland*, 17 U.S. 316, 414 (1819) ("no one word conveys to the mind, in all situations, one single definite idea").

[62] Adherents of this philosophy accept that "surrounding circumstances"[35] may clarify the ambiguities. Professors Kerridge and Rivers explain this assertion:

> [S]urrounding circumstances do not so much make language appear ambiguous, as make it clear, that in a particular context, it is *not* ambiguous at all. For example, a testator may make a will leaving "all my money to my nephews and nieces" and the intentionalist reader will think that those words are doubly ambiguous. There appears to be an ambiguity in the word "money" and another in the words "nephews and nieces". But it may turn out that all the testator's property is money in the bank and so clearly "money"; and that the only people who can possibly be described as the testator's "nephews and nieces" are all blood nephews and nieces.

"The Construction of Wills", 116 Law Q. Rev. 287, 312-13 (2000). See *Kell v. Charmer,* 53 Eng. Rep. 76 (Ch. 1856) & *Goblet v. Beechy*, 57 Eng. Rep. 910 (Ch. 1829) (extrinsic evidence of the special meaning of terms of art from those who shared the same occupation as the testator eliminated any doubt as to the meaning intended by the testator).

[63] While this school accepts that it is desirable to study data other than the will, it is opposed, in most cases[36], to reviewing evidence that relates to the intention of the testator with respect to specific dispositions.[37] It has a strong aversion to receiving evidence which competes with the

---

[35] *Rondel v. Robinson Estate*, 337 D.L.R. 4th 193, 201 (Ont. C.A. 2011).

[36] This opposition does not exist if extrinsic evidence and the text of the will produce two equally compelling interpretations. 9 J. Wigmore, Evidence in Trials at Common Law §2472 (J. Chadbourn rev. 1981); A. Oosterhoff, Oosterhoff on Wills and Succession 500 (7th ed. 2011) ("Unless a statue provides otherwise, evidence of the testator's actual intention ... is admissible only if there is an equivocation") & *Elton v. Elton,* 292 Nfld. & P.E.I.R. 237, ¶25 (Nfld. C.A. 2010) ("It is clear ... that evidence of surrounding circumstances and facts does not extend to direct evidence of intent ... unless there is an equivocation, i.e., where the words of the will apply equally well to two or more persons or things"). Contra *Connor v. Bruketa Estate,* [2011] 3 W.W.R. 557 (Alta. Q.B.) ("[i]t is within the Court's discretion to admit ... [the testator's] handwritten instructions as extrinsic evidence of his intention").

[37] With the passage of the *Administration of Justice Act, 1982*, c. 53, s. 21, the United Kingdom declared that a court may consider extraneous evidence of the testator's intention. *Marley v. Rawlings*, [2014] UKSC 2, ¶26 (a court may refer to what the testator "told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared"). This is also the effect in Alberta of the *Wills and Succession Act*, S.A. 2010, c. W-12.2, s. 26(c). A. Oosterhoff, Oosterhoff on Wills and Succession xi (7th ed. 2011). Section 3(3) of the *Wills and Succession Act* stipulates that "[f]or greater certainty, section 11 of the *Alberta Evidence Act* applies in respect of evidenced offered or taken in an application to the Court under this Act". Section 11 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 is in this form: "In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence". See A. Wakeling, Corroboration in Canadian Law 131-32 (1977). Some Alberta courts considered evidence of the testator's intention with respect to specific objects before the *Wills and Succession Act* came into force. *Connor v. Bruketa*, [2011] 3 W.W.R. 557, 570 (Alta. Q.B. 2010) ("It is within the Court's discretion to admit ... [the testator's] handwritten instructions as extrinsic evidence of his intention") & *Eisert-Graydon Estate*, 2003 ABQB 40, ¶36 (the court relied on the testator's written directions to her solicitor declaring that she wished to preserve her property as wildlife sanctuaries).

testator's intention as stated in the will. *Re Madison Estate*, [1997] A.J. No. 51, ¶12 ("I can [not] consider the [drafter's] ... statements ... recounting [the testator's] wishes as to her car ... as this would be considered direct evidence of intention outside the will"); *Haidl v. Sacher*, 106 D.L.R. 3d 360, 363 (Sask. C.A. 1979) (the "trial judge was right in refusing to admit the affidavit evidence in an attempt to establish an intention contrary to that to be determined by giving to the words of the will their ordinary and natural meaning"; *Robinson Estate v. Robinson*, 337 D.L.R. 4th 193, 202 (Ont. C.A. 2011) ("The law properly regards the direct evidence of third parties about the testator's intention to be inadmissible"); *Re Kaptyn Estate*, 2010 ONSC 4293, ¶36 ("The rationale for this principle is admissibility rests in preserving the written will as the primary evidence of the testator's intention and avoiding displacing the written will with an 'oral' will"); *Re Harmer*, 40 D.L.R. (2d) 825, 827 (Ont. H.C. 1963) ("an affidavit purporting to swear to the intentions of the testator ... was plainly inadmissible"); *Stewart v. Selder*, 473 S.W. 2d 3, 7 (Tex. 1971) ("The intention of the testator must be found, in the last analysis, in the words of the will, and for that reason his other declarations of intention dealing with the subject out of specific documents are generally not admissible") & 9 J. Wigmore, Evidence in Trials at Common Law §2471 (J. Chadbourn rev. 1981) (the will records the intention of the testator).

H. The Testator Intended To Create a Trust for the Benefit of Her Children and Grandchildren

[64] The Court finds no error in Justice Ross' conclusion that the testator intended to create a trust for the benefit of her children and grandchildren. Ms. Lubberts wanted her youngest daughter, Irene, and her son, Paul, to hold her estate for the benefit of her children and grandchildren. Justice Ross' determination is supported by the unequivocal message that is contained in the testator's direction to "jointly manage [her estate] ... for their own benefit ... or for the benefit of one of their siblings or one of my grandchildren".[38] She directed them to make decisions with the best interests of her extended family uppermost in their minds. This message is the product of this sentence: "Irene and Paul will make all these decisions together and without yielding to any pressure applied by possible recipients".

[65] While it is obvious that a lawyer instructed to impress the testator's estate with a trust would have used different language[39], the benchmarks of a trust nonetheless still emerge from her

[38] In this context "or" means "and". There is no good reason to conclude that the testator intended her property to be for the benefit of only one of her children or grandchildren. Had a valid trust been created, the trustees could have lawfully given some of the trust property to any or all of the testator's children or grandchildren. See J. MacKenzie, Feeney's Canadian Law of Wills §11.22 (4th ed. looseleaf issue 49 April 2014) ("The courts do not hesitate, where the context requires it, to construe 'or' as if it was 'and'").

[39] There are no words which must be used to evidence an intention to create a trust. G. Bogert, Trusts 25 (6th ed. 1987) ("No formal or technical expressions are required"). But the words used must lead the court to conclude that a person intended to establish a trust. *Tassone v. Pearson,* 2012 BCSC 1262, ¶31 ("The mere fact that the power is given to a trustee is not alone determinative of whether it is a true power or power of appointment") & *Boreing v. Faris,* 104 S.W. 1022, 1024 (Ky. 1907) (the fact that the settlor used the word "committee" instead of "trustee" was not determinative).

will. She intended to make two of her children the trustees. She did not wish to bestow on them a simple option to dispose of her estate if they chose to do so. The testator identified her children and grandchildren as beneficiaries. Indeed she states that her estate is to be managed for the "benefit" of her children and grandchildren. The testator intended Irene and Paul to use the property for the benefit of all her children and grandchildren.

[66] This is one of the benchmarks of a trust. "[A] trustee must perform the terms of a trust, whereas a donee of a power need not exercise the power at all". E. Gillese, The Law of Trusts 23 (3d ed. 2014). Had she been content to give Irene and Paul a choice as to whether they distributed her estate, most likely she would have provided some direction in the event they declined to do so. There is none. This conclusion is in keeping with the testator's character, insight into which are easily drawn from reading her historical wills.

[67] I agree with Justice Ross' implicit determination that there is no basis to conclude that the testator intended the words she used in her will to have any meaning other than their usual and ordinary meaning in Alberta.

[68] The motions judge said this:

> In my view, the language employed by the testatrix indicates that she intended to impose an obligation on Paul and Irene. Paul and Irene are required to make all decisions in relation to the estate together: "Irene and Paul will make all these decisions together and without yielding to any pressure applied by possible recipients". They are directed to jointly "manage" the estate and "use it" to benefit themselves, their siblings or the grandchildren, with examples of such benefits provided. They are not merely empowered to dispose of the estate to any or all of these persons. There is no provision in the Holograph Will regarding the disposition of the estate should Paul and Irene not exercise their joint power of appointment. While this is not determinative (property not disposed of reverts to the estate ...), it is a further indication that the testatrix considered that Paul and Irene would be obliged to act as she directed.

2012 ABQB 506, ¶40.

[69] Her will does not support the argument that the testator intended to give her estate to her youngest daughter and her only son. She knew what a gift[40] was – noting that she had given her children and grandchildren "financial presents on their birthdays" – and did not employ gift language in the two sentences under scrutiny. In addition, the testator announced that she intended to deposit $500 every month into a savings account in the name of Irene and the testator so that on

---

[40] In the 2007 holograph codicil the testator employed gift language: "no cash amount will go to my grandchildren ($4000.00 per grandchild was left to each of my grandchildren, since I have on [their] ... birthdays ... given each of them amounts of money) and no cash money to be left to any other persons mentioned in the will, since these *gifts* have been carried out already in the last number of years ... ." (emphasis added).

the testator's death, Irene would have a source of cash which she could access to cover any costs she might incur immediately after her mother's death. Had the testator intended to give her estate to Irene and her son, it is unlikely that she would have taken this step.[41]

[70] Several other features of the April 8, 2008 will strongly speak against the conclusion that the testator intended to give her estate to her youngest daughter and only son. First, the will directed Irene and Paul to manage her estate for the benefit of her children and grandchildren. If the testator had intended to gift her estates to Irene and Paul, the likelihood this direction would have been issued is very low. It would have been superfluous. Second, if the testator had wished to gift her estate to just two of her children and grandchildren, she most likely would have stated the allocation she intended. The testator liked to be the one making the important decisions about her estate. Third, as already noted, the testator would not likely have created a joint bank account for the benefit of Irene if she had intended to gift to Irene a part of her estate.

[71] The use of the word "leave" in the sentence "My entire estate ... I leave to my son ... and to my youngest daughter" does not support the argument that the testator intended on her death to gift her entire estate to her two named children. The rest of the words in the will belie such an intention. "Leave", in this context, is a neutral word, doing nothing more than designating an intention to transfer her estate to her son and youngest daughter in their capacity as managers or trustees of her estate.[42]

[72] This conclusion harmonizes the provisions in the will[43] and is consistent with all the relevant material before the Court. The testator was a mother interested in the future financial security of her children and grandchildren. A gift to only two of her children would leave nothing for her other two children and several grandchildren. The likelihood she intended to do this is very low. Nothing in the April 8, 2008 will reveals a desire on the testator's part to disinherit any of her

---

[41] It would have been unnecessary. While it is unclear at law that Irene would have become the legal and equitable owner of the funds in the joint account on her mother's death, it is obvious that the testator assumed this would be the result. See *Lowe Estate v. Lowe*, 2014 ONSC 2436, ¶20 ("where a person gratuitously adds another's name as owner of a bank account with right of survivorship, the transferee must rebut the presumption of resulting trust by proving that it was *not* the transferor's intentions that the funds from the joint account flow to the estate on the transferor's date of death").

[42] Had the testator's August 8, 2008 will consisted of only these few words – "My entire estate ... , I leave to my son ... and my youngest daughter" – the Court could have concluded that Ms. Lubberts' will gifted her estate to Irene and Paul. The word "leave" may mean "bequeath, devise <left a fortune to his wife>." Webster's Third New International Dictionary of the English Language Unabridged 1287 (1971). See also Black's Law Dictionary 973 (9th ed. B. Garner ed. in chief 2009) ("1. To give by will; to bequeath or devise <she left her ranch to her stepson>. This usage has historically been considered loose by the courts and it is not always given testamentary effect").

[43] Justice Scalia and Professor Garner emphasise the importance of textual harmonization: "The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves ... . Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously". Reading Law: The Interpretation of Legal Texts 180 (2012).

children. If she had such an intention, she would have said so in plain English. In earlier versions she made it clear that one of her grandchildren had annoyed her sufficiently that he was out of the will. She also left no doubt as to her feelings about her son's girlfriend: "Under no conditions will I ... allow Paul's 'girlfriend', Laurie ... to live in my house or to allow her to obtain an interest in my house, whether she and Paul get married or not ... 'Laurie" has been and still is a disruptive influence in our family relations".

[73] Justice Ross also saw no merit in the argument that the testator gifted her estate to Irene and Paul:

> [22] The overall import of the Holograph Will is, in my view, not consistent with a transfer of ownership of the estate to Paul and Irene. Although the estate is left to them, there is no indication that it is to be for their exclusive benefit or their "property" as stated in the 2007 Holograph Codicil. They are directed to jointly manage the estate, not to receive it. While they can benefit from the estate, the only form of benefit expressly mentioned is salary. This suggests an entitlement to compensation for performing duties in relation to the estate, rather than ownership. It is noteworthy that there is another reference to salary in the Holograph Will where the testatrix indicates that Irene Hanson can access funds contributed by the testatrix to a joint account "to replenish her salary if it is necessary for her to take time off from her job to be able to look after my interests". This reference to salary clearly contemplates compensation for duties.
>
> [23] Another indicator that Paul and Irene are not given ownership of the estate is that they are not required to make all decisions in relation to the estate together. The Holograph Will does not assign shares to each of them; there was, for example, no provision that they should receive the estate in equal shares, nor in any particular percentages, as one would expect in the case of a gift.

[74] The argument that the testator bestowed a power of appointment on Irene and Paul does not appeal to us.

[75] Ms. Lubberts' historical will collection indicates that she is an independent person who calls a spade a spade and likes to be in control. The December 2, 2007 codicil provides ample evidence of the testator's strong desire to control what happens to her property:

> My house ... will become the property of my son ... and my daughter, Irene Lubberts-Hanson, my son to live in the house and take care of it – he cannot rent or sell the house to non-family members. He may ... with Irene's consent sublet part of the house (e.g. the basement suite) but only to members of the immediate family.

[76] Given that the testator had a strong controlling personality, the notion she would be willing to give anyone a power over her estate to do what the appointor thought appropriate is impossible

to accept. As expected, there is no language in any of the historical wills or in the April 8, 2008 will that suggests she had any intention to bestow a power of appointment on Irene and Paul.

[77] The Court concludes that the testator intended to create a trust. The parties agreed that if the Court concluded that the testator intended to create a trust, she failed in this enterprise. They agreed that the objects of the trust are uncertain. This will not be the first time that such a plan has failed for this reason. E.g., *Daniels v. Daniels Estate,* 120 A.R. 17, 21 (C.A. 1991); *Re Madison Estate,* [1997] A.J. No. 51 (Q.B.); *Klassen v. Klassen*, [1986] 5 W.W.R. 746, 757 (Sask. Q.B. 1986); *Re Olson Estate,* 67 Sask. R. 103 (Surr. Ct. 1988); *Re Gilkinson*, 38 O.W.N. 26, 28 (H.C. 1930) aff'd 39 O.W.N. 115 (C.A. 1930); *Yeap Cheah Neo v. Ong Cheng Neo*, [1875] L.R. 6 P.C. 381 (Straits Settlement Penang). See generally *Marchuk v. Marchuk*, 52 W.W.R. 652, 680 (Sask. Q.B. 1965) (those who entrust the drafting of important legal documents to nonlawyers needlessly risk disappointment and promote "family quarrels over the division of assets for years to come").

VII. Conclusion

[78] The appeal is dismissed.

[79] Both the appellants[44] and respondents shall have their costs on a full-indemnity basis from the estate.

Appeal heard on February 25, 2014

Memorandum filed at Edmonton, Alberta
this 25th day of June, 2014

Wakeling J.A.

[44] This dispute was directly attributable to the fact that the testator chose to draft her will without the assistance of a lawyer and utilized unclear language. There is sufficient merit in the appellants' case to justify an order directing the estate to pay the appellants' costs on a full-indemnity basis. *Dice v. Dice Estate,* 351 D.L.R. 4th 646, 665 (Ont. C.A. 2012) ("As the issues on appeal arose from the wording of the will, I would order that the costs of all parties ... be paid by the Estate"); *Re Wigle,* 27 O.W.N. 357, 358 (H.C. 1924) ("There is just enough doubt to give him his costs out of the estate") & *Furlong Estate v. Memorial University of Newfoundland*, [1999] N.J. No. 292 (Nfld. C.A.) (the appeal court ordered that the costs before the trial and appeal courts be paid by the estate on a solicitor-and-client basis).

Picard JA and Veldhuis JA (concurring in the result):

[80] We agree with the conclusion reached by Justice Wakeling that the decision of Justice Ross (2012 ABQB 506) is well written and carefully reasoned, and that this appeal must be dismissed. We find her decision sufficient to dispose of all issues and thus, it is unnecessary to consider the other matters discussed in the memorandum of judgment of Justice Wakeling.

[81] The appeal is dismissed. Costs shall be payable to both appellants and respondents, from the estate, on a full-indemnity basis.

Appeal heard on February 25, 2014

Memorandum filed at Edmonton, Alberta
this 25th day of June, 2014

Authorized to sign for: Picard J.A.

Veldhuis J.A.

Appearances:

D.G. Groh, Q.C.
for the Appellants

R.B. Hajduk
for the Respondents