

THE COMPLEXITY OF INTERPRETATION OF THE TESTATOR'S INTENTION

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Abstract: The paper deals with communication in forensic discourse. It focuses on the construction and interpretation of the testator's intention in last wills and testaments. To guarantee precise understanding and interpretation of an intended legal message many important eventualities have to be taken into consideration at the time of their creation. There is an absence of instantaneous contact between the writer and the interpreter of a legal message. The vacuum between the production and interpretation of the testator's intention may result in different kinds of discrepancies (spatial, temporal, social, and professional). The interpreter needs access to the context of the utterance to be capable of adequate interpretation of the testator's intention.

Key words: forensic discourse, last will and testament, linguistic means, intention

Introduction

The paper is intended to provide linguistic and pragmatic insights into forensic discourse. It focuses on the complexity of expression and interpretation of intention in last wills and testaments. The goal of the research is to find out what linguistic and pragmatic devices authors of last wills use in order to **externalise the intention** of the testator. The article also attempts to show what factors may negatively influence the interpretation of a last will.

For the purpose of the research, the last wills and testaments of fifteen famous British and American people such as Linda McCartney, Diana, Princess of Wales, Doris Duke, Jerry Garcia, Harry B. Helmsley, Joe Jackson, John F. Kennedy, jr., John Lennon, Joe Di Maggio, Marilyn Monroe, Richard Nixon, Jacqueline Kennedy Onassis, David Packard, Elvis Presley, Babe Ruth were subjected to analysis. All are written in legalese. The selection of the corpus is motivated by the fact that the language of wills is viewed as one of the most resistant to changes. The wills were randomly chosen from the Internet. They vary in length (from 260 words to 16 784 words) and the time of their creation (they were made within the years 1945 and 1997) as shown in the following list:

- 1/ the will of Babe Ruth (3624 words; made in 1945),
- 2/ the will of Joe Jackson (260 words; made in 1951),
- 3/ the will of Marilyn Monroe (732 words; made in 1961),
- 4/ the Will of Elvis Presley (3480 words; made in 1977),
- 5/ the will of John Lennon (832 words; made in 1979),
- 6/ the will of David Packard (664 words; made in 1987),
- 7/ the will of Doris Duke (16 784 words; made in 1993),
- 8/ the will of Harry B. Helmsley (6245 words; made in 1994),
- 9/ the will of Richard Nixon (5706 words; made in 1994),
- 10/ the will of Diana, Princess of Wales (12 625 words; made in 1993),
- 11/ the will of Jacqueline Kennedy Onassis (12 561 words; made in 1994),
- 12/ the will of Jerry Garcia (4420 words; made in 1994),
- 13/ the will of Joe Di Maggio (7 137 words; made in 1996),
- 14/ the will of Linda McCartney (4913 words; made in 1996) and
- 15/ the will of John F. Kennedy, jun. (1 004 words; made in 1997).

Creation and interpretation of intention in a last will and testament

A will is a legal instrument that permits a person – a testator – to make decisions on how his estate will be managed and distributed after his death. A valid will has to contain three essential elements:

- first, a competent testator;
- second, a will must meet the execution requirements of the Statute of Wills, designed to ensure that the document is not a fraud but is the honest expression of the testator's intention;
- third, it must be clear that the testator intended the document to have the legal effect of a will. For a will to be admitted to probate, it must be clear that the testator acted freely in expressing his testamentary intention. A will executed as a result of undue influence, fraud, or mistake can be declared completely or partially void in a probate proceeding (<http://legal-dictionary.thefreedictionary.com>).

1 Factors that influence creation and interpretation of intention in a last will and testament

Intention is a determination to perform a particular act or to act in a particular manner for a specific reason. The element of intention in last wills and testaments is enormously important. The creation and interpretation of intention in last wills and testaments may be influenced by a number of factors. In my view the following are the factors that seem to play a significant role in the process of creation and interpretation of the testator's intention.

1.1 Institutionalized language

In everyday communication addressers have almost limitless devices for expressing their ideas. In the forensic environment the creative space of an addresser is considerably restricted by conventions and traditions. Communicators in forensic discourse use institutionalized language. It is a medium, process and product in the various fields of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour (Maley, 1994: 11). The language of the law is a highly specialised and distinctive genre or discourse type in English. Swales (1990: 203) characterises genre as “a recognisable communicative event characterised by a set of communicative purpose(s) identified and mutually understood by the members of the professional or academic community in which it regularly occurs. Most often it is highly structured and conventionalised with constraints on allowable contributions in terms of their intent, positioning, form and functional value. These constraints, however, are often exploited by the expert members of the discourse community to achieve private intentions within the framework of socially recognised purpose(s)”.

1.2 Fossilised language

A last will and testament is a legal document and its writers often use established words and phrases (they can safely rely on) “regardless of what a testator had in mind” (Melinkoff, 1963: 297). Moreover, legal language is sometimes called a frozen variety of English because legal draftsmen prefer to use terms which have stood the test of time (Bhatia 1994: 140). According to Melinkoff (1963: 25), who himself is a lawyer, “the language of the law is often unclear – plain muddy” and “lawyers use many ‘dead and deadly words’. This is not to say that the language is devoid of meaning. Simply that if there is any meaning, it is hard to find it”. All this makes communication in the legal environment more difficult and the interpretation of an intention of a last will less straightforward.

1.3 Discrepancies in legal communication

The paper tries to cast some light on the nature of legal communication from the pragmatic point of view. When the meaning of a will is so ambiguous that it might be interpreted in multiple ways, courts usually look for extrinsic evidence. I think that there are also non-linguistic elements of the real world that play an important role in pragmatics of legal communication. Pragmatics takes into consideration the use of language in communication, particularly relationships between utterances and contexts, i.e.

the situations in which they are uttered, as well as the relationships between the participants in terms of the intention with which the addresser enters the communicative situation. One of the areas of pragmatics ‘operation’ is the analysing of people’s speech and their intentions, which are often hidden behind the linguistic forms they use.

a/ discrepancy between the real and model context

Last wills and testaments are designed for future time. They are interpreted after some time. As the context changes depending on a particular time and a particular place, etc., the meaning may become different in a new context. The context determines the ‘actual communicative validity’ of the sentence. When an individual decides to make a last will and testament, they go to lawyers and ask them to draft the legal document. When a testator asks a lawyer to prepare a will in accordance with the established and required form, he expects that the language the lawyer has employed will also mean the same after some years. When the last will is interpreted the testator is not present to testify the intention implied in the language of his will. The intent of the testator, whether explicitly or implicitly expressed, must be clear to its interpreter. The linguistic means have to guarantee the accuracy of the transmission of the legal message. Hence, the lawyer who writes the will has to find appropriate linguistic means to express the intention of the testator precisely. If this requirement is not fulfilled, the writer risks that he will not be understood correctly. A problem occurs when there is not enough information to indicate what exactly the testator had in mind. In these cases courts rely on a virtual reasonable testator and his response in a given situation. The discrepancy is “between imagining what the real testator reasonably might have intended and imagining what an imagined reasonable person might have intended” <http://www.cardozolawreview.com>. There is a paradox between a model context hypothetically created by an interpreter and the real context in which the legal message was created.

b/ professional discrepancy

In legal communication a lawyer is needed for both creating a legal document and its interpretation. When in certain circumstances an individual, a layman, gets seriously interested in reading and understanding a last will and testament it becomes very difficult for him to cope with it. A layman is not capable of interpreting a last will, he needs a lawyer who acts as an interpreter. The interpreter tries to understand what the writer means. The role of a lawyer is not just to interpret but also to simplify and reinterpret a legal text when explaining it to a layman. He first interprets legal information to himself and then reinterprets it in a simplified form to a layman. He attempts to transform the creator’s ideas into a form that can be more easily understood by a layman. This complicated process includes the interpretation of legal information, its simplification, and reinterpretation for a layman. It is not a dialogue but a ‘trilogue’ (exchange of information among three basic parties) or a polylogue (conversation among more than three participants).

c/ discrepancy between impersonality and subjectivity

I also see a paradox between the impersonality and subjectivity of legal writing. The subjectivity results from the fact that the two activities - creating and then interpreting – are usually done by two different lawyers and separated by quite a long temporal gap. Brown and Yule (1983: 11) admit that the perception and interpretation of a text may, then, be subjective. Impersonality lies in the fact that the illocutionary force goes from an unknown writer to an unknown interpreter. The writer addresses his message to someone who is spatially and temporarily distant.

All this proves that it is very important for the writer of a last will and testament to choose the most suitable linguistic means, those that convey the information in the most precise form, to be easily understood in the future time when the will is interpreted. According to Yule (1996: 15) the writer “has to project themselves into mental, social, temporal and spatial locations, different from theirs without actually being in these locations”.

2 Analysis

During the analysis I focused my attention on the linguistic means used by the writers of the selected last wills to express the testator’s intention. The analysis shows that in order to externalise the testator’s intention the writers of the examined last wills most frequently use the noun *intention*. In all found examples it is pre-modified by the possessive pronoun *my* which accentuates the testator’s

personal will and desire. The pre-modified noun *my intention* is used in the wills in different structures:

2.1 Intention section

The last will of Jacqueline Kennedy Onassis contains a special section called *Intention* which does not seem to be a commonly accepted part in all the examined last wills. The writer starts the section with the phrase *It is my intention to do something ...* which stresses the importance of the section:

8. Intention. It is my intention to insure that the interest committed to the qualified charitable beneficiaries by this Paragraph A shall be deductible for income and estate tax purposes under the provisions -of the Code. Further, I intend that payments of gross income made by the Trustees to qualified charitable beneficlaries [sic] qualify as income tax charitable deductions. Accordingly, I direct that all provisions of this Paragraph A and this my Will shall be construed to effectuate this intention, that all provisions of this Paragraph A and this my Will shall be construed, and the trust be administered, solely in a manner consistent with sections 170(c), 642(c), and 2055 of the Code,... (The Will of Jacqueline Kennedy Onassis)

2.2 Structures containing the noun intention

In all the examined phrases I found the noun *intention* in differently modified phrases:

a/ *It is my intention that:*

It is my intention that my husband shall be entitled to receive that degree of benefit from the trust which is requisite for the allowance of, the marital deduction. (The Will of Linda L. McCartney)

It is my intention that The Doris Duke Foundation receive no benefit from my estate under this Will or the exercise of any power of appointment under this Will. (The Will of Doris Duke)

It is my intention that each of the foundations created hereunder shall be an organization qualifying under Sections 501(c)(3) and 170(c) of the Code, gifts or bequests to which are deductible for federal estate and gift tax purposes under the provisions of Sections 2055(a) and 2522(a), respectively, of the Code. (The Will of Doris Duke)

b/ the writer of Jacqueline Kennedy Onassis's will adds the intensifying word *express* to highlight restrictedness of the testator's aspiration :

NINTH: A. By directing payment of the aforesaid taxes from my residuary estate only in so far as those taxes are generated by property passing under this my Will, it is my express intention that the property over which I possess a general power of appointment and to which I refer in Article FOURTH of this my Will shall bear its own share of such taxes. (The Will of Jacqueline Kennedy Onassis)

c/ in Jerry Garcia's will the writer uses an altered form of the phrase *It is my intention by this Will:*

It is my intention by this Will to dispose of all my separate Property and of my one-half (1/2) interest in our community property. (The Will of Jerry Garcia)

d/ In the will of Doris Duke the next intention is introduced by the phrase *it is my further intention that:*

...it is my further intention that any court having jurisdiction over this Will shall construe and interpret and, if necessary, modify and limit the terms and provisions of this Will so as to permit such remainder interest so to qualify; may qualify, and by the survivor, survivors and successors of them. (The Will of Doris Duke)

e/ The phrase *it would not be inconsistent with my intention if* expresses Babe Ruth's inconsistency with the potential future acts:

Furthermore, **it would not be inconsistent with my intention if the trust eventually were to terminate in favor of one or more tax-exempt organizations. However, I leave the decision as to how these matters are handled to the sole discretion of my Trustees.** (*The Will of Babe Ruth*)

f/ Jerry Garcia's intention is articulated by *I declare my intention to do something*. The performative verb *declare* carries out a legal act of declaring and underlines the significance of the testator's intention:

I declare my intention to dispose of all property, real and personal, of which I have the right to dispose by Will, including any and all property as to which I may have at the time of my death a power of appointment by Will. (*The Will of Jerry Garcia*)

2.3 Structures containing the verb intend

The verb *intends* is also found to introduce the testator's intention. The analysis shows that it is used both in the active as well as passive verb phrases.

a/ It is interesting that in all of the found examples the verb phrase containing the verb *intend* in the active voice present tense is followed by the negative to infinitive of a lexical verb *intend not to do something*:

D. I intend not to exercise by this Will any power of appointment. (*The Will of Linda L. McCartney*)

E. I intend not to make any provision herein for the benefit of any child or other descendant of mine, whether born before or after the date of this Will, except as herein set forth. (*The Will of Linda L. McCartney*)

b/ The verb *intend* is also used in the passive voice present tense. In most of the last wills the positive verb structure *some(thing) is/are intended to do* is found:

SIXTH: The gift for my husband under Article FIRST is intended to qualify for the marital deduction under the Code to the extent permitted by law and to the extent of my executors, election. Accordingly, the powers and duties, discretionary and otherwise, conferred upon my fiduciaries shall be exercised only in such manner as shall be consistent with the allowance of such marital deduction. (*The Will of Linda L. McCartney*)

H. Each gift of tangible personal property under this Will is intended to include all copyright interests I may own at my death in such property. (*The Will of Linda L. McCartney*)

Except as otherwise specifically provided, the terms "executors" and "trustees" as used in this Will are intended to include the executors or executor and the trustees or trustee respectively acting hereunder from time to time. Such executors and trustees are sometimes referred to individually as "fiduciary" and collectively as "fiduciaries." (*The Will of Linda L. McCartney*)

c/ The verb *intend* in the passive present tense negative verb phrase is also found.

The words "income" and "profits" as used in this my Last Will are not intended to include profits realized upon the sale of any of the assets constituting the principal of my estate. Such profits are to treated as accretions to principal. (*The Will of Babe Ruth*)

2.4 Structures containing the noun will

a/ the results of the analysis show that the writers of the examined last wills often use synonyms of the noun *intention* or the verb *intend*. One of them is the noun *will*. Longman Dictionary of English Language and Culture describes the noun *will* as *a strong determination to act in a particular way; as an intention*. In some of the examined last wills the structure *It is my will that* is used to introduce testator's intention.

ITEM ONE: It is my will that as soon after my death as possible my Executor, hereinafter named, shall pay all my just debts and expenses of burial. (*The Will of Joe Jackson*)

2.5 Structures containing the noun wish

The noun *wish* is defined by Longman Dictionary of English Language and Culture as *an attempt to make a particular desired thing or situation happen*. In the examined last wills both the noun and the verb *wish* are used to express what the testator wants to be done after his death.

a/ The noun is used in the structure *IT is my wish that*:

8 IT is my wish (but without placing them under any binding obligation) that my executors employ the firm of Mishcon de Reya of 21 Southampton Row London WC1B 5HS in obtaining a Grant of Probate to and administering my estate... (The Will of Diana)

It is my wish, however, that in selecting the particular qualified charitable beneficiaries which shall be the recipients of benefits from the Foundation the independent Trustees give preferential consideration to such eligible organization or organizations the purposes and endeavors of which the independent Trustees feel are committed to making a significant difference in the cultural or social betterment of mankind or the relief of human suffering. (The Will of Jacqueline Kennedy Onassis)

b/ The noun *wish* is also found in the structure *I express the wish that* where the verb *express* underlines the dynamism of the utterance:

SHOULD any child of mine be under age at the date of the death of the survivor of myself and my husband I APPOINT my mother and my brother EARL SPENCER to be the guardians of that child and I express the wish that should I predecease my husband he will consult with my mother with regard to the upbringing education and welfare of our children... (The Will of Diana)

2.6 Structures containing the verb wish

a/ According to Longman Dictionary of English Language and Culture the verb *wish* formally expresses *to want*. To convey the testator's intention it is used in the indicative mood present tense with the first person singular pronoun *I*.

2 I WISH to be buried. (The Will of Diana)

b/ In the following last will the verb *wish* is used with the emphasizing verb *do*. *Do* has here the role of an intensifier of the legal act.

I do wish, however, to remember her children and, thus, I direct my Executors to set aside the amount of Five Hundred Thousand Dollars (\$500,000) for each child surviving me of my sister, Lee B. Radziwill,... (The Will of Jacqueline Kennedy Onassis)

2.7 Structures containing the noun expectation

Here the noun *expectation* is understood as *a belief that something will happen*. It fortifies the importance of the testator's will execution.

(Accordingly, it is my expectation that the house at Two Marlborough Street owned by the NEWPORT RESTORATION FOUNDATION be used as a rental property since it will no longer be used as office space.) Funds to maintain Rough Point shall be provided by the DORIS DUKE CHARITABLE FOUNDATION as set forth in Article EIGHT hereof. (The Will of Doris Duke)

2.8 Structures containing the verb expect

In Longman Dictionary of English Language and Culture the following definition of the verb *expect* is found; *'think or believe that something will happen; to have or express a strong wish for (something) or that (someone) will do something with the feeling that it is reasonable or necessary.'* In my view it here replaces the verb *intend*.

I expect that the DORIS DUKE CHARITABLE FOUNDATION shall provide such a residence for each of NILZA MOORE and GEORGE REED and that the NEWPORT RESTORATION

FOUNDATION shall provide such a residence for BENJAMIN REED. HOPE ... (The Will of Doris Duke)

2.9 Structures containing the verb desire

According to Longman Dictionary of English Language and Culture the verb *desire* has the following meaning: *wish, want, and hope for, very much*. I believe that in Princess Diana's last will it communicates the testator's wishes and plans.

I DESIRE them (or if only one shall prove her or him)

(i) To give effect as soon as possible but not later than two years following my death to any written memorandum or notes of wishes of mine with regard to any of my chattels

(ii) Subject to any such wishes to hold my chattels (or the balance thereof) in accordance with Clause 5 of this my Will... (The Will of Diana)

2.10 Structures containing a combination of two nouns with identical meaning (synonyms)

The occurrence of two nouns having identical meanings is observed in the analysed tests. I consider the phenomenon to be repetitions. It is a characteristic feature of legal English. Repetitions are words of the same grammatical category (verbs, adjectives, nouns) with identical or similar meaning joined together by co-ordinating conjunctions and/or or. These pairs of words (or 'the-same-word-class multi-numbered expressions') are often collections of words of Latin and/or French origin and an English word; however, they are sometimes of English origin only. The Latin phrase *eiusdem generis/ejusdem generis* means of the same kind and denotes a rule of legal interpretation, that when a word or a phrase follows two or more other words or phrases, it is construed to be of the same type as the words or phrases which precede it. (Dictionary of Law, 1993: 84) The origin of this kind of repetition seems to have been in the times when French was replacing Latin. A French word was added to a Latin one with the aim of avoiding any misinterpretation. Later when English was replacing French one of the foreign words or both of them was/were replaced with their English synonym/s. In some cases a third word of English origin was added to one or two foreign words. All the words refer to the same item. Crystal (1997: 208) doubts whether they always conveyed the same meaning and calls them 'synonyms or 'near synonyms'.

a/ It is my will and intention

Many times the noun *intention* is used in combination with the noun *will* in the structure *It is my will and intention*. It emphasises the performativeness of an utterance.

It is my will and intention that in dealing with the affairs and securities of any corporation in which I shall be interested at the time of my death, either as creditor or stockholder, or with the affairs and securities of any corporation in which my Executors or Trustees, as the case may be, may at any time be interested on behalf of my estate, as creditors or stockholders, my said Executors or Trustees, as the case may be, shall have and may exercise all of the powers that might lawfully be exercised by an individual owning said stock or obligation and acting in his own right and interest. (The Will of Babe Ruth)

b/ It is interesting that the noun hope on its own is not found to introduce the testator's intention. In the analysed last wills it is used only in combination with the noun expectation. Hope is always used as the first element in the structure It is my hope and expectation. In my view the usage of the two synonyms (hope, expectation) can also make the testator's intention clearer.

It is my hope and expectation that my Executors and Trustees and the foundations in which I am a member, director, trustee or officer at my death or which are to be created under this Will shall employ as many of these persons as reasonably possible in order to maintain my various properties and to operate these foundations after my death. (The Will of Doris Duke)

Conclusion

In spite of the fact that writers of last wills and testaments try to express intentions explicitly, its interpretation is sometimes troublesome. Thus, it is vital to verbalise the testator's intention precisely. The findings prove my expectation: despite the fact that certain predetermined forms of expressing the testator's intention exist, writers of last wills have adequate 'manoeuvring room' at their disposal. They continue to employ traditional linguistic forms but they also make use of less established ones.

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