

INTERPRETING A TESTATOR'S INTENT FROM THE LANGUAGE OF HER WILL: A DESCRIPTIVE LINGUISTICS APPROACH

The ordinary standard [for will interpretation], or “plain meaning,” is simply the meaning of the people who did not write the document.

The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth, there can only be *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document¹

I. INTRODUCTION

The very appellation of a “will” document suggests that the instrument should effect that which the testator would have done; it was her “will”—her intention—to pass her personal and real property in the particular manner outlined in the testamentary document.² Although legislatures have created certain, limited situations in which a statutory scheme for wealth transfer overcomes the testator's intent,³ the intent expressed in the

1. Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 811 (2001) (citing 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS IN COMMON LAW § 2462, at 198 (James M. Chadbourne ed., 1981)).

2. See SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 499, 500 (Dawsons of Pall Mall 1966) (1766) (noting that wills are also referred to as “testaments,” which Roman lawyers defined as “the legal declaration of a man's intentions, which he wills to be performed after his death”) (internal quotation marks omitted); ISAAC F. REDFIELD, 1 LAW OF WILLS § 2.1 (4th ed. 1876). See also *infra* notes 5-6 and accompanying text.

3. Legislatures have instituted such statutes to protect spouses from being disinherited, a move made necessary as jurisdictions have begun to move away from enforcing surviving spouses' common law rights of dower and curtesy. Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1501 (2000) (“[D]ower . . . and curtesy have given way to a probate system that includes not only the surviving spouse, but nonmarital and adopted children as well.”). For example, statutory schemes in twenty-five states provide for a spousal election of a statutorily determined share of decedent's estate in lieu of the testator's bequest to the spouse. David E. Wagner, *The South Carolina Probate Code's Omitted Spouse Provision and In re Estate of Timmerman*, 50 S.C. L. REV. 979, 981-82 (1999). Pretermitted spouse and pretermitted child statutes in force in some jurisdictions grant a statutorily defined share of the testator's estate to spouses and children left out of the estate plan with no explanation. See Bruce L. Stout, *Planning for Possible Pretermitted Children and Pretermitted Spouses*, 24 EST. PLAN. 269, 272 (1997) (“The purpose of a pretermitted spouse statute is to protect the surviving spouse of a marriage that was not contemplated when the testator's will was executed.”); see also *id.* at 269 (“The purpose of [pretermitted child statutes] is to provide a share of the testator's estate to a child who is omitted unintentionally from the will.”); Wagner, *supra*, at 982. *But see* Mary

language of the will document remains the foundation of testamentary interpretation.⁴

The idea that courts should seek to determine a testator's donative intent via an interpretation of the will's language flows implicitly from the foundations of Anglo-American society, as commentators and courts have often noted.⁵ Courts and legislatures continue to treat the determination of a testator's intent as the "pole star" of judicial interpretation.⁶

Despite overwhelming agreement that determining a testator's intent stands as the correct end of judicial interpretation of a will, this question remains: How should a court go about determining a testator's intentions? After all, courts find little more than words in the will document itself. Indeed, the testator, by definition, is not around to testify as to the intent couched in the language of his will.⁷

Ellen Kazimer, *The Problem of the "Un-omitted" Spouse Under Section 2-301 of the Uniform Probate Code*, 52 U. CHI. L. REV. 481, 497 (1985) ("[The omitted spouse statute] should not be construed to protect the surviving spouse when that goal conflicts with the testator's intent.").

Finally, slayer statutes alter the testator's intended distribution of her wealth as a matter of public policy; the legislature will not allow a devisee who intentionally kills his deviser to inherit from that testator. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 539-40 & n.45 (2000) (noting also that Congress and more than forty states have enacted statutes that prevent criminals from profiting in any way from their crimes, including inheriting from their victims) (citing Orly Nosrati, Note, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 953 nn.48-49 (1999)). In essence, the legislature alters the common law's deference to a testator's intent in his wealth distribution for policy reasons, striking a difficult balance between two elemental aspects of probate law: "attempting to carry out the testator's intent and protecting the surviving spouse." Wagner, *supra*, at 981. These legislative actions do not dull the importance of courts' attempts at determining testamentary intent. Legislation still overrules intention only in exceptional circumstances. Hirsch, *supra*, at 530 ("Rather than overturning prior doctrines overnight, lawmakers typically carve out exceptions until at last the old rule is entirely hollowed out.").

4. See *infra* notes 5-6 and accompanying text.

5. See, e.g., Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 634 (1992) (citing ELIAS CLARK ET AL., *CASES AND MATERIALS ON GRATUITOUS TRANSFERS* 1 (3d ed. 1985)); JAMES SCHOULER, *A TREATISE ON THE LAW OF WILLS* § 466 (1887) (calling deference to the testator's intent the "cardinal rule of testamentary constitution"); GEORGE W. THOMPSON, *CONSTRUCTION AND INTERPRETATION OF WILLS* § 41, at 48 (1928) ("The first rule of construction with respect to . . . a will is to ascertain the intention of the . . . testator from the four corners of the instrument, giving effect, if possible, to every part of it."). See also *infra* notes 31-38 and accompanying text.

6. Schouler, *supra* note 5. See also *infra* notes 39-40 and accompanying text. Additionally, the Uniform Probate Code ("UPC")—perhaps the most modern of all treatments of the law of wills—indicates that one of the UPC's purposes is "to discover and make effective the intent of a decedent in distribution of his property." UNIF. PROB. CODE § 1-102(b)(2) (1969).

7. The only situation in which a court can actually question the testator as to the meaning of his will's language arises in the rare case of a living probate proceeding, whereby a testator submits her will to a probate court during her life in order to discourage postmortem will contests and best insure that the testator's intentions will be honored in the probate process. Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 165-75 (1990). See also Gerry W. Beyer, *Pre-Mortem Probate*, PROB. & PROP. July-Aug. 1993, at 6-9; John H. Langbein,

Most jurisdictions' courts and legislatures dictate that a court should look to the four corners of a will document to determine a testator's intention.⁸ This "plain meaning" rule prohibits courts from admitting any evidence extrinsic to the will document that would contradict or add to the plain meaning of the will's language.⁹ Only when the meaning of the will is so ambiguous that a court might reasonably interpret the will's language in multiple ways may courts look to extrinsic evidence.¹⁰ Most jurisdictions require their courts to evaluate the effect of the will's "plain and unambiguous language" before determining whether the testamentary language is so ambiguous as to require analysis of extrinsic evidence.¹¹ Accordingly, courts enjoy great control in deciding what that "plain and unambiguous" language really says and, consequently, whether any evidence outside the four corners of a will document will ever be considered in determining a testator's intent. Once a court determines that the language of a will is "plain and unambiguous," that court has deemed itself the interpreter of the language of that will without reference to any

Living Probate: The Conservatorship Model, 77 MICH. L. REV. 63 (1978).

8. See *infra* notes 44-85 and accompanying text.

9. Cornelison, *supra* note 1, at 814.

10. *Id.* at 819. The ambiguity doctrine allowing the use of extrinsic evidence defies simple explanation. Under the doctrine, courts can look outside the four corners of a will document when they see certain ambiguities in a will's language. For instance, a patent ambiguity is apparent from the information available within the will document, usually because of directly conflicting provisions. *Id.* Most, but not all, courts admit extrinsic evidence to resolve patent ambiguities. *Id.* at 819-20. Latent ambiguities become evident when the terms of the will are applied. *Id.* at 820. The very nature of latent ambiguities requires the admission of some extrinsic evidence. *Id.* at 822. However, courts often differ as to the amount of extrinsic evidence they will admit to resolve these ambiguities. *Id.* at 822-23. Some courts also admit extrinsic evidence in order to resolve ambiguities arising from equivocations—where two objects fit a testator's description equally well. *Id.* at 823. For an examination of the Connecticut Supreme Court's endorsement of the use of extrinsic evidence to resolve an ambiguity resulting from a scrivener's error, see Jay N. Hershman, Case Comment, Erickson v. Erickson: *Extrinsic Evidence in Probate Cases*, 15 QUINNIPIAC PROB. L.J. 143 (2000).

If a court does *not* find a will document's language sufficiently ambiguous to require extrinsic evidence to determine a testator's intent, it can clarify the language of the will without venturing beyond the four corners of the document. THOMPSON, *supra* note 5, § 2, at 2.

Although the terms "construction" and "interpretation" are sometimes used interchangeably to describe the process by which a court determines a testator's intent from the words of her will, they have distinctly different definitions. *Id.* A court "construes" a will according to a set of jurisdiction-specific statutory or case-derived presumptions that operate to "draw[] . . . conclusions regarding subjects that are not always included in the direct expression." *Id.* A court "interprets" a will according to nonstatutory, universal standards "for the purpose of ascertaining the true sense of any form of words." *Id.* Accordingly, "[t]he meaning of the testator's words must be ascertained by interpretation before there can be a judicial construction of his will." *Id.* These are not uniform presumptions laid down by legislative mandate as the result of extensive policy discussion; rather, a court interprets a will according to practical considerations and case-by-case analysis to create meaning unique to the document being interpreted.

11. See *infra* note 46 and accompanying text.

evidence save the language of the will.¹²

The process by which courts interpret testamentary language—once they decide that the words of the will document are not so ambiguous as to require extrinsic evidence—is a key consideration. Ideally, these words are a means of communication particular to the testator that, when translated, unveil that testator's intent.¹³ Unfortunately, the code is typically less than perfect, for it depends on testators to use words in a perfectly decipherable way.¹⁴ As the amalgam of American society moves away from any semblance of a standardized grammar in actual usage, courts must recognize that universally and absolutely decipherable language is a relative descriptor, subject to various interpretations by different readers.¹⁵

American courts have followed four approaches to language interpretation in their attempts to recognize usage inconsistencies within the standard process of interpreting a testator's intent from only the words of the will document.¹⁶ These approaches all strive for balance between two historical concerns of testamentary law: the determination of testamentary intent and the inviolability of testamentary instruments as the

12. This Note focuses on the ways in which courts engage in the interpretation of the language of a will document. For a discussion of the differences between the "construction" and "interpretation" of a will's language, see *infra* note 10 and accompanying text.

13. Baron, *supra* note 5, at 637-39.

14. *Id.* at 639.

15. JAMES MILROY & LESLEY MILROY, *AUTHORITY IN LANGUAGE: INVESTIGATING STANDARD ENGLISH* 48-52 (3d ed. 1999). Spoken language changes continuously as a result of the innovations of individual speakers and the influences of social factors. *Id.* at 48. Pronunciation and meaning change within regions and social classes, and these new "standards" are maintained by "covert and informal pressure for language maintenance, which is exerted by members of one's peer-group or social group." *Id.* at 49.

Written language changes more slowly, for "[w]e live in a society that places considerable emphasis on literacy, and much of our schooling is devoted to the acquisition of literacy. As a result, many of the handbook prescriptions on 'correct' English . . . are concerned primarily with correct *written* English . . ." *Id.* at 52-53.

Because conflict exists between the myriad variations of spoken English and some single, standardized view of "correct" written English, confusions arise when one writes the way one speaks. For example, one might say, "He only died yesterday." *Id.* at 53. The speaker intends to convey the message that the person died, with emphasis on the fact that the death occurred yesterday. *Id.* Those proponents of standardized, "correct" English would suggest that this same syntax conveys a message similar to this: "All that he did yesterday was die." *Id.*

This potential ambiguity is of little or no importance in speech, as the social context and mutual knowledge of speakers, together with stress and intonation, will make the intended meaning clear. . . . Writing, however, is deprived of stress, intonation and the possibility of immediate feedback from speakers: to write a language well is a continuous struggle against ambiguity. In written prose, therefore, a potential ambiguity of the kind discussed is functionally inefficient: the sentence may be wrongly understood.

Id. See also *infra* notes 101-04 and accompanying text.

16. See *infra* notes 70-85 and accompanying text.

sole expression of a testator's intent.¹⁷ No approach achieves a perfect balance.¹⁸

Although a number of commentators have written on testamentary intent¹⁹ and the use of extrinsic evidence in determining testamentary intent,²⁰ few have addressed the consequences of courts' endeavors to determine testamentary intent solely through interpretations of a testator's language.²¹ Those analyses that have addressed courts' attempts to interpret the language of wills, however, recognize such interpretations' attendant problems.²² Courts that eschew extrinsic evidence of a testator's intent and rely solely on the will's language²³ run the risk of interpreting

17. Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1060-67 (1996). See also *infra* notes 31-66 and accompanying text.

18. See *infra* notes 107-39 and accompanying text.

19. See, e.g., REDFIELD, *supra* note 2, § 33.12; Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988); Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741 (1961).

20. See, e.g., Sir James Wigam, *On Extrinsic Evidence*, in THE LAW OF WILLS (1872).

21. James L. Robertson, a former justice of the Supreme Court of Mississippi, recognizes (based on many years of difficulty with the cases on his own docket) that courts have a hard time determining testamentary intent in any case, regardless of the clarity of the will's language, the existence of extrinsic evidence, or the theoretical approach underlying the court's analysis. James L. Robertson, *Myth and Reality—or, Is It "Perception and Taste?"—in the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045 (1993).

22. Robertson recognizes that, in attempting to interpret testamentary intent in situations where the court decides that the language of the will is not sufficiently ambiguous to require extrinsic evidence of intent, courts "commingl[e] a subjective, internal approach to meaning with a host of quasi-objective, external standards." *Id.* at 1053. The negative element of this sort of interpretation, in Robertson's opinion, is the courts' "failure to see how deeply interpretive our enterprise is." *Id.* Essentially, by couching its interpretation in quasiobjective standards, a court convinces itself that it has somehow objectively divined the testator's true intent. *Id.*

Robertson suggests that courts, in an attempt at intellectual honesty in their interpretation of wills, should no longer attempt to determine the intent of the testator. *Id.* at 1054. Instead, courts should apply rigid rules of construction to all wills; when a will uses certain words, a court will interpret the language in a particular way. *Id.* As Robertson notes, this approach better conforms with courts' actual practices. *Id.* To disregard the testator's intent completely, however, flies in the face of the elemental policy underlying wills—that a testator should be able to dispose of her property at death however she likes. See *supra* note 1 and accompanying text.

Judge Robertson's suggested solution perhaps moves too far away from an objective analysis of intent. As another commentator has stated, "[t]he state's requirements with respect to wills should be those—and only those—that enable it to serve its supporting, implementing (of the testator's intent) role." Baron, *supra* note 5, at 634. The foundations of Robertson's suggestions for reform, however, could merge with the continued search for a testator's intent. Following Robertson's writing, courts should at least recognize that their determinations of the meaning of a will's language are driven by forces other than merely the established rules of interpretation and construction.

23. This Note describes four approaches to interpreting the meaning of the language of a will that either completely or at least partially avoid considering extrinsic evidence of a testator's intent. See *infra* notes 74-75 and accompanying text ("words of the will" approach), notes 76-78 and accompanying text ("ordinary and natural meaning" approach), notes 79-81 and accompanying text ("liberal interpretation" approach), and notes 82-85 and accompanying text ("in light of surrounding circumstances" approach).

the testator's language according to traditional rules of grammar that might not apply to this particular user of English.²⁴ This ensures an interpretation of testamentary intent that might be far from the testator's true wishes.²⁵

Courts must recognize that their approaches to words drive their interpretations of language and their resultant determinations of a testator's intent.²⁶ Instead of foisting meaning on the testator's words according to some elaborate, prescriptive grammatical rules,²⁷ and instead of using some amorphous "natural and ordinary meaning" of the words,²⁸ courts should interpret the language of a will in such a way as to best determine testamentary intent while maintaining the strict standards of traditional probate law.²⁹ To this end, courts should look to extrinsic evidence—not of the testator's intent, but of the testator's use of language—to determine this intent via a descriptive linguistic analysis of the language of the will.³⁰

Part II of this Note examines the historical development of the various approaches to analyzing a testator's intent. Part II further explains the prescriptive grammar and the descriptive linguistics approaches to language analysis and their potential applications to the interpretation of wills. Part III analyzes current approaches to will interpretation and their relative abilities to meet the policy considerations typically thought to underpin the law of wills. Finally, Part IV proposes a workable solution based on a descriptive linguistic analysis of the language of a will that seeks to harmonize courts' approaches to will interpretation and better meet the historical objectives of the law of wills.

II. HISTORY OF THE LAW OF WILLS

A. Determining a Testator's Intent—English Roots

Determining a testator's intent has long served as the foundation of the common law of testamentary instruments.³¹ In his seminal analysis of the

24. See *supra* note 15 and accompanying text. See *infra* notes 87-104 and accompanying text.

25. See *supra* note 15 and accompanying text.

26. See *infra* notes 87-104 and accompanying text.

27. See *infra* notes 87-101 and accompanying text.

28. See *infra* notes 76-78 and accompanying text. Moreover, the "natural and ordinary meaning" approach to interpretation often turns out to be nothing more than a prescriptive grammatical analysis of the testator's language.

29. See *supra* note 17 and accompanying text. See *infra* notes 31-57 and accompanying text.

30. See *infra* Part IV.

31. BLACKSTONE, *supra* note 2, at 489-90 (discussing the history of testamentary transfers and

history of English common law, Blackstone noted that courts' collective focus on a testator's intent stems from the very foundations of the Anglo-American system of private property.³² The Magna Carta established the individual's statutory right to dispose of his³³ property at death according to his own intentions.³⁴ When a decedent had not provided by will for the disposition of his goods, the lord of the fee would take the property by escheat³⁵ and vest it in the Church, to be held in trust for the benefit of the poor.³⁶ Consequently, the Church's prelates began demanding that wills, which could deprive the Church of property, be proven valid by a showing that the testamentary document adequately represented the testator's intent.³⁷ Determining and proving the intention of the testator in creating his will thus grew to be the primary concern of the original probate processes in England.³⁸ This basic deference to the testator's intent remained strong in the American legal system³⁹ and continues in current

the foundational status of a testator's intent in that history).

32. "[W]hen property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it." *Id.* at 489.

33. Although I alternate between the use of masculine and feminine pronouns when describing abstract persons throughout this Note, in discussing abstract testators in historical England, it seems more appropriate to speak in masculine terms, as property rights of women at the time were severely restricted. For an example of the subjugated status of a woman's property rights in historical England, compare the common law rights of dower and curtesy. CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 67-70 (3d ed. 2002). A tenancy by the curtesy entitled a husband to "a life estate . . . in all lands of which his wife was seised . . . at any time during the marriage provided that there was issue born alive capable of inheriting the estate." *Id.* at 67-68. The husband had a present life estate both during and after his wife's life. *Id.* at 68. Through her dower right, a widow received a life estate in only one-third of the land of which her husband had been seised, and only after his death. *Id.* at 68. Although the wife's dower right was protected while it was an inchoate right, she enjoyed no present estate in her husband's lands until after his death. *Id.* at 68-69 & n.10.

34. "[T]hen the residue of the goods shall go to the executor to perform the will of the deceased." BLACKSTONE, *supra* note 2, at 492.

35. The king had power over all property existing in the land. MOYNIHAN, *supra* note 33, at 9. English subjects merely held an interest in the property, although the interest could be absolute and could stand up against all other claimants, save the king. *See Adams County v. State*, 252 N.W. 826, 827 (Neb. 1934). In the end, if the interests in the property somehow failed, the property would come, once again, under the control of its "original" owner by escheat. *Id.* ("In both England and the United States now, by escheat is meant the lapsing or reverting to the crown or the state as the original and ultimate proprietor of real estate, by reason of a failure of persons legally entitled to hold the same.")

36. BLACKSTONE, *supra* note 2, at 494.

37. *Id.* "[I]t was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate," for the will's "efficacy depends on it's [sic] declaring the testator's intention." *Id.* at 494, 500.

38. *Id.* at 494.

39. Hirsch, *Inheritance and Inconsistency*, *supra* note 17, at 1060 (quoting George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 *YALE L.J.* 1280, 1286-88 (1942)) ("The court then ordered distribution 'according to the minde of the deceased.'").

probate schemes, statutes, and jurisdictions throughout the United States' various jurisdictions.⁴⁰

Requirements as to the form and execution of will documents⁴¹ gradually developed as a foundation for helping prelates—and later, courts—determine a testator's intent.⁴² Form requirements alone, however, often precluded a precise determination of a testator's intent.⁴³ Consequently, the focus of many courts' analyses of testamentary documents turned to the words of the will.⁴⁴ Once a court decided to focus on the language of the will without the benefit of extrinsic evidence as to its meaning,⁴⁵ that court would consider only the "plain meaning" or the

40. See, e.g., CAL. PROB. CODE § 21102(a) (West 2002) ("The intention of the transferor as expressed in the instrument controls the legal effect of his dispositions made in the instrument."); LA. CIV. CODE ANN. art. 1611 (West 2000) ("The intent of the testator controls the interpretation of his testament."); MO. ANN. STAT. § 474.430 (West 1992) ("All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them."); *United States v. Spicer*, 332 F.2d 750, 753 (10th Cir. 1964) (noting that Kansas courts had stated "that the intent of the testator is to receive primary consideration"); *Stiles v. Brown*, 380 So. 2d 792, 796 (Ala. 1980) ("The general policy behind the law of wills in Alabama is to give effect as nearly as possible to the testator's intentions as expressed in his will."); *Ware v. Green*, 691 S.W.2d 167, 169 (Ark. 1985) (stating that the purpose of judicial interpretation of a will is to determine the testator's intent); *Palms Clinic and Hosp., Inc. v. Ariz. Soc'y for Crippled Children and Adults, Inc.*, 433 P.2d 296, 300 (Ariz. Ct. App. 1967) ("The cardinal rules for construction of all wills is to ascertain the intention of the testator . . .") (quoting *Newhall v. McGill*, 212 P.2d 764, 766 (Ariz. 1949)); *Fleming v. First Union Nat. Bank*, 555 S.E.2d 728, 730 (Ga. 2001) ("[T]he primary consideration in construing wills must be the ascertainment of the intention of the testator."); *Dempsey v. Holsen*, 444 N.E.2d 704, 712 (Ill. App. Ct. 1982) (noting that the determination of intent "from the will itself" is key to the construction of the will); *Petit v. Levine*, 657 S.W.2d 636, 643 (Mo. Ct. App. 1983) (noting that the controlling rule of testamentary interpretation is "to give effect to the true intent and meaning of the testatrix"); *Polen v. Baker*, 752 N.E.2d 258, 260 (Ohio 2001) ("[T]he sole purpose of the court should be to ascertain and carry out the intention of the testator.") (internal citations omitted); *In re Estate of Martin*, 635 N.W.2d 473, 477 (S.D. 2001) ("Our goal in interpreting a will is to discern the testator's intent.").

Additionally, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah have all adopted, to some extent, the Uniform Probate Code. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 900 (1992). See also UPC § 1-102(b)(2) (stating that honoring testamentary intent is one of the UPC's core values).

41. These execution requirements include such features as the testator's signature—usually at the end of a will document—and attestation by disinterested witnesses. Baron, *supra* note 5, at 635.

42. See *id.* ("The formal requirements of will execution—the necessity of a writing and of an attestation, for example—are designed to satisfy this need [to know the testator's intentions regarding her property].").

43. *Id.* at 635.

44. *Id.*

45. American courts and commentators have always recognized the value of extrinsic evidence in determining a testator's intent. See, e.g., *Wolfe v. Van Nostrand*, 2 N.Y. 436, 440 (N.Y. 1849) (using extrinsic evidence to further support a conclusion of intent justified by the words of the will alone). In early American courts, however, such extrinsic evidence could not, independent of other evidence in the language of the will, "have any proper weight, where the language is plain and the meaning is obvious." REDFIELD, *supra* note 2, at 431. Moreover, "it is always the safest mode of

“plain and unambiguous words of the will” in determining a testator’s intent.⁴⁶ Consequently, traditional approaches to will interpretation stayed within the four corners of the will to determine a testator’s intent.

Traditional approaches focused on determining “plain meaning” from within the four corners of the will because of the perceived inviolability of the will document. Indeed, historical English society’s reverence for the power and consequence of written words underpinned this deference to the will document in lieu of reliance on extrinsic evidence.⁴⁷ The “plain meaning” rule maintained its hold on the English legal system into the twentieth century for reasons unique to the English version of private property acquisition and transfer.⁴⁸ However, English courts eventually abandoned the plain meaning rule and its underlying justifications, and they now admit extrinsic evidence in their interpretations of will documents.⁴⁹

B. The American Approach to Determining Intent

Modern American courts, on the other hand, have yet to turn completely away from the words of a will document and toward extrinsic evidence, although their reasons for doing so vary somewhat from those motivating their English counterparts. Specifically, American courts continue to look first and often solely to the words of a will in order to avoid the uncertainties that might stem from less reliable sources of evidence.⁵⁰

American courts look to the words of a will to interpret testator intent because they tend to “doubt the reliability of extrinsic evidence.”⁵¹ Because a will does not take effect until the testator’s death, a court cannot

construction [(meaning interpretation)], to adhere to the words of the instrument, without considering [other] circumstances.” *Id.* (citing *Currie v. Murphy*, 35 Miss. 473, 487 (1858)). *See also supra* notes 10-12 and accompanying text.

46. REDFIELD, *supra* note 2, at 430 (citing *Dawes v. Swan*, 4 Mass. 208 (1808); *Mann v. Executors of Mann*, 14 Johns. Ch. 231 (N.Y. Ch. 1814)).

47. *Id.* at 194.

48. *Id.* Specifically, courts preferred the plain meaning rule to the use of extrinsic evidence of a testator’s intent because the English system’s emphasis on the transfer of real property within the family favored the intestate system of succession and disfavored transfers of real property to a decedent’s chosen beneficiaries when they were outside the family. *Id.* Consequently, judges sometimes turned a blind eye to obvious (yet extrinsic) evidence of intent in order to insure predictable conveyance of land-based wealth within a family. *Id.*

49. *See* Cornelison, *supra* note 1, at 814 (citing *JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES* 427 (5th ed. 1995)).

50. *See infra* notes 51-56 and accompanying text.

51. Cornelison, *supra* note 1, at 815.

ask the testator if a piece of extrinsic evidence truly reflects her wishes, and, as a result,⁵² some courts consider extrinsic evidence too unreliable to truly reflect a testator's intent.⁵³ Some commentators argue, however, that courts should not hesitate to use extrinsic evidence in their interpretations of wills under certain circumstances.⁵⁴ These commentators contend that the rules of evidence and "the crucible of cross examination" render extrinsic evidence certain enough to ascertain the testator's intent to an acceptable degree of certainty.⁵⁵ Courts also cite the possibility of fraudulent representations of the testator's intent as a reason to shy away from extrinsic evidence;⁵⁶ however, some commentators argue that the evidentiary process promises to root out fraudulent extrinsic evidence just as it should find unintentionally unreliable evidence.⁵⁷

Some courts avoid using extrinsic evidence in interpreting a testator's intent in order to provide some predictability to the form and interpretation of will documents.⁵⁸ When a testator spends time and, often, money to prepare a will according to established formalities, that testator expects that the language he has employed will mean the same thing fifty years from now as it does today.⁵⁹ Free use of extrinsic evidence in will interpretations threatens this certainty.⁶⁰ Some courts therefore attempt to

52. *Id.* "The testator's main protection against fabricated or mistaken evidence is the will itself." John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?* 130 U. PA. L. REV. 521, 525 (1982). For a discussion of ante-mortem probate, see *supra* note 7.

53. Cornelison, *supra* note 1, at 815.

54. Robertson, *supra* note 21, at 1081-84.

55. *Id.* at 1081. Some commentators have suggested that a "clear and convincing" standard of proof would assure the reliability of extrinsic evidence used in a will interpretation. Cornelison, *supra* note 1, at 815-16.

56. Cornelison, *supra* note 1, at 816.

57. *Id.* Professor Cornelison also notes that fraudulent evidence might be the work of unscrupulous lawyers, but states that the threat of disbarment should protect against such fraudulent activity. *Id.* Regardless of the deterrent effect of the threat of disbarment to lawyers, the same evidentiary process promises to protect a court from fraudulent information, whatever the source. *Id.*

58. *Id.*

59. *Id.* See also, e.g., *Atwater v. Meeks*, 508 P.2d 866, 873 (Kan. 1973) ("If courts should indulge an unlimited latitude of forming conjectures on wills by continually placing themselves in the positions of the testator to ascertain his intentions, instead of attending to their grammatical and legal construction, the consequences must be endless litigation."); *In re Estate of Campbell*, 655 N.Y.S.2d 913, 920 (N.Y. App. Div. 1997) ("A Will is a document of signal importance, expressive of an individual's last wishes regarding the disposition of the property he has worked a lifetime to accumulate. A testator has a right to expect . . . that only true expressions of the wishes of an individual possessing testamentary capacity and executed in accordance with the proper statutory formalities will be given effect by the courts of this state.") (citation omitted). See also *infra* note 60 and accompanying text.

60. Cornelison, *supra* note 1, at 816. The North Dakota Supreme Court, for one, explained that allowing extrinsic evidence "would leave every will open to attack as to the testator's alleged 'real'

maintain some sort of standardized code that defines particular language formations to represent each and every possible bequest in a will.⁶¹ If a standardized code can be achieved, then the testator and the courts will be speaking the same language.⁶²

Finally, American courts hesitate to consider extrinsic evidence when interpreting a will because the evidence has not been attested according to the formalities required by the Statute of Wills.⁶³ Some commentators have argued against these formalities as an “anguished, pedantic cult of symbols wholly worthless and meaningless in themselves.”⁶⁴ The Uniform Probate Code, however, has substantially lowered the bar on execution formalities, relying on alternative methods to determine testamentary intent.⁶⁵

Thus, American courts have continued to look within the four corners of the will for the testator's intent. In doing so, they have customarily allowed themselves to interpret a will in opposition to the strict grammatical reading of its language only when other sections of the will document provide a “clear and satisfactory ground” for presuming that the intent of the testator runs against the strict grammatical meaning of the words she used in writing her will.⁶⁶

intent, and would deprive decedents of any certainty about the eventual disposition of their estates.” *American Cancer Soc’y v. Unruh*, 559 N.W.2d 818, 822 (N.D. 1997).

61. Baron, *supra* note 5, at 638-39.

62. *See id.* (discussing the idea that one can think of the words of a will as a code to convey ideas; Richard W. Power, *Wills: A Primer of Interpretation and Construction*, 51 IOWA L. REV. 75 (1965)).

63. Cornelison, *supra* note 1, at 817. Indeed, many commentators recognize that these execution formalities “serve useful ends.” Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994).

They take the vast array of testamentary things and channel them into a form that is readily recognizable as a will, thus easing the transfer of property at death. By imposing a standard form on testamentary writings, they enable probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria, thereby permitting probate to proceed in the vast majority of cases as a routine, bureaucratic process.

Id. *See also* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 367-68 (1966); *supra* note 41 and accompanying text.

64. Mann, *supra* note 63, at 1034 (quoting 2 RUDOLPH VON JHERING, *GEIST DES ROMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* 478-79 (1883), quoted in Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 354 (1973)).

65. *See* U.P.C. § 2-502 & cmt. at 47 (“The intent is to validate wills which meet the minimum formalities of the statute.”). While this is by no means the law in every American jurisdiction, it does represent the thinking of the experts in the field of wills law who created the uniform code.

66. REDFIELD, *supra* note 2, at 465. It is interesting to note, too, that courts go to great lengths to balance the desire to derive intent from within the four corners of the will with a desire to give effect to its “plain and unambiguous language” when interpreting testamentary intent. *Id.* at 465-66. For example, once a court determines the testator's intent from the complete body of the will and decides

C. Current American Approaches

Current American approaches to determining a testator's intent from the language of a will tend to eschew the consideration of extrinsic evidence of testamentary intent in a manner consistent with traditional approaches. Generally, courts refuse to use extrinsic evidence of a testator's intent so long as the will document, by itself, yields some clues—through its language, structure, or general theme—about the author's wishes regarding his property.⁶⁷ Once these modern courts decide

that the testator's intent is not being fully effected by the grammatical forms used by the testator in the writing of the will, it can give such a construction as would support such intent of the testator, even against strict grammatical rules, to the extent of even transposing, supplying, or rejecting entire words, phrases, or punctuation. *Id.* at 464 (citing *Pond v. Bergh*, 10 Paige Ch. 140, 152 (N.Y. Ch. 1843)).

67. These approaches range from more restrictive "four corners of the will" analysis to more liberal approaches, which focus on determining intent even if not expressly contained in the words of the will. Regardless of approach, however, a number of courts have limited their analyses to the actual terms of the will. *See, e.g.*, *Robertson v. United States*, 310 F.2d 199, 202 (5th Cir. 1962) (stating that the will must speak for itself in the absence of ambiguity or conflict); *Roberts v. United States*, 182 F. Supp. 957, 959 (S.D. Cal. 1960) ("The intent of the testator is derived from the language he employed [in the will] and, when that is clear, the court may not speculate on what he might have intended to say or do."); *Born v. Clark*, 662 So. 2d 669, 671 (Ala. 1995) (stating that, absent ambiguity in the language of the will, the court must look to the four corners of the document and let those words inform them of the testator's intent); *In re Lanart's Estate*, 9 Alaska 535, 542 (D. Alaska 1939) (stating that the intention of the testator need not be expressly declared in the entire will, so long as it can be inferred from the scope and import of the will); *Lowell v. Lowell*, 240 P. 280, 282 (Ariz. 1925) (stating that, if the words of a will are not ambiguous, a court must allow the meaning of those words to control, even if this interpretation overrules the apparent will of the testator); *Aycock Pontiac, Inc. v. Aycock*, 983 S.W.2d 915, 919 (Ark. 1998) (stating that the court must allow the language within the four corners of the will to govern as to testator intent); *Crittenden v. Lytle*, 253 S.W.2d 361, 363 (Ark. 1953) (stating that intent must be derived from the language of the will); *Griffin v. Gould*, 432 N.E.2d 1031, 1033 (Ill. App. Ct. 1982) (stating that wills whose language leaves doubt as to their meaning may be interpreted in light of surrounding circumstances and extrinsic evidence); *Ostby v. Bisek*, 479 N.W.2d 866, 871 (N.D. 1992) ("Unless a duly executed will is ambiguous, the testamentary intent is derived from the will itself, not from extrinsic evidence."); *Westmoreland County Volunteer Rescue Squad v. Melnick*, 414 S.E.2d 817, 818 (Va. 1992) (stating that a testator's intention must be determined from the language of the will document).

Some courts, however, will circumvent the requirement that their analyses focus on the terms of the wills. For example, in California, a court may not consider evidence of the testator's intent outside the four corners of the will unless the terms of the will are unclear and ambiguous. *See, e.g.*, *Nunes v. Nunes*, 266 P.2d 574, 578 (Cal. Ct. App. 1954) ("If the terms are certain and free from ambiguity, effect must be given thereto and no speculation is permitted as to whether an intention may have existed contrary to that expressed. But if the language used is ambiguous, extrinsic evidence may properly be considered."). In *Hembree v. Quinn*, however, the California Supreme Court noted that courts may look outside the four corners of a will when first deciding whether the will is ambiguous, in order to determine whether to resolve any ambiguity. *Hembree v. Quinn*, 444 P.2d 353, 359-62 (Cal. 1968). *Id.* ("Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was

that the terms of the will are not sufficiently ambiguous to require extrinsic evidence of a testator's intent,⁶⁸ they step beyond the traditional approaches to will interpretation. Instead of only looking to a strict grammatical interpretation of the will's language,⁶⁹ modern courts will take one of four approaches to grammatical analysis of testamentary documents: the "words of the will" approach,⁷⁰ the "ordinary and natural meaning" approach,⁷¹ the "liberal interpretation" approach,⁷² or the "in light of surrounding circumstances" approach.⁷³

The "words of the will" approach to testamentary interpretation continues the strict, traditional path of looking only to the technical meaning of the language of the will document.⁷⁴ This approach proceeds

never intended." *Id.* at 359 (quoting *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 128 P.2d 665, 679 (Cal. 1942) (Traynor, J., concurring)). In this way, the court found a way to consider the testator's seemingly clear language in light of surrounding circumstances without technically violating the long-standing principle that a court may only look to extrinsic evidence when the terms of the will are facially ambiguous. For a similar approach to circumventing the traditional rules of will interpretation, see *In re Walker*, 849 S.W.2d 766 (Tenn. 1993).

68. See *supra* note 12 and accompanying text.

69. See *infra* notes 87-119 and accompanying text.

70. See *infra* notes 74-75 and accompanying text.

71. See *infra* notes 76-78 and accompanying text.

72. See *infra* notes 79-81 and accompanying text.

73. See *infra* notes 82-85 and accompanying text. This analysis is made more complex by the fact that courts in some jurisdictions have used more than one approach at different times in history without explicitly overruling a prior approach. For example, Arkansas courts have claimed to use both the "ordinary and natural meaning" approach and the "words of the will and nothing more" approach. See *Estate of Wells v. Sanford*, 663 S.W.2d 174, 176 (Ark. 1984) (holding that words in the will should be interpreted according to their "ordinary sense"); *Heirs of Mills v. Wylie*, 466 S.W.2d 937, 940 (Ark. 1971) (holding that court should look to the intention as it is expressed in the words of the will, not as the court might presume it to exist in the mind of the testator at the execution of the will); *Jones v. Ellison*, 15 S.W.3d 710, 713 (Ark. App. 2000) ("When construing a testamentary document to arrive at the testatrix's intention, one does not look at the intention that existed in the testatrix's mind at the time of the execution, but that which is expressed by the language of the instrument."). Generally, though, one can evaluate these approaches as if they are discrete, even if their discrete nature is merely an academic reality.

74. See, e.g., *Heirs of Mills v. Wylie*, 466 S.W.2d at 940 (holding that the purpose of will interpretation is to determine intent from the language of the will document); *Jones v. Ellison*, *supra* note 73; *Brewer v. Peterson*, 453 P.2d 966, 971 (Ariz. Ct. App. 1969) ("We agree that the intent of the testatrix is to be determined by the intent expressed in the will is controlling."); *In re Estate of Simoncini*, 280 Cal. Rptr. 393, 397 (Cal. Ct. App. 1990) ("In ascertaining the testator's intent, courts employ an objective test: the intention to be determined is that which is *actually expressed* in the language of the will."); *Cal. First Bank v. Lee* 166 Cal. Rptr. 587, 590 (Cal. Ct. App. 1980) ("The intention which an interpretation of a will seeks to ascertain is the testator's intention as expressed in the words of the will, not some undeclared intention which may have been in his mind."); *Babcock v. Watson*, 77 Cal. Rptr. 753, 763-64 (Cal. Ct. App. 1969) (holding that only one version of the testator's intent was supportable due to a strict application of the rules of grammar); *Bridgeport-City Trust Co. v. Buchtenkirk*, 124 A.2d 231, 236 (Conn. 1956) (noting that the intent of the testator may only be determined from the language he used in his will); *Cole v. Robertson*, 429 S.E.2d 678, 679 (Ga. 1993) ("This search for intention of the testator should be made . . . by scrutinizing every phrase

from the idea that the language of the will is the only certain expression of the testator's intent, particularly because of the safeguards afforded by the historical formalities of will execution.⁷⁵

The "ordinary and natural meaning" approach is quite popular among American jurisdictions.⁷⁶ It relaxes the traditional approach; although courts are still confined to the language of the will, the interpretation of that language is considerably less constricted.⁷⁷ Courts using this approach do not bind themselves to interpret the testator's words according to strict grammatical and legal analysis; rather, they may stretch the language beyond its strict definitions to its "ordinary and natural meaning" to better effectuate a testator's overall intent, as gleaned from the whole of the will document.⁷⁸

that [the will] contains."); *Weber v. Hawkins*, 196 N.E.2d 695, 698 (Ill. 1964) ("[T]he intention sought is not that which by inference may be presumed to have existed in the mind of the testator, but that which, by words used in the will, he has expressed."); *In re Estate of Nagl*, 408 N.W.2d 768, 771 (Iowa Ct. App. 1987) ("We consider not what the testator meant to say but what he meant by what he did say."); *In re Estate of Wernet*, 596 P.2d 137, 145 (Kan. 1979) ("It is the intention of the testator spoken in the words of his will that govern and not any intention deduced from speculation as to what would have been done had the change been anticipated."); *Atwater v. Meeks*, *supra* note 59, at 873 (suggesting that courts must focus on the grammatical and legal construction of a will document to determine a testator's intent); *Estate of Leighton*, 638 A.2d 723, 724 (Me. 1994) ("The fundamental principle in [interpreting] a will is that the intention of the testator as expressed in her will controls the legal effect of her disposition."); *Solomon v. Cent. Trust Co. of Northeastern Ohio, N.A.*, 584 N.E.2d 1185, 1187 (Ohio 1992) ("Generally, the express language of the testamentary provisions themselves will indicate the testator's intent."); *Gehl v. Reingruber*, 159 N.W.2d 72, 75 (Wis. 1968) ("The essence of our inquiry then is to determine the reasonable meaning of the words actually used.").

75. See *supra* notes 41-42 and 50-53 and accompanying text.

76. See *infra* note 78 and accompanying text.

77. See *infra* note 78 and accompanying text.

78. CAL. PROB. CODE § 21122 (West 2002) (calling for the interpretation of words in a will according to their "ordinary and grammatical meaning"); 84 OKLA. STAT. ANN. tit. 84, § 158 (West 2001) ("The words of a will are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected, and that other can be ascertained."); *Lehr v. Collier*, 909 S.W.2d 717, 723 (Mo. Ct. App. 1995) ("In ascertaining this intent, courts must give the words used in the will and trust their usual, ordinary and natural meaning unless there is something in the instruments to deflect from that meaning."); *Snyder v. Snyder*, 2 P.3d 238, 240 (Mont. 2000) ("Words used in the instrument are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be ascertained." (quoting *In re Estate of Evans*, 704 P.2d 35, 38 (Mont. 1985)); *Lincoln Nat. Bank & Trust Co. v. Grainger*, 262 N.W. 11, 11 (Neb. 1935) (holding that courts should interpret the language of a will according to its "ordinary and natural meaning"); *Forshee v. Downdey*, 139 A. 321, 321 (N.J. Ch. 1927) (holding that words in a will should be given their "ordinary and natural meaning"); *Narita v. Bernstein*, 476 N.E.2d 298, 300 (N.Y. 1985) (stating that courts should construe the words of a will "according to their everyday and ordinary meaning"); *Kretzer v. Brubaker*, 660 N.E.2d 446, 447 (Ohio 1996) (stating that words should be given "their ordinary meaning and natural effect" (quoting *Anderson v. Gibson*, 157 N.E. 377, 378 (Ohio 1927))); *Rhode Island Hosp. Trust Co. v. Otis*, 75 A.2d 210, 212 (R.I. 1950) (holding that the words of a will should be interpreted according to their "natural sense and use" absent contrary intent); *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949) (holding that courts should interpret a will's language according to its "ordinary and natural meaning"); *Firststar Trust Co. v. First Nat'l Bank of Kenosha*, 541

Other courts prefer a “liberal interpretation” approach. This approach maintains the traditional limitation on a court’s focus;⁷⁹ the judges still look exclusively to the words of the will to determine testamentary intent.⁸⁰ Unlike the requirement that constrains the courts to look to an objective meaning of a will’s language under the “words of the will” approach and the “ordinary and natural meaning” approach, however, this approach gives a “liberal interpretation” to the words of the will in order to better effectuate the testator’s intent.⁸¹

Finally, some courts prefer the “in light of surrounding circumstances” approach.⁸² This approach explodes the four corners of the will document and allows courts to attempt to determine the intention of the testator from an analysis of her words “in light of the surrounding circumstances.”⁸³ In other words, this approach allows courts to examine extrinsic evidence about the situation surrounding the execution of the will, which is essentially evidence as to testator intent.⁸⁴ The court can then attempt to liberally interpret the language of the will to fulfill the testator’s apparent intent.⁸⁵

N.W.2d 467, 471 (Wis. 1995) (“When considering the language of the will, the words must be given their common and ordinary meaning unless something in the will suggests otherwise.”).

79. See *supra* notes 50-66 and accompanying text.

80. See *infra* note 81 and accompanying text.

81. *In re Lanart’s Estate*, 9 Alaska 535, 542-43 (D. Alaska 1939) (stating that a court should look to the four corners of the will for the testator’s intent, and, if that intent is clearly inferred, that the court should engage in a “departure from the literal construction of [the language in] the will” to effect this inferred intent); *Palms Clinics and Hosp., Inc. v. Ariz. Soc’y for Crippled Children and Adults, Inc.*, 433 P.2d 296, 300 (Ariz. Ct. App. 1967) (“[T]he language used must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator.” (quoting *Newhall v. McGill* 212 P.2d 764, 769 (Ariz. 1949)); *In re Estate of Shaw*, 538 N.E.2d 643, 645 (Ill. App. Ct. 1989) (allowing a liberal interpretation of the language of a will document to avoid intestacy); *In re Estate of Johnson*, 615 N.W.2d 98, 103 (Neb. 2000) (“To arrive at a testator’s or testatrix’s intention expressed in a will, a court must examine the will in its entirety, *consider and liberally interpret every provision in the will*, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the maker of the will understood words stated in the will.”) (emphasis added); *Burgess v. Poulsen*, 836 P.2d 1386 (Utah Ct. App. 1992) (allowing for a liberal interpretation of the language of a will in order to better determine a testator’s intent).

Although fewer jurisdictions employ the “liberal interpretation” approach, it remains a valid option for courts, partially due to its recognition by judicially utilized reference material. 80 AM. JUR. 2D *Wills* § 1157 (1975) (“It is frequently recognized that in ascertaining the meaning of words used in a will, a distinction exists between instruments drawn by skilled testamentary draftsmen and those prepared by persons obviously unlearned in the law; . . . the language exhibited in wills of the [second kind] is to be interpreted liberally with reference to its popular meaning.”).

82. See *infra* note 85 and accompanying text.

83. See *infra* note 85 and accompanying text.

84. See *infra* note 85 and accompanying text.

85. See, e.g., *Pouser-Webb v. Pouser*, 975 P.2d 704, 708 (Ariz. 1999) (“In attempting to ascertain the testator’s intent, we consider the text of the will as a whole and, when appropriate, the circumstances at the time it was executed.”); *Newman v. Wells Fargo Bank, N.A.*, 59 Cal. Rptr.2d 2, 7

D. Grammatical Models of Language Analysis

In all of the approaches to determining a testator's intent described above, courts rely to some extent on a grammatical analysis of the language of the will as the basis for their decisions.⁸⁶ Typically, these analyses revolve around a standardized approach to English grammar: a prescriptive grammatical theory, or "a set of regulations that are based on what is evaluated as correct or incorrect in the standard varieties."⁸⁷ "Prescription depends on an ideology . . . concerning language which requires that in language use . . . things shall be done in the 'right' way."⁸⁸

(Cal. 1996) ("Before resorting to legal presumptions [(construction)], however, . . . the court must attempt to ascertain the intent of the testator by examining the will as a whole and the circumstances at the time of execution."); *Mangines v. Ermisch*, 705 A.2d 1025, 1027 (Conn. Super. Ct. 1997) (stating that a court will interpret the words of the will in light of the surrounding circumstances at the time of execution); *Lehner v. Lehner's Estate*, 547 P.2d 365, 369 (Kan. 1976) ("The tools in aid of our search for the testator's intention are the language contained within the four corners of the document, plus any extraneous circumstance surrounding its execution which assist in understanding his true intent and purpose.") (citation omitted); *In re Estate of Branigan*, 609 A.2d 431, 436 (N.J. 1992) ("[I]n ascertaining the subjective intent of the testator, courts will give primary emphasis to his dominant plan and purpose as they appear from the entirety of his will when read and considered in the light of the surrounding facts and circumstances" (quoting *Fidelity Union Tr. Co. v. Robert*, 178 A.2d 185, 187 (N.J. 1962))); *Orans v. Dousey*, 695 N.E. 2d 1119, 1122 (N.Y. 1998) ("[I]ntent is to be ascertained, not from a single word or phrase but *from a sympathetic reading of the will as an entirety* and in view of all the facts and circumstances under which the provisions of the will were framed." (quoting *Matter of Fabbri*, N.Y.2d 236, 240 (1957) (alteration in original)); *Am. Cancer Soc'y v. Unruh*, 559 N.W.2d 818, 822 (N.D. 1997); ("Courts must [interpret] a will to find the testator's intent from full consideration of the will in light of surrounding circumstances."); *Wright v. Brandon*, 863 S.W.2d 400, 402 (Tenn. 1993) ("The will is . . . to be interpreted in light of the circumstances in existence at the time of the will's execution.").

86. See *supra* notes 74-85 and accompanying text.

87. SIDNEY GREENBAUM & RANDOLPH QUIRK, *A STUDENT'S GRAMMAR OF THE ENGLISH LANGUAGE* 3 (1990).

88. JAMES MILROY & LESLEY MILROY, *AUTHORITY IN LANGUAGE: INVESTIGATION LANGUAGE PRESCRIPTION AND STANDARDIZATION 1* (1985). The ideology underpinning prescriptive grammar involves certain assumptions about language. KATHRYN RILEY & FRANK PARKER, *ENGLISH GRAMMAR: PRESCRIPTIVE, DESCRIPTIVE, GENERATIVE, PERFORMANCE* 47-50 (1998). First, a prescriptive grammar assumes that a set of strict grammatical rules based on Latin grammars is an appropriate model for English. *Id.* at 47. Latin and English, however, "display significant structural differences that prevent a direct transfer of rules from one language to the other." *Id.* at 48.

Second, prescription assumes that different English forms *necessarily* imply different meanings. *Id.* Indeed, "I leave," "I am leaving," "I will leave," and "I am going to leave" can all convey slightly different iterations of a common theme; however, context, inflection, and *customary usage* can render those variations of meaning insignificant. *Id.*, MILROY & MILROY, *supra*, at 62.

Third,—and perhaps most tellingly—prescription assumes that "[l]anguage change represents decay," and that "older forms of the language are preferable and should be preserved." RILEY & PARKER, *supra*, at 49. Language change, however, is natural, especially in English. *Id.* English has evolved from Old English to Middle English to Early Modern English to Modern English, and it continues to evolve today. *Id.* Latin, on the other hand, has remained unchanged for centuries primarily because of its status as the language of religion; in other words, in terms of language, Latin's unchanging form is the exception rather than the rule. *Id.*

Prescriptive grammars of the English language first surfaced in England during the Age of Reason, the mid-eighteenth century.⁸⁹ This age of science yielded a complete classification of all living creatures.⁹⁰ Surely, grammarians thought, such a society could also define and regulate a grammar of the “corrupt” English language based on the “divine” and “pure” grammars of Latin and Greek.⁹¹ Therefore, most eighteenth-century grammarians attempted to refine the English language, establish rules based on these refinements, and fix the language to prevent further change by codifying these rules.⁹² These early grammarians imposed on English sets of rules based on Latinate grammars.⁹³ Consequently, the English language changed by becoming fixed.⁹⁴ For example, the rule that “[t]wo negatives in English destroy one another, or are equivalent to an affirmative”⁹⁵ continues today even though, for many speakers of nonstandard English (as well as for those who understand nonstandard forms of English), the use of more than one negator serves only to emphasize the negation.⁹⁶ Interestingly, this rule against double negation serves no function of meaning; rather, it merely introduces some prescriptive certainty to the use of the English language.⁹⁷ Moreover, this

Finally, prescription assumes that language adheres to some sort of inherent logic. *Id.* Indeed, English is logical to the extent that “it is a self-contained, rule-governed system.” *Id.* But English is internally inconsistent, too.

89. C. M. MILLWARD, *A BIOGRAPHY OF THE ENGLISH LANGUAGE* 242 (2d ed. 1996).

90. *Id.* Linnaeus had completed a “taxonomic classification system” for all living creatures, plant and animal. *Id.*

91. *Id.* at 242-43. Indeed, the English language, because of its pronounced lack of declensions and inflections, was considered less pure than the known—and highly inflected—languages of Latin and Greek. *Id.* at 242-43.

92. *Id.* at 243.

93. *Id.* These early English grammars included Jeremiah Wharton’s *The English Grammar* (1654) and Joseph Aickin’s *The English Grammar*, which cautions its readers that “you are not an English Scholar, till you can read, write, and speak English truly.” *Id.* (quoting JOSEPH AICKIN, *THE ENGLISH GRAMMAR* 1 (1693)). See also *supra* note 88 and accompanying text.

94. Specifically, the standardization of English flies in the face of the dynamic history of the English language. Languages change all the time, sometimes dramatically—as in times of social and political upheaval—and sometimes imperceptibly. EDWARD FINEGAN & NIKO BESNIER, *LANGUAGE: ITS STRUCTURE AND USE* 277 (1989). To freeze the progress of any language denies this reality.

95. MILLWARD, *supra* note 89, at 244 (quoting ROBERT LOWTH, *A SHORT INTRODUCTION TO ENGLISH GRAMMAR* (1762)). Just as two negative numbers created a positive number when multiplied together, so do two negative words.

96. “I have yet to meet any speaker of any variety of English who on hearing Mick Jagger sing ‘I can’t get no satisfaction’ has entertained for one moment the belief he means the opposite.” DEBORAH CAMERON, *VERBAL HYGIENE* 25 (1995). See also MILROY & MILROY, *AUTHORITY IN LANGUAGE* (1985), *supra* note 88, at 62 (“A socially neutral approach to this requires us to consider the possibility that multiple negation is an additional resource of speech and not a defect due to ignorance or illogicality.”).

97. Certainty of meaning is, of course, an important end of language standardization. MILROY & MILROY, *AUTHORITY IN LANGUAGE* (3d ed.), *supra* note 15, at 19. “The whole notion of

rule against multiple negation—and the other rules espoused by early English grammarians—made “correct” usage a moral good and the goal of educated speakers of English.⁹⁸ The belief that one usage of the English language is “correct” survives today.⁹⁹ When these prescriptive grammarians found a usage in the English language that did not fit within their carefully calibrated grammars, they attempted to squelch that usage and purify the English language.¹⁰⁰ This inflexibility has left the prescriptive approach to English grammar unable to explain usage that falls outside its bounds.¹⁰¹

A descriptive linguistics approach to language, on the other hand, describes how people use the English language to communicate;¹⁰² it does not attempt to distinguish between “correct” and “incorrect” usage.¹⁰³ Specifically, a descriptive grammar requires an analysis of how individuals within a group—or individuals, themselves—communicate in

standardization is bound up with the aim of functional efficiency of the language. Ultimately, the desideratum is that everyone should use and understand the language in the same way with the minimum of misunderstanding and the maximum of efficiency.” *Id.* Even though speakers of different forms of English may have some difficulty understanding each other’s particular usages of the language in certain situations, *Id.* at 20, the ability for speakers of various forms of English to shift among different forms of English is common. MILROY & MILROY, *AUTHORITY IN LANGUAGE*, *supra* note 88, at 62. Although the removal of a nonstandard form of usage might increase efficiency, it might also mean “the loss of a device that could be used for emphasis [of meaning].” *Id.* Spelling reform served a similar purpose of standardization for efficiency’s sake without a concomitant improvement in conveyance of meaning. MILLWARD, *supra* note 89, at 232-35.

98. MILLWARD, *supra* note 89, at 245.

99. This might be best demonstrated by a quotation from a Roald Dahl short story: “Then suddenly, he was struck by a powerful but simple little truth, and it was this: *That English grammar is governed by rules that are almost mathematical in their strictness!* Given the words, . . . then there is only one correct order in which those words can be arranged.” RICHARD LEDERER, *THE MIRACLE OF LANGUAGE* 11 (1991) (quoting Roald Dahl, *The Great Automatic Grammatiasator*, in *THE UMBRELLA MAN AND OTHER STORIES* 13 (1997)).

100. MILLWARD, *supra* note 89, at 213.

101. Descriptive linguists argue that each variety of English has its own “correctness.” EDWARD FINEGAN, *ATTITUDES TOWARD ENGLISH USAGE: THE HISTORY OF A WAR OF WORDS* 165 (1980). If this is so, any prescriptive grammar will necessarily omit the “correctness” of nonstandard forms of English to the detriment of any scholar—or any court—employing a prescriptive grammar to understand the language of a nonstandard speaker of English.

102. RILEY & PARKER, *supra* note 88, at 58-71. Descriptive linguistics is “concerned primarily with collecting and cataloguing data, rather than with establishing rules governing usage. *Id.* at 58. “[L]inguistic science . . . preserves a notion of grammar as ordered, hierarchical and rule-governed, but dispenses with tradition and authority as necessary components of its meaning. . . . [Descriptive linguistics describes a language] in which the rules are underwritten not by traditional authority but by internalized native speaker competence.” CAMERON, *supra* note 96, at 97.

103. RILEY & PARKER, *supra* note 88, at 58. *See also, e.g.*, GREENBAUM & QUIRK, *supra* note 87, at 3. Greenbaum and Quirk’s grammar attempts to describe, in the aggregate, how people use the English language, although it recognizes that prescriptive grammars have sometimes pervasive influences on individuals’ approaches to grammar. *Id.*

order to describe the way in which certain speakers use words, syntax, punctuation, and word combinations in certain contexts.¹⁰⁴

III. ANALYSIS OF CURRENT APPROACHES IN LIGHT OF POLICY AND GRAMMAR

Once a court decides that it must interpret the language of a will to determine a testator's intent, it may follow many paths to meaning. In any case, the court will need to balance the seemingly competing policy interests of determining a testator's true intent by any possible means available with the desire to protect against fraud and maintain the integrity of the testamentary document by adhering to the traditional inviolability of the words of the testator's will.¹⁰⁵ All the while, the court must also be aware of the prejudices that accompany the use of prescriptive grammars in their analyses.¹⁰⁶ Unfortunately, none of the modern approaches to will interpretation effectively balance these competing factors.

A. *The "Words of the Will" Approach*¹⁰⁷

The "words of the will" approach to will interpretation bases itself in the traditional deference to the inviolability of the words of a properly executed will.¹⁰⁸ Any attempt to presume intention from evidence other than the simple words of the will document potentially does violence to the intent of the testator.¹⁰⁹ The "words of the will" approach avoids the potential pitfalls inherent in extrinsic evidence.¹¹⁰ Moreover, the "words of the will" approach favors a fail-safe code of language for certainty's sake, such that every possible bequest in a will corresponds to a particular set of English words.¹¹¹ However, courts can only rely absolutely on the language of a will if the formal execution requirements are effective to deter fraud.¹¹² With the Uniform Probate Code's move away from formal execution requirements,¹¹³ the language of a will may no longer be as reliable as it once was.

104. RILEY & PARKER, *supra* note 88, at 58.

105. *See supra* notes 50-65 and accompanying text.

106. *See supra* notes 87-100 and accompanying text.

107. *See supra* notes 74-75 and accompanying text.

108. *See supra* note 75 and accompanying text.

109. *See supra* notes 31-40 and accompanying text.

110. *See supra* notes 50-65 and accompanying text.

111. *See supra* notes 58-62 and accompanying text.

112. *See supra* notes 41-42, 57-58 and accompanying text.

113. *See supra* note 65 and accompanying text.

Additionally, the “words of the will” approach can do a poor job in deciphering true testamentary intent. Many authors of wills, especially those who create holographic—handwritten—wills, draft in all sorts of nonstandard English forms.¹¹⁴ As with any court-instituted interpretation of testamentary language that fails to consider the descriptive grammar of the testator, the “words of the will” approach risks missing the testator’s intent completely because of a misguided attempt to fit the testator’s use of the English language within overgeneralized, prescriptive categories.¹¹⁵

B. The “Natural and Ordinary Meaning” Approach¹¹⁶

The “natural and ordinary meaning” approach—quite popular among American courts¹¹⁷—does a similarly good job of emphasizing the importance to will interpretation of the words of a validly executed will.¹¹⁸ The approach puts great credence in the words of the testamentary document, thus reasserting the importance of the fraud-protection functions of formal will execution;¹¹⁹ however, this approach relaxes somewhat the traditional “words of the will” approach to the interpretation of language. Specifically, courts need no longer interpret the testator’s words according to a strict prescriptive grammatical or legal analysis;¹²⁰

114. For example, one testator’s handwritten will read as follows:

To you—

Cornie and Richard Ostercamp my all and may all to you[.]

Osterkamp v. Weeks, 250 N.W.2d 286, 287 (S.D. 1977).

Despite the absence of any verb in the document, the court found “the phrase ‘to you’ indicative of an intent to pass property.” *Id.* at 289.

Another testator’s will—handwritten on a piece of company stationary with numerous additions and illegible scratchings—gave “one payment of \$1000.00 from [(sic)] Patricia Chalgren as final settlement.” *Babcock v. Watson*, *supra* note 74, at 759. In the very next sentence, the testator asked that his property be deeded to Patricia, too. *Id.* The court had to decide the meaning of “as final settlement.” *Id.* at 763-64.

Yet another testator’s will read as follows:

On this day July 7

I Gloria Franklin leaves everything to Terry & Jess Waltman in

I Gloria Franklin leaves everything I own including farm, vehickles everything to Jess & Terry Waltman in case I die on my way to & from Jersey.

In re Estate of Franklin, 2001 WL 896635, 1 (Tenn. Ct. App. 2001).

115. *See supra* notes 87-104 and accompanying text.

116. *See supra* notes 76-78 and accompanying text.

117. *See supra* note 78.

118. *See supra* notes 50-65 and 78 and accompanying text.

119. *See supra* note 57 and accompanying text.

120. *See, e.g., Firststar Trust Co., supra* note 78. In *Firststar*, the court recognized that it should interpret the language of the will according to its ordinary and natural meaning unless the whole of the will suggested that the intent of the testator was otherwise. *Id.* at 471.

rather, those courts may stretch the language of the will beyond its strict definitions to its “ordinary and natural meaning” to better achieve a testator’s intent as gleaned from a reading of the will as a whole.¹²¹

The “ordinary and natural meaning” approach continues to limit courts’ analyses to the four corners of the will document.¹²² However, it also moves beyond historical approaches to a less restrictive reading of the will’s language in light of the testator’s supposed intention as derived from a reading of the entire testamentary scheme.¹²³ However, as with any interpretative scheme based on prescriptive grammatical analysis, this approach can still yield an interpretation that veers far from the true intention of the testator simply because the words of the testator are not used in the way a court says a typical testator would or should use them.¹²⁴

C. The “Liberal Interpretation” Approach¹²⁵

Like the first two approaches analyzed here, the “liberal interpretation” approach to testamentary interpretation maintains focus on the fraud-avoidance value of limiting the analysis to the words of the validly executed will document.¹²⁶ A court following this approach may still look exclusively to the words of the will;¹²⁷ however, the “objective” analysis requirement that might restrain a court’s interpretation in the first two approaches gives way, here, to a “liberal interpretation” of the words of the will in order to effectuate the testator’s intent.¹²⁸ If the intent of the

121. See, e.g., *Snyder*, *supra* note 78. The *Snyder* court recognized that the court could go beyond a word-for-word consideration of the ordinary and natural meaning of the terms of the will in order to determine the testator’s intent. *Id.* at 240-41.

122. See *supra* notes 50-66 and 78 and accompanying text.

123. See *supra* notes 78, 120, and 121 and accompanying text.

124. See *supra* notes 87-100 and accompanying text.

125. See *supra* notes 79-81 and accompanying text.

126. See *supra* notes 50-66 and accompanying text.

127. See *infra* note 128 and accompanying text.

128. See, e.g., *In re Lanart’s Estate*, *supra* note 81. One might note that the “objective” analysis required under the “words of the will” approach and the “ordinary and natural meaning” approach to will interpretation seems to require a prescriptive analysis of a testator’s grammar, as an analysis based on an outside standard is the essence of objectivity. While the “liberal interpretation” moves away from requiring an objective analysis of the testator’s language, a court’s analysis may still very well be based in a prescriptive grammar. Indeed, prescriptive grammars are convenient tools for analysis and they prevail in common usage in American society. Most importantly, the “liberal interpretation” approach still forbids extrinsic evidence of any sort. See *supra* notes 79-81 and accompanying text. Consequently, no evidence of a testator’s personal grammar could ever inform a court’s analysis under this approach.

testator is apparent from some other source *within the will*, then the court can essentially do whatever it needs to do to carry out this intent.¹²⁹ While courts utilizing this approach to will interpretation experience a freedom of action unknown to courts following the more traditional approaches described above, a court's general interpretation of a testator's intent may be flawed because the testator failed to organize his words in the commonly accepted manner.¹³⁰

*D. The "in Light of Surrounding Circumstances" Approach*¹³¹

The "in light of surrounding circumstances" approach continues the traditional deference to the words of a properly executed will document in a slightly different way.¹³² By allowing courts to consider the meaning of a will's language "in light of the surrounding circumstances," this approach uses extrinsic evidence to determine a testator's intent.¹³³ The court will then attempt to liberally interpret the language of the will and, to the extent possible, try to meet the intent evident from the extrinsic evidence.¹³⁴ In this way, the "in light of surrounding circumstances" approach challenges the traditional importance of the words of a formally executed will.¹³⁵ Yet, this approach still holds, at least to some extent, the words of a validly executed will above all other evidence.¹³⁶ Despite looking to extrinsic evidence for testamentary intent, the words of the will still serve as a check on the extrinsically determined interpretation of intent.¹³⁷

129. See *supra* note 128 and accompanying text.

130. See *supra* notes 87-100 and accompanying text.

131. See *supra* notes 82-85 and accompanying text.

132. See *supra* notes 50-66, 82-85 and accompanying text.

133. See, e.g., *In re Estate of Branigan*, *supra* note 85, at 437 (determining the testator's intent with reference to extrinsic evidence of the prevailing estate tax laws).

134. See *supra* note 133 and accompanying text.

135. See *supra* notes 63-65, 79-81 and accompanying text.

136. *Lehrer v. Lehrer's Estate*, *supra* note 85, at 368 ("Proper resolution of the issue raised by the parties depends on the construction to be given to the controlling language found in the will.").

137. See *supra* note 85 and accompanying text. Theoretically, at least, this approach allows a court to use extrinsic evidence to determine the testator's intent, while simultaneously holding that the language of the will cannot be interpreted to effect that intention. This paradox puts an important theoretical limitation on the efficacy of this approach; it also holds the approach closer to traditional models than it might appear on its face. In the end, however, no courts utilizing the "in light of surrounding circumstances" approach have actually found that the language of the will did not support the extrinsically determined intent of the testator.

The “in light of surrounding circumstances” approach attempts to tweak the will into actually yielding the intent of the testator, regardless, almost, of the strict meaning of the words of the will.¹³⁸ While bending the will’s language and meaning might best allow courts to find a testator’s intent, it also leaves open the possibility that a court’s analysis of fraudulent extrinsic evidence and the words of the will could lead to an interpretation of a testator’s intent directly opposite of her true intention. To this end, an analysis based in prescriptive grammar might facilitate such a fraud and allow a court to harmonize fraudulent extrinsic evidence with a reading of the will’s language that does violence to a testator’s true intention.

IV. PROPOSAL: THE DESCRIPTIVE GRAMMAR APPROACH

The four approaches discussed above all fall short of true efficacy in determining and achieving true testamentary intent¹³⁹ while adhering to the traditional emphasis placed on the inviolability of the language of the will.¹⁴⁰ Indeed, they each focus too much on one policy issue or the other. Moreover, the approaches all face the possibility of failing due to a faulty prescriptive analysis of the language in front of them.¹⁴¹ A better approach involves looking outside the will to extrinsic evidence, not for the testator’s intent, but for the meaning of the words used by the testator in the validly executed will document.

138. See, e.g., *In re Estate of Branigan*, *supra* notes 85 and 134.

139. See *supra* notes 107-38 and accompanying text.

140. See *supra* notes 107-38 and accompanying text.

141. See *supra* notes 107-38 and accompanying text. A few courts employ a personal use exception to allow extrinsic evidence of a testator’s intent. Cornelison, *supra* note 1, at 825. (“The personal usage exception allows courts to give effect to the testator’s personal vocabulary and permits extrinsic evidence to show that the deceased habitually used certain words or phrases idiosyncratically [even when the will’s language is not ambiguous].”) (quoting Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scrivener’s Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 22 (1990) (internal quotation marks omitted)). *Id.*

Although the personal usage exception parallels the descriptive linguistics approach in its ability to consider an individual testator’s use of language, it still does not address the problem directly enough. Note that the personal usage exception considers “idiosyncratic” uses of language. *Id.* As described above, *supra* notes 102-04 and accompanying text, the descriptive grammar approach recognizes that there are no “idiosyncratic” uses of language; rather, there are merely uses specific to the testator. The difference is palpable in determining when to look to extrinsic evidence. Under the personal usage exception, a court will look to extrinsic evidence only when the testator’s usage is recognized as potentially outside the bounds of standardized usage. Cornelison, *supra* note 1, at 825. Because the descriptive linguistics approach considers *all* of the testator’s language usage, it does not omit consideration of any usage that is particular to the testator.

This extrinsic evidence takes the form of a body of writings, testimony, and expert analysis sufficient to construct a descriptive grammar of the testator's use of the English language. Parties would present evidence specially tailored to answer questions of interpretation for particular passages of the will document, and the evidentiary process would provide the information necessary for the court to make its decision. The court would then use its understanding of the testator's descriptive grammar to interpret her intent from the actual words of the will.

The "descriptive grammar" approach best balances the competing policy interests of testamentary intent and deference to the will's language. It continues to recognize the important fraud-avoidance function served by using only the language of a validly executed will as the basis for determining testamentary intent. Because extrinsic evidence informs the court only about the meaning of the testator's words and not his intent, this process is very unlikely to introduce fraudulent information of intent directly into the court's decision. Moreover, because of the encompassing nature by which the descriptive grammar is compiled, any fraudulent material introduced into evidence as indicative of the testator's grammar would quickly be identified as an outlier and dismissed from the greater body of knowledge about the testator's use of language. Finally, much of the extrinsic evidence that would surely inform the collection of a descriptive grammar—letters, recordings, diaries—does not easily lend itself to fraud, especially as it applies to the compilation of a descriptive grammar.¹⁴² The "descriptive grammar" approach also does a fine job of discovering a testator's true intent. A descriptive grammar's specificity to the testator and her use of the English language creates conditions whereby the likelihood of discovering a testator's true intent is very high.

One possible limitation to the efficacy of this approach occurs when the will includes some omission, mistake, or true ambiguity. If any of these situations exists, no interpretation will be possible. A descriptive approach to interpretation will help confirm these ambiguities, which then might convince the court to look to extrinsic evidence of intent on the basis of ambiguity in the will's language. Another possible limitation of this approach arises when the testator's writing, even when correctly

142. For example, simply falsifying a letter from the testator would likely not be enough to perpetrate a fraud on the creation of a descriptive grammar. The person who falsified the document would likely need to understand the intricacies of grammar, and the element of evidentiary value would need to harmonize with the grammatical construction of the rest of the document. Additionally, the body of evidence would likely render one falsification an outlier, requiring fraud on a mass and informed scale to effectively disrupt the creation of a descriptive grammar.

interpreted, does not effectuate her intent.¹⁴³ What to do with a poorly written will, perhaps, is the puzzle that cannot be resolved through application of the approaches here analyzed. Common sense might suggest looking outside the will to extrinsic evidence of intent to determine whether the will was written in a way that conveyed a meaning contrary to the testator's intent. The struggle between discovering intent and protecting the will against fraud recurs here. History has chosen to include protections against fraud in the interpretation equation, and the "descriptive grammar" approach maintains these precautions.

Creating a descriptive grammar for each testator whose will needs interpretation promises to be an expensive and time-consuming endeavor. Probate courts will become havens for highly paid expert witnesses, and professors of grammar will line their bank accounts with fees. Moreover, probate judges will encounter more evidentiary collection than ever, and dockets will clog. Even with all of this potential trouble, however, the "descriptive language" approach to will interpretation is still a viable option because of its potential upside. Courts can determine specific testamentary intent confident that they are honoring both the policy of determining a testator's intent above all else and the policy of relying on the words of the will to determine that intent.

V. CONCLUSION

The Anglo-American legal system's age-old emphasis on determining a testator's intent as expressed in a will document while protecting against misrepresentation of that intent is an exacting standard. American courts' various approaches to meeting both requirements all fail, to some extent; either the approach breaks from the protective procedures surrounding the admission of extrinsic evidence of intent, or the approach fails to consider that speakers of English seldom use language in narrowly proscribed and easily ascertainable ways. Courts should analyze the language of testamentary documents from a descriptive linguistics perspective. By

143. In other words, a testator wrote a sentence: "I bequeath to my mother a life estate in my property and a specific testamentary power of appointment over the same property." If the testator misunderstood the effect of the language to mean that her mother could appoint the property to her estate, the Descriptive Grammar Approach would not provide evidence to show the testator's true intent because the testator is likely never to have used this language before in her life.

No approach short of one that allows for consideration of all extrinsic evidence, however, could implement the testator's true intent. Moreover, an approach allowing the consideration of all extrinsic evidence would raise the possibility of misrepresentation of a testator's intent. *See supra* notes 53-57 and accompanying text.

admitting extrinsic evidence of language usage, a court can protect the will document from tampering while more closely determining what the decedent truly intended.

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