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# INFLUENCE OF OBJECTIVE ELEMENTS ON THE INTERPRETATION OF WILLS

*Summary:* The author of the paper discusses rules relating to will execution formalities, and rules relating to interpretation of wills in order to show the importance of legal policy and general legal values for interpretation of wills. Aharon Barak's theory of purposive interpretation is a starting point for the discussion because this theory emphasizes the importance of objective elements for interpretation of wills. The author analyses the main problems that arise in connection with interpretation of wills and indicates possible policy considerations underlying different approaches to interpretation. The author concludes that courts have a justifiably large freedom to interpret the words of the will and that there is convergence between civil law and common law approach to interpretation of wills, and this interpretation is often based on objective rules not connected to the most likely intent of the testator.

*Keywords:* Interpretation, wills, purposive interpretation, substantive compliance, Law of Succession

## INTRODUCTION

Interpretation of wills is different from interpretation of other legal acts because of the importance of testator's intent. Unlike contracts and statutes, wills are interpreted with the aim of finding the most likely intent of the author. The standard used in will interpretation is tailor made for the particular testator. Faced with an ambiguous will, the court will ask the question – what did the testator mean by the words he used in his will?<sup>1</sup>

This particularity of interpretation of wills stems from the personal nature of wills. The main aim of testamentary law is to allow individuals to decide how their property will be

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1 The subjective approach to testamentary interpretation, which focuses on the intention of the testator at the time when he made the will is universally accepted in European legal systems, see: Herrler, S., "Wills", *The Max Planck Encyclopedia of European Private Law* (eds. Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann, Andreas Stier), Vol. II, Max Planck Gesellschaft-Oxford University Press, Oxford, 2012, p. 1775–1777.

divided after their death. Freedom of testation has deep roots in the right to property and dignity – it is an expression of personal freedom.<sup>2</sup> The personal nature of the will is so important that the will must be executed by the testator himself, it cannot be executed through a representative.<sup>3</sup> Taking into account that a will contains a unilateral declaration which is not addressed to any particular person and which is freely revocable, there is no need to protect the expectation interest of the beneficiaries.<sup>4</sup> The only relevant meaning is the meaning intended by the testator.

The main trouble with this approach is that testator's intent is very difficult to discover. Abstract objective standards of interpretation are easier to apply than personalised standards. In other words, it is much easier for the court to resort to the usual meaning of the words and phrases in a will than to interpret them according to the wishes of the deceased author.

Because of this difficulty, lawyers have come up with restrictive rules of form and interpretation. However, these rules, which are meant to protect testator's intent, really avoid interpretation altogether. According to the rule of strict compliance with statutory formalities, no document may be admitted to probate if it does not comply with all formalities exactly as they are defined in the law. According to the so-called plain meaning rule, the court should give the words their usual meaning, unless there are strong indications that a different meaning should be adopted. Both of these rules are losing ground in contemporary law to free interpretation based on the circumstances of the case.<sup>5</sup>

This liberal approach to form and interpretation shows that interpretation of wills is heavily influenced by legal policy. What was once unthinkable is becoming the dominant rule of testamentary law. Interpretation of wills is not based only on the intent of the testator, but also on the general legal values that provide a context for testamentary law. The work of Aharon Barak is significant in this context because he recognises and emphasises the importance of the objective aspect of will interpretation. According to him, interpretation of wills is not merely a search for testator's intent, but for a balance of subjective and objective purposes of a will.

The following paragraphs offer a very brief outline of purposive interpretation as elaborated by Aharon Barak. This part should provide a short introduction to "objective purpose" which will be discussed in other parts of the article.

## PURPOSIVE INTERPRETATION

Purposive interpretation, as the name suggests, is a method of interpretation that is completely devoted to achieving the purpose of the legal document. It is a sort of teleological inter-

<sup>2</sup> See: Leipold, D., *Erbrecht*, Mohr Siebeck, Tübingen, 2014, p. 28–29. Under German law, freedom of testation is constitutionally protected as an expression of private freedom and guarantee of private property.

<sup>3</sup> Gruber, M., Sprohar-Heimlich, H., Scheuba, E., "Die letztwillige Verfügung", *Erbrecht und Vermögensnachfolge* (eds. Michael Gruber, Susanne Kalss, Katharina Müller, Martin Schauer), Springer, Wien–New York, 2010, p. 437.

<sup>4</sup> Brox, H., *Erbrecht*, Carl Heymanns Verlag, Köln, 2003, p. 125.

<sup>5</sup> The space for interpretation has been expanded by a strong trend of liberalising the requirements of testamentary form, see: Zimmermann, R., "Testamentsformen: »Willkür« oder Ausdruck einer Rechtskultur?", *Rabel Journal of Comparative and International Private Law*, Vol. 76, 2012, p. 497–499.

pretation based on various presumptions about the subjective and objective purposes.<sup>6</sup> An important characteristic of purposive interpretation is its striving towards synthesis – a balance between authorial intent and the values of the legal system which provide a context for the legal act.<sup>7</sup>

Purpose of a legal act is a normative concept that flows from many sources. For instance, the ultimate purpose of a will is not to achieve the intent of the testator, but to distribute testator's property after his death; intent of the testator is only the most important criterion for the manner of distribution.<sup>8</sup>

Aharon Barak has devoted one part of his book on purposive interpretation to the interpretation of wills.<sup>9</sup> He begins from the most important characteristics of a will: it is an expression of testator's intent, it is formal and it has no immediate legal effect (it is an ambulatory norm).<sup>10</sup> Barak highlights the importance of testator's intent, which he also calls "subjective purpose".<sup>11</sup> Having restated the significance of testator's intent, Barak admits that in many cases subjective intent is unavailable.<sup>12</sup> Interpretation of a will is often based on "objective purpose", i.e. on the values inherent to the given legal system.<sup>13</sup> When the court cannot make a reasonable presumption about the intent of the particular testator, it must turn to an abstract standard – intent of the reasonable testator or values of the legal system.<sup>14</sup> According to Barak, this objective purpose appears in the form of presumptions.<sup>15</sup> For instance, the presumption that the will is valid, the presumption that a will respects public interest, the presumption that the testator prefers family member etc.<sup>16</sup>

The distinction Barak makes between "subjective purpose" and "objective purpose" follows the traditional distinction between interpretation and construction. When the court tries to presume what the particular testator wanted to achieve – taking into account the words of the will and the circumstances of its execution – we speak of interpretation. On the other hand, if there is no evidence about the likely intent of the testator, the court must simply decide on the most reasonable solution, regardless of what the testator may have intended.<sup>17</sup>

Barak was right to point out the necessity of objective rules. The search for testator's intent is always composed of presumptions based on the circumstances. There is no such thing as completely subjective interpretation – the mind of the testator is not directly accessible to

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6 Barak, A., *Purposive Interpretation in Law*, Princeton University Press, Princeton and Oxford, 2005, p. 88 sqq.

7 *Ibid.*, p. 95.

8 *Ibid.*, p. 110.

9 *Ibid.*, p. 307–317.

10 *Ibid.*, p. 307.

11 *Ibid.*, p. 307–308.

12 *Ibid.*, p. 308–309.

13 *Ibid.*

14 *Ibid.*, p. 313.

15 *Ibid.*, p. 314–316.

16 *Ibid.*

17 Storrow, R., F., *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, Case Western Reserve Law Review, Vol. 56, 2005, p. 68–82.

anyone.<sup>18</sup> When we speak of the subjective approach, we actually mean that we employ a generalized standard that reflects the characteristics and the circumstances of the testator. We presume what the testator intended from the facts of the case. Whether such approach can ultimately discover real intent is subject to debate and also dependent on the way we understand real intent.<sup>19</sup>

Objectivity has a different meaning when the court is unable to determine the most likely intent of the testator. In such cases interpretation is guided by abstract rules which are not connected to the individual testator, but based in general legal values. In the context of this article, general legal values are understood in the modest sense, as values established by legal conventions and forming part of a certain legal culture.<sup>20</sup> For instance, the court may be required by statute to adopt an interpretation which favours the heir at law. Such a rule would indicate that family relationships are seen as more important, i.e. more highly valued, than the testator's right to freely dispose of his property. If the rule favours the testamentary heir, the opposite may be concluded. Values should be understood as objective in a relational manner: values are conclusions about factual circumstances which may change over time.<sup>21</sup>

Objective interpretation is understood as interpretation which is not influenced by the particular circumstances and characteristics of the testator. Therefore, interpretation is subjective when based on the circumstances and characteristics of the particular testator and objective when based on abstract rules.

In the following parts we will see that the interpretation of wills is often based on abstract rules and that the outcomes of interpretation depend a great deal on prevailing legal values. Many wills which were discarded for lack of testamentary intent or misconstrued due to vague terms, would have a much different fate under today's liberal rules.

## FIRST STEP – FINDING TESTAMENTARY INTENT

Before deciding on particular legal effects of a purported will, the court must be satisfied that the document really is a will – a final disposition of property meant to take effect after its author's death. A document will be qualified as a will if two elements are present: testamentary intent and due execution (fulfilment of all statutory requirements).<sup>22</sup> In this context, testamentary intent is understood as intent to make a will, as distinct from the particular wishes regarding property distribution.<sup>23</sup> This intention may be further divided into donative intent

18 At one point Barak equates subjective purpose with the actual intent of the testator. This position is not tenable. "It is real intent. It is the images that in fact went through the testator's mind. It is composed of biological-psychological-historical facts that took place in the past." Actual intent in this sense is never available to the court. Barak, A., *supra* note 6, 310.

19 Barak believes that real, historical intent can be discovered: "We should draw a clear distinction between claims that we can never know an author's historical intent (which I reject) and claims that an author's historical intent is not the only criterion for interpreting a text (which I accept)." *Ibid.*, p. 130.

20 Marmor, A., *Positive Law and Objective Values*, Oxford University Press, Oxford, 2001, p. 146–147.

21 *Ibid.*, p. 167.

22 Guzman, K. R., *Intents and Purposes*, Kansas Law Review, Vol. 60, 2011, p. 310.

23 *Ibid.*

and operative intent.<sup>24</sup> Donative intent is the intent to make *mortis causa* dispositions, transfers that will be effective only after testator's death.<sup>25</sup> On the other hand, operative intent is the intent that a certain document should operate as a will, i.e. that it should be legally effective.<sup>26</sup> These two strands of testamentary intent are often referred to together as testamentary intent or *animus testandi*.

When a document is executed in accordance with all formal requirements, a rebuttable presumption arises that the document was made with testamentary intent.<sup>27</sup> However, according to the rule of strict compliance with formal requirements, a formally defective document will not be qualified as a will even if there is conclusive proof that it was made with testamentary intent.<sup>28</sup> In order to overcome the harshness of the strict compliance rule, some common law jurisdictions have adopted a more relaxed standard, which is usually termed substantive compliance or harmless error rule.<sup>29</sup> Under this standard, a court may admit a document to probate, even if it does not fulfil all formal requirements, if the court is convinced that the document expresses the intent of the decedent and that the purposes of the will formalities have not been defeated.<sup>30</sup> We may, therefore, conclude that testamentary form offers the most important proof of testamentary intent, but that proof is not conclusive.<sup>31</sup>

There are cases in which correctly executed wills have no basis in testamentary intent. In the leading English case *Lister v. Smith* from 1863 the court rejected a formally executed will on the grounds that there was no *animus testandi* as the will was made only to pressure a third party.<sup>32</sup> Similar circumstances existed in the leading American case *Fleming v. Morrison* from 1904.<sup>33</sup> In this case extrinsic evidence was admitted to show that the decedent executed his will only to induce the beneficiary to sleep with him.<sup>34</sup>

Another interesting example is offered by the so-called Masonic will cases.<sup>35</sup> These cases were very difficult because they dealt with wills which were duly executed as part of a solemn ritual. In two of the cases it was decided that the documents were executed without testamen-

24 Glover, M., *A Taxonomy of Testamentary Intent*, George Mason Law Review, Vol. 23, 2016, p. 582–595.

25 *Ibid.*

26 *Ibid.*

27 Sawyer, C., *Principles of Succession, Wills & Probate*, Cavendish, London & Sydney, 1998, p. 39.

28 Miller, J. G., *Substantial Compliance and the Execution of Wills*, International and Comparative Law Quarterly 36, 1987, p. 559–562. Strict compliance is also required in continental legal systems, e.g. Germany: Bartsch, H., Bartsch, M. B., *Das aktuelle Erbrecht*, Walhalla, Regensburg, 2010, p. 62.

29 Langbein, J. H., *The Crumbling of the Wills Act: The Australians Point the Way*, The University of Chicago Law School Record, Vol. 25, 1979; Langbein, J. H., *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, Columbia Law Review, Vol. 87, 1987; Langbein, J. H., *Curing Execution Errors and Mistaken Terms in Wills*, Probate & Property, Vol. 28, 2004; Langbein, J. H., *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, Actec Law Journal, Vol. 38, 2012, p. 7–10.

30 Langbein, J. H., *Substantial Compliance with the Wills Act*, Harvard Law Review, Vol. 88, 1975, p. 489.

31 "The substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution – the existence of testamentary intent and the fulfilment of the Wills Act purposes." *Ibid.*, p. 513.

32 Guzman, K. R., *supra* note 22, p. 312.

33 *Fleming v. Morrison*, Supreme Judicial Court of Massachusetts (1904, no. 187 Mass. 120).

34 *Ibid.*

35 Glover, M., *supra* note 24, p. 590–591.

tary intent, as there was evidence that the decedents only wanted to satisfy the requirements of the initiation rite.<sup>36</sup> In one case a will executed during an initiation rite was held to be valid as there was witness testimony that the decedent intended the document to be his will.<sup>37</sup> These very similar cases were decided differently because the weight of evidence against testamentary intent was different. However, even in the case where the will was upheld, one member of the court dissented, stating that the circumstances of the making of the will were suspect enough to invalidate it.<sup>38</sup> The Masonic will cases were so difficult to decide because there were strong reasons for both invalidating and upholding the wills. It seems that even slightest evidence in support of one solution influenced the final decision. For instance, in *Vickery v. Vickery* the court based its judgment on the fact that the decedent signed the will with an incomplete signature: he wrote "Vickey" instead of "Vickery".<sup>39</sup> In *In Re Watkin's Estate* the court decided on the basis of the decedent's statement that he was satisfied with the will and that it should be effective if he fails to make another will.<sup>40</sup> Only the decision in *Shiels v. Shiels* had strong grounds in witness testimony that the decedent initially refused to make a will.<sup>41</sup>

Apart from those cases where testamentary intent is completely lacking, there are also difficult cases where some testamentary intent is present, but that intent is not final. Documents which satisfy all will execution formalities may be ineffective as wills if they lack present and final testamentary intent. In one case the decedent left a suicide letter which fulfilled all formal requirements for a holographic will and which contained a disposition of property.<sup>42</sup> However, in this letter the decedent wrote that he would leave a will.<sup>43</sup> Since he failed to execute a will before committing suicide, the letter was offered for probate.<sup>44</sup> The court denied probate on the grounds that the letter was clearly not intended as a final testamentary disposition.<sup>45</sup> This is a good example of the elusiveness of testamentary intent. Here the decedent expressed two different intentions: he wanted to benefit the addressee of the letter, but he also wanted to execute a will. Which intention should the court prefer? The traditional argument would be that the court protected decedent's intent as there was clear indication that the intent expressed in the letter was not final. Still, it is not a far-fetched conclusion that the decedent failed to execute a will for some other reason and not because he changed his wish expressed in the letter.

In similar circumstances a contrary decision was reached in the famous case *In Re Estate of Kuralt*, where a letter was qualified as a codicil regardless of the fact that it envisaged a future

36 *Vickery v. Vickery*, Supreme Court of Florida (1936, no. 170 So. 745); *Shiels v. Shiels*, Court of Civil Appeals of Texas (1937, no. 109 S.W.2d 1112).

37 *In Re Watkin's Estate*, Supreme Court of Washington (1921, no. 198 Pac. 721). One of the witnesses reported a statement by the decedent: "All he said was that if he never made another will that one would do. I can't remember that he said anything else."

38 *Ibid.*

39 *Vickery v. Vickery*, *supra* note 36.

40 *In Re Watkin's Estate*, *supra* note 37. "All he said was that if he never made another will that one would do. I can't remember that he said anything else."

41 *Shiels v. Shiels*, *supra* note 36. "Mr. McCluney testified that he remembered Mr. Shiels, that he was about twenty-four or twenty-five years of age, that he was sitting by a Mr. Mitchell with whom the witness was acquainted; that when he handed the printed form to him, Mr. Shiels protested and said that he did not want to make a will, that he did not have anything to make a will for (...)."

42 Guzman, K. R., *supra* note 22, p. 363.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

will.<sup>46</sup> In the letter the decedent wrote: “I’ll have the lawyer visit the hospital to be sure you inherit the rest of the place in MT. if it comes to that.”<sup>47</sup> The court argued that the testamentary intent is unclear and that it should be established on the circumstances of the case.<sup>48</sup> The court relied on decedent’s previous gifts to the beneficiary, on the bad state of decedent’s health and on the word “inherit” to conclude that the letter showed present testamentary intent.<sup>49</sup> After remand, the trial court decided that the letter is a valid codicil and this decision was upheld on appeal.<sup>50</sup> The conclusion cannot be escaped that the court strived towards a just solution, more than it relied on established legal doctrine. It was more than clear that the decedent did not regard his letter to be his will. Nevertheless, the letter was upheld because it could be presumed with certainty that the decedent really wanted to effect gifts mentioned in the letter.

Contradictory decisions stem from the fact that testamentary intent has no clear and universally accepted definition.<sup>51</sup> There is no commonly accepted rule regarding the relationship between testamentary form and testamentary intent.<sup>52</sup> As we have seen in the cited cases, it is very difficult to decide whether a document expresses present testamentary intent or only future intent to make a will. Katherineen Guzman argues in favour of accepting a more lenient definition of testamentary intent, whereby any document expressing testamentary intent should be admitted as a will, even if the author did not intend to effectuate that will by that same document.<sup>53</sup> It should be enough that the testamentary intention is clear from all the circumstances.<sup>54</sup> A more relaxed approach to determining testamentary intent would eliminate hardship in cases where decedents sent detailed instructions to their lawyers, but never got the chance to execute final documents.<sup>55</sup>

The most difficult problem arises when a document which expresses testamentary intent fails to comply with all will execution formalities. Under the traditional rule of strict compliance, such documents could not be admitted as wills, regardless of their content. However, the substantial compliance doctrine has empowered courts to accept documents which contain genuine testamentary intent, despite certain technical flaws. This “dispensing power” has been accepted in Australia and New Zealand,<sup>56</sup> some US states<sup>57</sup> and some Canadian provinces.<sup>58</sup>

46 *In Re Estate of Kuralt*, Supreme Court of Montana (1999, no. 1999 MT 111).

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 Guzman, K. R., *supra* note 22, p. 339–342.

51 *Ibid.*, p. 322–332. Katherineen Guzman gives a detailed explanation of the difficulties with defining and applying the notion of testamentary intent.

52 *Ibid.*

53 *Ibid.*, p. 360–369.

54 *Ibid.*

55 *Ibid.*, p. 364.

56 For an overview of substantial compliance doctrine in Australia see: Peart, N., “Testamentary Formalities in Australia and New Zealand”, *Comparative Succession Law: Testamentary Formalities* (eds. Kenneth G. Creid, Marius J. Dewall, Reinhard Zimmermann), Vol. 1, Oxford University Press, Oxford 2011, p. 349–351.

57 Scalise Jr., R. J., “Testamentary Formalities in the United States of America”, *Comparative Succession Law: Testamentary Formalities* (eds. Kenneth G. Creid, Marius J. Dewall, Reinhard Zimmermann), Vol. 1, Oxford University Press, Oxford, 2011, p. 374–376.

58 Miller, J. G., *supra* note 28, p. 573–575.

The courts have used the dispensing power to overcome mistakes in witnessing, signature or informal alteration of a duly executed will.<sup>59</sup> Testamentary intent was upheld in cases where formal defects were innocuous, for instance in the case where a soldier made an unwitnessed will under false instructions that a will may be made without witnesses.<sup>60</sup> The courts were even able to admit unsigned wills. Lack of signature is a harmless error if wills were prepared for husband and wife and they merely switched wills during execution, so that the husband signed the will of the wife and the wife signed the husband's will. One such case appeared in South Australia, where the court is authorised by statute to disregard harmless errors, but, more interestingly, one such case appeared in New York and the New York court of appeals admitted the unsigned will to probate without support in legislation, relying on the fact that the formal defect was a result of an obvious mistake.<sup>61</sup>

There is much debate about the usefulness of substantial compliance doctrine; it may be that it leads to an increase in litigation and it is also likely to create some uncertainty regarding flawed wills.<sup>62</sup> However, if a legal system gives precedence to freedom of testation – if it prefers individual estate distribution plans over the general scheme of intestate succession – it should be favourably inclined towards the doctrine of substantial compliance. It is considered more damaging for testator's intent to deny probate of a document which expresses the true wishes of the testator than to admit a document which does not reflect these wishes.<sup>63</sup> Especially if we take into account that rules of intestate succession are no substitute for decedent's actual intent. It has been shown that majority of wills express intentions which are contrary to the intestate scheme of succession.<sup>64</sup>

## SECOND STEP – INTERPRETING TESTAMENTARY INTENT

After finding that certain document is a will, the court must decide on its legally relevant meaning. It is usually said that the court must try to understand the expressed intentions of the testator, his or her plan for the distribution of property. Interpretation according to testator's intent stems naturally from the purpose of a will. The court's only concern should be to effect testator's wishes, as far as it is possible in the given legal system.

According to traditional doctrine in common law, finding the relevant meaning of a will has two phases. The court first interprets the words of the will to find actual intent of the testator – aided if necessary by extrinsic circumstances – and if this approach fails, the court applies

59 For an overview of cases in South Australia, see Langbein, J. H., 1987, *supra* note 29, p. 15–33.

60 *Ibid.*, p. 19.

61 *In re Snide*, New York Court of Appeals (1981, no. 418 N.E.2d 656).

62 For a discussion see: Miller, J. G., *supra* note 28, p. 575–582.

63 Menashe, D., *Relaxed Formalism: The Validation of Flawed Wills*, Israeli Law Review, Vol. 40, 2007, p. 132–133; "(...) formalities traditionally held the upper hand, yet it is both more likely and more devastating to have testamentary intent without the formalities than the reverse." Guzman, K. R., *supra* note 22, 312.

64 Clowney, S., *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, Real Property, Trust and Estate Law Journal, Vol. 43, 2008, p. 53–54.



some abstract rule of construction to attribute presumed intent to the document.<sup>65</sup> The concept of interpretation and construction provided useful guidance to courts by structuring the interpretive process. However, in reality there is no substantial difference between interpretation and construction. Interpreting even unambiguous words of a will requires some extrinsic evidence.<sup>66</sup> Most importantly, real intent of the testator is never available to the court, the court can do no more than presume what the testator's intent was at the time he executed his will.<sup>67</sup> The difference between interpretation of actual intent and ascribing presumed intent is only a difference in probability. "A holding that a donor intended this or that is simply a holding that a reasonable donor, providing a particular text under these particular circumstances, would most likely have meant this or that."<sup>68</sup>

The unavoidable fact that the testator is dead at the time of will interpretation gives great weight to the words of the will. They are the most reliable expression of testator's wishes. The law must presume that the testator said all that he wanted to say in his will. Ideally, testator's intent should be clear from the will itself. Therefore, the first principle of will interpretation is the so-called plain meaning rule. Words used in a will should be given their ordinary meaning.<sup>69</sup> This presumption fails only if there is evidence that the testator attached a specific meaning to certain words and when the ordinary meaning makes no sense in the circumstances.<sup>70</sup> If a will is clear and unambiguous the court may not admit extrinsic evidence showing a different intent of the testator.<sup>71</sup> According to the traditional rule, the court will not look outside the four corners of a will.

Unfortunately, the plain meaning rule is based on an erroneous idea that words have plain meaning.<sup>72</sup> In fact, there is no such thing as plain meaning and the existence of ambiguity cannot be determined without reference to extrinsic circumstances.<sup>73</sup> It is widely acknowledged in legal philosophy that any text, however clear it may appear *prima facie*, may be encountered with difficulty in its interpretation and/or application. This is an issue stemming from the imperfect nature of language as a form of communication, and is what H.L.A. Hart referred to as the *open texture* of law.<sup>74</sup> This is especially true of wills, since they are interpreted according to testator's intent – when he used a certain word, the testator may have meant something other than the ordinary meaning of that word. In the standard example from German text-books,

65 Storrow, R. F., *supra* note 17, p. 68–82.

66 *Ibid.*, p. 75–77.

67 "We have never had, and never will have, direct access to the property owner's "subjective will." Vain is the search for actual intent in a world where probable intent at one fleeting moment in time is the most we may ever know." Robertson, J. L., *Myth and Reality--Or, is It "Perception and Taste"?*--In *the Reading of Donative Documents*, Fordham Law Review, Vol. 61, 1993, p. 1052. Robertson gives a detailed account of an external approach to will interpretation, based on a hypothetical reasonable testator.

68 *Ibid.*, p. 1063.

69 Rendell, C., *Law of Succession*, Macmillan, London, 1997, p. 96–97.

70 *Ibid.*

71 *Ibid.*, p. 99–100.

72 Due to the open texture of language, the meaning of words may be plain only in familiar cases. See: Hart, H. L. A., *The Concept of Law*, Oxford University Press, Oxford, 1994, p. 126–128.

73 Hirsch, A. J., *Inheritance and Inconsistency*, Ohio State Law Journal, Vol. 57, 1996, p. 1117–1125.

74 Hart, H. L. A., *supra* note 72, p. 124–136.

the testator disposed of his library, whereby he meant his wine cellar.<sup>75</sup> Moreover, extrinsic evidence is equally reliable as the duly executed will document: its quality is guaranteed by rules of evidence, especially by cross-examination.<sup>76</sup> Admission of extrinsic evidence cannot be limited to ambiguous will.<sup>77</sup> We simply cannot know whether a will is ambiguous before we have considered extrinsic circumstances.<sup>78</sup>

Exclusion of extrinsic evidence can lead to unfair and unreasonable results. Two English cases may serve as examples. In one famous case a Scottish woman left a series of legacies to various Scottish charities and one legacy to the National Society for the Prevention of Cruelty to Children, which is an English charity.<sup>79</sup> Although all circumstances pointed to the conclusion that the testatrix intended to make a legacy to the Scottish Society for the Prevention of Cruelty to Children, the House of Lords refused to admit extrinsic evidence arguing that the will was clear on its face and that the court may not change the clear wording of a will.<sup>80</sup> The second case is equally unreasonable: the court adopted the technical meaning of a word used in the will, although it was clear to the court that the testator meant something different – the testatrix used the term “personal estate” to describe her property, a term whose legal meaning excludes real property.<sup>81</sup>

The courts are more willing to consider extrinsic evidence of personal usage, of the specific meaning which certain words had for the testator, than extrinsic evidence which shows a mistake in the will.<sup>82</sup> Thus, in *Moseley v. Goodman* the court decided that the name Mrs Moseley refers to Mrs Trimble, based on evidence that the testator habitually referred to Mrs Trimble as Mrs Moseley.<sup>83</sup> In a similar case, *Mahoney v. Grainger*, the court refused extrinsic evidence which showed that a mistake had been made in the drafting of the will: testatrix’ attorney testified that she wanted to leave the residue of her estate to her cousins, however the will used the term “heirs at law” and the heir at law was testatrix’ aunt.<sup>84</sup> The court decided in favour of the aunt.<sup>85</sup> Robertson suggests that the substantial difference between these two cases was in the quality of the evidence.<sup>86</sup>

The protective function of the plain meaning rule, as well as the protective function of will execution formalities, is very doubtful. There is no failsafe mechanism for protecting the

75 Frank, R., *Erbrecht*, C. H. Beck, München, 2003, p. 83.

76 Robertson, J. L., *supra* note 67, 1081.

77 *Ibid.*, p. 1081–1084.

78 “Sensitive reflection suggests that, only after all of the extrinsic evidence is on the table may we know the full dimensions of our interpretive task.” *Ibid.*, p. 1084.

79 *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children*, House of Lords (1915, no. [1915] AC 207).

80 *Ibid.*

81 *Re Cook*, Chancery Division of the High Court of Justice of England and Wales (1948, no. [1948] Ch 212), cited according to: Rendell, C., *supra* note 69, p. 96.

82 Waggoner, L. W., Langbein, J. H., *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, University of Pennsylvania Law Review, Vol. 130, 1982, p. 535–538.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 Robertson, J. L., *supra* note 67, p. 1100.

authenticity of a will. Even the most stringent formalities of execution are undermined by informal revocation.<sup>87</sup> The potential for fraud is always present and the correctness of the final decision ultimately depends on the rules of evidence.

Continental legal systems are generally more open to consulting extrinsic evidence. For instance, in Austrian law it is accepted that the words of the will carry most weight in interpretation, but they should be interpreted in light of all the circumstances.<sup>88</sup> If there is a gap in the will, the court may fill the gap with an appropriate rule, if there is indication in the will that this rule corresponds to intent of the testator (*Andeutungstheorie*).<sup>89</sup> The requirement of an indication in the will is also accepted by German scholars.<sup>90</sup> It means that the interpretation must be in some way linked to the terms of the will.<sup>91</sup> However, even this approach has been criticized as too formalistic and arbitrary.<sup>92</sup> Interpretation according to external circumstances does not defeat the purpose of formal requirements (if they are satisfied), therefore, interpretation should not be limited by the existence of an “indication” (*Andeutung*).<sup>93</sup> Such a requirement would lead to uncertainty, as it is not easy to decide whether an indication exists, and it would also favour wills which contain wide and imprecise formulations.<sup>94</sup>

The liberal approach to interpretation is also seen in the so-called “supplementary interpretation” (*Ergänzende Testamentsauslegung*), which is used to fill gaps in a testamentary disposition, which may appear when important circumstances change after will execution.<sup>95</sup> In such circumstances, the court may alter the beneficiary or subject of the will, according to the hypothetical will of the testator.<sup>96</sup> This kind of interpretation is focused on the hypothetical will at the time of will execution and it is limited by the terms of the will.<sup>97</sup> The main goal of supplementary interpretation is to protect the intention of the testator, which may be defeated by unforeseen events. Interpretation is not limited by clear and unambiguous wording of the will, since external circumstances may indicate a different meaning.<sup>98</sup> If the testator intended to bequeath certain land, but later had to sell this land, it may be reasonable to suppose that he intended the beneficiary to receive another piece of land which was bought by the proceeds of the first sale.<sup>99</sup> Only after determining the intent of the testator, should the court look for support in the text of the will.<sup>100</sup>

87 See opinions cited by Menashe. Menashe, D., *supra* note 63, p. 152.

88 Gruber, M., *et al.*, *supra* note 3, p. 463.

89 *Ibid.*, p. 465–466.

90 Leipold, D., *supra* note 2, p. 137.

91 *Ibid.*, p.148–149.

92 Brox, H., *supra* note 4, p. 130.

93 *Ibid.*

94 *Ibid.*

95 Leipold, D., *supra* note 2, p. 147–149.

96 *Ibid.*

97 *Ibid.*

98 Decision of the Supreme Court of Germany (1982, no. IVa ZR 94/81), available at: <https://www.jurion.de/urteile/bgh/1982-12-08/iva-zr-94-81/> (18. 3. 2017).

99 *Ibid.*

100 *Ibid.*

The search for testator's intent becomes complicated when the most probable intent contravenes public policy. The court must then examine all the circumstances and decide on the most reasonable meaning of the will. In one instance, the Supreme Court of Mississippi had to decide on a will which created a charitable trust for college education, but limited aid to students "who are of the caucasian [sic] race and ... none other".<sup>101</sup> Robertson, who was one of the judges deciding this case, explained the situation: "Here the court was charged to find the best and most coherent and most sensible meaning this circumstanced text could be given, although it would have to ignore one condition important to the overall scheme the racially restrictive clause."<sup>102</sup> Having struck out the offending clause, the court had to decide on the hypothetical intent of the testator, but also to consider reasons of public policy which speak in favour of upholding charitable trusts.

This case was decided as if the court divided testator's intent into parts. The testator wanted to benefit students and he also wanted to limit that benefit to white students. Only the second intent is contrary to public policy. The testator is allowed to provide a charitable trust for students, but he is not allowed to introduce racist criteria for deciding who gets support. This way of looking at testator's intent allows the court to effectuate a part of the will which would, taken as a whole, be offensive to public policy. However, from the viewpoint of everyday experience, this reasoning is untenable: in reality the testator wanted only one thing – to benefit white students. His intent was clear and straightforward. In fact, the court had to disregard testator's intent and substitute it with a general rule of equality.

Another example of interpretation that is guided by fundamental legal values may be found in the judicial practice of the European Court of Human Rights.<sup>103</sup> In 1939 the testatrix executed a will whereby she bequeathed her property to her son, under the condition that he must pass it on to his child or grandchild from a legitimate church marriage.<sup>104</sup> If the condition was not satisfied, the property would pass to the descendants of the testatrix' daughters.<sup>105</sup> The High Court of Justice of Andorra interpreted this condition to mean that an adopted child cannot inherit the property.<sup>106</sup> The European Court of Human Rights found this interpretation to be contrary to the prohibition of discrimination in Art. 14 of the European Convention on Human Rights, stating that interpretation must take contemporary values into account.<sup>107</sup> This decision indicates that contemporary social conditions and principles embodied in human rights law decisively influence the search for testator's intent, even when the will was written at a time when prevailing social attitudes were much different.<sup>108</sup>

Undoubtedly, a lenient approach to interpretation is becoming dominant. The plain meaning of words no longer stands in the way of determining testator's real intent. The old unfor-

<sup>101</sup> *Tinnin v. First United Bank of Mississippi*, Supreme Court of Mississippi (1987, no. 502 So. 2d 659).

<sup>102</sup> Robertson, J. L., *supra* note 67, p. 1106–1107.

<sup>103</sup> *Pla and Puncernau v. Andorra* (2004, no. 334).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Leipold, D., *supra* note 2, p. 101–102.

giving approach to formal expressions<sup>109</sup> is slowly abandoned. The words of the will normally have the greatest influence on interpretation, but their reliability can be disproved and it may be shown that extrinsic circumstances provide a better foundation for understanding the will.<sup>110</sup>

In a comparative perspective we can see a convergence of rules relating to interpretation of wills. The common law approach is becoming less strict and more similar to the prevailing attitude in continental legal systems. Extrinsic circumstances are generally accepted as relevant for every case of interpretation. The difference remains in the assessment of compliance with will execution formalities: continental legal systems have not accepted the substantial compliance doctrine. Under German law, the courts do not have a general power of admitting formally deficient documents as wills.<sup>111</sup> The same is true under Austrian law – formal defects are fatal to the validity of a will.<sup>112</sup> Formal defects may only be cured by acceptance of the will by all interested parties.<sup>113</sup> It is considered that heirs at law waive their right to contest a formally defective will by accepting it.<sup>114</sup> Protection of the family is, therefore, seen as the main aim of formal requirements – protection of testator’s intent falls in the background.

## CONFLICTING VALUES

Strict compliance with execution formalities and exclusion of extrinsic evidence are meant to protect testator’s intent and, therefore, the freedom of testation. It is beyond doubt that in most cases these rules really guarantee the authenticity of testamentary dispositions. However, there is always room for mistake and ambiguity: testators use idiosyncratic expressions, lawyers make drafting mistakes and circumstances change in unforeseen ways. Because of this, the meaning of a will can only be understood in light of all the circumstances of its drafting. Simple and strict rules offer poor support for interpretation, as they are not flexible enough to accommodate the realities of life. Thus, when it comes to finding testator’s intent, formalism may do more harm than good.

Nevertheless, in many jurisdictions the courts still adhere to formalism, requiring strict compliance with formalities and excluding extrinsic evidence when a will seems on its face to be unambiguous. Such practice protects two important values, but not freedom of testation.<sup>115</sup>

109 “It is true that the testator is a despot, within limits, over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.” Holmes, O. W., *The Theory of Legal Interpretation*, Harvard Law Review, Vol. 12, 1899, p. 420.

110 Barak, A., *supra* note 6, 136.

111 Zimmermann, R., “Testamentary Formalities in Germany”, *Comparative Succession Law: Testamentary Formalities* (eds. Kenneth G. Creid, Marius J. Dewall, Reinhard Zimmermann), Vol. 1, Oxford University Press, Oxford, 2011, p. 177.

112 “Die Formvorschriften sind zwingend. Werden sie nicht erfüllt, so ist die Verfügung ungültig, auch wenn sie eindeutig dem erwiesenen letzten Willen des Verfassers entspricht.” Gruber, M., *et al.*, *supra* note 3, p. 448.

113 *Ibid.*, p. 468–469.

114 *Ibid.*

115 Hirsch notes that apart from testator’s intent, courts are primarily interested in administrative convenience and protection of the family. Hirsch, A. J., *supra* note 73, p. 1115.

On the one hand, exclusion of extrinsic evidence for unambiguous wills protects legal certainty and makes the job of courts much easier; it protects efficiency and uniformity. On the other hand, strict insistence on formalities of execution implicitly shows that courts prefer intestate succession to doubtful wills.<sup>116</sup> Many authors have voiced concerns that the courts are paying lip service to freedom of testation, while preferring the statutory scheme of property distribution.<sup>117</sup> Of course, rules of intestate succession are attractive because they favour the decedent's family – a principle which has instinctive appeal.

Importance of the family protection policy is very clear in the Austrian approach to formally defective wills: such wills will be valid if heirs at law do not object to the testamentary distribution. The question of testator's intent is completely put aside. Formal requirements are understood as protection of heirs at law. As we shall see, similar concerns influence the scope and rules of interpretation in Serbia and other countries of former Yugoslavia, which share a common legal heritage.

## IMPORTANCE AND INTERPRETATION OF WILLS IN SERBIA AND COUNTRIES OF FORMER YUGOSLAVIA

In Serbian law intestate succession is far more important than succession on the basis of wills, despite the fact that freedom of testation is claimed to be the ultimate principle of the law of succession. It is also important to note that intestate succession is referred to as succession by law because it is not seen as a backstop for testate succession.

Leading authors explain the dominance of intestate succession as a cultural phenomenon – preparing wills is not part of Serbian legal culture.<sup>118</sup> Because of very close family relationships, freedom of testation is far from being the ultimate principle of the law of succession. Execution formalities and forced shares drastically limit the individual's right to dispose of his property as he finds appropriate. Consequently, the courts are not willing to excuse innocuous errors in the ritual of will execution.<sup>119</sup>

Several factors may be listed as causes for the relative insignificance of testamentary succession in Serbia. First of all, close family relationships are part of the Serbian culture and the intestate scheme of succession reflects the importance of the family. Making a will is usually seen in a negative light because people resort to wills only when they are dissatisfied with their children or other close relatives who would be their heirs at law. Secondly, forced shares offer a very strong protection to the family and severely limit freedom of testation.<sup>120</sup> A person who

<sup>116</sup> Speaking in the context of American law, where rules of intestate succession offer little protection for the family, Langbein concluded that formalism in the law of wills cannot be explained by an implicit preference for intestate succession. Langbein, J. H., *supra* note 30, p. 499–500.

<sup>117</sup> Menashe, D., *supra* note 63, p. 148–155.

<sup>118</sup> Đurđević, D. B., *Institucije naslednog prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2015, p. 76.

<sup>119</sup> Wills have been voided because of witness incapacity, because the witnesses were not simultaneously present and because the testator had placed his fingerprint instead of a signature. It is doubtful how far such decisions protect the testator.

<sup>120</sup> A wide scope of relatives have the right to a forced share: all direct descendants, spouse and parents. Even more distant relatives have a right to a forced share if they have no means to support themselves and if they are incapable of work: brothers and

has children may freely dispose with only one half of his property – the rest is reserved for forced shares. Therefore, a person may feel that his plans for the distribution of his property after death will be frustrated. Another reason may lie in the low standard of life: many people have property of modest value so that there is nothing to distribute between multiple beneficiaries. Finally, Serbian law recognizes life care agreements which offer an alternative method for *mortis causa* transfer of property. Under such contracts, a care giver acquires care recipient's property at the moment of care recipient's death, as if the care giver were an heir. These contracts are sometimes abused in order to avoid forced shares<sup>121</sup> because the right to a forced share cannot be claimed against a care giver as he has acquired property in consideration of the services he has provided to the care recipient.<sup>122</sup>

It is very interesting to note that there are very few reported cases of interpretation of wills in Serbia.<sup>123</sup> This is a result of two factors; first of all, wills are not common in Serbian legal practice as very few people make wills; second of all, challenges to wills are usually based on formal deficiencies or lack of capacity – the courts are not prepared to delve into the intricacies of interpretation.

According to the Serbian Law on Succession, if there is doubt about the real intent of the testator, the courts should accept the interpretation which is in favour of the heir at law.<sup>124</sup> The courts have followed this rule. In one interesting case the testator devised certain land to his heir at law and to a person who was not his heir at law, then, after making the will, the testator disposed of one half of that land.<sup>125</sup> The court refused to decrease the gifts proportionally; it decided that the heir at law should keep a larger part of the land.<sup>126</sup>

Preference for the interpretation which favours the heir at law was a common characteristic of succession law in all jurisdictions of former Yugoslavia.<sup>127</sup> One decision of the Supreme Court of Croatia may provide an example of its importance.<sup>128</sup> Namely, the testator had nominated one person as the “sole universal heir of all property he possesses or may possess in the Republic of Venezuela”.<sup>129</sup> It was disputed whether testator's property in Croatia was also covered by the will.<sup>130</sup> The court disregarded the technical meaning of the phrase “sole universal heir” – according to which the testamentary heir would inherit the whole estate – and based

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sisters, grandparents and all other direct ancestors. Forced shares are regulated in Arts. 39–65 of the Law on Succession – *Law on Succession of the Republic of Serbia*, Official Gazette of the Republic of Serbia (1995, no. 46; 2015, no. 6).

121 Počuca, M., *Ugovor o doživotnom izdržavanju*, Pravni fakultet za privredu i pravosuđe, Novi Sad, 2011, p. 126.

122 Đurđević, D. B., *supra* note 118, p. 261.

123 Two cases can be found in a handbook: Antić, O. B., Đurđević, D. B., *Priručnik za nasledno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2003, p. 158–159.

124 Art. 135 (2), Law on Succession of the Republic of Serbia.

125 Decision of the County Court of Subotica (1996, no. Gž. 1195/95), published in Antić, O. B., Đurđević, D. B., *supra* note 123, p. 159.

126 The available extract does not offer full insight into the details of the case. However, it is clear that the court favoured the person who was heir at law and that this person received a larger part of the land. *Ibid.*

127 Gavella N., *Nasljedno pravo*, Informator, Zagreb, 1990, p. 198.

128 Decision of the Supreme Court of Croatia (2005, no. Gzz 157/05-2), available at: <https://sudskapraksa.csp.vsrh.hr/decisionText?id=090216ba80530d41&q=oporuka+tumačenje> (17. 3. 2017).

129 *Ibid.*

130 *Ibid.*

its decision on the purpose which the testator wanted to achieve.<sup>131</sup> The court supported its decision by reference to the rule that ambiguous provisions of a will should be interpreted in favour of the heir at law.<sup>132</sup> Thus, the heir at law received all testator's property in Croatia.

The rule of interpretation which favours the heir at law has recently been abandoned in Croatia<sup>133</sup> and in the Federation of Bosnia and Herzegovina.<sup>134</sup> This change has been explained as a manifestation of the principle of *favor testamenti*, i.e. that the court must adopt the meaning which makes the will valid and is, therefore, more favourable to the testamentary heir.<sup>135</sup> However, it has been stated in theory that the principle of *favor testamenti* may coexist with the subsidiary rule of interpretation which favours the heir at law.<sup>136</sup> The first is applied in deciding questions of validity, the second in deciding the meaning of an undoubtedly valid will.<sup>137</sup> The same approach has been suggested for Serbian law: the principle of *favor testamenti* may be invoked only if the validity of the will is in question – then the court must adopt the interpretation which makes the will valid.<sup>138</sup> However, if there is a choice between two or more meanings according to which the will would be valid, the court must adopt the one which is most favourable to the heir at law.<sup>139</sup> The new rule of interpretation in Croatian and Bosnian law means that the court must apply the principle of *favor testamenti* in both situations: not only if there is doubt about validity, but also when interpreting a valid will. Ultimately, this is a legal policy decision. The preference for the testamentary heir highlights the supremacy of freedom of testation over the intestate order of succession.

Intestate succession is not only common in practice, it is also openly favoured by the legislator. One important example is the Law on Restitution, which provides the rules for restitution of private property which was confiscated by the communist government of Yugoslavia.<sup>140</sup> This law explicitly limits the right to restitution to legal heirs of former owners<sup>141</sup> – testamentary heirs cannot claim restitution. It cannot be stated with certainty why the legislator enacted this restriction, however, it can be reasonably presumed that the intention was to limit the burden of restitution. This rule may be seen as an infringement of the constitutional guarantee of private property and succession, which includes the freedom of testation, as a guarantee of the owner's right to dispose of his property.<sup>142</sup>

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> See: Art. 50 (2) of the Croatian Law on Succession, Official Gazette of the Republic of Croatia (2003, no. 48; 2003, no. 163; 2005, no. 35; 2013, no. 127; 2015, no. 33).

<sup>134</sup> See: Art. 105 (2) of the Law on Succession of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina (2014, no. 80).

<sup>135</sup> Gavella, N., Belaj, V., *Nasljedno pravo*, Narodne novine, Zagreb, 2008, p. 174.

<sup>136</sup> Đurđević, D. B., "Dopunska pravila za tumačenje testamenta", *Stvaranje prava*, Univerzitet Donja Gorica – Fakultet pravnih nauka, Podgorica, 2016, p. 219–223.

<sup>137</sup> *Ibid.*

<sup>138</sup> Đurđević, D. B., *supra* note 118, 186–189.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Law on Restitution of Confiscated Property and Compensation*, Official Gazette of the Republic of Serbia (2011, no. 72; 2013, no. 108; 2014, no. 142; 2015, no. 88).

<sup>141</sup> Art. 5, *ibid.*

<sup>142</sup> Đurđević, D. B., *supra* note 118, 42–43.



Preference for intestate succession may also be seen in Slovenian law, which is very closely related to Serbian law. After the fall of Socialist Yugoslavia, Slovenian legislator passed the Law on Denationalisation, which governs the return of private property that was nationalised after 1945.<sup>143</sup> According to Art. 81 of that law, a will made before the decision on denationalisation covers denationalised property only if the property is explicitly referred to in the will or if the heirs at law agree with the testamentary plan of distribution. This rule openly favours heirs at law: if the testator failed to mention denationalised property explicitly, it will be excluded from the will and divided according to rules of intestate succession. Therefore, the law completely excludes interpretation of testator's intent.

This harsh rule was challenged on constitutional grounds, but the Constitutional Court of Slovenia decided that the legislator did not infringe constitutional rights by preferring heirs at law.<sup>144</sup> The court justified the rule in Art. 81 of the Law on Denationalisation as an effective solution that prevents long and complicated legislation over questions of testamentary intent.<sup>145</sup> The court based its decision on the presumption that most testators made their wills without taking their nationalised property into account and that they would have made different wills had they known that their property would be denationalised.<sup>146</sup> However, as it was pointed out in a dissenting opinion, the legislator is not free to choose between two different methods of succession; as an emanation of the right to private property, succession on the basis of a will must take precedence over intestate succession.<sup>147</sup> If law offers protection to the testator's family through forced shares, there is no need to increase that protection by a rule that exclusively favours heirs at law.<sup>148</sup> Nevertheless, the Constitutional Court confirmed its decision, again with a dissenting opinion, in another case which dealt with the same issue.<sup>149</sup>

Examples from Serbian, Croatian and Slovenian legislation and court practice indicate that freedom of testation is far from being a sacrosanct principle of the law of succession in legal systems of former Yugoslavia. It is true, wills can change the intestate order of succession, but if ambiguities or other difficulties appear, the courts are often prepared to resolve them in favour of the legal heirs.

## CONCLUSION

Interpretation of wills is a delicate task that cannot be anchored in abstract rules and presumptions. However, general values inherent to the legal system and prevailing societal norms exert a strong influence on interpretation, especially when there is ambiguity. Finding testator's intent is the ultimate aim of interpretation: the court will adopt the meaning which was

<sup>143</sup> *Law on Denationalisation of the Republic of Slovenia*, Official Gazette of the Republic of Slovenia (1991, no 27).

<sup>144</sup> Decision of the Constitutional Court of the Republic of Slovenia (1993, U-I-96/92), published in: Official Gazette (1994, no 4).

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Decision of the Constitutional Court of the Republic of Slovenia, (1995, U-I-16/94), published in: Official Gazette (1995, no 37).

most likely the meaning of the testator, taking into account the circumstances that influenced him. The interpretation of wills is, therefore, based on a generalized standard, which takes into account the personal characteristics and circumstances of the testator. If the application of such a standard fails to provide clear answers, the court will turn to rules which are not connected with the situation of the particular testator.

Prevailing social values and legal principles often guide interpretation of ambiguous or unenforceable terms. The most obvious example is provided by wills which are at variance with public policy. Such wills cannot be interpreted according to testator's intent because that intent is illegal, immoral or otherwise socially damaging; the court must then substitute testator's intent with a meaning which furthers public interest. The importance of policy considerations is also visible in statutory rules which guide or limit interpretation of wills, as we have seen in the example of Serbian, Croatian and Slovenian law. Therefore, wills may be interpreted not only in accordance with the intent of the testator, but also on the basis of "objective" and abstract rules.

The importance of policy considerations is also seen in hard cases of determining testamentary intent in informal documents. When there is doubt about the testamentary character of a letter, the ultimate decision will depend on the policy choice between freedom of testation and inheritance by law. Even a tiny difference in the wording of a will can lead to its acceptance or downfall.<sup>150</sup>

We may conclude that the courts could make a substantial improvement by admitting that their interpretation of wills is guided not only by presumptions about the intent of the testator, but also by legal policy and common social values. Such openness would create transparency and give the courts the opportunity to directly express the values which influenced their final decision. Interpretation of wills would, therefore, become more transparent and more reliable.

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<sup>150</sup> In the famous Kuralt case the court put great emphasis on the fact that the testator used the word "inherit". In *Re Estate of Kuralt*, *supra* note 46.

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## UTJECAJ OBJEKTIVNIH ELEMENATA NA TUMAČENJE OPORUKA

### Sažetak

U ovom radu autor analizira pravila o formi oporuke i pravila o tumačenju oporuke s ciljem da pokaže značaj pravno-političkih odluka i općih pravnih vrijednosti za tumačenje oporuka. Teorija Aharona Baraka o ciljnom tumačenju koristi se kao polazna točka, budući da ova teorija naglašava važnost objektivnih elemenata za tumačenje oporuke. Autor analizira glavne probleme koji se javljaju u vezi s tumačenjem oporuke i ukazuje na moguće pravno-političke obzire koji podupiru različite pristupe tumačenju. Autor zaključuje da sudovi imaju opravdano veliku slobodu da tumače riječi korištene u oporuci, da postoji približavanje između kontinentalnoeuropskog i anglosaksonskog pristupa tumačenju oporuke i da se tumačenje često zasniva na objektivnim pravilima koja nisu povezana s najvjerovatnijom namjerom oporučitelja.

*Ključne riječi:* tumačenje, oporuka, ciljno tumačenje, nasljedno pravo

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