

PROBATE CORNER

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ARTICLE: Admissible Testimony In Will Construction Disputes

In construing the provisions of a will, the primary consideration is to effectuate the testator's intent. A court must strive to discern the intent of the testator and give effect to his or her wishes. It sometimes becomes necessary that extrinsic evidence be resorted to for aid in the construction of a will because of uncertainty or doubt as to the meaning of some statement contained in the will. In such instance, it is generally recognized that evidence relating to the attendant facts and circumstances existing at the time of the execution of the will and of which the testator had knowledge may be admitted, not to vary nor to contradict any of the terms of the will, but to explain or resolve the ambiguity and so to enable the probate court to effectuate the dispositive intent of the testator.

Although the testimony of the drafting attorney is admissible in latent ambiguity cases, such testimony is limited to the surrounding circumstances of the testator when the will was made and the state and description of the testator's property in order to ascertain the testator's intention. The drafting attorney is prohibited from testifying as to his own interpretation of the terms of the will, i.e., his own intention in drafting the will. Finally, expert testimony may be admissible to assist the court in understanding and making an informed determination concerning complex and obscure legal issues such as complex federal estate tax questions.

In *Estate of Mullin*, 133 So. 2d 468 (Fla. 2nd DCA 1961), the lower court found that the codicil was ambiguous and that it was necessary to take extrinsic testimony as to the intent of the testatrix. The drafting attorney testified that "immediately prior to execution of the codicil, he had explained to testatrix that under the will and codicil, inasmuch as her sister had died, the trust would not come into effect but that the residue of her estate would be equally divided between the five remaindermen named in the same paragraph. After receiving this information, the testatrix immediately signed the codicil in the presence of subscribing witnesses." The court found that the testimony as to the knowledge possessed by testatrix at the moment of execution was pertinent and enabled the judge to fit himself more effectively into the "armchair" of the testatrix in order to ascertain her dispositive intent at the time she executed the codicil.

In *Marshall v. Hewett*, 156 Fla. 645, 24 So.2d 1 (1945), the testator was illiterate and had procured the services of a non-lawyer/friend to draft his will. The court found testimony concerning the testator's intent was admissible to resolve the ambiguity in the will. The court reasoned that "[i]f there are expressions in the will which are difficult to reconcile, then the situation of the testator at the time he made his will, the ties that bound him to the objects of his beneficence, the motives that prompted him to make the will he did make, and the influences that wrought on him at the time, will be considered in arriving at the purpose of the testator."

In *Dutcher v. Estate of Dutcher*, 437 So. 2d 788 (Fla. 2nd DCA 1983), the decedent, by a "do-it-yourself" will, attempted to devise the majority of her estate either to her son or to her grandchildren. The PR filed a petition for determination of beneficiaries based upon conflicting

and ambiguous paragraphs of the will. At hearings held before the trial court, four witnesses testified that decedent and her son had a good relationship, and that decedent's intention had been to devise and bequeath her property to her son, with the property to go to son's children if he predeceased her. The court held that extrinsic evidence had been properly admitted to assist in resolving uncertainties contained in the will, and to aid in the determination of the intent of the testatrix.

COMPLEX LEGAL QUESTIONS:

In *In Re Estate of C. J. Lenahan*, 511 So. 2d 365 (Fla. 1st DCA 1987), the testator died leaving a will that created a marital deduction trust. A question arose concerning whether federal and state taxes should be paid from the trust. The attorney who drafted the will was qualified as an expert and permitted to testify as to his interpretation of the will and as to the testator's intent. The court, in discussing whether the expert witness should have been permitted to testify to his interpretation of the will, reasoned in part:

Appellees have asserted that one of the purposes behind admitting Grimsley's testimony was to assist the court in understanding and making an informed determination concerning the complex and obscure legal questions involved in the instant case, specifically concerning probate law, federal and state estate taxation, and will construction. Such questions certainly go beyond the ordinary understanding of the trier of fact and expert testimony on these questions would qualify under the standard enunciated in Section 90.702. Therefore, under Section 90.703, the fact that the expert's testimony may include an ultimate issue to be decided by the trier of fact will not generally render such testimony inadmissible.

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We conclude that while expert testimony which addresses the ultimate issues in a case is generally admissible as long as it assists the trier of fact, such testimony is to be rejected if it amounts to inadmissible parol evidence in a will construction proceeding.

In *Pouser v. Pouser*, 193 Ariz. 574; 975 P.2d 704 (Ariz. Sup. Ct.1999), the trial court properly admitted the testimony of an attorney who testified as an expert witness on federal estate tax law because construction of the will required an analysis of a complex federal estate tax question.