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The (Literal) Death of the Author and the Silencing of the Testator's Voice

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Abstract: *This essay considers the various legally recognized means by which an individual's wishes can be frustrated by the subsequent acts of others under English law and seeks to identify, within such practice, a dishonoring of the voice of the testator. It looks first at the stringency of the formalities required to create a valid will, then goes on to consider the paradoxical approach of the courts to the interpretation of wills, whereby the intention of the testator is frequently acknowledged yet is abandoned in favor of an ostensibly textual analysis. The essay concludes by demonstrating the extent to which the testator's wishes, even when clearly and validly expressed on the face of the will, can nevertheless be defeated by those whom the testator intended to benefit under the will and even by those whom he did not.*

Keywords: *voice / will / intention / testator / inheritance / dishonor*

At the time of writing, it seems that the practice of silence is being both encouraged in the academy and celebrated in popular culture. Large, colorful signs placed at the stairwells of our university library seek not to impose but rather to encourage silence by advocating its benefits:

> Silence is more musical than song.
>
> —*Christina Rossetti, 1830–1894*
>
> Silence is more eloquent than words.
>
> —*Thomas Carlyle, 1785–1881*

English poet Ian McMillan, has provoked public discussion by choosing as one of his Desert Island Discs John Cage's silent "4′33″,"[1] and the BBC has

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recently aired "The Big Silence," a three-part series that follows the lives of five volunteers who have entered into sustained periods of silence in a quest for spiritual growth. Such periods, argues Jesuit priest Father Christopher, can enable us "to see things with greater clarity. We come to know ourselves, and get in touch with the deepest part of ourselves. That is our soul."[2]

When practiced voluntarily, it seems that the act of suppressing the human voice can stimulate a variety of benefits. This might be an ability to hear the voice of another more clearly, or alertness to ambient sounds that would otherwise be ignored—a capacity to concentrate on one's studies or to reflect upon the state of one's soul. Collectively, the silencing of voices for a period of time may serve as an act of respect or of remembrance for the dead. The Royal British Legion has succeeded in entering the U.K. music charts with their release of a "2 minutes' silence" single; its director general, Chris Simpkins, stated, "Rather than record a song, we felt the UK public would recognise the poignancy of silence and its clear association with remembrance."[3] Common to all of these examples is the fact that the silence is transitory, and the stilling of the voice is impermanent. When the periods of silence have ended, the speaker is once more free to assert a claim, to express an opinion, or to make a loud and forceful protest. But this is not so when the voice has been permanently silenced, and it is this eternal silencing of the voice, described by Thomas Hardy as "being ever dissolved to wan wistlessness, Heard no more again far or near,"[4] which is the focus of this essay.

The essay considers how far a written declaration operates under English law to secure the intentions of an individual whose voice has been permanently silenced by death. Or, more specifically, it seeks to establish how far the voice of a testator can continue to be heard metaphorically beyond death via the legal instrument that purports to give effect to his or her wishes: the will. It has been stated that "[w]ills and testaments are the legal genre that most emphasizes the problem of the death of the author,"[5] and there is clearly scope here for the drawing of interdisciplinary analogies with the field of literary criticism. The so-called "intentional fallacy,"[6] the subsequent "Death of the Author,"[7] and other related theories that dismiss as "a cultural artifact" the modern practice of attributing "specific works to specific individuals as authors"[8] all clamor for attention here. However, these more obvious and familiar concerns do not form the substance of this paper.[9] Instead, by reference to extracts from two of Thomas Hardy's poems,

"The Voice" and "The Haunter," the paper seeks to identify the intense regret that a failure to honor the voice of the dead can, or even ought to, provoke. Subsequently, it seeks to reveal the extent to which the English law allows a deceased person's textualized "voice" to be silenced without demonstrating any depth of remorse for this apparent lack of honor.

The essay takes as its starting point an assertion made by Kate McLoughlin and Carl Gardner that when the meaning of a will is to be construed by the court, the practice of the court will be to give effect to the apparent meaning of the text or "face" of the will, even when contrary to the testator's intentions. They go on to observe that the court's interpretation of the deceased's wishes "are not necessarily coincident with authorial intention [and] may be counter-intuitive to the lay person and difficult to accept."[10] McLoughlin and Gardner adopt a linguistic approach in their consideration of the issue, noting that "the language of intentionalism" is used in the construction of wills, in spite of the fact that "the mind of the author is ultimately given up in favour of an analysis of the text itself."[11] This essay seeks to endorse and extend their identification of the inappropriateness of a purely textual approach to the interpretation or construction of wills through a further consideration of the statute and case law, which both initiates and perpetuates this practice. It is then primarily a doctrinal consideration of the legal formalities relating to wills and the interpretation of these by the courts. The essay considers, too, the various legally recognized means by which an individual's wishes can be frustrated by the subsequent acts of others. It commences by "stepping behind" McLoughlin and Gardner's assertion, looking first at the stringency of the formalities required to create a valid will. It goes on to consider the textual approach of the courts to the interpretation of wills before "stepping beyond" this discussion into a consideration of the extent to which the testator's wishes, even when clearly and validly expressed on the face of the will, can nevertheless be defeated by those whom the testator intended to benefit under the will and even by those whom he did not.[12]

A FAILURE TO HONOR THE VOICE

In Hardy's "The Voice," the speaker in the poem echoes and speaks directly to the voice of the deceased, saying, "Woman much missed, how you call to me, call to me," and he goes on to question whether he can

indeed hear the woman's voice, "Can it be you that I hear? Let me view you, then," before describing the sense of disorientation that he is now experiencing:

> Thus I; faltering forward,
> Leaves around me falling,
> Wind oozing thin through the thorn from norward,
> And the woman calling.

Implicit in these lines is the deep sense of regret that the speaker in the poem expresses not only for the loss of the "woman much missed" and for the loss of her voice, but also for his failure to pay attention to her living voice when it remained in existence but had lost its attraction. This same regret is more forcefully apparent in Hardy's "The Haunter," where the speaker in the poem now assumes the voice of the deceased:

> He does not think that I haunt here nightly:
> How shall I let him know
> That whither his fancy sets him wandering
> I, too, alertly go? —
> Hover and hover a few feet from him

In both poems, the voices from "beyond the grave" call for attention, neither wishing to be ignored by the living, and in both, there is an acknowledgment of the significance of the voice of the deceased, even when it can no longer make an audible accusation or express dissatisfaction. In his dissenting judgment in *Re Rowland*, Lord Denning makes reference to the "group of ghosts of dissatisfied testators who . . . wait on the other bank of the Styx, to receive the judicial personages who have misconstrued their wills."[13] The phrase is not Lord Denning's own. He cites Lord Atkin in *Perrin v. Morgan*, who in turn identifies "a late Chancery judge" as the architect of this disturbing vision.[14] This indicates that there is at least, through the relatively recent genealogy of English case law, a strand of thought that shows an appreciation of the fact that the imposition of legal doctrine can result in a frustration of the testator's intent. Less apparent is any deep sense of concern or remorse for the dishonoring of the testator's voice.

FROM WISHES TO WILL—THE VOICED INTENT

Oral declarations made by members of the armed forces in active service can be taken as valid nuncupative wills,[15] provided that these represent "a deliberate expression of his wishes as to the disposition of his property in the event of death."[16] The voice of the testator may then be honored exceptionally and only in keeping with his status as military personnel. More generally, the voiced intent of the testator will carry authority only if it is translated into a legally recognized written form: the will. In other words, to ensure that he is able to legally influence the distribution of his property following his death, the living testator is required to constrain his voice to within the confines of the written text and to submit to the "fixing" of its meaning within that text. Thus, from the outset, the authenticity of the testator's voice must be sacrificed for the sake of institutional certainty.[17]

Furthermore, the statutory formalities that must be followed in order for a written will to be valid are stringent, and their application is similarly rigorous. The Wills Act 1837 § 9 imposes a requirement that, in order to be valid, a will must be in writing and signed by the testator in the presence of two witnesses, who must also sign the will in the presence of the testator. Once the validity of a will is contested, the witnesses may be called upon to testify that they were both present when the will was signed. The rigidity of the application of these rules is demonstrated in *Re Colling*, *Lawson v. von Winckler*. Mr. Colling, a hospital patient, asked a fellow patient and a nurse to witness the signing of his will. The nurse was called away briefly as Mr. Colling was signing the document. He finished writing his signature, which was witnessed by his fellow patient, and then the nurse returned and signed the will in the presence of them both. Because the nurse had witnessed only part of Mr. Colling's signature and because the signature had not been made out fully in the presence of two witnesses, the will was declared invalid. Referring to § 9 in his judgment, Ungoed-Thomas J. conceded that "the section has manifestly on occasion defeated the intention of the testator and, in some cases, of which this is one, glaringly so," but he emphasized that the requirements of the section are "established as strict and technical."[18] He concluded regretfully by citing the observations of Morris J. in *In the estate of Davies*, *Russell v. Delaney*: ". . . I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix."[19]

The similarly strict application of analogous provisions under U.S. law (where most states adhere to the requirement that the will must be in writing and signed by the testator in the presence of two witnesses) has been described as "intent-defeating formalism."[20] Leslie acknowledges that adherence to such formalities can serve a number of useful functions, such as facilitating a standard system of the distribution of property following death that can be recognized and administered easily by the courts ("the channeling function"); alerting the drafter of the will to the serious implications of executing a valid will ("the cautionary function"); and protecting the testator from undue influence at the point of making the will ("the protective function"). However, she reminds us that each of these functions has, at its root, a concern that the distribution of a person's property after death should be carried out in accordance with his wishes.[21] Under the present system, she observes that "a primary purpose of will formalities is to ensure that the testator's final, deliberate intent controls," yet "judicial insistence on strict compliance with these formalities frustrates the testator's intent by aborting transfers the testator clearly intended to make." This is, as Leslie states, "a paradox."[22]

THE TEXTUAL ANALYSIS OF WILLS—THE VOICE CONSTRAINED

The paradox continues since, as McLoughlin and Gardner have observed, once a valid will is created, the interpretation of the document becomes an exercise in textual analysis rather than a search for the testator's true intentions. Somewhat ironically, the will comes into force only at the death of its author, and at the very same time, it takes on a life of its own and becomes the central focus of the court's attention. This is acknowledged, apparently unintentionally, by Barlow and colleagues in their weighty practitioner's text as they explain that "[a] reference to a person's will can mean the expression of a person's testamentary wishes but more commonly refers to the document itself."[23]

When a court is asked to consider the effects of the provisions in a will, its duty is to give effect to the intention of the testator, *as expressed in the words of the will*.[24] There is no obligation upon the court to consider previous authority. This was explained clearly by Lindley L.J. in the context of

determining the validity of will trusts, when he directed the court that "you must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended you say so, although previous judges have said the contrary on some wills more or less similar to the one you have to construe."[25] As pointed out more recently, this lack of reference to authority stems from the view that "the meaning of each set of words must be decided in the precise verbal and factual context within which those words are used,"[26] and this context is strictly that of the will itself rather than the circumstances that surrounded the testator at the time the will was written. A notable exception to this occurred in *Re Steele's Will Trusts*, where a will was professionally drafted by a solicitor who deliberately used wording identical to a previous will in which a trust had been upheld by the court.[27] When the will came into effect, the court's approach to the use of precatory words in the creation of trusts had changed, and a strictly textual reading of the will would have rendered the provision invalid. Despite this, the court upheld the trust on the basis that the copying of the wording of a previously valid trust demonstrated the requisite certainty of intention to create a trust. This decision is most notable for the criticism that it has attracted,[28] with some commentators terming it as a "rogue decision" on the basis that it "disregards the actual wording of the deed, imputes an artificial intention to the settlor and departs from the general rule that extrinsic evidence is inadmissible in the construction of a trust deed."[29]

It is only where particular words in the will are meaningless or ambiguous that extrinsic evidence will be admitted to court in order to determine what the testator may have intended by the use of such words.[30] Even here, the investigation has been described as one in which "extrinsic evidence, including evidence of the Testator's intention" will be considered insofar as it is useful in determining "the true meaning of any part of a Will."[31] Conversely, when the meaning of a will is clear and unambiguous, this meaning will prevail, even when it does not accurately represent the testator's wishes in respect of his property.[32] Exceptionally, for wills coming into effect after 1983, if there has been a clerical error in the drafting of the will or a failure by a will draftsman to understand the instructions of the testator in the professional drafting of the will, then the court may order that the will be rectified to carry out the testator's true intentions.[33] Of course, the difficulty here is that, although a clerical error may be reasonably easy to detect, it will be a more difficult task to determine whether the will actually represents the

intentions that were communicated by the testator when he was alive. The nature of the relationship between the testator and the draftsman will be characterized by confidentiality, and the drafstman may be the only living witness to his own error. Inevitably, a conflict arises because "virtually every successful rectification claim in relation to a professionally drawn will involves an implicit finding of negligence on the part of the draftsman."[34]

It is clear then, that the court will determine the meaning of a will from its face and only exceptionally take into account extrinsic evidence to resolve ambiguity. The testator's voice has become constrained within the text of the will, and its silence assured through the process of textual analysis. It is also true to say that the court does not consider itself bound by previous authority in the construction of the meaning of that will. However, a brief consideration of the court's changing approach to the use of precatory words in wills demonstrates that the determination of the will's meaning has not always been entirely textual. Rather, the textual analysis takes place in light of a normative standard that is implicit in the process of judicial interpretation, which varies in accordance with the changing legal and historical context. Although it is often an exercise in "New Critical close reading," as McLoughlin and Gardner suggest,[35] the means by which the terms of a will have been construed by the court have, in some circumstances, extended to a blatant form of reader response criticism, whereby the meaning of the text is *imposed* by the court in light of extraneous circumstances. Notably, these are circumstances other than those that shed light on the testator's expressed wishes.

Until Parliament passed the Executors Act 1830, an executor appointed under a valid will was entitled to take for himself any part of the estate that was not disposed of under that will. For this reason, the court tended to "seize upon any expression of hope or desire in order to negative the presumption that the executor was intended to take beneficially."[36] It was common practice for precatory words such as "hope" or "desire" to be construed as evidence of the testator's intention to create a legally binding trust of his property, even to the extent that an artificial intention to create a trust was attributed to a testator from the terms of a will "where no such certainty existed at all."[37] A change in the statutory law prompted a change in the court's approach. Following the enactment of the Executors Act 1830, the practice of allowing precatory words to create legally binding trusts in wills declined. It was disapproved of in a leading case, *Knight v. Knight* (3 Beav.

148, (1840)), and *Lamb v. Eames* (L.R. 6 Ch. 597, (1871)) is considered to mark the final turning point in the court's approach. In this latter case, a testator stated that his estate should be given to his widow "to be at her disposal in any way she may think best, for the benefit of herself and her family," and this wording was interpreted as an absolute gift to the widow rather than imposing upon her any trustee obligation. Although this is a discrete and historical example, Leslie argues that even in a modern context where an ostensibly textual approach is adopted by the court, its decision can nevertheless be influenced by its adherence to broader principles[38] and even manipulated to conform to the court's own "normative visions of justice."[39]

An adherence to wider principles or to normative standards is most apparent under English law in statutory and case law that openly allows for the defeating of a testator's wishes, even when these are plainly stated in the form of a valid will, and even when it is understood that the granting of permission for such actions is entirely opposite to the testator's expressed intentions. Arguably, it is here that the voice of the testator calls most forcefully for attention, but is most widely ignored.

THE DEFEAT OF THE TESTATOR'S WISHES EVEN WHERE VALIDLY EXPRESSED IN THE WILL—THE VOICE DISREGARDED

There are many circumstances in which the wishes of the testator, even when accurately and legitimately expressed on the face of the will, can be defeated. These can be broadly categorized into the "automatic" consequences of events or actions that the testator may be unaware of during his lifetime, actions taken following the testator's death by the beneficiaries named in the will, and actions taken following the testator's death by would-be beneficiaries.

"Automatic" Consequences

Under the Wills Act 1837 § 18, a legally valid will will be revoked entirely and automatically if the testator marries subsequent to signing it, and the only exception to this will be when the will has been made expressly in

contemplation of that marriage. Any gift in a will to a person who has witnessed the signature of the testator in that will is invalid, as is any gift to the witness' spouse or civil partner, although the will itself remains valid in such circumstances.[40] Not surprisingly, a person who has unlawfully killed another is prohibited on grounds of public policy from inheriting under the person's will or via intestacy.[41] An unfortunate consequence of this rule is that any child of the killer will also lose the right of inheritance.[42]

All of these statutory provisions are absolute, and there is no scope, for example, for a widower to bring evidence that his deceased wife was unaware of the existence of § 18 when she made her will, or for the witness to a will to bring evidence that there is no question of any undue influence and request that the gift be validated. Here, the voice is disregarded by operation of the law; it is an impersonal "crushing" of the testator's voice by the strict imposition of statutory rules.

Actions Taken by Beneficiaries Named in the Will

When money or other property is given on trust in a will, it has been long established that the trust can be terminated by an adult beneficiary with full capacity or by more than one beneficiary if all have full capacity and are in agreement.[43] This rule was established in *Saunders v. Vautier* (Cr. & Ph. 240 (1841)), when, under the provisions of a will, at the age of twenty-five, Vautier would become entitled to receive all of his deceased uncle's East India stocks, including the interest and dividends that had accrued on them since the date of death. In accordance with his uncle's wishes, the wording of this accumulation trust was such that the property was to be held for Vautier, or his "executors, administrators, and assigns absolutely," so it was clear that Vautier had a vested interest, as opposed to an interest that was contingent upon him reaching a certain age. At the age of twenty-one, Vautier requested that the trustees transfer the entire stock to him, and his application was upheld by the court. Oakley maintains that there are two underlying reasons for this approach. Firstly, a voluntary fixed trust is considered to be akin to an absolute gift under common law, and when the testator creates such a trust, he effectively loses control of the property, as would be the case for the settlor in an inter vivos disposition. Secondly, when more than one beneficiary is involved, the role of the trustees is to administer the trust fairly among them and in light of any conflicting

interests. If the beneficiaries are of one mind that the trust should be terminated, then this role is redundant.[44]

Considering *Saunders v. Vautier* from the stance of upholding a testator's expressed intentions, the rule represents a major challenge to any attempt to control the release of a capital sum until such time as the beneficiary is considered to be capable of dealing sensibly with the money. However, the rule is broadly applied and is considered to be noncontroversial.[45] It can apply not only to named individuals but also to charities who are beneficiaries.[46]

More generally, where a testator makes an absolute gift in the will, but expresses a desire that the property be used in a certain way, the legatee is entitled to take the property free from obligation and "regardless of the particular mode directed for its enjoyment and application."[47] Indeed, if the testator seeks to control the use or the application of money to the extent that he can be said to have purported to create a trust for a noncharitable purpose, then this will be void and his aim defeated altogether. A notable example of the application of this rule occurred in the determination of the will of George Bernard Shaw in 1957, the novelist, playwright, and reformer whom Harman J. in the Court of Appeal refers to as "a kind of itching powder to the British public."[48] Shaw sought to leave money to be used for the purposes of researching and developing a new alphabet. He hoped that this research might result in the formation of a new, common language that could be understood across the nations and used as a means to achieve peace between them.[49] Harman J. held that because Shaw's motives were partly political, he could find no charitable intention. Shaw's "alphabet trust" was therefore declared invalid because it was not a trust made in favor of an ascertainable beneficiary but rather was an impersonal trust designed for a noncharitable purpose.[50]

Perhaps, less surprisingly but upon the same basis, trusts for purposes such as "providing some useful memorial to myself"[51] or requiring that the doors and windows of a house "be well and effectually bricked up from the outside in a good and substantial manner" for a period of twenty years[52] have also failed—the latter case raising issues of public policy and capriciousness. Remarkably, though, the court has been willing to make exceptions to the so-called beneficiary principle in upholding some purposes that demonstrate intentions that are less noble than Shaw's. Examples are trusts for the upkeep of the testator's horse in *Pettingall v. Pettingall* (11 L.J. Ch 1760, (1842)), a horse and hounds in *Re Dean* (41 Ch D 552, (1889)), and the promotion

of fox-hunting in *Re Thompson* (Ch 342, (1934)). The category of exceptions is considered to have closed with cases such as *Re Shaw* and *Re Endacott*, since "these authorities comprise a powerful restatement of the force of the beneficial principle."[53]

The discussion of *Saunders v. Vautier* has indicated already that when a testator creates a valid trust within a legally valid will, it is possible for an adult beneficiary with full capacity to accelerate the terms of that trust and take the property absolutely. This capacity for a beneficiary to alter the manner or means by which his or her entitlement is received is demonstrated further in the practice known as the post-death variation of wills. Finding the basis of the court's power to sanction the variation of a will has proved a challenging exercise in spite of the fact that a brief google search reveals a vast array of professionals offering a will variation service. For example, one simply states, "A Deed of Variation sometimes known as an instrument of variation . . . enables beneficiaries of a deceased's estate to alter the distribution of that estate, or relinquish a bequest from an estate. Thus changing the deceased Will."[54] On this basis, it appears that the situation is summed up accurately in the *Daily Telegraph*'s caption, "If there's a will, there's a way."[55]

The fascinating issue for the purposes of this essay is that once the issue of variation fails to be considered, it becomes primarily a discussion concerning the duties and obligations of trustees, the corresponding rights of beneficiaries, and the role of the court in managing this relationship. The right to vary a will, it seems, stems from the court's willingness to vary the terms of a trust (whether inter vivos or testamentary) under certain, established circumstances. A strong allegiance to the trust concept, allied with the court's concern dealing with trust property appropriately, causes the court's focus to fall entirely upon the living issues before it. Indeed, it seems that, both in statute and in case law, any discussion of or concern for the testator's original intentions in framing the will is notable only in so far as it is nonexistent. The voice of the testator is, it seems, irrelevant here, and its dishonoring appears to go largely unnoticed.

Although there is a general principle that a trustee cannot deviate from the terms of a trust,[56] there are circumstances in which the court will sanction such a deviation. In some cases, this may be done under the court's inherent power in relation to the administration of trusts,[57] but also a number of statutory provisions are relevant here. The Trustee Act 1925, § 57(1) gives

power to the court to authorize dealings with trust property that are not expressly authorized by the trust itself, provided that the court considers it expedient to do so. Under the Variation of Trusts Act 1958 § 1, the court can also approve a variation of a trust on behalf of an infant beneficiary or on behalf of an adult beneficiary who is incapable of giving consent, when it considers the variation to be in the beneficiary's best interests. When such variations are made to decrease tax liability, inheritance tax provisions expressly make allowance for this for a period of two years from the date of the testator's death.[58]

All of these discussions of trust provisions may at first sight seem relevant only to wills in which the testator has created a valid trust of his property, thus limiting the practical extent of the court's power to approve a will variation. This would also seem to be in line with the strict approach that the court adopts in determining the validity of a will, as discussed earlier in this essay. If, as McLoughlin and Gardner observe, it seems counterintuitive that the fact that the deceased's wishes "are not necessarily coincident with authorial intention,"[59] it seems utterly absurd that the deceased's wishes can be ignored entirely by beneficiaries acting under the rule in *Saunders* v. *Vautier*, or by trustees acting in accordance with the beneficiaries' wishes but contrary to the testator's expressed intentions.

However, it seems that the concept of trusteeship is construed widely by the courts in this area, as demonstrated in the case of *Bernstein v. Jacobson* (EWHC 3454, (2008)). The case involved an application under § 1 of the Variation of Trusts Act 1958, which sought the court's approval of a variation of the terms of a will to reduce the tax liability that arose under its original terms, thus taking advantage of § 142 of the Inheritance Tax Act 1984. As has already been stated, the Court has power to consent to the variation of a trust on behalf of a beneficiary who lacks full capacity. In this case, the residue of an estate estimated with a net value of some £6.4 million had been left by the testator to his widow and his adult daughter, with specific pecuniary legacies being given to ten grandchildren, eight of whom were minors. Blackburne J. was content that the revised provisions of the will were for the benefit of these minors and gave his consent to the variation of the will.

There is no discussion in the judgment concerning whether the revised provisions of the will remained in keeping with the testator's expressed intentions. There is, however, a discussion of whether the court in fact has any jurisdiction in the case, since the Variation of Trusts Act 1958, both in its title

and in its brief provisions, refers to the variation of *trusts* that arise under "any will, settlement or other disposition."[60] The bequests for the minors in the will in question were absolute gifts and indeed contingent on each of them reaching the age of twenty-five. There was, therefore, no sense in which the minors could be described as beneficiaries under a trust arising under the will. Similarly, the other bequests in the will were absolute in nature, and it could not be said that a trustee had been appointed under the will. The only possible construction that allowed for the application under the 1958 Act was that the executor of the will had become a trustee of the entire estate until such time as all the assets had been distributed. Blackburne J. referred to a number of authorities to support this view and concluded that the nature of this will was such that there existed a "wider species of trust," which could be implied by the court in these circumstances.[61] Blackburne J. came to this conclusion despite arguments put forward concerning the much more narrow definitions of trusts and trusteeship that are generally enforced. In particular, as has already been noted in this essay, a trust will normally fail for want of an ascertainable beneficiary.

The ease by which the variation of trusts can take place appears to be rooted in the fact that the court's power to accede to such arrangements is based no longer on the context of wills but rather within the remit of trust law. This can be the case where there is a trust within the will, or even where there is not. Here, effectively, the will becomes camouflaged by language that describes it as "a wider species of trust," and the focus of the court's consideration becomes the living persons set to benefit under that trust. This is despite the fact that such persons are not "trust beneficiaries" in the ordinary sense, since equity does not recognize "or create for the legatees . . . a beneficial interest in the assets in the executor's hands during the course of administration."[62]

When this situation is analyzed from the perspective of the testator, it appears that a testator's wishes, albeit clearly expressed in a legally recognized form, can soon be overruled by an application to vary the terms of the will. Indeed, this was expressly what the Court of Appeal decided in *Goulding v. James*, in its determination of an appeal concerning an application to vary the terms of a will under the Variation of Trusts Act 1958. At first instance, the court had declined to give approval to the proposed arrangement on the basis that to allow this would be offensive and "clearly contrary to the firm intentions of [the testatrix]."[63] This approach was rejected by the

Court of Appeal. Mummery L.J. concluded that the trial judge had erred in taking into account the evidence that related to the testator's intentions. Instead, the court's focus should have been on protecting the interests of the minor beneficiaries, in accordance with the provisions of the statute. It should be noted that, in this case, the evidence of the testatrix's intention was not only that which was apparent on the face of her will, but also that which was extrinsic evidence brought before the court by her executor concerning the testatrix's definite intention not to benefit a certain individual.[64]

Actions Taken by Would-Be Beneficiaries Following the Testator's Death

The first scenario to consider within this final category is the operation of the Inheritance (Provision for Family and Dependants) Act 1975 (IPFDA 1975), which allows certain categories of persons to apply to the court for financial provision from a deceased person's estate on the basis that no reasonable provision has been made for them in the will or via intestacy. This form of application presents an obvious and clear challenge to the expressed wishes of the testator when a valid will exists. There is no policy under English law that requires a person to make provision in his will for his dependants. However, the IPFDA 1975 has been described as "the nearest it has come to such a concept, and the most significant inroad that has been made to testamentary freedom."[65]

The list of persons who may bring an application under the Act is considerable. Specifically, these are (in relation to the deceased person) a spouse or civil partner, a former spouse or civil partner who has not subsequently remarried or formed a new civil partnership, and a child or a person treated as a child of the family. There is also a broad category that covers any person who was maintained, either wholly or partly, by the deceased immediately before his death. Provided that a person falls within one of these categories, he or she may apply to the court for the "reasonable financial provision" that the testator has failed to make.[66] Under IPFDA 1975's statutory predecessor, the Inheritance (Family Provision) Act 1938, in determining whether a testator had failed to make reasonable provision for the applicant, the court was required to give specific consideration to the reason or reasons that a testator had decided not to make provision for a person under his will. The relevant subsection states, "The court shall also, on any such application, have regard to the testator's reasons, so far as ascertainable, for making the dispositions

made by his will, or not making any provision or any further provision, as the case may be, for a dependant."[67]

In cases following the Inheritance (Family Provision) Act 1938, there was some discussion about whether the decision of the reasonability of the provision should be subjective or objective. In *Re Pugh* (Ch 387, (1943)), it was held that the test was subjective; the court was required to determine that the testator had acted unreasonably in failing to make sufficient provision for the applicant, and this was approved in *Re Inns* (2 All E.R. at 308 (1947)). Such an approach did require a consideration of evidence as to the testator's reasons for framing his will in a certain manner, when this evidence was available. However, in subsequent case law, *Re Goodwin*, the subjective approach was disapproved of on the basis that the language employed in the statute was "wholly impersonal."[68] Section 1(1) of the Inheritance (Family Provision) Act 1938 gave the court power to make reasonable financial provision when it came to the opinion that "the will does not make reasonable provision for the maintenance of that dependant." Therefore, "the question is simply whether the will . . . has made reasonable provision, and not whether it was unreasonable on the part of the deceased to have made no provision or no larger provision for the dependent."[69]

The objective approach prevailed, and under IPFDA 1975, there is *no* express provision that requires a consideration of the reasons for the testator's decision not to benefit a certain individual under his will. Barlow and colleagues point out that it is still possible to bring in such evidence in respect of an IPFDA 1975 application under § 21, and that it *may* be regarded under § 3(1)(g). However, they point out that the significance of this evidence has been "reduced by the fact that the test as to whether reasonable provision has been made is objective."[70] Once again, the approach of the court is a textual analysis of the will, and the testator's expressed intentions are effectively invalidated by this process, even when the court is considering an application that is manifestly opposite to that which the testator intended. In light of this, it is possible for a testator to include in his will a condition not to dispute the will. Such conditions are not per se considered to be contrary to public policy, but it has been held that a legatee will not be in breach of such a condition where the claim is considered "necessary for the protection of his rights."[71] Furthermore, it was held in *Nathan v. Leonard* (4 All E.R. 198, (2003)) that such a condition cannot prevent a person from pursuing a claim under IPFDA 1975, since the right to do so arises under statute. The application

may result in the loss of a benefit under the will due to a breach of the condition, but this does not preclude the court from making provision from the estate in accordance with its powers under the Act.

The preceding discussion, falling under the broad heading of "The Voice Disregarded," has demonstrated three distinct areas in which the voice of the testator is ignored to an escalating degree. A testator "calling" from beyond the grave might object to the automatic consequences of provisions of the Wills Act 1837 that invalidate a legacy or even an entire will, yet he would concede that it would have been possible to avoid these consequences by actions taken in his lifetime or by the acquisition of further knowledge, and feel similarly with regard to the long-established rules prohibiting noncharitable purpose trusts. However, a testator who, like Hardy's "faithful phantom," has the benefit of observing beyond his death the behavior of his loved ones, would surely be disconcerted by the extent to which they are able to disregard his wishes by either accelerating a trust under the rule *Saunders v. Vautier* or by altering the terms of his will entirely, and indeed with the sanction of the court. Where the testator has deliberately omitted to make a provision for a relative or for someone he had provided for during his lifetime, he would surely be appalled at the extent to which his wishes can be openly ignored and his voice dishonored by an application under IPFDA 1975.

EQUITABLE PROPRIETARY ESTOPPEL AND SECRET TRUSTS—THE TESTATOR'S VOICE REVIVED

One final issue to be considered is the operation of the doctrine of equitable proprietary estoppel in relation to wills. It is in this context that words spoken by the testator in his lifetime can have the greatest significance. When the testator has raised an expectation of benefit on the part of an individual, who has acted to his detriment in reliance on that expectation, the testator can be precluded from exercising his legal rights in a manner that defeats the individual's expectation.[72] The effect of this is that a testator's expressed intentions in the form of a will can be defeated by contrary intentions that were expressed in his lifetime. For example, on the basis of repeated but vague assurances by an elderly woman that he need not worry about money because she would "see to it," a claimant continued to work and care for the woman without

pay. The claimant successfully estopped the woman's executors from distributing the woman's estate under the terms of her will that made no provision for him. He was awarded a sum of money from the estate that reflected the value of the work that he had carried over the years.[73] In other cases, words or actions that have encouraged a person to believe that he had "a home for life"[74] or the expectation of inheriting land[75] have bound a testator whose will failed to make the expected provision. It seems remarkable that the testator's voice, so effectively and permanently silenced in all matters pertaining to his will, becomes so pertinent in the context of a claim that seeks to defeat it.

The only other situation in which the testator's own voice can override the provisions of his will occurs in the context of "secret trusts." Hudson states that this form of trust "is almost as exciting as its name suggests,"[76] since it is a situation whereby a testator leaves property in his will to a named beneficiary, with the secret intention of benefiting a third party who is not mentioned in the will. The legacy can be framed as a gift (a fully secret trust) or as a trust, the terms of which are not explained (a half-secret trust). To be binding, the legatee, of course, has to have consented to the arrangement, which may have been communicated to him orally or in writing during the testator's lifetime.[77] Such an arrangement is particularly attractive to a testator who wishes to make a provision for an illegitimate child because the child's existence and identity are not revealed on the face of the will.[78] These forms of trust are upheld by the courts, but the basis upon which they are upheld has long been a source of contention.[79] Neither this conflict nor the scandal of extramarital affairs is within the scope of this essay. However, the excitement that Hudson refers to in relation to secret trusts is shared in this essay, since the upholding of a secret trust represents the only situation in which the testator's voice prevails in the determination of a will's construction. The testator's living voice triumphs over a textual interpretation of his will and, in doing so, gives effect to his dying wishes.

CONCLUSION

This essay has sought to draw attention to the significance of the voice of the testator, the voice that is "[a]lways lacking the power to call"[80] yet demands with some urgency the respect of the living. It has also sought to demonstrate that the concerns expressed by McLoughlin and Gardner regarding the paradoxical approach to the construction of wills are borne out by a consideration of the

relevant case law and statutes. It concludes by suggesting that their concerns are understated. The rigor with which Wills Act formalities are applied has been acknowledged by members of the judiciary as operating to defeat the purpose and intention of the testator. When a will is considered valid and is not defeated by excessive formalism, a formalist approach to the interpretation of the will can nevertheless produce an outcome that is plainly contrary to the testator's intentions. In some instances, the approach of the courts has extended beyond a formalist approach to one in which the meaning of the will is interpreted in light of extraneous legal principles, resulting in an interpretation that represents the judge's paternalistic intentions rather than those of the testator.

It has been shown that it is possible for beneficiaries of a trust under a will to call for the early termination of that trust, even when to do so is contrary to the testator's wishes. Variations made under the Variation of Trusts Act 1958 can also be made when it is known that this was contrary to the testator's wishes, and by construing the will itself as a "trust in the wider sense," the courts have been willing to vary the terms of a valid will without any reference to the damage done to the testator's expressed intentions. It is also possible for would-be beneficiaries not named in the will to apply to the court for reasonable financial provision, and because the court's decision is to be made objectively, the testator's reasons for withholding such provision are mostly irrelevant. Although a testator can include a condition in his will to discourage such applications, he cannot legally preclude them.

Finally, it has been shown that the testator's own voice, though eternally silenced by death, can be recalled and relied upon by a person who calls for provision from the testator's estate on the basis of equitable proprietary estoppel. The willingness of the courts to uphold a secret trust, therefore, represents a discrete and limited example of when the still, small voice of the testator can be said to be determinative of the outcome of a dispute over the terms of his will.

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9. Not least because they are dealt with in specific relation to wills by Hancher, *supra* note 5, at 101–14.
10. Kate McLoughlin & Carl Gardner, "When Is Authorial Intention Not Authorial Intention?," *European Journal of Legal Studies* 93–105, 96 (2007).
11. *Id.*
12. Traditionally, the term "testator" has referred to a male who has written or who has instructed another person to write a will on his behalf, and the term "testatrix" refers to a female. For the sake of clarity, the term "testator" is adopted generically in this essay to describe a person of either sex. The use of the pronoun "he" is used frequently throughout this paper in reference to that term and is not intended to be gender specific in this context.
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17. Hancher, *supra* note 5, at 106.
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19. *In the estate of Davies, Russell v. Delaney*, 1 All E.R. 922 (1951); *Re Colling*, *supra* note 18, at 731.
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32. McLoughlin & Gardner, *supra* note 10, at 96.
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34. Roger Kerridge & Alastair Brierley, "Mistakes in wills: Rectify and be damned," 62/3 *Cambridge Law Journal*, 750–70, 756 (2003).
35. McLoughlin & Gardner, *supra* note 10, at 95.

36. Oakley, *supra* note 25, at 50.
37. *Id.*
38. Leslie, *supra* note 20, at 268.
39. *Id.* at 266.
40. Wills Act 1837, at § 15.
41. Forfeiture Act 1982, at § 2.
42. *Re DWS*, Ch 568 (2001).
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44. *Id.* at 819.
45. *Id.*
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66. Inheritance (Provision for Family and Dependants) Act 1975, c. 63 § 1 (Eng.).
67. Inheritance (Family Provision) Act 1938, s. 1(7); See also Barlow et al., *supra* note 16, at 1022.
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