

## Reflecting on the Language of Death

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it will be short, it will take all your breath  
it will not be simple, it will become your will<sup>1</sup>

The “Last Words” of great men, Napoleon, Lord Byron, were . . . printed in gift books, and the dying murmurs of every common man and woman were listened for and treasured by their neighbours and kinfolk. These sayings, no matter how unimportant, were given oracular significance and pondered by those who must one day go the same road.<sup>2</sup>

### I. INTRODUCTION

Consider the following scenario: A seventy-five-year-old woman visits her estate planning lawyer to execute her will. The instrument she is given to sign directs the woman’s executor to distribute the woman’s primary asset, a small farm, to her eldest daughter and to make token financial gifts to her other two children.<sup>3</sup> The balance of the will con-

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1. Adrienne Rich, *Final Notations*, in *THE ART OF LOSING: POEMS OF GRIEF & HEALING* 34 (Kevin Young ed., 2010) [hereinafter *THE ART OF LOSING*].

2. WILLA CATHER, *DEATH COMES FOR THE ARCHBISHOP* 172–73 (Alfred A. Kopf 1964) (1927).

3. The specific dispositive provisions might read as follows:

(1) Subject to the provisions of subsection (2), I direct my executor to make the following distributions:

- a. TEN THOUSAND DOLLARS (\$10,000) to my son B;
- b. TEN THOUSAND DOLLARS (\$10,000) to my youngest daughter C;
- c. My farm, together with all the fixtures, furniture, and equipment located thereon (hereafter “the Farm”), to my eldest daughter, A;
- d. All the rest and remainder of any property I own, to be sold and the net proceeds of sale to A.

(2) If A, in her sole and absolute discretion, decides to sell the Farm within one (1) year of my date of death, I direct my Executor to distribute the net proceeds of sale, together

tains detailed administrative provisions, including a standard forfeiture clause that bars anyone who challenges the will from taking under it.<sup>4</sup> In accordance with her lawyer's advice, and because the instrument seems situated to achieve the woman's donative intent, she executes it. She leaves her lawyer's office with a technically proficient will poised to cause divisiveness among her surviving family members.

There is, of course, more to this story. The woman has explained to her lawyer that she and her late husband purchased the farm when they married, and that together they cultivated it into a small but profitable business that helped finance the educations of their children. The woman's eldest daughter, who lives nearby, helps run the farm. The woman's son moved to a nearby city, where he manages a commercial real estate company, and her youngest daughter lives out of state, where she practices medicine. The woman concedes that the farm is more valuable for its real estate than as an operating business, but her primary goal is to preserve the legacy that she and her husband built together. Although she loves her children equally, the woman has expressed to her lawyer her belief that she will achieve her goal by leaving the farm outright to her eldest daughter.<sup>5</sup> The lawyer has cautioned against incorporating any of this explanation into the will itself. Opining that the document serves its purpose by transmitting the woman's property as she intends, the lawyer advises that any more expressive, descriptive, or unusual language, any recounting of this alternative story, is unnecessary and may provide grounds for a challenge by one of the disadvantaged beneficiaries. The woman ends up executing a will that reflects her specific wishes but does nothing to put them in their fundamental context.

Often the final significant written communication by its author, a will has the potential to be a monument—or indeed a testament—to the decedent's loved ones, to express her vision for the future or her version

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with any property described in subsection (1) above, equally among my three children A, B, and C.

4. Also called an "*in terrorem*" or "no-contest" clause, a forfeiture clause is a standard provision stating that anyone who challenges a will may not inherit under it. See Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 629 (1994); Gerry W. Beyer, Rob G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 227 (1998) (defining an *in terrorem* clause as "a provision that voids gifts to beneficiaries who fail in their attempt to invalidate the instrument and seek to enlarge their shares by taking as heirs under the applicable intestacy statutes or under a prior dispositive instrument").

5. The hypothetical provisions set forth in note 3 *supra* are designed to reflect the realistic situation of a testator who does not wish to tie her daughter up in complicated trust provisions or impose any requirements or conditions on ownership, other than dividing the property equally if the daughter decides, in her sole discretion and within a reasonable time, to choose not to continue the business after her mother's death.

of the past. More often than not, however, today's wills are written in an insider's private language, so that testator after testator exclaims about the formal, dry, legalistic, and sometimes archaic writing at the will-execution ceremony.<sup>6</sup> If all written communication has meaning<sup>7</sup> and if all legal writing has enhanced meaning because it also has a real-world effect,<sup>8</sup> then imagine the potential of legal writing that embodies an individual's "last words." A will can reflect and reinforce the decedent's relationships with friends and family, can express support for institutions and causes in which the decedent believes, and can establish the decedent's lasting legacy.<sup>9</sup> And even if the will is simple and mundane, its terminal nature imbues the will with talismanic power.

This Article argues that a more expressive and expansive approach to will drafting—one which incorporates important components of the testator's life story—has value not only as a means of incorporating the testator's voice, but also as a means of addressing the problems of interpreting dry, technical language. The term "expressive language" for the purposes of this Article refers to writing that departs from formula and enhances the nonlinguistic function of the document provisions.<sup>10</sup> While

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6. See *infra* notes 78–81 and accompanying text.

7. See *infra* text accompanying notes 69–71.

8. See Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 382 (1941) ("Words are the principal tools of lawyers and judges, whether we like it or not. They are to us what the scalpel and insulin are to the doctor, or a theodolite and sliderule to the civil engineer."); cf. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 7 (2d ed. 1998) ("Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods for interpreting and evaluating it are aesthetic."); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1062 (1996) [hereinafter Hirsch, *Inheritance and Inconsistency*] ("[B]ecause lay persons more frequently use words for communicative than for performative purposes, it falls upon authorities carefully to differentiate those instances in which persons *intend* their words to carry legal consequences from those in which they do not.").

9. Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 COLO. LAW. 73, 73 (Dec. 2003) ("It is worth evaluating whether estate planning documents articulate what the client would want said to his or her grieving family and friends, and whether the legal documents are likely to soothe or aggravate the survivors' pain."); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 595 (2005) ("[W]e care about what happens to our property after death . . . [because of] the passions that we feel in life: love for family and friends; love for the arts; love for education; love for bettering humanity. We want the people we care about to have the money they need after we are gone, and we want the causes or institutions about which we are passionate to continue in existence. But these are not the only reasons. We often fear that our property will be put to a use of which we do not approve, or that it will be wasted, and we want to ensure that does not happen. And, in many cases, we may want to dispose of our property so as to leave a mark on this world, so that those who come afterward will look back on our life and accomplishments and respect us and the values for which we stood.").

10. A will, like any binding legal document, has nonlinguistic functions: for example, it distributes property, appoints fiduciaries, and confers powers. See Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1062–63 (describing performative and communicative power of words in wills). This Article argues that these nonlinguistic functions are enhanced by including language that ex-

I recognize that an extensive literature discussing the “expressive” function of the law exists, I do not intend to invoke that literature in this Article because it is concerned with entirely different goals.<sup>11</sup>

A study of how wills are written, and specifically whether a place exists for expressive language and personal narrative in testamentary documents, is long overdue. Although the force of narrative in the law has been widely recognized, only a few scholars in recent years have explored its place in transactional, and specifically testamentary, documents.<sup>12</sup> In addition, this Article’s approach to the law of wills fills a vacuum in the current substantive wills scholarship, which focuses almost exclusively on will interpretation rather than will creation.

As Part II explains, nearly every discussion of wills law begins with the familiar maxim that a testator’s donative intent is the “polestar” that guides interpretation of testamentary documents.<sup>13</sup> Despite this basic

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plains, broadens, deepens, or refines the nonlinguistic functions. *See generally* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1385–88 (2000) (describing distinction between nonlinguistic and linguistic meaning and between speaker’s linguistic meaning and sentence linguistic meaning); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1506–07 (2000) (expressive language manifests writer’s state of mind, in all of its multiple dimensions). Accordingly, in this Article, it is not simply the action directed by the will and its results that matter, but also the justifications and reasons behind the results that allow the speaker and readers to appreciate why the action has occurred. *But cf.* Andersen & Pildes, *supra*, at 1510–12.

11. *See, e.g.*, Adler, *supra* note 10, at 1364–74 (describing leading “expressivity” scholarship and doctrine); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1077–80 (1999) (describing expressive function of intestacy law); Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 294–95 (2010) (same).

12. *See infra* note 29.

13. This principle is reflected in legal scholarship, judicial decisions, treatises, and casebooks. For selected examples from the scholarship, see, e.g., Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 634 (1992) [hereinafter Baron, *Stories*] (casebooks, statutes, and cases “in the field [of wills] have as their purpose the discovery of the true intent of the property owner, not to thwart it, but to give it effect[.]”) (quoting ELIAS CLARK ET AL., CASES AND MATERIALS ON GRATUITOUS TRANSFERS 1 (3d ed. 1985)); Begleiter, *supra* note 4, at 633 (“The testator’s intent has been referred to as the ‘polestar’ of testamentary construction.”); Michael Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 514 (1982) (arguing that, in wills, we should search thoroughly for the intention of the testator); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004) [hereinafter Langbein, *Mandatory Rules*] (“The dominant substantive principle of the law of gratuitous transfers is to carry out the donor’s intent.”); and John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) [hereinafter Langbein, *Compliance*] (“[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”). For judicial decisions espousing this principle, see, e.g., *In re Kerr’s Estate*, 433 F.2d 479, 489 (D.C. Cir. 1970); *Barnett v. Estate of Anderson*, 966 So. 2d 915, 919 (Ala. 2007); *Phillips v. Estate of Holzmann*, 740 So. 2d 1, 2 (Fla. Dist. Ct. App. 1998), *review denied*, 735 So. 2d 1287 (Fla. 1999); *Strojek ex rel. Mills v. Hardin Cnty. Bd. of Supervisors*, 602 N.W.2d 566, 571 (Iowa Ct. App. 1999); and *Estate of Smertz*, 701 A.2d 268, 270 (Pa. Super. Ct. 1997). For examples of treatises and text books stating the idea, see, e.g., 96 C.J.S. WILLS § 831 (2009) (“The chief object and purpose of the construction of a will is to

agreement, scholars have opined at length about the difficulty—even impossibility—of divining authorial intent from written language generally<sup>14</sup> and from wills in particular.<sup>15</sup> The existing scholarship ultimately fails to improve wills law because it addresses only the reading of wills, relegating writing considerations to the practicing bar.<sup>16</sup>

Part III explores the benefits and costs of incorporating expressive language into wills.<sup>17</sup> This Part argues that including explanations, de-

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discover and carry out the intent of the testator as expressed in the will, and this is the prime duty of the court, and its sole function or province. In other words, the intention of the testator is the prime or paramount consideration, controlling factor or element, main guide in the interpretation of a will, or polestar to guide the court to which the problem is presented in the construction of every will.”) (citations and footnotes omitted) and LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 1–6 (4th ed. 2006) [hereinafter WAGGONER ET AL., *FAMILY PROPERTY LAW*].

14. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 43 (1980) (“The objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is so physically convincing. The illusion is one of self-sufficiency and completeness. A line of print or a page is so obviously there . . . that it seems to be the sole repository of whatever value and meaning we associate with it.”); Stanley Fish, *There Is No Textualist Position*, 42 *SAN DIEGO L. REV.* 629, 632–33 (2005) [hereinafter Fish, *No Textualist Position*] (“The instant I try to construe the words, the instant that I hear the sounds as words, the instant I treat them as language, I will have put in place some purpose . . . in the light of which those sounds become words and acquire sense. Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language; and when someone tells you (as a textualist always will) that he or she is able to construe words apart from intention and then proceeds (triumphantly) to do it, what he or she will really have done is assumed an intention without being aware of having done so.”); Chafee, *supra* note 8, at 388–89 (“We find abundant examples in law of the trouble caused by a word which is capable of standing for two or more different objects,” leading Justice Holmes to remark that “‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.’”) (quoting *Towne v. Eisner*, 245 U. S. 418, 425 (1918)); Sanford Levinson, *Law As Literature*, 60 *TEX. L. REV.* 373, 380–82, 402–03 (1982) (comparing textualists to “truthseekers” but ultimately recognizing that “[e]ven poets who emphasize the contingency of perception nevertheless continue to write their poems” because all “writing (and reading) is a supreme act of faith”).

15. See, e.g., Baron, *Stories*, *supra* note 13, at 633 (“[T]he connection between the words of testamentary instruments and the intention that is supposed to animate them can be extremely problematic. The problem is clearly larger than wills law in particular. It implicates generally recognized concerns about the nature of and relations between thought and language.”); Chafee, *supra* note 8, at 394–97 (noting and discussing linguistic ambiguities in cases involving donative instruments); Mary Louise Fellows, *In Search of Donative Intent*, 73 *IOWA L. REV.* 611, 631–35 (1988) (describing how language’s imperfections and imprecision prove particularly problematic when attempting to read a will to divine donative intent); Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 *SAN DIEGO L. REV.* 533, 549–54 (2005) (exploring different interpretative approaches to analysis of wills and contracts). *But see* Hancher, *supra* note 13, at 522–23 (1982) (“[R]eading statutes or constitutions is harder than reading a will [because] the passage of time can enlarge the hermeneutic gap that always exists between interpretation and application . . . . [I]n time the same section of a statute or constitution may need to be applied again, and yet again, to novel circumstances extremely remote from the circumstances that framed the Framers’ supposed intentions. The ordinary will does not invite such difficult rereading.”).

16. See *infra* text and accompanying note 62.

17. See *infra* text accompanying notes 65–156.

scriptions, and purpose provisions in a will provides a testator with the opportunity to express her individualism and thereby create a testament to her beneficiaries, even if such language is not necessary to the will's dispositive or nonlinguistic functions.

Then, Part IV tests the concern that testators and their beneficiaries would suffer a legal disadvantage from a more expressive approach to wills language by surveying cases in which wills are challenged on the grounds of undue influence. These cases from the past five years provide examples of how language is currently used in wills and how courts respond to that language. Contrary to expectations, the case law supports the idea that directly infusing wills with individualized, expressive, and what some might call "extra" language better insulates them against challenges.<sup>18</sup>

Based on this foundation of theory, analysis, and case studies, Part V concludes that deliberate focus on a will's language to enhance the accepted and well-tested "linguistic formulae"<sup>19</sup> can help people make more mindful choices about their legacies and change how those legacies are conveyed to and understood by a will's many readers. Far from a luxury, encouraging a testator to express herself in her will can strengthen the testator's connection to her personal identity and her community, an important step in furthering the ultimate goal of having her property pass as she intends and desires.

## II. HOW THE LONG-STANDING SCHOLARLY DEBATE ABOUT INTERPRETATION OMITTS A CRUCIAL INQUIRY

In the bundle of property rights encountered by every first-year law student is the power to convey one's property at death, also known as the freedom of disposition.<sup>20</sup> If this power is not exercised, a person dies intestate (or without a will), and default rules dictate how and to whom her property passes.<sup>21</sup> Properly exercised, this power allows a decedent

18. See *infra* text accompanying notes 157–230.

19. See Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1062.

20. See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 165 (6th ed. 2006); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 283 (1998); see also David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1682, 1700 & n.33 ("[T]he power to designate who will receive one's assets at death adds an important stick to the bundle of property rights."); Langbein, *Compliance*, *supra* note 13, at 491 ("The first principle of the law of wills is freedom of testation.")

21. See, e.g., UNIF. PROBATE CODE Art. 2, pt. I ("Intestate Succession"); JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 71–73 (8th ed. 2009) [hereinafter DUKEMINIER ET AL., WILLS]; EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 27 (7th ed. 2006); WAGGONER ET AL., FAMILY PROPERTY LAW, *supra* note 13, at 2–5; Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033–37 (2004); Frances Foster, *The Family Paradigm of*

to die content that her loved ones, the “natural objects of her bounty,”<sup>22</sup> will receive her treasures and thereby benefit from her generosity and care either at the moment of her death or, if a trust is in place, over time.<sup>23</sup>

How best to interpret and understand the testator’s intent as it is conveyed in her will has been the subject of a long-standing debate,<sup>24</sup> one unlikely to end soon.<sup>25</sup> One reason for the interest in will interpretation

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*Inheritance Law*, 80 N.C. L. REV. 199, 206 (2001) [hereinafter Foster, *Family Paradigm*]; see also Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 36 (2009) (presenting and analyzing survey data about people who die intestate).

22. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (2003) (to be competent to make a will, a testator, among other things, must know and understand in a general way the “natural objects of his or her bounty”).

23. See, e.g., Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1327 (2003); Fellows, *supra* note 15, at 626 (in addition to minimizing taxes, the primary criteria for a good estate plan is that it remains flexible for as long as possible); John H. Langbein, *Mandatory Rules*, *supra* note 13, at 1110–11 (“The distinctive attribute of a trust is that it can and commonly does perpetuate the settlor’s autonomy after his or her death (hence the dead-hand label.)”; Tate, *supra* note 9, at 606 (describing how trusts that last for some period of time after the creator’s death must be flexible enough to serve unplanned occurrences, such as changes in marital and family status, wealth, and well being of the trust’s beneficiaries, tax laws, trust doctrine, investment opportunities, and world financial situations). A common estate plan consists not only of a will but also of other instruments, like stand-alone trusts, pension plans, joint tenancies, payable on death accounts, among others, that dispose of property outside of the probate system. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). This Article focuses deliberately on language in wills, “the most important and the most sensitive part of the enterprise.” THOMAS L. SHAFFER, CAROL ANN MOONEY & AMY JO BOETTCHER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 177 (5th ed., Found. Press 2007) [hereinafter SHAFFER ET AL., *DRAFTING WILLS*]. Stand-alone trust agreements present fascinating drafting questions, and many of the same observations about drafting apply equally. See Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 592–93 (2008) (describing results of poorly drafted living trust) [hereinafter Foster, *Trust Privacy*]; Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1452–56 (1961) (discussing problems raised by discretionary trusts, which “too frequently . . . provide no guidance as to the purpose and scope of [the trustee’s] power,” and suggesting drafting solutions); see also *infra* note 31.

24. See Chafee, *supra* note 8, at 394 & n.15. Participants in this debate include scholars, practitioners, courts, legislatures, and even law school classes. See, e.g., UNIF. PROBATE CODE § 1-102 (2010) (“Purposes; Rule of Construction . . . (b) The underlying purposes and policies of this Code are: . . . (2) to discover and make effective the intent of a decedent in distribution of his property.”); UNIF. PROBATE CODE § 2-805 (2010) (“Reformation to Correct Mistakes. The court may reform the terms of a governing instrument . . . to conform the terms to the transferor’s intention . . .”); DUKEMINIER ET AL., *WILLS*, *supra* note 21, at 335 (describing Chapter 5 as focusing on will interpretation which is “easier said than done”); WAGGONER ET AL., *FAMILY PROPERTY LAW*, *supra* note 13, Ch. 12, at 12-1 (describing chapter as addressing the “dilemma of how the law should respond to allegations of mistake (and uncertainty about the meaning of language)”; Greenawalt, *supra* note 15, at 549–50.

25. See Hancher, *supra* note 13, at 523–25 (“The strategic question of the author’s intention . . . usually defies consensus: one interpretive strategy will sanction elaborate efforts to recover the author’s subjective intention, but another will repudiate any interest in the matter . . . . I predict

is that the author of a will is necessarily unavailable to describe the meaning of ambiguous or controversial sections when the text takes its effect.<sup>26</sup> Another reason is that the individualized nature of testation means that precedent often is useless to guide understanding of a particular testator's language or donative intent.<sup>27</sup> A third reason for the interest is simply that death, with all of its human drama and details, is an area of the law with wide-scale impact.<sup>28</sup>

This Part first briefly surveys some of the leading contributions to the debate about donative intent, then highlights how the discussions neglect to address the writing, as opposed to the reading, of wills. Notwithstanding a wealth of debate about interpretation, only a few scholars in recent years have considered whether testators should include more varied and expressive language, more personalized stories, in their wills.<sup>29</sup> Legal scholarship, and the areas on which it chooses to focus,

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that literary critics as well as lawyers (who have debated this question much longer) will a hundred years from now still be pondering the importance of the author's intention.”).

26. See, e.g., *In re Clarke's Estate*, 57 P.2d 5, 8 (Colo. 1936) (“It is a familiar and well-settled principle of law that a will speaks as of the time of death or as though it had been written immediately prior to death.”); *In re Estate of Heller*, 159 N.W.2d 82, 85 (Wis. 1968) (“A will written and executed is merely the expression of an intention to dispose of one's property in a certain way in the future, provided one does not have a change of mind. Only when death ensues, thus making a change of mind impossible, will these expressions of future intention bring rights into existence.”); Greenawalt, *supra* note 15, at 550 (“When courts construe wills, their writers are not available to say what they were trying to do (or how their wishes may have changed by the time they died).”); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1284 (1999) (describing how the author of a will, because she no longer is around to need the property, exercises “power without responsibility”).

27. See SHAFFER ET AL., DRAFTING WILLS, *supra* note 23, at 188 (“[The processes for interpreting language in wills] should avoid the rigidity of *stare decisis* because in this sort of case—as in no other—no two cases are alike.”); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 66–67 (2005) (“Because of a growing distrust and dissatisfaction with the application of hidebound interpretive rules to testamentary documents, the law of will interpretation has gradually evolved from a stiff and often artificial formalism to an almost organic approach to interpretation that extols the quest for the testator's intention. . . . [S]ome courts have gone as far as to announce that precedent is not controlling in will interpretation matters. Without *stare decisis* as a guide, and without semantics as an unassailable benchmarking tool, the quest to locate a testator's intent through the words of her testament becomes particularly perplexing.”).

28. See *infra* text accompanying notes 159–62, 231–38; cf. KARL S. GUTHKE, LAST WORDS: VARIATIONS ON A THEME IN CULTURAL HISTORY 49 (1992) (“At first glance, it might be thought that what assures last words of attention always and everywhere is the banal fact that mortality is a *sine qua non* of the human condition.”) (emphasis added).

29. See Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 1 (forthcoming 2010) (investigating the power of voice and persona in testamentary drafting); see also DUKEMINIER ET AL., WILLS, *supra* note 21, at 198 (recognizing some value in accompanying a testamentary document with explanatory language); SHAFFER ET AL., *supra* note 23, at 173–88 (describing language, both preferred and archaic, for drafting wills). Some articles also discuss drafting in the context of specific legal issues, such as lapse. See, e.g., John L. Garvey,



shape not only intellectual debate but also pedagogical and practical approaches to the law. By assuming that competent lawyers draft valid wills, which in the “overwhelming majority” of instances will never be contested or questioned,<sup>30</sup> and by failing to consider proposals for how wills might be written better or at least differently, the existing wills scholarship neglects an important tool for changing how lawyers, law students, courts, beneficiaries, and existing and future testators think about what makes a valid will.

#### A. Existing Scholars’ Proposals for Interpreting Wills

The traditional tension in the debate over how to interpret wills has been polarized.<sup>31</sup> According to the strict view, words in a will should be given their “plain meaning,” such that extrinsic evidence should not be

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*Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries*, 71 OR. L. REV. 47, 47–48 (1992) (discussing lapse). Noteworthy in its detailed approach to wills language, Professor Sneddon’s recent article is a scholarly examination of how important individual voice and persona are to wills. I am grateful to her for sharing an early version of her article with me and seek, in this piece, to participate in the discussion Professor Sneddon has started by taking a focused look at a specific body of case law and its treatment of wills language.

30. Baron, *Stories*, *supra* note 13, at 667–68 (“Sometimes stories will be unnecessary. Most cases will not be contested. However ‘remote’ the words of attorney-drafted instruments may be from the ordinary stories told by the testator in his own words, the ‘legal words’ can function tolerably well to achieve dispositive objectives. Indeed, this is the result for which so many responsible estate planners strive, and mostly succeed.”); James L. Robertson, *Myth and Reality—Or is it “Perception and Taste”?*—*In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1055 (1993) (“Every lawyer familiar with the field knows the overwhelming majority of donative documents are adequately drafted so that no questions arise or, in any event, so that they may be enforced and implemented efficiently, without resort to litigation.”); Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 144 (2008) (“[A] skilled estate planner can always take steps to make a will contest less likely or less likely to succeed. For instance, planners may gather evidence of capacity before death, making sure that potential witnesses see that the testator is competent. They may also draft an effective no-contest clause in the will. Thus a good estate planner can make disinheritance of children or grandchildren effective, unless the testator obviously lacks testamentary capacity or competent volition.”).

31. Because the scholarship considering will interpretation is extensive, this Article examines only a representative sampling and does not purport to be exhaustive. This Article also focuses deliberately on language in wills, *see supra* note 23, though the same debate about interpretation—whether to seek and attempt to apply the property owner’s intent or to apply default rules and modify the trust provisions in service to other values—is equally alive in the trust literature. *See, e.g.*, Benjamin H. Pruett, *Tales from the Dark Side: Drafting Issues from the Fiduciary’s Perspective*, 35 ACTEC J. 331, 341–47 (2010) (“To the extent that the settlor’s intent is expressed in the trust, it is much easier for the trustee to carry out that intent.”); Tate, *supra* note 9, at 622–23 (examining competing theories about trust termination and modification because “[w]hether the settlor’s intent should be respected is a central problem, perhaps the central problem, of the law of trusts”); *cf.* Robert H. Sitkoff, *An Agency Costs Theory of Trusts Law*, 89 CORNELL L. REV. 621, 667–69 (2004) (discussing costs of settlor standing to sue trustee to enforce intent regarding treatment of beneficiaries).

available to aid interpretation other than in very limited circumstances;<sup>32</sup> the more liberal view recognizes that language is inherently imperfect, such that relying on words alone to discern meaning and understand a testator's intent is impossible.<sup>33</sup> Although commentators uniformly agree that courts, juries, and even beneficiaries cannot glean a testator's intent apart from the manifestations of that intent—in other words, the testator's language and actions<sup>34</sup>—their approaches to weighing and interpreting those manifestations differ. As James B. Thayer characterized the problem more than two centuries ago, the “fatal necessity of looking outside the text in order to identify persons and things, tends steadily to . . . reveal the essential imperfection of language.”<sup>35</sup> Or, as a more poetic

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32. *DUKEMINIER ET AL.*, *WILLS*, *supra* note 21, at 335–36; *see* Greenawalt, *supra* note 15, at 557 (“Courts have traditionally assumed that if the text of a will has a plain meaning, they should not go beyond the text; and more generally courts have refused to consider what testators said at the time about what they were trying to do or how they understood particular words they used in the will.”); Storrow, *supra* note 27, at 70 (“The plain-meaning rule states that where a testator’s intention is clear from the plain language of the document, there is no need to admit extrinsic evidence or resort to rules of construction to advance the interpretive process.”).

33. *See, e.g.*, 9 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2462, at 198 (James H. Chadbourne ed., rev. 1981) (“The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth there can be only some person’s meaning: and that person, whose meaning the law is seeking, is the writer of the document. . . . [T]he ‘plain meaning’ is simply the meaning of the people who did not write the document.”); Greenawalt, *supra* note 15, at 560–62 (describing debate and recognizing that “[l]eading scholars of the last century have not looked kindly on plain meaning rules, and leading modern scholars have supported a focus on the intent of a will’s author in preference to reliance on plain meaning”). Wigmore, in addition to authoring the canonical text on evidence and serving the law in many other ways, created a “Legal List of Novels” that helped “revolutionize” the “law and literature movement” by encouraging lawyers to read great works of literature to enhance their legal professionalism. *See generally* Richard H. Weisberg, *Wigmore and the Law and Literature Movement*, 21 *L. & LIT.* 129 (2009) (describing Wigmore’s contributions and the lessons of his list for legal interpretation generally).

34. *See, e.g.*, Baron, *Stories*, *supra* note 13, at 641 (“[D]espite their apparently vehement disagreement over interpretative issues, the commentators are surprisingly uniform in their insistence that interpretation must focus on the words.”); Fellows, *supra* note 15, at 626 (cautioning against imputing a more “generalized” intent when manifestations of the testator’s specific intent (language and actions) are inadequate to determine testator’s desire with respect to distributions).

35. *See* JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* 429 (1898); *see also* Baron, *Stories*, *supra* note 13, at 648 (“[T]he problems of will interpretation illustrate and exemplify a more general problem concerning the interrelation of thought and language.”); Fellows, *supra* note 15, at 631–32 (“Words are imperfect means of communication because a word can stand for more than one object or event . . . . [T]he word’s relation to the object is an indirect means of conveying the property owner’s thought and, therefore, is susceptible to miscues.”); Hancher, *supra* note 13, at 513–14 (“In so varied and variable a linguistic world, even the most skillful writer must be at a disadvantage; and many ordinary writers of wills are not skillful at all. Ethical compassion for their plight moved [one scholar] to proclaim interpretation to be ‘in truth a species of equity,’ with the judge acting as champion of the testator’s subjective intention, rather than as the jealous guardian of legal niceties.”) (citations omitted); Storrow, *supra* note 27, at 71 (“The plain-meaning rule has been the subject of considerable derision, with no less an authority than Professor Wigmore branding it a fallacy: ‘In truth there can be only some person’s meaning: and that person, whose meaning the law

scholar has explained, “[i]n the interpretation of wills some cases do seem to show the difference between the letter, which killeth, and the spirit, which giveth life.”<sup>36</sup>

This “fatal” and “essential imperfection” of language has led critics of the “plain meaning” rule to posit numerous alternative interpretative mechanisms to deduce the testator’s intent from her will or, in the absence of being able to do so, to prefer rules that support certain societal preferences and norms.<sup>37</sup> For example, an early but noteworthy critic of the “plain meaning” rule was Justice Oliver Wendell Holmes, who advised that instead of seeking subjective meaning in the language of a will, courts should ask what the language means “in the mouth of a normal speaker of English[.]”<sup>38</sup> By considering how “our old friend the prudent [person]” would have used words in similar circumstances, Holmes observed, courts can discern and decode ambiguous language.<sup>39</sup> Professor (formerly state supreme court Justice) James L. Robertson advocates a modern version of Holmes’s objective approach to will interpretation, what he terms a “circumstanced external approach,”<sup>40</sup> under which a reader deliberately refuses to “invad[e] the mind of the person who made the donative transfer” and instead refers to “the hypothetical, yet reasoned, intent of an external character, an imagined semi-sovereign donor.”<sup>41</sup>

While agreeing that the divination of subjective intent is an elusive goal, other scholars have rejected the idea that an “objective” approach to interpretation is possible or even useful. Instead, they have advocated that courts confronted with difficult, unclear, or indecipherable documents should adopt deliberate interpretative preferences. For example, recognizing “[t]he imperfect symbolism of language, the property owner’s limited understanding of the instrument’s details, the dynamics of the estate planning process and the potential for lawyer error and incompetence,”<sup>42</sup> Professor Mary Louise Fellows argues that a court, interpret-

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is seeking, is the writer of the document . . . . [T]he “plain meaning” is simply the meaning of the people who did not write the document.”) (quoting WIGMORE, *supra* note 33, at 198).

36. Hancher, *supra* note 13, at 521.

37. *See, e.g.*, Hancher, *supra* note 13, at 513–14; Robertson, *supra* note 30, at 1109–10 (sometimes even “clear” legal language is inadequate, precisely because language has a “firm and long settled and well understood meaning” so default rules are necessary to fill gaps).

38. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899) (cited in Storrow, *supra* note 27, at 72).

39. *See* Storrow, *supra* note 27, at 72.

40. Robertson, *supra* note 30, at 1049.

41. *Id.* at 1047.

42. *See* Fellows, *supra* note 15, at 634–35. Fellows questions the “classical liberal conception” that a court’s goal is to discover a property owner’s subjective intent and, in furthering that intent, to promote individual autonomy; rather, she argues, a court can never know an individual’s actual

ing a will that fails to provide definitive guidance as to how property should be distributed, can make the document meaningful and avoid inconsistencies by preferring results that provide property owners with “competent” estate planning or, as she calls it, “equal planning under the law.”<sup>43</sup> Professor Kent Greenawalt advocates a “pluralist” approach, which takes into account not simply the testator’s intent as manifested in the will’s specific language, but a host of other factors particular to the specific will being examined.<sup>44</sup> Other scholars have proposed and examined methods for correcting specific types of mistakes, such as lapse or scrivener’s errors.<sup>45</sup> All of these approaches replace “fixed rules that produce predictable results” with more flexible tactics “designed to effectuate the presumed intent of the donor *where the language of the dispositive instrument fails to achieve that result.*”<sup>46</sup>

A final group of scholars focuses on the assumptions that permeate and infect the traditional will-interpretation doctrine, although they do not necessarily advocate alternative approaches to interpretation. For example, Professor Melanie Leslie uses cases discussing undue influence and will formalities to show that many will contests are flawed by normative assumptions that pervade our courts and lead them to prefer re-

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subjective intent as distinct from how that intent is manifested in words and actions. Precisely because of language’s inadequacy, such manifestations are often unclear or inadequate and provide no definitive guidance as to how the property should be distributed, leading courts to impute more generalized intent, which sometimes provides a barrier to reform. Fellows illustrates her ideas by considering how this preference for equal planning under the law can eliminate anomalies between formal wills and will substitutes, *id.* at 614–20, and can temper the reluctance to modify an estate plan where the property owner becomes incompetent, *id.* at 621–30.

43. *Id.* at 613. For example, this approach would “extend[] to incompetents the benefits of sound estate planning strategies” while “support[ing] a state’s preference for an estate plan that minimizes income and transfer taxes” and “remain[s] flexible for as long as possible.” *Id.* at 626.

44. See Greenawalt, *supra* note 15, at 555 (“Courts might rely on: the general, or ordinary, sense of words and phrases, allowing greater or lesser attention to the context in which the words and phrases are used; the sense of individuals situated as was the writer; the writer’s own sense of the words he has employed; the writer’s specific intentions for dealing with a situation; his broader purposes in disposing of his estate; or his hypothetical intentions about what he would have understood or wanted if he had focused on the situation.”). Greenawalt describes pluralism as a “practical concept, that interpretation to discern meaning is not reducible to a single inquiry. Pluralists believe that meaning will vary among disciplines and among subfields within disciplines,” *id.* at 535, ultimately requiring consideration, to different degrees, of the “testator’s idiosyncratic formulations” and his “presumed intentions.” *Id.* at 556–57. So, for example, courts should correct mistakes in wills, a pluralist would argue, by “giv[ing] effect to words as the words are understood by those who write them, if there is powerful, acceptable evidence that this understanding deviates from general usage.” *Id.* at 566.

45. See, e.g., Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scrivener’s Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1 (1990); James A. Henderson, Jr., *Mistake and Fraud in Wills—Part II: A Suggested Statutory Departure*, 47 B.U. L. REV. 461 (1967).

46. Pamela R. Champine, *My Will Be Done: Accommodating the Erring and Atypical Testator*, 80 NEB. L. REV. 387, 389 (2001) (emphasis added).

sults that reinforce traditional values.<sup>47</sup> Similarly, Professor Frances H. Foster documents how inheritance case law, legislation, and reform proposals are locked within an inflexible “family paradigm” that has distinct human and individual costs.<sup>48</sup> Finally, in a particularly heartfelt essay sparked by language in the wills of her father and father-in-law, who died within a “nightmarish six-week period,”<sup>49</sup> Professor Jane B. Baron, who has written extensively on language, interpretation, and property law,<sup>50</sup> describes the individualized stories in wills that readers of the texts often ignore.<sup>51</sup> Recognizing that even as a will is viewed as an “unfettered expression of individual choices,”<sup>52</sup> a will is a communal endeavor because, for example, it depends on an audience to read and effectuate its commands.<sup>53</sup> By challenging traditional methods of interpretation, these scholars urge a reader—an interpreter—to take a more self-conscious approach to the assumptions underlying what is characterized as a search for donative intent.

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47. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (“A careful review of case law, however, reveals that many courts do not exalt testamentary freedom above all other principles. Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent.”); see also Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997) (“[R]ather than furthering freedom of testation, the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms. . . .”). Professor Leslie shows how courts manipulate doctrine to impose on testators a duty to provide for those beneficiaries that the court views as having a superior moral claim; this “unspoken rule, seeping quietly but fervently from the case law,” Leslie observes, “directly conflicts with the oft-repeated axiom that testamentary freedom is the polestar of wills law.” Leslie, *supra*, at 236.

48. Foster, *Family Paradigm*, *supra* note 21, at 200–01 (“In a world where the individual has emerged from the tyranny of the abstract, inheritance law continues to define people by family categories. Decedents and their survivors remain first and foremost spouses, parents, children, and siblings rather than individuals with particular human needs and circumstances that increasingly defy conventional family norms.”).

49. Baron, *Stories*, *supra* note 13, at 633.

50. See, e.g., Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917 (2010); Jane B. Baron, *The Rhetoric of Law and Literature: A Skeptical View*, 26 CARDOZO L. REV. 2273 (2005); Jane B. Baron, *The “No Property” Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. 1000 (2004); Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208 (2002); Jane B. Baron, *Language Matters*, 34 J. MARSHALL L. REV. 163 (2000) [hereinafter Baron, *Language Matters*]; Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989); Jane B. Baron, *Empathy, Subjectivity and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1056–58 (1987) [hereinafter Baron, *Empathy*] (describing how even when courts, juries, and commentators speak about testamentary capacity in terms of objective rationality, they require empathy to consider whether the individual’s will is consistent with her preferences during life).

51. Baron, *Stories*, *supra* note 13, at 656–69.

52. *Id.* at 650.

53. *Id.* at 656.

Although the various theories on how best to interpret—or not to interpret—wills differ in important ways, each proponent focuses primarily on poorly drafted testamentary documents and proposes convincing arguments for how a court should or should not analyze the ambiguities, fill any gaps, and reform any mistakes.<sup>54</sup> In other words, the essential purpose of current wills scholarship appears to be improving the law of wills, but only by providing future interpreters—usually courts—with theories and strategies to “figure out what some purposive agent intended.”<sup>55</sup> Recognizing that drafting wills is a difficult business and that authorial intent is key,<sup>56</sup> wills scholars nevertheless fail to consider how drafters might choose language to express and memorialize the testator’s intent from inception and instead focus almost exclusively on intent-effectuating rules.

*B. Moving Beyond Interpretation to Formulation,  
Creation, and Communication*

The scarce treatment of writing in the scholarly dialogue about wills appears to be based on one or more assumptions. First, a notion exists that, for the most part, competent lawyers draft valid wills that, in the “overwhelming majority” of instances, will never be contested or questioned.<sup>57</sup> Second, some of the literature conversely posits that even

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54. See, e.g., Baron, *Stories*, *supra* note 13, at 659–60 (“Where a will’s verbal commands seem clear (in the sense of being complete, comprehensible, and in accord with the reader’s expectations), the richness of the ‘under-story’ can be comfortably ignored; the words of the will can be followed. But where a will’s words are unclear (incomplete, internally inconsistent, ambiguous, at odds with expectations), the under story is what we most want to know.”); Robertson, *supra* note 30, at 1064 (“If [the would-be donor’s] wishes are complex and he secures competent estate planning advice and counsel, his skillfully drafted donative document will almost certainly enjoy judicial approval and realize in fact his actual intent. . . . But where the will is not so well written, where the donative document admits of ambiguity and mistake or its meaning is otherwise problematic . . . our approach matters most.”); Storrow, *supra* note 27, at 67 (arguing that “too flexible interpretive rules” allow courts to ignore will ambiguities and seeking “a renewed understanding of the distinction between interpretation and construction” to curb courts’ “limitless discretion”).

55. Fish, *No Textualist Position*, *supra* note 14, at 646.

56. See Gerry W. Beyer, *Avoiding the Estate Planning “Blue Screen of Death”—Common Non-Tax Errors and How to Prevent Them*, 1 *EST. PLAN. & COMMUNITY PROP. L.J.* 61, 82–93 (2008) (describing various will drafting errors and ways to avoid them) [hereinafter Beyer, *Blue Screen*]; Garvey, *supra* note 29, at 47 (“Few estate planning lawyers would argue with the idea that drafting a competent will or trust requires ‘hard thinking and patient labor.’”) (quoting W. BARTON LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 234 (2d ed. 1955)); Storrow, *supra* note 27, at 65 (“On the one hand, language is imperfect because it fails as a tool of prognostication. On the other hand, language is imperfect because it fails to live up to a role it should play—to serve as a set of signs capable of representing an author’s intention. Given the paramount importance of intention in the law of wills, this latter imperfection of language makes responsible estate planning a perilous undertaking.”).

57. Robertson, *supra* note 30, at 1055; see also Baron, *Stories*, *supra* note 13, at 667–68 (“Sometimes stories will be unnecessary. Most cases will not be contested. However ‘remote’ the

the most careful of estate planners cannot always express a testator's desires adequately or completely. Not only is language imperfect, according to this line of thought, but also the simple processes of using a legal vocabulary and thinking about the testator's needs in terms of "available legal categories and devices" affect how a testator perceives, formulates, and defines her intent.<sup>58</sup> Accordingly, even while recognizing that "[r]eal people, not abstractions, write wills," at least one scholar focuses on encouraging interpreters to "seek the human voice" behind the words, rather than encouraging testators and their drafting lawyers to write that story into the document.<sup>59</sup> Third, some of the articles imply that examining intent-effectuating rather than intent-creating concepts is substantively more helpful because placing "the onus on testators to expound their wishes—whether present or anticipated—within an executed writing" may have significant downsides, such as the imperfection of human foresight, the legal expenses associated with planning for contingencies, and the cognitive costs that arise when individuals confront the unpleasant prospect of death.<sup>60</sup> With several notable exceptions,<sup>61</sup> any serious debate about will drafting seems to be viewed as a subject more appropriate for the practicing bar<sup>62</sup> than for scholarly examination, discussion, and debate.

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words of attorney-drafted instruments may be from the ordinary stories told by the testator in his own words, the 'legal words' can function tolerably well to achieve dispositive objectives. Indeed, this is the result for which so many responsible estate planners strive, and mostly succeed."); Tate, *supra* note 30, at 144.

58. See, e.g., Baron, *Stories*, *supra* note 13, at 647–48; Champine, *supra* note 46, at 389–90 (arguing that "[t]he movement away from fixed rules in the law of wills" has enjoyed support primarily because "safe harbors permit careful testators to preclude litigation over intent and protect against the possibility that intent will be discerned inaccurately . . ."); Fellows, *supra* note 15, at 633–34 ("That clients are remote from their instruments does not mean that lawyers garbled their clients' donative intent. It does, however, increase the possibility that donative intent will be garbled because clients are less able to review the legal translations of their donative intent. Although a good lawyer will try to explain the various provisions to the client, the level of detail and the economic constraints of the planning process make it impossible for the property owner to understand, let alone make an informed choice about, all the issues that arise."); Greenawalt, *supra* note 15, at 564–65 (describing the many types of mistakes a testator might make in drafting a will, including using language that fails to accomplish its intended purpose, omitting key language, using terms with precise legal significance and application that the testator does not understand, or misunderstanding circumstances in the external world).

59. Baron, *Stories*, *supra* note 13, at 664–69.

60. Adam Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 623 & n.74 (2009) [hereinafter Hirsch, *Text and Time*].

61. See *supra* note 37.

62. See generally Beyer, *Blue Screen*, *supra* note 56 (describing estate planning best practices); Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, 38 No. 1 PRAC. LAW. 61 (1992) (describing how to draft to avoid will contests) [hereinafter Beyer, *Will Contests*]; Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQ. ELDER'S ADVISOR 253 (2007) (providing practical, including drafting, suggestions for estate

There is room, and indeed need, for wills scholarship to be less myopic. Even if scholars identify how courts prefer certain prevailing themes or act inconsistently in their approaches to resolving ambiguities, we present only a partial solution if we limit our inquiry to considering how courts should interpret the problematic instruments more effectively. To the contrary, these themes influence how wills are written, and we will be better equipped to counter the prejudices and default rules that exert power over outcomes<sup>63</sup> if we also look at that pre-interpretative stage. In other words, by systematically exploring strategies for and questioning limits on will writing, scholars can ultimately help produce a better body of substantive wills law.

In an effort to fill the current gap, this Article provides a long-overdue look at will creation and, more specifically, the potential advantages and disadvantages of expanding the traditional, contained, and formulaic language of wills to be more varied and expressive. To this end, the balance of this Article posits that testamentary documents can and should be drafted to include language that is more individualized, evocative, and expressive, and to include a testator's story, her life vision, or at the very least, details about the people and property referenced in the will. Drafters need not set forth this language in separate, non-testamentary side letters and need not avoid using language that is "precatory" rather than essential.<sup>64</sup> Rather than exposing the legal text to increased ambiguity and therefore litigation, allowing expressive writing to infuse the otherwise rigid language of traditional will forms has significant benefits.

### III. THE COSTS AND BENEFITS OF EXPRESSIVE LANGUAGE IN WILLS

The idea that a testator should think about her will carefully and include a written explanation and expression of her wishes seems obvious, and yet, as the cases that will be discussed in Part IV show, wills language clings fiercely to formula. Before surveying examples of wills from case law, this Part discusses the potential advantages of an approach to drafting wills that would be more nuanced and diverse, less mechanical and rigid. First, recognizing the relationship between writing

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plans that increase rather than disrupt family harmony); Smith, *supra* note 9 (describing how to draft testaments); cf. Pruett, *supra* note 31 (describing drafting approaches from fiduciary's perspective).

63. See, e.g., Leslie, *supra* note 47, at 243–67.

64. Precatory language consists of words that recommend, rather than command or direct, a course of conduct. Frank L. Schiavo, *Does the Use of "Request," "Wish," or "Desire" Create a Precatory Trust or Not?*, 40 REAL PROP. PROB. & TR. J. 647, 650–51 (2006); see also GEORGE T. BOGERT, TRUSTS § 19 (6th ed., West 1987) ("The words 'request,' 'desire,' and the like, do not naturally import to most persons a legal obligation . . ."). In other words, precatory language is language of guidance rather than direction, wishes rather than demands, stories rather than strictures.



and cognition, this Part argues that using richer language in wills influences the testator's formulation of her intent about how she wants to build her legacy. Second, a will, and indeed any testamentary document, is not only a legally binding statement of the decedent's individual wishes, but also a communal instrument that affects others apart from its maker.<sup>65</sup> By creating a will that strives to be expressive, this Part posits, a testator may share her intent more effectively with her various audiences and thereby reap benefits that go beyond pure legal validity. Third, expressive language enables a lawyer drafting a will to incorporate the testator's voice more effectively, helping to avert contests over ambiguous intent. Fourth, and finally, expressive language aids the grieving to understand and reconcile themselves with the testator's wishes. Although there are costs to including expressive language in wills, including complicating an already difficult planning process<sup>66</sup> and providing increased opportunity for "dead hand" control,<sup>67</sup> encouraging a testator to consider weaving aspects of her personal narrative<sup>68</sup> into her will also has advantages that should not be undervalued or routinely rejected.

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65. See Baron, *Stories*, *supra* note 13, at 649–52; see also Foster, *Trust Privacy*, *supra* note 23, at 567–610 (documenting the benefits and costs of trust privacy for creators, beneficiaries, creditors, and fiduciaries); Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313 (1996) (recognizing attorneys' ethical obligations to clients' spouses and children when presenting estate planning options and especially traditional default planning devices).

66. See *infra* text accompanying notes 127–30.

67. See *infra* text accompanying notes 150–54.

68. Legal storytelling and narrative theory have continued to spark interest in recent years, especially in the legal writing community. See, e.g., J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53 (2008) (describing persuasive value of narrative in the law); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 773 (2006) ("We understand narrative because we join the story and see ourselves as part of it: We place ourselves into the story and walk with the characters."). For depictions of the power of narrative and legal storytelling generally, see LAW'S STORIES (Peter Brooks & Paul Gewirtz eds., 1996) (collecting essays that describe the relationships between and power of law, rhetoric, narrative, and storytelling); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 578 (1992) (describing how using storytelling techniques in legal discourse can disrupt traditional assumptions and counteract discrimination specifically with respect to gay and lesbian individuals); and Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 26–27 n.112 (2008) (observing how stories are "not just a series of intellectual or abstract claims in service of a principle" but rather a powerful tool to "disrupt . . . rationalizing, generalizing modes of analysis with a reminder of human beings and their feelings, quirky developments, and textured vitality. . . . And stories at the moment seem better able to evoke realms of meaning, remembrance, commitment, and human agency than some other methods of human explanation.") (quoting Martha Minow, *Stories in Law*, in LAW'S STORIES, *supra*, at 24, 36). For a discussion of storytelling in the context of wills, see *infra* note 95.

A. *Expressive Writing as a Tool for the Testator to Formulate Intent*

It would be folly to claim that how a thought is expressed, and more particularly how it is written, does not matter to its writer.<sup>69</sup> Each choice about what language to include or omit changes the way the author analyzes and understands the idea's substance.<sup>70</sup> For that reason, scholars, in the context of judicial decision making, have explained that the very process of writing an idea down helps discipline the judge's thoughts; judges speak of how recognizing that a decision "just won't write" often leads them to rethink the result's underpinnings and workability.<sup>71</sup> The crafting is inextricably tied to the author's process of carrying the idea to completion, and the written expression of an idea has importance independent of the idea's content.

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69. Characterized by written opinions, statutes, and agreements, written language occupies a sphere that is central to American law. See Richard A. Posner, *Judge's Writing Styles (and Do They Matter)*, 62 U. CHI. L. REV. 1421, 1447 (1995) (discussing how the "pure" and "impure" style of written decisions correlates to the judge's thought and purpose); BENJAMIN N. CARDOZO, *Law and Literature*, YALE REV. (1925), reprinted in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3–5 (1931) (arguing that in law, as in letters, "[f]orm is not something added to substance as a mere protuberant adornment. The two are fused into unity."). *But cf.* Guinier, *supra* note 68, at 24–28 (discussing the difference between spoken and written communication and, in particular, the unique power of judicial dissents delivered orally).

70. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1284–85, 1303–04 (2008) (considering the complicated relationship between writing and reasoning by referring to "psychological research on the relationship between verbalization and problem solving"); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 55 (1994) (describing cognitive and epistemic components of writing and observing that "[w]riting is used not only to communicate knowledge, but also to generate knowledge. That is, writing plays a role in thinking."); see also Elaine Ellis-Stone, *Appendix I Letter*, in BARRY K. BAINES, M.D., *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* 98, 99 (2d ed. 2006) ("Not only does writing help me clarify my thoughts; it also gives me something tangible to return to over time to measure how my thinking has evolved."); Posner, *supra* note 69, at 1447 (using examples of the "pure" and "impure" opinion-writing style to argue that style and content are interrelated and that words can both "enable" and "substitute for" thought).

71. See, e.g., Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 994 (2009) ("[T]he mere act of drafting an opinion—crafting a coherent and believable explanation of how a decision flows from the relevant facts and legal authorities—can sometimes ensure that the decision accords with the governing law. Often, a judge will discover an error in reasoning when she realizes that the opinion 'just won't write' as she had conceived it."); Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 183 (1941) (describing how Justice Brandeis "spent no less time in the expression of thought than in its conception"); Kenneth F. Ripple, *Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special "Classroom"*, 74 NOTRE DAME L. REV. 925, 926 (1999) (describing how "writing was not just a means of communication" for Chief Justice Warren E. Burger but rather "a necessary tool for thinking through the most difficult problems"); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 50 (2005) ("Every judge has had the experience of finding that an initial decision just 'won't write,' and thus every judge knows that it is manifestly untrue that reasoning and writing can be separated."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374–75 (1995) (discussing the "true test" of a judicial opinion as coming when a judge "reasons it out on paper (or on computer)" and observing that "[r]hetoric will always be tied to import and permanence").

And the writing of a will has personal as well as legal significance. People write wills as a way to take control of death and to put their “affairs in order.”<sup>72</sup> A simple document naming an executor and disposing of property may facilitate transfers on death and spare loved ones from an added burden at the moment of their own suffering and loss.<sup>73</sup> The resulting planning document often lives securely in a bank safe-deposit box or a home safe.<sup>74</sup> Whether purchased as a form document,<sup>75</sup> homemade,<sup>76</sup> or created by a lawyer who specializes in estate planning, the

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72. See Foster, *Family Paradigm*, *supra* note 21, at 242–43 (Inheritance can “promote greater continuity in the decedent’s survivors’ lives” and “can ensure a continued connection with a deceased loved one. The property that survives a death is often a repository of memories, a tangible reminder of a life shared.”). See generally Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL L. REV. 509 (1991) (describing the unique emotional issues that arise for people dying from HIV-related illnesses and recognizing the role estate planning can play to ease burdens). But see Hirsch, *Text and Time*, *supra* note 60, at 623 n.74 (people avoid details of planning because of death’s unpleasantness and reluctance to face mortality); Sneddon, *supra* note 29, at 6–7 & nn.16–18 (describing reasons for individuals’ reluctance to execute wills); Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 771–72 (1993) (same).

73. The Uniform Probate Code defines a will as “a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to the property of the decedent.” UNIF. PROBATE CODE § 1-201(57) (2010). Wills are defined differently depending on jurisdiction. See, e.g., CAL. PROB. CODE § 88 (West 2010) (“‘Will’ includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.”); N.J. STAT. ANN. § 3B:1-2 (West 2010) (“‘Will’ means the last will and testament of a testator or testatrix and includes any codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of a person or class to succeed to property of the decedent passing by intestate succession.”); N.Y. EST. POWERS & TR. L. § 1-2.19 (McKinney 2010) (will is an oral declaration or written instrument that takes effect on death and disposes of property or exercises power of appointment or appoints fiduciary); 20 PA. CONS. STAT. ANN. § 102 (West 2010) (“‘Will[.]’ [m]eans a written will, codicil or other testamentary writing.”).

74. See, e.g., *Carter v. Estate of Davis*, 813 N.E.2d 1209, 1212 (Ind. Ct. App. 2004) (referring to testator’s will being kept in safe-deposit box); *In re Nalls*, 998 So. 2d 697, 698 (La. 2009) (per curiam) (same).

75. See Horton, *supra* note 20, at 1675, 1682 & n.33, 1718–19 & nn.204–12 (2008) (describing modern proliferation of “do-it-yourself books and software” that have spurred a “boom in home-grown estate planning”) (citations omitted).

76. If properly witnessed, homemade wills are not treated any differently than attorney-drafted wills. Without proper attestation, however, a homemade will may be recognized as a holographic will so long as it is signed and in the testator’s handwriting. Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 93 n.2 (2006); Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1071 & n.40 (describing holographic will statutes). As Brown’s article illustrates, holographs are still controversial. See Brown, *supra*, at 123 (arguing that homemade wills give rise to greater validity and interpretation disputes). But see Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 70–71 (2008) (examining 145 holographic wills from Allegheny County Pennsylvania during five-year period from 1990–95 and concluding that the holographs were not any more likely to spark litigation than other testamentary instruments).

will, like the deed to a person's home, is without question treated by its maker as something important. Indeed, much has been made of the formalism and seriousness surrounding will-execution ceremonies.<sup>77</sup>

Ironically though, most testators make little real contribution to the language used in the documents that result from the planning and drafting process. Notwithstanding the obvious need for a testator to understand what her will does and says, clients frequently express confusion and surprise at the formulaic and legalistic writing.<sup>78</sup> Drafters are nevertheless encouraged not to veer from standard language and not to include background information, explanation, or any other "precatory" or unnecessary words.<sup>79</sup> Truly written in an insider's private language, a will

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77. See, e.g., Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 122 (2008) ("[M]ost estate planning attorneys . . . will tell you that preparation and execution of a will is a process fraught with ritualism and formality."); Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1060 ("Inheritance law stands on ceremony."); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994) ("Wills have always been creatures of form rather than substance.").

78. When a will is presented for signature, the testator must:  
be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty and *the disposition that he or she is making of that property*, and must also be capable of relating these elements to one another . . . .

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (2003). Will-execution ceremonies typically involve the testator acknowledging aloud to her witnesses that she has read the will, she knows what it says, and she has made it willingly as her free act, so that the witnesses can attest to the will and sign self-proving affidavits too. See, e.g., UNIF. PROBATE CODE §§ 2-502 & 2-504 (2010); Beyer, *Will Contests*, *supra* note 62, at 70 (describing "best practices" colloquy for will-execution ceremony to include questions such as "[h]ave you carefully read this will and do you understand it?"). Frequently, when asked to recite this basic understanding, testators look to the estate planning attorneys with a nervous laugh and exclaim that they tried to understand "the legalese" and are relying on the lawyers' advice to sign. See, e.g., Baron, *Stories*, *supra* note 13, at 633 ("My father-in-law . . . had his will drafted by an attorney. No matter how many times I or the will's scrivener explained its provisions to him, he professed not to understand its terms.").

79. See, e.g., JULE E. STOCKER ET AL., DRAWING WILLS AND TRUSTS § 1:5 (PLI 2001) (describing drafter's objective, whether will drafted in formal or "plain English" style, as avoiding language that would expose the will to challenge); Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 196 (1963) ("[G]o slow on explaining in the will the reason for omitting a legacy. One lady insisted on: 'I leave nothing to my nephew George for reasons I am sure he will appreciate.' He didn't and a will contest ensued."); Smith, *supra* note 9, at 73 ("Most attorneys have never considered including a client's personal testament in the wills they draft."). Specifically avoiding precatory language appears to be a directive of many in the estate planning world. See, e.g., Beyer, *Blue Screen*, *supra* note 56, at 88 ("Precatory language has no place in a will. If the testator wishes to express nonmandatory desires, then the attorney should use a separate non-testamentary document. If the testator insists on placing such language in the will, then the attorney should add language indicating that the suggestions are merely precatory and have no binding effect."); Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1, 5 (2007) ("When a donor uses precatory language, he or she descends into a legal no-man's-land, in which the instructions may be enforceable or may be disre-

often provides the testator with no more than a “limited understanding of the instrument’s details.”<sup>80</sup> While “determining and assisting in the formulation of the donor’s intention is a primary counseling function,” one prominent scholar has observed, “it is apparently one of the most neglected aspects of estate planning” resulting in instruments that “too frequently . . . provide no guidance as to . . . purpose and scope.”<sup>81</sup>

Where the modern trend is to criticize legalese in general,<sup>82</sup> legalese has been defended in the specific context of wills for helping evidence the seriousness of the endeavor.<sup>83</sup> Indeed, the “stylized, often redundant, linguistic formulae found within testamentary instruments” has been praised for setting the occasion apart from everyday life.<sup>84</sup> It is by no means intuitive, however, that the solemn purpose of wills justifies sacrificing the testator’s connection and self-conscious attention to the document that she uses to transmit her property to the community she leaves behind.<sup>85</sup> To the contrary, “[t]hough the words of a will typically follow certain traditions of form, these are not required by law.”<sup>86</sup>

A will has the *potential* to express the individualism, autonomy, and personal freedom that are inherent to the liberalism of American so-

garded.”); James C. Rehberg, *Wills, Trusts and Administration of Estates*, 48 MERCER L. REV. 565, 580 (1996) (observing that precatory language in a will is “an invitation to litigation”).

80. Fellows, *supra* note 15, at 634; *see also* Greenawalt, *supra* note 15, at 549 (“[P]eople often may not understand complex provisions in their own wills.”).

81. Halbach, *supra* note 23, at 1433–34. Professor Halbach refers in a footnote to the “many available check lists for estate planning that elaborately detail the facts to be determined about the client’s assets and the possible objects of his bounty but fail to list the recurring questions about the donor’s intentions.” *Id.* at 1434 n.47.

82. *See, e.g.*, RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005); DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 107–08 (2008).

83. *See* Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1064–65 (“The arcane minut of the will-execution ceremony, like the marriage ceremony, serves to impress upon the testator that on this occasion her words will count, that this is no time for idle banter.”).

84. *Id.* at 1063–64 (denouncing critics who have “railed against the ‘ponderous phrases and legalistic mumbo jumbo’” and the “solemn hocus-pocus” appearing in will) (quoting, respectively, NORMAN F. DACEY, *HOW TO AVOID PROBATE—UPDATED!* 555 (1980), and FRED RODELL, *WOE UNTO YOU LAWYERS!* 185 (1939)).

85. *See* SHAFFER ET AL., *DRAFTING WILLS*, *supra* note 23, at 175 (“Dispositive instruments, to a greater extent than business contracts and corporate forms, retain a level of legalese that betrays a black-magic theory of interpersonal relations in the law office—an inarticulate fear that everything the relatively undereducated 19th century lawyer used had cabalistic significance; although a modern person is incapable of understanding it, it is vital to a document’s success. Law, according to this theory, is witch-doctoring with a pencil and drafting is half exposition and half ritual.”); Fellows, *supra* note 15, at 633 (describing how lawyers “will avoid unique word usages” and use “[l]egal boilerplate provisions” that “create a remoteness between property owners and the instruments purporting to reflect their donative intent”).

86. Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1064.

ciety.<sup>87</sup> Some scholars have recognized such promise by charting how “deviant” and “defiant” testamentary transfers affected the sexual and racial order of the antebellum South and nineteenth-century America generally.<sup>88</sup> Others scholars have acknowledged how individuals define themselves through the property (intellectual, fiscal, charitable) they create, earn, receive, and own during life;<sup>89</sup> how these individuals choose to dispose of their property on death is a lasting extension and expression of that self-definition and individual determination.<sup>90</sup> Indeed, when a will is read and interpreted, it is treated as an individualized and personal expression because attention is focused on the author’s intent.<sup>91</sup>

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87. See Baron, *Empathy*, *supra* note 50, at 1049 & n.16 (describing how the doctrines of testamentary freedom and capacity, with their emphasis on individual values, “reflect notions that are fundamental to liberal political theory”); Baron, *Stories*, *supra* note 13, at 634 (acknowledging that “[t]he rhetoric of wills law portrays wills as exercises of autonomy and self-determination,” but recognizing the problems of discovering the testator’s wishes and implementing those wishes neutrally); Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 966–76 (2006) (describing early history of wills law, starting with the Roman Republic and Blackstone’s England, which imposed moral limits on testamentary freedom, to Revolutionary America, which sought to balance demands of individual liberty, equality, family protection, and the needs of commerce, to the era of “Common Sense,” which recognized virtually limitless individual autonomy in will making); *cf.* Cathrine O. Frank, *Of Testaments and Tattoos: The Wills Act of 1837 and Rider Haggard’s Mr. Meeson’s Will (1888)*, 18 L. & LIT. 323, 325–26 (2006) (describing how the Wills Act of 1837 transformed the will into a specifically written document which became an “objectified extension of the testator’s subjective self” and its “institution as a document . . . like the birth and marriage certificate” that functions “rhetorically” as the “testator’s legal identity”).

88. See Blumenthal, *supra* note 87, at 959; Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 236, 285–87 (1999). These intriguing articles highlight the possibility that testamentary freedom offers, even as they illuminate the entrenched and deeply troubling attitudes towards women, race, sexuality, and the existing restrictive social order that governed.

89. See Blumenthal, *supra* note 87, at 964 (examining several hundred will contests brought over the course of the nineteenth century and concluding that the trials concerned not only property but also more importantly “fundamental questions about the bounds of human freedom, the meaning of mental health, and the very constitution of the self”); Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 975 (1999) (using disputes over mortal remains to explore the “family-decedent tension” in the law of wills and arguing that this tension “can be alleviated with a deeper understanding of the importance of decedent autonomy in coming to terms with death and in determining who is family beyond the confines of biological ties”). See generally Jeremy A. Blumenthal, *“To Be Human”: A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609 (2009) (recognizing the relationship between property ownership and psychology and surveying empirical research in the discipline); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing property’s relationship to personhood); Williams, *supra* note 20 (explaining the different philosophical and scholarly rhetoric of property, including intuitive absolutism, communalism, republican egalitarianism, romantic homeownership, liberal dignity, possessive individualism, and pragmatism).

90. See, e.g., Baron, *Stories*, *supra* note 13, at 673 (“As has frequently been noted, there is no doubting the association in our legal and social theory between property and modernist, liberal notions of individual autonomy.”).

91. See *supra* text accompanying notes 13–15.

Although formulaic language, like will-execution formalities, serves a “channeling” and ritual function,<sup>92</sup> this language becomes problematic when it is adopted without mindful consideration of alternatives. Thinking purposefully and self-consciously about language in whatever form—be it reading great literature, composing poetry, or more pertinently, choosing carefully the description for an item of personal property or a beloved friend or relative—keeps authors “aware of the kinds of magic language can perform.”<sup>93</sup> This recognition is by no means a directive to write well or in any particular manner because what is considered “good writing” is as subjective today as it was when Justice Cardozo wrote on the topic nearly a hundred years ago.<sup>94</sup> Rather, this line of reasoning acknowledges that by refusing to write robotically and instead choosing language that requires precision, variety, and thoughtfulness, by drafting with a “rich texture” that includes “emotion and particularity,” a will can allow the testator to tell her story and thereby “help connect us to the person the testator was.”<sup>95</sup> Attention to a will’s language is thus crucial to the formulation of testamentary intent in the first instance.

*B. Expressive Writing as a Tool for the Testator to Communicate Intent*

In addition to assisting a testator in formulating her intent, purposeful choices about how and when to use descriptive language and personal narrative also contribute to the testator’s ability to convey her intent to

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92. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2–5, 9–10 (1941); see also Greenawalt, *supra* note 15, at 558–59 (Will formalities “help guide those who consult lawyers or look at will forms to accomplish their objectives. In addition to providing precise language with clear legal effect, lawyers can suggest previously unconsidered contingent possibilities and legal devices to allocate control of property and minimize tax burdens.”); Langbein, *Compliance*, *supra* note 13, at 494 (describing how compliance with formalities lowers routine costs of administration because “[c]ourts are seldom left to puzzle whether [a] document was meant to be a will”).

93. Margaret Turano, *Moments of Grace: Lawyers Reading Literature*, 72 N.Y. ST. B.J. 12, 13 (Oct. 2000).

94. CARDOZO, *supra* note 69, at 9–10 (recognizing the many and diverse styles of effective writers); see also Baron, *Language Matters*, *supra* note 50, at 178 (“[L]egal language is often portrayed as dry and insensitive, in implicit contrast to language outside legal contexts, which is presumably rich and nuanced. However, some legal language (think of Cardozo’s famous decisions) is obviously rich and nuanced, while language outside of law is often dry or insensitive.”); Posner, *supra* note 69, at 1422–25 (describing and defining style in the context of judicial opinion writing as communication, ornament, literature, and signature).

95. Baron, *Stories*, *supra* note 13, at 676; see also Baron, *Language Matters*, *supra* note 50, at 178–80 (recognizing the importance of deliberate and nuanced language to combat the persistent and entrenched stereotypes, expectations, and formulae in the law). Even as critics and proponents of the different approaches to interpretation acknowledge that transmitting intent is complex, some also recognize the importance of listening to individual stories to help avoid dangerous patterns into which readers and writers alike fall at their peril. See generally Baron, *Stories*, *supra* note 13.

her various audiences.<sup>96</sup> “Last words” have received special attention throughout history based in part on a belief that in the final moments of life, a person has examined her path and perhaps can impart some wisdom about how it has unfolded.<sup>97</sup> For this reason, historians and anthologists have observed, memorialized, celebrated, and even manipulated the last words of famous and ordinary people.<sup>98</sup> Artists from William Shakespeare<sup>99</sup> to Orson Welles<sup>100</sup> have created or spoken memorable lines to mark their characters’ final moments. These last words have a talismanic quality or, in the words of Willa Cather, “oracular significance.”<sup>101</sup>

A will, among any individual’s final communications to her loved ones, carries this same potential. Perhaps for that reason, there is a popular cultural expectation that upon death the decedent’s loved ones will gather to hear her will read aloud. The execution ceremony is typically imbued with ritual precisely because a testator is expected to take the will’s words seriously.<sup>102</sup> At this crucial and focused moment where language takes on added significance, then, the will provides an opportunity for the testator to communicate her preferences to her family, her friends, and her surrogates (in the form of fiduciaries).

Rhetoric has been defined as “not merely” the “dress[ing] up [of] preexisting truths” but rather “the central art by which community and culture are established, maintained, and transformed.”<sup>103</sup> A testator can fulfill the expectations of her audience—her community—at this key moment by selecting her will’s rhetoric with care and precision. One

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96. See Sneddon, *supra* note 29, at 31–32.

97. GUTHKE, *supra* note 28, at 3–4. Professor Guthke proposes other reasons why last words have cultural significance, including that they give “some idea that the essence or the truth of a life . . . emerges in death,” *id.* at 49, and “whether confirming a life or breaking with it, could grant a kind of secularized immortality.” *Id.* at 53. They also possess “meaning and quality best described with this admittedly vague term, mystique.” *Id.* at 58.

98. *Id.* at 98–154 (describing anthologies of last words that were designed to guide and entertain).

99. *Id.* at 35–47 (discussing Shakespeare’s use of last words).

100. *Citizen Kane*, starring Welles, revolved around a search for the meaning of the main character’s last word “Rosebud.” See THE NEW YORK TIMES GUIDE TO THE 1000 BEST MOVIES EVER MADE, UPDATED AND REVISED 186 (Peter M. Nichols ed., 2004); see also GUTHKE, *supra* note 28, at 7–35 (discussing literary use of dying words by diverse writers, including Carlos Fuentes, Willa Cather, and Mark Twain).

101. See *supra* text accompanying note 2.

102. See Gulliver & Tilson, *supra* note 92, at 9–10 (describing “ritual function,” “evidentiary function,” and “protective function” of will formalities).

103. Williams, *supra* note 20, at 306 (quoting James Boyd White, *Law as Rhetoric; Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985)); see also *id.* at 360 (using doctrinal chaos that characterizes property rhetoric to show how law students and lawyers can become better advocates when they focus not only on logic but also on chaos, inarticulateness, inconsistency, and silences to make their ultimate approach more persuasive to the listener).



method of enhancing expressiveness in a will is for the testator to include a statement of purpose or explanation in the testamentary instrument. Consider, for example, the case *In re Estate of Singer*, in which a testator left his two sons bequests of fifteen thousand dollars, subject to forfeiture clauses that would bar recovery by any son who challenged the will, and the balance of his vast estate to his daughter.<sup>104</sup> This seemingly inequitable result was tempered by the testator's rhetoric explaining that he chose to benefit his daughter and appoint her as fiduciary, "in recognition of her unusual dedication to [testator] and for the taking care of [testator. Testator] realizes that his daughter gave her life to take care of him and feels a great sense of gratitude toward her."<sup>105</sup> Although the sons considered suing their sister over the disparate inheritance they received, ultimately they decided not to pursue the will challenge.<sup>106</sup>

By communicating intent, a testator's use of expressive language can help resolve complicated disputes among beneficiaries over issues like property distribution and tax apportionment.<sup>107</sup> Consider, for example, *In re Application of Rhodes*, a case involving a substantial estate that ended up not having enough cash to pay its taxes and expenses.<sup>108</sup> To communicate how he intended his property to be distributed, the testator included the following expressive language in his will:

I have given much thought and deliberation to the provisions which I make for each of you . . . . While I have equal love and affection for my sons . . . I recognize that I make disproportionate provisions for my sons . . . for reasons I deem sufficient. In arriving at the specific provisions which I make . . . I have taken into account, among other factors, the provisions which I have made for each of them during my lifetime, in certain cases my son's connection with the particular assets which I bequeath to him or his issue, and in the case of the disposition of my business interests, the efforts certain sons have made in helping me run and develop the particular business.<sup>109</sup>

Although none of the beneficiaries challenged this language, the will, or any distributions under it, when the executors sought to impose tax obli-

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104. *In re Estate of Singer*, 920 N.E.2d 943 (N.Y. Ct. App. 2009).

105. This explanatory language actually appeared in the revocable trust agreement into which the will poured. *Id.* at 944.

106. Although the younger son deposed the testator's former lawyer, who had drafted seven of his prior wills, ultimately the son decided that his sister had not unduly influenced the testator. *Id.* at 945. The New York Court of Appeals decision involved whether taking the lawyer's deposition triggered applicability of the forfeiture clause. *Id.* at 947.

107. *E.g.*, *In re Application of Rhodes*, 868 N.Y.S.2d 513, 516–17 (N.Y. Surr. Ct. 2008).

108. *Id.* at 514.

109. *Id.*

gations on all of the beneficiaries ratably, some objected.<sup>110</sup> Luckily, the testator's own expressive language addressed the issue of tax apportionment too, explaining "I have given great consideration as to how I have directed that the taxes . . . are to be paid," and "I believe that the provisions which I have arrived at are equitable for all of my family members."<sup>111</sup> Specifically, the will directed the executors to pay taxes for three categories of gifts from the residuary estate, but to charge all remaining taxes against the gifts themselves.<sup>112</sup> When the residue turned out to be insufficient to pay taxes on the so-called "preferred gifts," the executors sought to apportion those taxes, treating these gifts identically to the non-preferred gifts.<sup>113</sup> The court refused, finding the specific language of the will required the two sons who received the testator's business interests to bear the tax burden.<sup>114</sup>

The court's reasons behind this ruling related largely to the language chosen by the testator to reflect his intent. First, the court relied on the testator's "great consideration" of "equitable" tax apportionment, which did not include the business interests as preferred.<sup>115</sup> Second, the court was reluctant to allow apportionment of the tax shortfall against the less substantial gifts to family members and to a friend who was "described by decedent as the person 'who has looked after me so diligently during the later years.'"<sup>116</sup> Third, the testator's language explaining his reasons for leaving his sons the business interests helped the court understand how the testator viewed both these very significant gifts and the children who received them.<sup>117</sup> Although adding expressive language may not always help to communicate intent,<sup>118</sup> the *Rhodes* language pro-

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110. *Id.* at 515–16.

111. *Id.* at 515.

112. *Id.* at 515–16.

113. *Id.* at 514.

114. *See id.* at 516 ("the testator's intent is to be ascertained 'not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed'" (quoting *Matter of Bielewicz*, 695 N.E.2d 1119 (N.Y. 1998))).

115. *Id.* at 515, 517.

116. *Id.* at 517.

117. *Id.*

118. *See In re Estate of Schunk*, No. 2008AP614, 768 N.W.2d 62, 2009 WL 703098 (Wis. Ct. App. Mar. 19, 2009) (per curiam unpublished table decision). In *Schunk*, for example, the testator, a father of seven, left the bulk of his property to his youngest daughter, Megan. *Id.* at \*1. The will specifically stated that three of the testator's children were omitted "not through oversight" but were "intentionally not included . . . as beneficiaries herein." *Id.* The three children who were not specifically excluded received five-thousand dollar bequests, and Megan received the balance of the property. *Id.* Because she was only eleven when the will was signed, however, the estate-planning attorney recommended including in the will a testamentary trust so that the property could be managed for Megan until she reached her majority. *Id.* Unfortunately, the language of the testamentary trust was problematical because its purpose was stated as providing "for the expenses of raising my child-

vides a vivid demonstration of the value such expressive language might contribute.

Even if a testator or drafter is reluctant to include overarching statements of narrative, explanation, or purpose in a will, the testator can make the language of her will more expressive simply by providing descriptive details about the property that the will is conveying or the people who are to receive it.<sup>119</sup> Consider the difference between a will that disinherits a child in favor of “my friend” and a will that disinherits a child in favor of my friend “who has faithfully served my wife and me during extended illnesses for many years.”<sup>120</sup> Similarly, a bequest of “my diamond ring to my daughter” is quite different from a bequest of “my grandmother’s diamond ring to my daughter who shares my grandmother’s name.” Although this more detailed language is technically unnecessary, it helps transform an otherwise dry and formulaic document into a more fluent expression of the speaker’s personal story and thus her intent.

Deviating from formula, even if the modifications are subtle or minute, can be a tremendously powerful means of communication. As poet Kevin Young has described, there is excruciating eloquence to death’s most practical details: “In my own grief it was and is the smallest kindnesses that still stick with me: the man who gave me my father’s dry cleaning for free . . . the dry cleaning I’d had to drive all over town looking for, using old tags found on other of his still-plastic-wrapped clothes . . .”<sup>121</sup> Young wonders why he kept his father’s “crummy plaid shirts and [gave] his good suits away” and recognizes that death makes “material things matter at once less and more”; “ritual, both inherited and

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*ren*” rather than “child” or “Megan.” *Id.* Arguing that the reference to “children” created an ambiguity, all six disadvantaged offspring challenged the will. *Id.* The trial court agreed that the will was ambiguous but allowed testimony from the drafting lawyer who explained “that the reference to ‘children’ in the family trust portion of the will was standard form, or ‘boiler plate,’ language that . . . was never corrected to reflect Schunk’s actual intent.” *Id.* Based on this testimony, the trial court awarded the property to Megan. *Id.* The appellate court reversed, finding that, notwithstanding the specific disinheritance language as to three of the children, the document was ambiguous on its face because of the word “children.” *Id.* at \*2. The court remanded but simply for the purposes of seeing whether all seven children (Megan and her siblings) were entitled to benefit from the trust or only the four not specifically omitted. *Id.* The problems caused by improper use of boilerplate language in this will could not be corrected by the specific explanatory language that appeared elsewhere.

119. See Sneddon, *supra* note 29, at 46–53 (identifying five categories in which a will’s author (the attorney on behalf of the testator) has the opportunity to inject the testator’s voice into the will without disturbing the will’s substantive validity, including the order of provisions in a will, deliberate self-referencing, including explanations, describing people and entities, and describing property).

120. See *In re Will of Carter*, 948 So. 2d 455, 456 (Miss. Ct. App. 2007).

121. Kevin Young, *Introduction*, in *THE ART OF LOSING*, *supra* note 1, at xix.

invented, rush[es] in.”<sup>122</sup> The artistic recognition that it is equally as poignant to wonder when “‘hair will become interesting’” as when life will become interesting,<sup>123</sup> is a phenomenon mirrored in will contests, which just as frequently involve disputes over cattle<sup>124</sup> or family heirlooms<sup>125</sup> as they do over multi-million dollar legacies. Who receives great-grandmother’s pewter knife, its handle worn down by generations of ancestral grips, its blade dulled by decades of holiday meals, may be as important to testator and recipient as who receives a valuable securities account. The more willing a testator is to express her personal vision or describe with particularity a beneficiary, an item of property, or the reason for distributing property in a particular manner, the better the testator will communicate with her audiences.

### C. Expressive Writing as a Tool for the Drafting Lawyer

Expressive, descriptive writing has the potential to help an author formulate intent and to convey that intent to her readers. Wills are unique among writings because, for the most part, they have two authors—the second being the scrivener (the lawyer)<sup>126</sup> who must, in effect, translate the words of the only author whose intent matters (the testa-

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122. *Id.* Likewise, Joan Didion has described the most painful aspect of her husband John’s death as the repeated reminder that, as she turned to share the prosaic minutiae of her day, her beloved was no longer present to hear them. JOAN DIDION, *THE YEAR OF MAGICAL THINKING* 193–96 (2006).

123. Young, *supra* note 1, at xix (quoting Galway Kinnell, *Wait*, in *THE ART OF LOSING*, at 250).

124. *See, e.g., In re Estate of Peterson*, 439 N.W.2d 516, 519 (Neb. 1989) (will contest by three of testator’s five sons claiming that undue influence by favored son caused testator to leave him cattle and household goods).

125. *See* Joseph M. Scheuner & Olen M. Bailey Jr., *A Legal and Practical Guide to the Disposition of Tangible Personal Property at Death*, ABA PROB. & PROP., May/June 2006, at 66, (2006) (“Tangible personal property [items] . . . have histories, stories, mythical values, family connections, and emotional attachments” which if unaddressed cause “feelings [to] become hurt, siblings [to] become rivals, and families [to] become divided. Like the Hatfields and the McCoys, the resulting divisiveness—over a gold-filled ring, a tattered purse, or the family Bible—can last a lifetime.”).

126. *See* Chafee, *supra* note 8, at 394–95 (“[A] lawyer who is drafting an important document . . . searches for words to fit objects. He must probe his client’s mind to ascertain his wishes for all the contingencies that are likely to occur, and then do his best to put into the document a phrase which describes the persons or things the client desires—every one of them and no more. Furthermore, the lawyer must be sure that when the document later gets before the court, the judge will reverse the lawyer’s process and go back from the phrase to those very persons and things. Thus the lawyers who wrote wills or contracts and the judges who interpreted them have acted under a very heavy responsibility.”); Greenawalt, *supra* note 15, at 549–50 (“Although lawyers and their staffs write many wills, and people often may not understand complex provision in their own wills, still a lawyer’s main job is to carry out the aims of a testator as completely as possible, not to intrude her own views about who should receive property.”); Sneddon, *supra* note 29, at 15 (“When attorneys draft Wills, attorneys ‘are speaking for [their] clients . . . .’”) (quoting KEVIN D. MILLARD, *DRAFTING WILLS, TRUSTS, AND OTHER ESTATE PLANNING DOCUMENTS: A STYLE MANUAL* 13 (2006)).

tor).<sup>127</sup> An estate planning attorney's job is to "adjust the wording of a form document . . . to accommodate and not conflict with the clients' statements, while maintaining the legal provisions necessary for enforceability."<sup>128</sup>

An attachment to defined terms helps to explain lawyers' reluctance to deviate from formulaic language when drafting wills. In the 1940s, Harvard Professor Zachariah Chafee explored the centrality of written language specifically to lawyers, explaining that "[l]awyers and judges are highly susceptible to [the] notion of an indissoluble link between the word and the thing"; language and its many uses fascinate legal minds, Chafee recognized, because "words are the effective force in the legal world," and indeed, he concluded, "[t]he communication of facts and thoughts seems never completely separated from the desire to make somebody do something or feel somehow."<sup>129</sup> In this endeavor, lawyers often search for more concise ways to convey a particular meaning, using what Chafee calls "technical terms."<sup>130</sup>

A "technical terms" or "formula" approach to written language makes tremendous sense in the field of law. Drafting from forms is not only easier than creating documents from scratch, but it also allows lawyers to reduce the economic costs of planning.<sup>131</sup> That is, even where there is a "clearly competent testator advised by the best lawyers," requiring the testator, and more particularly the scrivener, to eschew formula and strive for expressiveness threatens to generate economic costs that may be difficult to justify.<sup>132</sup> The expenses associated with drafting

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127. With respect to intent, though, only one author matters, thereby distinguishing a will from other legal writing, such as a contract, statute, or constitution. Hancher, *supra* note 13, at 510 (observing that wills, as compared with statutes and constitutions, make it "easier to think about a single author, a single testator").

128. Smith, *supra* note 9, at 74; *see also* Sneddon, *supra* note 29, at 15–16 & 29–30 (discussing role of attorney in drafting wills to speak on behalf of testator).

129. Chafee, *supra* note 8, at 383; *see also id.* at 384 ("Lawyers and judges are highly susceptible to this notion of an indissoluble link between the word and the thing. A sense of the inherent potency of words is natural with us. Words are the effective force in the legal world. In statutes, they result in heavy fines, long imprisonment or even death. In contracts, deeds, or wills, they transfer large amounts of property. Hence the persistent feeling in our profession that the right words must be used."); SCALIA & GARNER, *supra* note 82, at 61 ("Lawyers possess only one tool to convey their thoughts: language. They must acquire and hone the finest, most effective version of that tool available. They must love words and use them exactly.")

130. Chafee, *supra* note 8, at 384.

131. *See* Sneddon, *supra* note 29, at 28–29.

132. *See* Foster, *supra* note 21, at 244–45 (describing the challenge of drafting as "often accompanied by inordinate expense as the will is revised over and over—not to provide for different beneficiaries but merely to acknowledge changes in family status or assets that, if not mentioned, could provide the basis for an attack"); Hirsch, *Text and Time*, *supra* note 60, at 623 (acknowledging possibility of "placing the onus on testators to expound their wishes—whether present or antic-

and redrafting documents, even if not to make substantive changes but simply to adapt to unanticipated events resulting from the passage of time, can be significant.<sup>133</sup> The simpler and more formulaic a will is, one might argue, the cheaper and more accessible it will be both for lawyers and laymen to read and adapt.<sup>134</sup>

Nevertheless, “estate planners must focus on the particular testator’s wishes, even if it means deviating from a form, rather than routinely shunting the client to a pre-drafted form” because a will, “unlike most other legal documents, is a representation of the individual ‘speaking.’”<sup>135</sup> As costly as it may be for the testator to add more expressive language to a will, the costs of litigating a will contest, whether borne by the litigants or the estate, are likely to be far more onerous.<sup>136</sup> Furthermore, while drafting with an intensified level of self-consciousness and expressiveness adds another burden to the estate planning lawyer’s job, the freedom or license to depart from formula and to provide a vehicle and voice for a client’s last words should be a welcome relief to these lawyers.<sup>137</sup> Faced with clients (testators and beneficiaries) who complain about fees and threaten malpractice suits,<sup>138</sup> an approach that encourages lawyers to take the time to infuse a document with the client’s deliberate preferences, and even her history or philosophy, has the potential to give the testator and the objects of her bounty—those remembered and those omitted—a sense of closure that counteracts other frustrations they might

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ipated—within an executed writing” but recognizing the expense, both economic and cognitive, of planning for every contingency).

133. Foster, *supra* note 21, at 244; Hirsch, *Text and Time*, *supra* note 60, at 623. Changes to property or family may occur after a will is drafted and before death that render the will’s language meaningless or ambiguous. *See id.* at 611; Garvey, *supra* note 29, at 47–48.

134. There are numerous websites available today where a testator can have a will drafted and even add her own language variations. For some of the most popular examples, see LEGALZOOM.COM, <http://www.legalzoom.com> (last visited Nov. 9, 2010); LEGACY WRITER, <http://www.legacywriter.com> (last visited Nov. 9, 2010); THE WILL COMPANY, <http://www.thewillcompany.com> (last visited Nov. 9, 2010).

135. *See* Sneddon, *supra* note 29, at 29.

136. *See* Halbach, *supra* note 23, at 1452, 1456–57 (stressing the imperative of drafters providing answers to questions in documents because ultimately “[c]ostly litigation produces only a guess as to what the [decendent] would have intended if the precise question in issue had been presented”).

137. *See* Weisberg, *supra* note 33, at 135 (“Each prospective client crossing the lawyer’s threshold presents a kind of ‘first narrative’ to the professional listener. . . . The act of ‘representation’ (a word that means both the way something is portrayed and the lawyer’s decision to take on a client’s case!) inevitably involves the translation of the original narrative into a series of professionally crafted writings. In these, be they last wills and testaments, contracts, pleadings, or memoranda, the lawyer must structure the matter from a narrative perspective suitable to the audience and faithful to the client’s wishes as now rewritten, renarrativized.”).

138. *See* Beyer, *Blue Screen*, *supra* note 56, at 64–96 (describing potential for malpractice actions arising in estate planning context and common errors in client counseling, drafting, and overseeing execution of wills that might lead to such actions); *see also* Sneddon, *supra* note 29, at 34–36 (discussing evolution of malpractice actions in wills context).

feel about costs, delays, or administrative burdens.<sup>139</sup> In addition, if a will ends up in litigation, a jury may be more receptive to the intent of a testator when her goals are expressed clearly and in her individual voice.<sup>140</sup> As the case survey discussed in Part IV suggests, expressive language may help facilitate a court's analysis of a challenged instrument and also may dissuade will contests in the first place.<sup>141</sup>

#### *D. Expressive Writing as a Tool for the Grieving*

Although the authors of wills (testator and scrivener) may benefit from an approach that discourages use of purely formulaic language in wills in favor of more expressive drafting, those most likely to benefit from this suggested change are the different readers, including the beneficiaries, fiduciaries, and possibly the court. Along with facilitating the testator's ability to formulate her intent in the first instance and then fostering her ability to convey that intent on her own or with her lawyer's help, expressive writing also has the potential to bring the testator's loved ones together in a moment of loss. Consider, for example, the ethical will<sup>142</sup> of Rose Weiss Baygel, who immigrated to Cleveland from

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139. Smith, *supra* note 9, at 73–75. Ironically, a more expressive approach to will drafting also might increase estate planning business for lawyers by convincing individuals to seek advice and counsel rather than preparing wills on their own. Many individuals today avoid hiring lawyers to prepare their wills based in part on a belief that form books produce documents that are as useful as, if not identical to, any document produced by a trained lawyer. Grant, *supra* note 77, at 136 (“Over the past twenty to twenty-five years, we have seen a proliferation of pre-prepared will forms that are readily available to consumers in this country. . . . Individuals turn to these other sources for a number of reasons. Many are disillusioned or mistrust attorneys. Some individuals feel like they know just as much as a trained and licensed attorney. In many communities, attorneys have priced themselves out of the market for average consumers. Some individuals want the highest level of privacy when it comes to their personal lives. Some individuals are forced to deal with death and mortality in ways they do not want to in preparing their wills. Some clients feel that attorneys overly and unnecessarily complicate basic but important aspects of will preparation.”); *see also* Clowney, *supra* note 76, at 35–38 (describing arguments for and against allowing holographic wills). For a comprehensive list of available internet websites and portals available for consumers to create a will without the assistance of an attorney, *see* Grant, *supra* note 77, at 136 n.137. For a discussion of statutory fill-in-the-blank will forms, *see* Beyer, *supra* note 72, at 769. If we accept that wills should be more than fill-in-the-blank forms, a testator might feel better about seeking help from a lawyer to craft a will that adequately expresses the testator's desires. And if choosing to draft a homemade will is the appropriate decision for a testator, *see* Clowney, *supra*, at 76, this expressive approach might help clarify the meaning of such homemade wills, which often become the subject of challenge. *But see* Chafee, *supra* note 8, at 395 (“‘The jolly testatrix who makes her own will’ supplies remunerative semantic investigations for the bar.”).

140. Baron, *Empathy*, *supra* note 50, at 1076 (discussing how juries accept testators' views and act with empathy, so that the clearer such views are expressed, the easier it becomes to trigger jury empathy).

141. *See infra* text accompanying notes 172–77.

142. Ethical wills, defined as “legacies of intangibles” or “statements intended to pass along values and beliefs to succeeding generations,” stem back to the ancient world. Zoe M. Hicks, *Is Your (Ethical) Will in Order*, 33 ACTEC J. 154, 154 (2007); James Edward Harris, *Level Five Phi-*

Riga, Latvia, when she was young, worked in a sweatshop as a teen, and married and raised three children with her husband who predeceased her.<sup>143</sup> Her last written words to her children admonished them to “be to one another—good sisters and brother. . . . Be good to each other.”<sup>144</sup> As the author of a book about the value of ethical wills explains, children who get a last request like this one “are not likely to end up fighting with each other in court.”<sup>145</sup>

Like ethical wills, traditional wills too might aid the grieving by explicitly describing the testator’s preferences and delineating the reasons for any unusual dispositions.<sup>146</sup> This type of explanation might help “dissuad[e] a child receiving a lesser share from concluding that such treatment resulted from the influence of a favored child” and might help

avoid[] the angst of children having to speculate on the parental rationale or coming to the wrong conclusion for such disparate treatment, e.g., that their parents had less affection for them as opposed to a parental desire to reward a sibling for care or services provided to them either personally or in a business endeavor.<sup>147</sup>

Including the testator’s preferences, personal history, or vision for the future might also help address in part the problem of “testamentary obsolescence” that results from the passage of time.<sup>148</sup> One practitioner describes a purpose provision that he includes in all the instruments he prepares as “summarizing the primary goals of the estate plan from the purview of the client, including, for example, preserving family harmony, minimizing taxation, reducing administrative costs, and protecting assets from claims by third parties through the use of lifetime trusts for

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*lanthropy: Designing a Plan for Strategic, Effective, Efficient Giving*, 26 U. ARK. LITTLE ROCK L. REV. 19, 22 (2003). For a comprehensive book describing and encouraging the use of ethical wills, see BARRY K. BAINES, M.D., *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* (2d ed. 2006).

143. *SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM* xxiv–xxv (Jack Riemer & Nathaniel Stampfer eds., 2009).

144. *Id.* at xxv.

145. *Id.*

146. See O’Sullivan, *supra* note 62, at 308–10; see also Hicks, *supra* note 142, at 162 (“Many ethical wills are woven into traditional wills as we have seen, for example, in the traditional wills of George Washington, Patrick Henry, and John Jay. This may be particularly true with charitable bequests as the testator or testatrix provides thinking behind the bequest or goals with respect to the bequest to the desired charitable organization. So called ‘incentive trust documents’ also include types of provisions that could be considered part of ethical wills because they set forth values of the trustor and indicate to the children what type of behavior is expected and will be rewarded.”).

147. O’Sullivan, *supra* note 62, at 308–09.

148. See Halbach, *supra* note 23, at 1427, 1433 (“Although all possible questions can not be anticipated, every effort should be made to give the [fiduciary] sufficient guidance as to what” was intended, including “illustration” or “suggestion”); Hirsch, *Text and Time*, *supra* note 60, at 623 (describing problem of “testamentary obsolescence”).



family members.”<sup>149</sup> Even if this language is purely precatory,<sup>150</sup> it expresses the testator’s philosophy and might prove helpful to the readers—court, beneficiaries, other mourners, fiduciaries—in understanding, accepting, and carrying out the testator’s intent.<sup>151</sup>

Indeed, the audience most likely to welcome a more expressive approach to wills consists of the fiduciaries, such as executors and trustees, who essentially stand in the testator’s shoes and act as the testator’s surrogates with respect to distribution and ongoing administration of estate property.<sup>152</sup> While a more expressive testamentary document may impose added restrictions on these fiduciaries, it can also provide them with crucial guidance in moments of uncertainty.<sup>153</sup>

In this respect, it is important to acknowledge that giving a testator a more expansive platform for expression potentially provides a greater opportunity for the testator to engage in vain and irresponsible “post-humous meddling.”<sup>154</sup> While a property owner might imagine she knows the best and most fruitful disposition for her property, her attempt to control her loved ones’ lives and futures, even if well intended, may be counterproductive when it actually takes effect.<sup>155</sup> Moreover, even when

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149. O’Sullivan, *supra* note 62, at 320. Professor Greenawalt recognizes that interpretation itself would be facilitated if a court were able to “develop a clear sense of the objectives of the writer.” Greenawalt, *supra* note 15, at 570.

150. *See supra* notes 64 & 79.

151. *See* Smith, *supra* note 9, at 74. Although none of the cases examined in Part IV contained this type of language, one might argue that the absence indicates that where statements of values are included, these wills are respected or at least not litigated. *See infra* text accompanying notes 178–79. On an interesting note, one scholar has observed the gendered implications of precatory language, *see* DiRusso, *supra* note 79, although another has observed that left to their own devices, a testator’s gender does not appear to affect use of expressive language, Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, J. OF EMPIRICAL LEGAL STUD. at 16–17 (forthcoming 2010) (on file with author) (reviewing twenty-three empirical studies on inheritance from around the world and calling for further studies to test whether women feel “constrained by their spouses and by professionals involved in the will-making process from using their wills to acknowledge their broader network of relationships, to address specific items they own, and to express personal and sentimental thoughts and feelings”).

152. *See* SHAFFER ET AL., DRAFTING WILLS, *supra* note 23, at 177 (“Many of our documents in the property settlement practice have offices far beyond disposition. They are charters for human conduct which must or should be used routinely by lay fiduciaries, beneficiaries, and parties to contracts.”).

153. *See* Halbach, *supra* note 23, at 1433–34 (discussing the problem of lack of guidance in the context of fiduciary powers in trusts); Pruett, *supra* note 31, at 341–47 (providing drafting suggestions from fiduciary perspective).

154. *See* Sherman, *supra* note 26, at 1283–84.

155. *Id.* (“The tendency of some testators to make rigid dispositions is often an aspect of an understandable type of vanity. T has been successful in business and this money is the measure of and witness to his success. He has been a good father and has always known what was best for his family. Who should know better than he how to invest and dispose of this money after his death? The only answer is: Time marches on. Thoughtless, playful children grow into serious-minded resourceful adults. Healthy, prosperous adults suffer illness, failure and the other casualties of life.”)

the will does not impose lasting conditions on the beneficiaries or fiduciaries, expressions by the testator may be just as likely to cause friction and divisiveness as to convey meaning and foster harmony. In a 1932 essay entitled *The Whimsies of Will Makers*, lawyer and humorist Harry Hirschman recounts will after will that contains unique and quite expressive language, much of which appears designed to control or toy with the testator's beneficiaries.<sup>156</sup> Ranging from cruel to pathetic to humorous, the wills Hirschman cites show that these words have the potential to be as cutting as they are kind, imposing the testators' idiosyncratic desires on the people they have left behind.<sup>157</sup> Such negative expressions may be "the last memory the [loved one] has of the [deceased], which if not resulting in an enduring resentment not previously present, will create a permanent feeling of rejection that could exact a costly emotional toll."<sup>158</sup> This type of language also may raise issues of testamentary libel,<sup>159</sup> although such claims appear to carry little contemporary force.<sup>160</sup>

Recognizing these potential costs of expressive language should be more cautionary than prohibitive, though, and should help moderate and guide those testators who accept the potentially significant benefits of enhancing an ordinary, standard will with their own personal narratives and expressive language. As the following case studies vividly demonstrate, careful and deliberate inclusion of expressive "last words" can facilitate the communication of intent without causing disarray.

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The guilt-edge bonds of today are the cats-and-dogs of tomorrow. . . . Making a will is an exercise of power without responsibility. Free of the constraint of what the neighbours would think; free, above all, of the constraint of requiring houses and assets for their own use, testators can sometimes be so awed by the infinite wisdom of their own plans for the future as to feel justified in controlling other people's lives—for their own good, naturally."

156. See Harry Hirschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932).

157. See *id.* ("[A] will is a man's one sure chance to have the last word. In it he can vent his spite in safety without his victims' having a chance to answer back."); Horton, *supra* note 20, at 1704 (suggesting that "a testamentary instrument . . . raises the specter of moral hazard" because the property owner is exercising "power without responsibility"); Greenawalt, *supra* note 15, at 570 (observing that testators are free "to be arbitrary or capricious"); Sherman, *supra* note 26, at 1276 ("[T]estamentary conditions proceed more often from spite than from benevolence and result not in connubial rejoicing but in enduring bitterness.").

158. O'Sullivan, *supra* note 62, at 309–10.

159. DUKEMINIER ET AL., *WILLS*, *supra* note 21, at 198. See generally Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749 (1994) (discussing fundamentals of action for testamentary libel and proposing alternative uniform approach).

160. Dawn Allison, Note, *The Importance of Estate Planning within the Gay and Lesbian Community*, 23 T. MARSHALL L. REV. 445, 472–73 (1998) (observing decline of testamentary libel suits).

IV. READING CASES ABOUT WILLS:  
DOES EXPRESSIVE LANGUAGE HELP OR HINDER?

The discussion to this point has focused on the potential social, rhetorical, and functional benefits and costs of incorporating expressive language in wills. This Part focuses on the legal ramifications of expressive language by looking at the language of wills in a defined universe of inheritance case law.<sup>161</sup> More specifically, this Part considers the existence and effect of expressive language in wills that are challenged on the grounds of undue influence or, in other words, for being something other than a true expression of the testator's intent.<sup>162</sup> Although undue influence cases do not specifically present situations where will language is potentially ambiguous or controversial, the cases provide a fertile database for exploring expressive language because the testators in these cases are aware that their respective wills diverged from expectation or, in other words, did something other than default rules would dictate.

First, this Part provides some general background on undue influence law. Second, it analyzes a representative sample of those cases to show how expressive language can aid in explaining the testator's intent. Third, it acknowledges that expressive language cannot solve all problems of interpretation, particularly in the situation where the testator is unable to adequately form or express intent. Finally, it argues that expressive language is most useful when it is incorporated directly into the will, rather than being relegated to nonbinding side letters.

*A. Why Undue Influence Cases Promise to Illustrate  
Expressive Will Language*

Undue influence cases provide a unique snapshot of wills doctrine across the country due primarily to their sheer number.<sup>163</sup> Undue influ-

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161. *But see infra* notes 172 & 177 (discussing further areas of inquiry).

162. All testators, like all individuals generally, are influenced in action and thought by those around them and, most powerfully, by those whom they love and admire. Influence that the law deems "undue" enough to invalidate a will, however, must "overwhelm" or "overpower" the testator's autonomy, to "destroy[] the free choice of the person making the will," so that the influencer's intent is substituted for the testator's own. *Allee v. Ruby Scott Siggers Estate*, 182 S.W.3d 772, 780 (Mo. Ct. App. 2006); *Leslie, supra* note 47, at 244; *Madoff, supra* note 47, at 575; *see also* O'Neill v. Farr, 30 S.C.L. (1 Rich.) 80, 83-84 (1844) (describing disposition that disinherited wife in favor of mistress as "an act all would condemn, and concur in denouncing as immoral and improper the influence which produced it; yet, if it be done under the influence of affection merely, however unworthy the object may be, such wills have been, and must be, supported, so long as the law allows a sane man to dispose of his property according to his own wishes") (quoted and discussed in *Blumenthal, supra* note 87, at 999).

163. *Leslie, supra* note 47, at 243 (noting "the large number of undue influence cases litigated each year"). More than mere number, though, undue influence cases are occupied by characters who exhibit the raging drama of family life: an endless litany of jealousy; love; resentment; self-preservation; favoritism; selfishness; and suspicion. *The Jerry Springer Shows* of the law, these

ence claims are the “most frequent ground for invalidating a will”<sup>164</sup> and usually involve a testator who becomes particularly susceptible because of age, illness, poverty, loneliness, or some combination thereof.<sup>165</sup> The testator’s autonomy is compromised by one or more individuals who are close to the testator and frequently essential to her survival.<sup>166</sup> The cases tell two vastly conflicting stories: the first, that of a singular friend or relative who helps an elderly or infirm testator and benefits from the testator’s gratitude and therefore bounty; and the second, recounted by the family members or friends who are on the losing end of the gift, of an overreaching opportunist who helps the weakened testator not because she is generous but rather because she is mercenary.

Although these cases do not specifically involve interpretation of ambiguous language, the cases provide a perfect opportunity for a testator to address directly the underlying human interactions and emotions that led to what the outside world—court, beneficiaries, fiduciaries—might view as an “unnatural” (meaning either unequal or unpredictable) disposition.<sup>167</sup> In other words, regardless of an observer’s normative

cases present a dramatic stage on which to test various theories, such as the perpetuation of normative values and gender inequities, among others. See, e.g., Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 202 (1989) (arguing that “meretricious relationships” should constitute evidence that recipient is natural object of testator’s bounty rather than potentially wrongful influencer); Leslie, *supra* note 47, at 243–58 (arguing that courts impose their own moral values rather than honor testamentary intent); Madoff, *supra* note 47, at 576 (contending that “the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms”); Brian Alan Ross, *Undue Influence and Gender Inequity*, 19 WOMEN’S RTS. L. REP. 97, 100 (1997) (arguing that courts apply undue influence doctrine to “preserve[] a male-oriented status quo by effectively punishing women who stray from traditional gender roles and expectations”).

164. Madoff, *supra* note 47, at 574 (“[U]ndue influence doctrine is the most frequent ground for invalidating a will. . . . [F]or every reported case there are many more cases that settle before trial or even before the filing of a suit.”).

165. See, e.g., DUKEMINIER ET AL., WILLS, *supra* note 21, at 180–207 (compiling materials and describing warning signs for undue influence cases).

166. See, e.g., *Medlock v. Mitchell*, 234 S.W.3d 901 (Ark. Ct. App. 2006); *Sandford v. Metcalfe*, 954 A.2d 188 (Conn. App. Ct. 2008); *Conrad v. Gamble*, 962 A.2d 1007 (Md. Ct. Spec. App. 2008); *In re Estate of Holmes*, 961 So. 2d 674 (Miss. 2007); *Monroe v. Marsden*, 207 P.3d 320 (Mont. 2009).

167. See, e.g., *Germain v. Girard*, 892 N.E.2d 754, 758 (Mass. App. Ct. 2008) (reversing judgment approving will and remanding case for fact finding on undue influence by son-in-law who “enjoyed [decedent’s] trust and confidence because no explanation appeared in trust explaining why imposition of a trust, vesting sole discretion in [daughter] over distributions, was necessary or appropriate to achieve [decedent’s] stated objectives, in contrast to the terms of his 1983 will (which devised his entire estate to [his wife] outright”); *In re Estate of Hall*, 32 So.3d 506, 518 (Miss. Ct. App. 2009), *cert. denied* 31 So.3d 1217 (Miss. 2010) (Testator, a river boat engineer who became ill with lung cancer, relocated to a home on the property of a long-time friend; after months of care from friend and family, testator executed will leaving property to friend without saying why friend was preferred over sister; although appellate court affirmed trial court’s finding of no undue influence, court warned it “may well have reached a different conclusion from that of the chancellor if it

view of the estate plans in these cases, the dispositions do something other than what default rules would support, either by omitting a blood relative in favor of some other person or entity or preferring one blood relative over another who would have equal claim based solely on consanguinity rules in the jurisdiction. Expressive, unique, and individualized language has the ability to explain the reasons behind the unexpected dispositions.<sup>168</sup>

In fact, some of the most notorious undue influence cases that currently appear in leading casebooks and scholarly works contain memorable and vivid language and personal narratives that explain the will provisions.<sup>169</sup> From an empirical survey of undue influence cases, then, a reader would expect these testators to be more likely than others to use expressive language because these testators are well aware of the possibility that the omitted or short-changed heirs will pursue a will contest.<sup>170</sup>

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were considering the case in the first instance.”); *In re Will of Turner*, No. COA08-1564, 687 S.E.2d 319, 2009 WL 2780009 (N.C. Ct. App. Sept. 1, 2009) (unpublished) (invalidating codicil that did not explain why testator excluded prior charitable beneficiary and instead left estate to friend who, during the nineteen years they knew each other, cared for testator and helped operate business when testator became disabled).

168. See Smith, *supra* note 9, at 76 (“By permitting, and even encouraging, a client to express personal values or positive motivation behind a legal disposition of assets, an attorney can minimize the beneficiaries’ basis for a claim of undue influence.”).

169. See DUKEMINIER ET AL., WILLS, *supra* note 21, at 194–98 (The source demonstrates undue influence law with *Lipper v. Weslow*, 369 S.W.2d 698, 700 (Tex. App. 1963), where testator explained her property distribution by stating, in relevant part, “My son, [Julian] died on August 6, 1949, and I want to explain why I have not provided anything under this will for my daughter-in-law, [Bernice], widow of my deceased son, Julian, and her children . . . , and I want to go into sufficient detail in explaining my relationship in past years with my said son’s widow and his children, before mentioned, and it is my desire to record such relationship so that there will be no question as to my feelings in the matter or any thought or suggestion that my children . . . or my husband, Max, may have influenced me in any manner in the execution of this will.”); WAGGONER ET AL., FAMILY PROPERTY LAW, *supra* note 13, at 4-65 to 4-66 (The source demonstrates undue influence law with the case of *Ramsey v. Taylor*, 999 P.2d 1178, 1186 (Or. Ct. App. 2000), *petition for review denied*, 18 P.3d 1099 (Or. 2000), in which testator’s will contained the following explanation: “I have intentionally provided significant, yet smaller amounts for my son and grandsons because they have for several years alienated my affections by being irresponsible, contentious, and constantly seeking financial support from me rather than providing for themselves. I have made provisions for MELODY J. TAYLOR . . . [who] provides me care and support. In providing for [my mistress] instead of my sons and grandsons, I am recognizing her for providing for my needs.”); see also Blumenthal, *supra* note 87, at 986–89 (discussing Heirs at Law of *Lee v. Ex’r of Lee*, 15 S.C.L. (4 McCord) 183, 184 (1827), where testator’s will bequeathed the whole of his \$50,000 estate to the states of South Carolina and Tennessee and disinherited the testator’s nieces, nephews, and illegitimate sons, explaining his “will and desire that no part or parcel of my estate shall be enjoyed, or in any wise inherited by either or any of my relations, while wood grows or water runs”).

170. See, e.g., DUKEMINIER ET AL., WILLS, *supra* note 21, at 203–05 (proposing strategies for avoiding will contest when warning signs, such as an unnatural disposition, are present); Fajer, *supra* note 68, at 578 (“[B]lood relations will often try to break the will of a deceased member of a gay relationship, sometimes alleging undue influence or lack of capacity, thus insulting the memory of the deceased.”).

### B. Analyzing the Cases

In a search that turned up approximately 180<sup>171</sup> cases from the past five years,<sup>172</sup> twelve cases referred to language in the challenged testamentary instruments that could be characterized as expressive because it was explanatory, individualized, or departed from formula.<sup>173</sup> Although sixteen additional cases either cited, quoted, or discussed written language relating to the property disposition in question, the language in those cases did not meet this Article's definition of expressive-wills language because the cited language was either a standard provision, such as a forfeiture, or revocation clause,<sup>174</sup> or it appeared somewhere other than in the will, such as in Post-It notes or side letters.<sup>175</sup> Although the testa-

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171. In fact, the search resulted in 181 cases, *see infra* APPENDIX A, but one was the lower court decision of a case that was reversed on appeal. *See Chapman v. Varela*, 191 P.3d 567 (N.M. Ct. App. 2008), *rev'd*, 213 P.3d 1109 (N.M. 2009).

172. The search examined each case noted in the Westlaw topic number 409 (Wills), key numbers 154–66 (covering the elements of undue influence and related evidentiary and procedural issues) for the period between December 31, 2004, and January 1, 2010. For a complete list of cases, *see* APPENDIX A. This search is identical to the one run by Professor Leslie in her seminal article, *see supra* Leslie, note 47, although the search in this Article looked at cases from a more recent time period.

173. *Pirtle v. Tucker*, 960 So. 2d 620, 624 (Ala. 2006); *Sloan v. Segal*, No. 2319-VCS, 2009 WL 1204494, \*7, \*17 (Del. Ch. Apr. 24, 2009); *Kersey v. Williamson*, 670 S.E.2d 405, 406 (Ga. 2008); *Rothwell v. Singleton*, 257 S.W.3d 121, 123 (Ky. Ct. App. 2008); *Graham v. Fulkerson*, 187 S.W.3d 324, 326 (Ky. Ct. App. 2005); *In re Succession of Hollis*, 987 So. 2d 387, 392 (La. Ct. App. 2008); *In re Succession of Culotta*, 900 So. 2d 137, 138 (La. Ct. App. 2005); *Conrad v. Gamble*, 962 A.2d 1007, 1011 (Md. Ct. Spec. App. 2008); *Allee v. Ruby Scott Sigeas Estate*, 182 S.W.3d 772, 776 (Mo. Ct. App. 2006); *In re Will of Carter*, 948 So. 2d 455, 456 (Miss. Ct. App. 2007); *Chapman v. Varela*, 213 P.3d 1109, 1109 (N.M. 2009); *In re Will of Ryan*, 824 N.Y.S.2d 20, 23 (App. Div. 2006).

174. *See In re Estate of Clementi*, 82 Cal. Rptr. 3d 685, 687 (Ct. App. 2008) (finding testator's statement in will to "give the balance of my assets to a charitable foundation or trust" manifested sufficient charitable testamentary intent); *Lillard v. Owens*, 641 S.E.2d 511, 512 (Ga. 2007) (forfeiture clause); *In re Succession of Deshotel*, 10 So. 3d 873, 877 (La. Ct. App. 2009) (citing introductory clause revoking prior will); *In re Will of Kistler*, 22 So. 3d 1209, 1211–12 (Miss. Ct. App. 2009) (citing forfeiture clause); *In re Estate of Greenwald*, 849 N.Y.S.2d 346, 347 (App. Div. 2008) (forfeiture clause); *In re Estate of Pringle*, 751 N.W.2d 277, 282 (S.D. 2008) (The court found no undue influence when the will "expressly set out [Testator's] intent to have joint tenancy property pass outside the will [to her son Ron] with the remainder of her estate to [pass to her three children equally]."); *In re Estate of Henry*, 250 S.W.3d 518, 521 (Tex. App. 2008) (quoting formulaic survivorship language in will); *cf. In re Estate of Holmes*, 961 So. 2d 674, 678–79 (Miss. 2007) (describing bequests in multiple wills, the latest of which contained forfeiture clause that court found to be moot because will deemed invalid based on undue influence).

175. *See Medlock v. Mitchell*, 234 S.W.3d 901, 903 (Ark. Ct. App. 2006) (citing revocable trust containing forfeiture clause and specific exclusion of adopted children); *In re Estate of Wiltfong*, 148 P.3d 465, 466 (Colo. App. 2006) (discussing letter submitted to probate as will); *In re Ingersoll Trust*, 950 A.2d 672, 678 (D.C. 2008) (referring to handwritten notes); *Patterson v. Patterson*, No. 17-04-07, 2005 WL 1074809, \*1 (Ohio Ct. App. May 9, 2005) (remarking on original but revoked wills that devised farm to youngest son, divided remainder between two other sons and specifically excluded fourth son "because he had already been provided for by virtue of his remainder interest in the other farm"); *Bajakian v. Erinakes*, 880 A.2d 843, 846–47 (R.I. 2005) (side letter of

tors in the remaining 152 cases chose to make testamentary dispositions that departed from expectation—or at least from what default rules would dictate—the cases did not produce the anticipated examples of expressive language.

Although one might posit various reasons why these courts did not discuss the words of the wills challenged in these cases, one explanation for such omission is that nothing in the language of the wills attracted the attention of the respective courts.<sup>176</sup> In other words, the overwhelming majority of wills across the country that were challenged on undue influence grounds during this five-year period must have used language that was entirely ordinary and unworthy of note. Standing alone, this observation is interesting because, recognizing that direct evidence of undue influence is rare and elusive, courts look for ways to sift through, unravel, and evaluate what are often equally credible narratives.<sup>177</sup> A consistent element of the inquiry is whether “suspicious circumstances” exist,<sup>178</sup> and the language of the testamentary instrument provides one way to overcome evidence of such circumstances.<sup>179</sup> If a court makes no mention of a will’s language as part of its analysis, it is likely that the will does not contain any unique or helpful language. This observation

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explanation not admitted into evidence); *In re Estate of Schisler*, 316 S.W.3d 599, 603 n.2 (Tenn. Ct. App. 2009) (early version of revocable trust explained that one of six children “had already received ‘machinery and other assets’ that represented his share of the family farm” but no such distinctions or explanations in any of the wills); *Parish v. Kemp*, 179 S.W.3d 524, 527–28 (Tenn. Ct. App. 2005) (citing formulaic language from payable-on-death account forms and durable powers of attorney); *In re Estate of Russell*, 311 S.W.3d 528, 533–34 (Tex. App. 2009) (Post-It notes related to giving dining room table to grandson).

176. Another explanation might be that courts in some cases are choosing not to cite to expressive language because it does not serve the result the court is seeking to implement. Examining the 180 wills at issue in these cases to determine what type of language the testators actually used and the courts decided not to include is an area for further study.

177. Leslie, *supra* note 47, at n.47; Madoff, *supra* note 47, at 582–83.

178. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. h. Where a relationship is deemed “confidential” and “suspicious circumstances” arise, a court will presume that the will has been improperly influenced and place some form of evidentiary burden on the fiduciary or confidant to show that the will was the product of the testator’s desire and not the beneficiary’s. See, e.g., *DUKEMINIER ET AL., WILLS*, *supra* note 21, at 184–85.

179. See *DUKEMINIER ET AL., WILLS*, *supra* note 21, at 198 (observing court’s reliance on testator’s recital of reasons for disposition). Consider, for example, one subset of undue influence cases involving a family business or farm that the testator leaves to the person who has helped operate the property, to the exclusion of other relatives with technically equal or superior claim. See, e.g., *Patterson*, 2005 WL 1074809 at \*1; *Bajakian*, 880 A.2d at 845–47; *Pringle*, 751 N.W.2d at 282. In this type of case, courts often consider witness testimony concerning the testator’s desire to preserve her legacy by preventing the property from being sold. See *infra* note 207. There are many practical approaches to dealing with this preference by the testator, see O’Sullivan, *supra* note 62, at 291–94 (suggesting drafting options, such as buy–sell arrangements, insurance provisions, and voting shares, for testator who is transitioning family-owned business and wants to facilitate rather than disrupt family harmony), one of which would be including language that explains the reason for the distribution. *Id.* at 320.

also leads to a second but related inference about wills containing more expressive or explanatory language. Numerous wills are admitted to probate each year without challenge.<sup>180</sup> To the extent that wills containing more expressive, individualized language exist, then, these wills may be less likely to result in a formal contest, at least on the grounds of undue influence, than wills with standard formulaic language.<sup>181</sup>

Support for the observation that expressive language can prove beneficial is found in the few cases from the five-year survey that discuss wills that diverge from formula and contain some form of unique language. When the wills incorporated even very simple expressions about the dispositive plan that went beyond the actual disposition—for example, the reason for disinheritance or for preferring one relative over another—those wills were generally upheld, regardless of whether a jury or judge decided the case. In *Graham v. Fulkerson*, for example, the elderly testator's three estranged daughters challenged a will that bequeathed them token gifts and gave the remainder of the decedent's estate to his only son.<sup>182</sup> The will contained language explaining "I make this bequest because my son is the only child who has cared for me in my old age."<sup>183</sup> The jury found that the son had not exerted undue influence over the testator, and the daughters appealed. Notwithstanding a residuary clause that contained several errors, the appellate court agreed that the will was unambiguous on its face and "clearly disposed" of the elderly testator's estate as he intended; the court therefore rejected the daughters' challenge.<sup>184</sup>

The New York case *In re Will of Ryan*, involving the will of a ninety-two-year-old mother of eight, likewise supports the conclusion that expressive language can help support will validity by demonstrating donative intent.<sup>185</sup> The *Ryan* testator specifically disinherited three of her children, "albeit regretfully,"<sup>186</sup> leaving the bulk of her estate to four of the five remaining children and the wife of her eldest son. The will contained explanatory or "extra" language noting that the disinherited siblings had initiated a proceeding in California against one of the testator's other children; the testator had asked her three children to discontinue the California proceeding and, when they refused, had threatened them with

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180. Karen S. Gerstner, *A Message to Clients . . . Avoiding Probate Court Litigation*, ABA PROB. & PROP., Mar./Apr. 2008, at 56–57.

181. Comparing language in wills that lead to challenge against wills that are admitted to probate without contest presents another area for further study.

182. *Graham v. Fulkerson*, 187 S.W.3d 324, 326 (Ky. Ct. App. 2005).

183. *Id.*

184. *Id.* at 328–29.

185. *In re Will of Ryan*, 824 N.Y.S.2d 20, 23 (App. Div. 2006).

186. *Id.* at 22.



disinheritance.<sup>187</sup> Recognizing that the attorney who had drafted the will was a friend of the “favored” son, the appellate court nevertheless observed that motives like “gratitude, love, esteem or friendship,” even if they “induce” a testator to dispose of his property in particular ways, do not rise to undue influence but rather “are allowed to have full scope.”<sup>188</sup> Accordingly, the appellate court reversed the surrogate’s denial of summary judgment and dismissed the disinherited children’s undue influence claim.<sup>189</sup> The expression of the testator’s reasoning that appeared in the will did not contribute to any misunderstanding but rather facilitated the court’s decision to grant summary judgment in the will proponents’ favor.<sup>190</sup>

Based on the five-year sampling, then, where the testamentary document told the story of why the identified heirs were or were not receiving property, even if that explanation was simple, courts respected the disposition.<sup>191</sup>

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187. *Id.* (“The propounded will stated that objectants knew ‘from the beginning that [decedent] disapproved of what they were doing’ and were warned on numerous occasions that they would be disinherited unless they called off the lawsuit against Tomas.”).

188. *Id.* at 23 (quoting *Children’s Aid Soc’y v. Loveridge*, 70 N.Y. 387, 394–95 (1877)).

189. *Id.* at 24.

190. Another case supporting this observation is *Allee v. Ruby Scott Sigeards Estate*, 182 S.W.3d 772, 774 (Mo. Ct. App. 2006), in which the testator, an eighty-one-year-old widow with four living children from her first marriage, executed a will that benefited her two sons and excluded her two daughters. More specifically, the challenged will directed that all property, real and personal, was to be divided equally between the sons and explained that the testator “intentionally [made] no provision in [her] Last Will and Testament for [her] daughters . . . having already given large amounts of money to them during [her] lifetime and having been poorly treated by them.” *Id.* at 776. After the testator’s death, her daughters presented an earlier will to probate, arguing that the will excluding them from inheriting had been executed when the testator lacked capacity and was under the improper and undue influence of her sons and their respective wives. *Id.* at 775. Soon after the testator executed the contested will, she was declared fully incapacitated. *Id.* At trial, the attorney who drafted the second will testified that although the testator’s son and his wife had driven testator to the meeting, the attorney met with testator alone, and it was she who requested inclusion of the explanatory language. *Id.* at 776–77. The trial court, which also heard testimony from the testator’s treating physician, neighbors, and children (including a son who was a social worker and specialized in elder care), concluded that “[q]uite honestly, using my own good judgment sitting here” the testator

was quite clear in that, that she had housed [daughter] and her family for a lot of years and it seemed to me as though she was saying that that is what she had [already] given her of her estate. . . . Whether that is right or not, it sure tells me that she thought through this issue and made a decision on that. . . . We’re not here to double guess . . . by using our value standards.

*Id.* at 777–82. Affirming the trial court’s admission of the will to probate, the appellate court found that although “others might have placed a different assessment on the relative claims of the daughters and the sons,” the decision ultimately belonged to the testator. *Id.* at 781–82.

191. *See Sloan v. Segal*, No. 2319-VCS, 2009 WL 1204494, at \*7, \*17 (Del. Ch. Apr. 24, 2009) (discussing earlier version of will explaining “I give no part of my estate to either of my sons, Frank Sloan and Jack K. Sloan, or to their Issue. This is because of the fact that they have voluntarily removed themselves from my life and have made no effort to contact me in any way, since 1991,

Although none of the cases in the sample discussed wills with explicit purpose provisions or statements of the testator's philosophy, several cases did refer to wills with language that was ostensibly unnecessary but descriptive. This form of expressive language also proved helpful, or at least not problematic, in the few cases in which it appeared. For example, phrases of identification defining the beneficiary or her relationship with the testator, such as "lifelong" or "faithful" friend, helped courts to find and uphold donative intent with respect to the beneficiary to whom the description applied.<sup>192</sup> One case also upheld a will that de-

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leaving only my son, Louis Segal, to care for me and to correct my financial problems caused by other people," which, the court found, helped provide "ample evidence that [testator's] testamentary intent for over a decade was to leave nothing to Frank or Jack, either from her estate or through the Power of Appointment," leaving "no doubt that [testator] would have willingly signed—nay, demanded to sign" the disputed codicil needed to correct a technical oversight); *In re Succession of Hollis*, 987 So. 2d 387, 392 (La. Ct. App. 2008) (finding no undue influence where holographic will contained provision equalizing share for son who received stock in family business). *But see* *Pirtle v. Tucker*, 960 So. 2d 620, 624 (Ala. 2006) (reversing summary judgment because testator's granddaughters raised sufficient questions of fact regarding neighbor's influence to go to jury on undue influence claim, notwithstanding a forfeiture clause and a statement in the will declaring that it was "not made as the result of a contract of understanding with any other person but solely of my own free will"). The more difficult issue arises when the descriptive language is suspect, for example erroneous or inaccurate. *See* *Chapman v. Varela*, 213 P.3d 1109 (N.M. 2009); *see also* *Rothwell v. Singleton*, 257 S.W.3d 121, 123 (Ky. Ct. App. 2008) (holograph, the most recent of at least nineteen wills, explained that daughter was ninety-year-old testator's "only help over many years" but misspelled daughter's name). In *Chapman*, for example, the testator, a mother of nine, executed a will that contained a detailed, spiteful, and apparently inaccurate explanation of why she left a single dollar to eight of her children. 213 P.3d at 1109. The remaining child, who received the balance of testator's estate, had cared for testator prior to her death, including bathing testator, buying her groceries, cleaning her house, taking her to the doctor, paying her bills, and helping her to communicate with others. *Id.* at 1118–19. The challenged will contained explanatory language that "purported to detail [Testator's] grievances with several" of the disinherited offspring. *Id.* at 1113. The trial court invalidated the will on the basis of undue influence by the favored child, and ultimately the New Mexico Supreme Court agreed, finding sufficient evidence to support the district court's findings of a confidential relationship between the testator and her favored daughter and "suspicious circumstances" surrounding the will's execution. *Id.* at 1126. Notably absent from the decision was any discussion of how the will's language demonstrated the testator's strong feelings about the children she decided not to benefit; on the other hand, though, testimony from various witnesses called into question the truth and accuracy of the statements about those beneficiaries that appeared in the will. *Id.* at 1121–22 ("[I]t would be arbitrary to refuse to consider evidence that a will is full of false or unrepresentative assertions about the people it disinherits").

192. *See, e.g.,* *Kersey v. Williamson*, 670 S.E.2d 405, 406 (Ga. 2008) (rejecting claim of undue influence where testator's will devised entire estate to his "life-long friend," whom he had known for thirty years, to the exclusion of collateral relatives); *In re Will of Carter*, 948 So. 2d 455, 456 (Miss. Ct. App. 2007) (rejecting claim of undue influence brought by disinherited son, where father's will left everything to predeceased spouse and then friend "who has faithfully served my wife and me during extended illnesses for many years"); *cf. In re Estate of Wiltfong*, 148 P.3d 465, 466 (Colo. App. 2006) (reversing and remanding trial court's determination that typewritten and signed letter not a will where letter explained that if anything ever happened to decedent, everything he owned should go to his long-time domestic partner, because the partner, their pets, and an aunt were his only family, and "everyone else is dead to me"; although not holographic, because material portions

scribed a visual impairment from which the testator was suffering when she executed the document.<sup>193</sup> Finally, colloquial language, language or phrasing in the testator's individual voice, helped evidence the testator's purpose.<sup>194</sup> In contrast, courts were more likely to find undue influence when the testator's language appeared to come from a source other than the testator.<sup>195</sup>

In each of these examples, the testator used language that could be characterized as expressive because it was not required to achieve the will's nonlinguistic purposes. Rather than finding this deviation problematic, courts greeted the respective testators' more deliberate and purposeful approach to language with respect.<sup>196</sup>

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were not handwritten, potentially an attested will that failed to comply with formalities but was cured through harmless error doctrine).

193. See *In re Succession of Culotta*, 900 So. 2d 137, 138 (La. Ct. App. 2005).

194. See *In re Estate of Clementi*, 82 Cal. Rptr. 3d 685, 692 (Ct. App. 2008) (finding testator to have charitable intent when will provided "I give the balance of my assets to a charitable foundation or trust in my name to be run by [executor/scrivener]"); *In re Succession of Hollis*, 987 So. 2d 387, 395 (La. Ct. App. 2008) (finding testator's deliberate intent to treat all her children equally when such language was specifically preserved in her will); *Conrad v. Gamble*, 962 A.2d 1007, 1011 (Md. Ct. Spec. App. 2008) (finding undue influence in will leaving property to "my loyal cousin . . . in consideration of LOVE AND AFFECTION" where prior will left property to testator's "godson" and "goddaughter," which, according to drafting attorney, "reflected the decedent's choice of words"); see also *Langford v. McCormick*, 552 So. 2d 964, 969 (Fla. Dist. Ct. App. 1989) (finding testator to have taken command of the estate planning process and thereby be less susceptible to undue influence where testator specifically requested scrivener to include additional more expansive powers for executor).

195. See, e.g., *Chapman*, 213 P.3d at 1123 ("[T]he finder of fact reasonably could have inferred that Viola both wrote the language that ended up in the will and also shepherded it through multiple drafts and meetings with a notary and an attorney until the will had been properly legally executed in nearly the exact form in which Viola had first drafted it."); *infra* text accompanying notes 194–203 (discussing *Estate of Odian*, 51 Cal. Rptr. 3d 390 (Ct. App. 2006), in which the court observed that testator, whose will was invalidated for undue influence, appeared to know and be able to use language of capacity, but such use did not show that testator understood the language); cf. Smith, *supra* note 9, at 74 ("There is value in having clients put their thoughts, priorities, and convictions into their own words, because such statements are more credible to family members who know the individual. The attorney's legally exact but impersonal choice of words will sound like someone put words in the decedent's mouth—because that is exactly what happened."); Sneddon, *supra* note 29, at 65 ("[I]njection of a false voice does not further the testator's interests.").

196. In sharp contrast are cases where language in the will appears to be so unimportant, formulaic, and ready-to-wear that the testator did not even bother to meet with the attorney before having the will prepared for execution. See, e.g., *Lavigne v. Loulakis*, No. TTDCV074007053S, 2009 WL 660211, at \*2 (Conn. Super. Ct. Feb. 19, 2009) (attorney drafted will after only a thirty-minute discussion with testator (who gave wrong answers) and completion of "will intake sheet" completed by niece being accused of undue influence); *In re Estate of Rosato*, No. 0604-1431, 2007 WL 3775923, at \*4 (Pa. Ct. Com. Pl., Orph. Div. June 25, 2007) (scrivener never met or talked to decedent); *Carvalho v. Carvalho*, 978 A.2d 455, 458 (Vt. 2009) (where ninety-two-year-old widow "talked with a paralegal in the attorney's office and requested that the office prepare for her a will, an advanced healthcare directive, and a financial power of attorney" and "attorney understood that [testator] would on that day 'sign her . . . will,'" a misunderstanding ensued because testator signed

*C. Acknowledging the Limits of Expressive Language*

Wills language is undoubtedly only one piece of a larger undue influence inquiry, which also looks to confidential relationships, condition of the testator, and other suspicious circumstances.<sup>197</sup> And while it is simple to propose that using more expressive and explanatory language has the potential to help readers and writers of wills, this suggestion admittedly has limited utility when a testator's competence and free will are such that the testator is unable to formulate intent.

Indeed, many cases involve factual situations where a discussion of language at any one point in time, whether it be from an interpretative or a drafting perspective, would be meaningless in light of the testators' progressively degenerative condition. Consider, for example, *Estate of Odian*, a case from the survey in which a California appellate court invalidated a will that left all of the testator's property to her paid live-in caregiver.<sup>198</sup> The testator and her sister, neither of whom married or had children, were able to amass significant wealth over their respective lifetimes by investing their modest incomes with the help of a long-time financial advisor.<sup>199</sup> Both sisters, while in their early eighties, executed wills leaving their respective estates to each other and then to seven charities.<sup>200</sup> After the first sister's death, however, Helen, the surviving sister, began a decline that ended in her death in 2003 at age eighty-seven. During this six-year period, Helen continued to rely on her financial advisor but also hired the caregiver to assist with housework, driving, and other daily tasks. Not surprisingly, Helen appreciated the help that the caregiver provided and wanted to express gratitude because, as Helen indicated, "she [otherwise] would not have lived as long."<sup>201</sup> Over time, though, Helen's memory began to fail and her understanding of finances to wane; she became increasingly suspicious of those around her, including her lifelong friends.<sup>202</sup> She nevertheless did what a conscientious estate planning lawyer might advise her to do: she stayed connected with her testamentary plan and continued to revise it periodically.<sup>203</sup> Even with repeated inquiries by estate planning professionals, medical personnel, and a trained investigator whose job it was to determine whether a

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disclaimer of interest in son's estate, which may have been a smart tax-planning move but was not consistent with her intent).

197. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 & cmts. e-h.

198. *Estate of Odian*, 51 Cal. Rptr. 3d 390, 402-03 (Ct. App. 2006).

199. *Id.* at 392.

200. *Id.*

201. *Id.* at 393.

202. *Id.*

203. *Id.* at 394-95.

person had mental capability to make decisions for herself, Helen's testamentary intent was difficult to discern while she was alive.<sup>204</sup> She appeared to know the language of capacity, but even those around Helen when she was living were not sure where her knowledge originated and whether the intent she demonstrated was her own.<sup>205</sup>

Ultimately, the *Odian* court relied on a California statute designed to protect elderly dependents from making transfers that might be the "product of fraud, menace, duress, or undue influence."<sup>206</sup> The statute shifted the burden to the presumptively disqualified transferee to provide "substantial evidence" that the will was not the product of undue influence, a burden the caregiver was not able to satisfy.<sup>207</sup> The end result in the *Odian* case was to invalidate any estate planning documents executed by Helen after 1997.<sup>208</sup> Language of any type in Helen's will would not have been able to help Helen, her caregiver, her natural heirs, or the court because Helen was unable to formulate intent while alive.<sup>209</sup> Even accepting that the ultimate goal of those charged with carrying out the will's directives is effectuating the testator's intent, the testator's inability to formulate and convey her intent, as in *Odian*, make it difficult to explain how any language, expressive or otherwise, might facilitate the process.

Nevertheless, where a testator is able to formulate intent,<sup>210</sup> the undue influence cases from the five-year period are noteworthy in that they respond to estate planning lawyers' (and will scholars') traditional reluctance to use or recommend using expressive language in a will for fear that such language will obscure and confuse the testator's intent rather than illuminate it.

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204. See *id.* at 394–97 ("Helen suffered from mild to moderate expressive aphasia—a difficulty in retrieving words—as well as difficulty in organizing information. She also had attention and concentration problems, and both long-term and short-term memory problems. . . . He also concluded that she was very dependent and that as a result of that, along with her cognitive impairments, she was vulnerable to undue influence.").

205. See, e.g., *id.* at 396 (examining physician startled to hear Helen's formal statement that trust "was made in accordance with my wishes").

206. *Id.* at 397–402.

207. *Id.* at 401–02.

208. *Id.* at 392 (affirming lower court judgment).

209. See, e.g., *In re Estate of Lightfield*, 213 P.3d 468, 473–74 (Mont. 2009) (documenting testator's decline, including increasing incidents of paranoid delusions, and invalidating wills propounded by each of testator's children, including one will that explained basis for unequal division); *In re Estate of Hedke*, 775 N.W.2d 13, 33 (Neb. 2009) (upholding determination that son unduly influenced testamentary documents of mother who suffered from dementia because, although will was silent on reasons for disposition, testimony evidenced mother's continued but mistaken belief that her plan benefited her two children equally).

210. Even where a will's author has testamentary capacity, changes to property or family may occur after a will is drafted and before death that render the will's language meaningless or ambiguous. See Garvey, *supra* note 29, at 47–48; Hirsch, *Text and Time*, *supra* note 60, at 611.

*D. Using the Language in Wills Rather than Side Letters*

A final but surprising observation deriving from these cases is the comparative ineffectiveness of expressive or explanatory language that appears in a separate writing composed by the testator, often called a “side letter” or “letter of wishes.”<sup>211</sup> As many of the cases from this five-year period show, where a will’s language does not illustrate the decedent’s unfettered donative intent, courts often consider evidence of intent from other sources. The primary source for this evidence is testimony from physicians, friends, neighbors, relatives, and even the attorney/scrivener,<sup>212</sup> but courts also consider evidence in the form of videotapes<sup>213</sup> of and nonbinding written statements by the testator.<sup>214</sup> Although videotapes and other electronic recording mechanisms have been recognized as useful devices to evidence the testator’s capacity and pur-

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211. See *Bajakian v. Erinakes*, 880 A.2d 843, 846–47 (R.I. 2005).

212. See, e.g., *Bell v. Hutchins*, 268 S.W.3d 358, 362 (Ark. Ct. App. 2007) (reversing trial court’s finding that housekeeper had to disprove presumption of undue influence and remanding for new trial where will did not include explanatory language but estate planning attorney testified that testator “explained to her the reasoning behind dividing his estate between his daughter and [his housekeeper]”); *Hernon v. Hernon*, 908 N.E.2d 777, 782 (Mass. App. Ct. 2009) (crediting witness testimony that “blood relations meant a great deal to the testator and . . . about the fact that his nephews (who were disinherited) were the sole males to carry on the Hernon name”); *Estate of Rutland v. Rutland*, 24 So. 3d 347 (Miss. Ct. App. 2009) (doctor testimony); *Estate of McCorkle v. Beeson*, 27 So. 3d 1180 (Miss. Ct. App. 2009) (“uncontradicted” witness testimony); *Williams v. Estate of Cheeks*, 961 So. 2d 65, 69 (Miss. Ct. App. 2007) (attorney’s testimony that testator, who gave twenty-seven nieces and nephews each 1% and balance to caretaking niece of 73%, wanted to be “fly on the wall” when final niece received only \$1); *Lazelle v. Estate of Crabtree*, 225 P.3d 11 (Okla. Civ. App. 2009) (testimony from attorney and friends); *Howard v. Nasser*, 613 S.E.2d 64, 66 (S.C. Ct. App. 2005) (witness testimony that decedent left property to spouse over nephew because mounting tension had led decedent to exclaim that he would rather “throw that money in the garbage can” than allow nephew to receive “one cent of my money”); *In re Estate of Smart*, No. 2007AP2501, 769 N.W.2d 572, 2009 WL 1151987, at \*1 (Wis. Ct. App. 2009) (unpublished) (attorney testified that he asked testator whether she was being influenced, to which she responded “[n]obody did and nobody could”).

213. See, e.g., *King v. Brown*, 632 S.E.2d 638, 639 (Ga. 2006) (jury found will invalid based on viewing videotape of execution ceremony); *In re Estate of Chapman*, 966 So. 2d 1262, 1265 (Miss. Ct. App. 2007) (“resounding[.]” affirmation of will by testator on audiotape of execution ceremony); *Slusarenko v. Slusarenko*, 147 P.3d 920, 923 (Or. Ct. App. 2006) (videotape showed testator expressing multiple grievances with his children); *In re Estate of Pringle*, 751 N.W.2d 277, 285 (S.D. 2008) (transcripts of telephone conversations); *Birmingham-Queen v. Whitmire*, No. 04-05-00646-CV, 2006 WL 1539587, at \*6 (Tex. App. June 7, 2006) (testator explained in taped execution ceremony that will gave property to second wife to the exclusion of children because surviving widow was a “good wife” upon whom he was completely dependent). *But see In re Estate of Laughter*, 23 So. 3d 1055 (Miss. 2009) (videotapes excluded from evidence).

214. See, e.g., *Bailey v. Sawyer*, 991 So. 2d 725, 732 (Ala. Civ. App. 2007) (written instructions to attorney on how testator wanted property divided); *In re Ingersoll Trust*, 950 A.2d 672, 678 (D.C. 2008) (handwritten notes); *Barber v. Holmes*, 653 S.E.2d 448 (Ga. 2007) (affidavit alleging undue influence years after will executed not admissible); *In re Estate of Russell*, 311 S.W.3d 528, 533 (Tex. App. 2009) (finding testator did not intend to disinherit granddaughters based in part on Post-It notes attached to will).

poseful decision making about her will,<sup>215</sup> they raise nearly as many concerns as they satisfy.<sup>216</sup> Supplemental writings, such as side letters, are a tempting alternative mechanism by which the testator may express her individual desires and provide guidance to her fiduciaries and beneficiaries, thereby reaping the nonlegal benefits of expressive writing without obscuring the dispositive document.<sup>217</sup> Notably, though, because the letters are designed to be nonbinding, fiduciaries and beneficiaries may ignore them, and the letters may never become part of the court record should the will be contested.

The difference between including expressive language in a side letter and including it in the will itself is illustrated in *Bajakian v. Erinakes*.<sup>218</sup> The *Bajakian* case involved a dispute between two siblings over the will of their widowed mother, Blanch Erinakes. Blanch executed the contested will in November of 1994 and left \$25,000 to her daughter, Mildred, and the balance of her “rather large” estate to her son, Stephan.<sup>219</sup> Blanch’s prior will, executed five years earlier, divided her assets equally between her two children.<sup>220</sup> Mildred challenged her mother’s 1994 will for lack of capacity and undue influence. Although no mention of the language from Blanch’s will appears in the appellate decision, the text of a letter purportedly written by her in May 1994 appears in full.<sup>221</sup> The letter recounts that when Blanch’s husband died twenty years earlier, she “was left with the responsibility of carrying on his life’s work, which was the movie theatres and real estate business.”<sup>222</sup>

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215. ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS & ESTATES 136–37 (3d ed. 2007); DUKEMINIER ET AL., WILLS, *supra* note 21, at 205; Langbein, *Compliance*, *supra* note 13, at 519; *see also* Grant, *supra* note 77, at 105–10.

216. Videotapes may expose a will to challenge that would not otherwise exist by, for example, revealing frailties that would not be apparent from the writing standing alone. Accordingly, an estate planning lawyer must deliberate seriously before deciding to tape a will-execution ceremony and must ensure that safeguards exist to prevent the tape from undermining rather than demonstrating intent and capacity. *See, e.g.*, DUKEMINIER ET AL., WILLS, *supra* note 21, at 205.

217. *Id.* (The source suggests the strategy of a lawyer requesting that the client “write, in the client’s handwriting, a letter to the lawyer setting forth in detail the disposition the client wishes to make. Upon receiving the letter, the lawyer replies, detailing the consequences of the disposition for the client’s family, and asks for a letter setting forth the reasons for the disposition. After receiving this letter, the will is drafted as the client wants. The letters are kept in the lawyer’s files.”); Alexander A. Bove, Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?*, 35 ACTEC J. 38 (2009); *see also* Beyer, *Blue Screen*, *supra* note 56, at 88 (“If the testator wishes to express nonmandatory desires, then the attorney should use a separate non-testamentary document.”). These letters are used frequently in the context of asset protection trusts, where the settlor seeks to relinquish control of the assets but wants to provide guidance to the trustees on issues ranging from investment to distributions.

218. *Bajakian v. Erinakes*, 880 A.2d 843 (R.I. 2005).

219. *Id.* at 846.

220. *Id.* at 845.

221. *Id.* at 847.

222. *Id.*

As Blanch dealt with the “nightmare” of loss and tried to “keep everything going,” the “only full time support” she received came from her son Stephan.<sup>223</sup> They “worked together” to “retain the properties, pay off seven mortgages and buil[d] a few new stores.”<sup>224</sup> For that reason, and because she desired to keep the businesses operating rather than allowing them to be sold, Blanch explained “it only makes sense to me to let [Stephan] continue to carry on in this capacity, in control and to have ownership of everything,” expressing her belief “in my heart that when the day comes when [Stephan] is able to show a profit he can share it as he sees fit.”<sup>225</sup>

During trial, Stephan sought to have this letter admitted into evidence, but the court denied the motion because it found that the declarations of memory contained in the letter were inadmissible hearsay.<sup>226</sup> Following a four-day trial, Stephan moved for judgment as a matter of law, the trial court reserved decision on the motion and sent the case to the jury, and the jury found that Blanch Erinakes lacked testamentary capacity and therefore invalidated her 1994 will.<sup>227</sup> Stephan then moved for a new trial, and the court denied his motion. On appeal, the Rhode Island Supreme Court found that the trial judge had not abused his discretion in declining to admit the written statement,<sup>228</sup> and it affirmed the trial court’s denial of the motion for judgment as a matter of law<sup>229</sup> and motion for a new trial.<sup>230</sup> With respect to the evidentiary ruling regarding the side letter, the appellate court upheld the trial judge’s determination that Blanch’s statements of memory were hearsay.<sup>231</sup>

Not only did the explanation in Blanch Erinakes’s letter explain the basis for her otherwise curious decision to treat her daughter and son differently, but it also brought her story into the courtroom, giving her the opportunity to express her intent to her beneficiaries and, if they were not listening, to the jury. Blanch would have communicated her message

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 846. It also found that “[u]nfortunately, this statement cannot be redacted . . . or edited in some form to take out the declarations of memory from [the] statements of intention.” *Id.* at 848.

227. *Id.* at 846. Because it found lack of capacity, the jury did not render a decision on Mildred’s undue influence claim.

228. *Id.* at 848–49.

229. *Id.* at 850.

230. *Id.* at 852–53.

231. The appellate court noted that Stephan had not sought a cautionary instruction or suggested a creative way to redact his mother’s letter, which was his burden as the party seeking admission of the evidence. *Id.* at 848 & nn.7–8. The appellate court also recognized in dicta the trial judge’s “skepticism as to the bonafide nature of the May 5, 1994 statement” but refused to opine on these views. *Id.* at 849 n.10.



more effectively had she incorporated her explanation into the testamentary instrument itself. The *Bajakian* decision thus illustrates the risks associated with relying on side letters to supplement a will and make it more expressive. Although the decision implies that pure statements of intent in a side letter might have been admissible,<sup>232</sup> and although a court ultimately might choose to ignore precatory language that appears in a will itself,<sup>233</sup> the case suggests that side letters are not without their concerns. Relying on nonbinding letters to contain important explanations or expressions, as practicing lawyers often do, might lead to those expressions being ignored or devalued by the legal readers.<sup>234</sup>

In sum, the cases from the five-year survey that discuss wills with expressive language support the idea that descriptive, explanatory language, even simple deviations from formula, can help evidence the testator's ability to formulate intent and communicate that intent to her audiences. Instead of the anticipated host of wills setting the reasoning or story behind the unnatural or unequal dispositions, however, the survey of cases revealed a dearth of expressive language. This result suggests either that wills with expressive language have not been contested on undue influence grounds—the most common basis for challenge—as frequently as wills that contain only formulaic language, or that notwithstanding the many benefits of expressive language, a reluctance to draft wills containing expressive language persists.<sup>235</sup>

#### V. CONCLUSION: THE SOCIETAL VALUE OF CONSIDERING WILL WRITING GENERALLY AND EXPRESSIVE LANGUAGE IN PARTICULAR

Few would argue that laws about death do not influence the public good and raise issues of justice and morality when, for example, the laws involve topics like capital punishment or an individual's right to die.<sup>236</sup> In comparison, wills law and, in particular, how wills are written seem somehow smaller, perhaps less worthy of attention, but this initial reaction is mistaken for three interrelated reasons. First, analyzing wills law and its intensely personal dispositions allows scholars to look (microscopically) at individual human stories and (macroscopically) at human

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232. *Id.* at 848 & nn.7–8.

233. *See* Schiavo, *supra* note 64.

234. *See also* Barber v. Holmes, 653 S.E.2d 448, 450 (Ga. 2007) (affirming trial court's determination that affidavit containing statements by testator that she was unhappy with will were inadmissible hearsay made by testatrix years after signing her will); Conrad v. Gamble, 962 A.2d 1007, 1021–22 (Md. Ct. Spec. App. 2008) (affirming trial court's refusal on hearsay grounds to allow testimony "as to why [the decedent] may have wanted to change her will").

235. Of course, another possible explanation is that expressive language is not relevant to the issue of undue influence. *But see supra* text accompanying notes 177–79.

236. *See, e.g.,* Hernandez, *supra* note 89, at 975, 1001–03 (describing euthanasia debate).

interaction, interpretation, and expression.<sup>237</sup> As authors of a leading casebook explain, wills law is a “tapestry of humanity” where “every behind-the-scenes peek, every quirk of the parties’ behavior has its place as a piece of ornament fitting into the larger whole.”<sup>238</sup>

Second, in a society whose members are generally characterized by a reluctance to face mortality,<sup>239</sup> many people die without wills.<sup>240</sup> By encouraging testators to add greater expression—be it descriptive detail, explanation, narrative, or statements of individual philosophy to their wills—we allow those testators to define themselves, to think mindfully about death, and to take control of their personal legacies. In fact, fostering opportunity for individuals to express themselves in their will may make the estate planning process more appealing to people who believe

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237. See, e.g., Hirsch, *Inheritance and Inconsistency*, *supra* note 8, at 1060 (using the law of wills and inheritance as “a case-study of the jurisprudential phenomenon of structural inconsistency in law”); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 531–32 (2000) (using the law of trusts and estates, admittedly “a single patch of the legal landscape,” because it provides “a perfect laboratory for the study of legal dynamics, revealing evolutionary patterns that are bound to reappear within other, far-flung areas of doctrine”); Robertson, *supra* note 30, at 1045–46 (“When we seek the meaning of a donative document, we are not searching just for an ordinary fact, some object that is or some event that has occurred. We are seeking the meaning of law, albeit privately made law.”).

238. DUKEMINIER ET AL., *WILLS*, *supra* note 21, at xxxii.

239. See SOGYAL RINPOCHE, *THE TIBETAN BOOK OF LIVING AND DYING 7–8* (Patrick Gaffney & Andrew Harvey eds., 1994) (“When I first came to the West, I was shocked by the contrast between the attitudes to death I had been brought up with and those I now found. For all its technological achievements, modern Western society has no real understanding of death . . . [P]eople today are taught to deny death, and taught that it means nothing but annihilation and loss. . . . Others look on death with a naive, thoughtless cheerfulness . . . . Of these two attitudes toward death, one views death as something to scurry away from and the other as something that will just take care of itself.”); MICHEL DE MONTAIGNE, *THE ESSAYS OF MICHEL DE MONTAIGNE 95* (M. A. Screech, trans., ed., 1991) (“Men come and they go and they trot and they dance, and never a word about death. All well and good. Yet when death does come—to them, their wives, their children, their friends—catching them unawares and unprepared, then what storms of passion overwhelm them, what cries, what fury, what despair!”).

240. WAGGONER ET AL., *FAMILY PROPERTY LAW*, *supra* note 13, at 2-1 to 2-3. Although more individuals die with valid wills in place today than ever before in America, see Sneddon, *supra* note 29, at 4–5 & n.7 (citing Carole Shammass, Marylynn Salmon & Michel Dahlin, *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* (1987)), more than half of Americans die without a will. See DUKEMINIER ET AL., *WILLS*, *supra* note 21, at 71 (relying on Gallup poll data); see also DiRusso, *supra* note 21, at 41 (random survey of 374 individuals indicates that only 31% of Americans have wills, of which 20% are attorney generated and 11% are holographic). These numbers, however, may be exaggerated. See WAGGONER ET AL., *FAMILY PROPERTY LAW*, *supra* note 13, at 2-2 to 2-3 (The authors analyze age demographics to conclude that “[p]erhaps it is more accurate to suggest that most people who die prematurely die intestate”; “if 60.7 percent of the 46–54 population, 63.4 percent of the 55–64 population, and 84.6 percent of the 65-and-over population have wills, the conventional wisdom that most people die intestate may be unfounded.”).

will drafting was not intended for them because they lacked a significant financial impetus to execute a will.<sup>241</sup>

Third, deliberate choice about how property is distributed, rather than robotic adherence to form, is most meaningful to people whose goals will not be served by the default laws of intestacy.<sup>242</sup> Working toward a system that gives those individuals an opportunity to share their last words can give them a crucial voice.<sup>243</sup>

Of course, asking a testator to use expressive language in her will demands as much of that testator as it potentially offers. Because writing is so important to audience and author alike, and because writers are engaged in the endless task of trying to express their thoughts so that those thoughts are perfectly understood, writing (like interpretation) can be an excruciating process that might lead to frustration and even desperation. Indeed, this very theme is central to the will-interpretation scholarship discussed in Part II.<sup>244</sup> Yet the difficulty of achieving perfect expression need not dictate a reluctance to pursue it. James Boyd White, who spent his life dissecting and analyzing language (and legal language in particular), acknowledges language's limits but guides a writer on how to transcend those limits.<sup>245</sup> Explaining that any writer is not only the product

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241. See Sneddon, *supra* note 29, at 41 (“In the era of decreased wealth, the non-financial legacy may be even more important to the individual.”); cf. Davis, *supra* note 88, at 223, 225 (“The focus on private law and, stranger still, wills and intestate succession, is an initially implausible, or at least an unfamiliar one in examining racial issues in this country. . . . Yet . . . these case studies open a window on a more general economy of race, status, and sex . . .”).

242. See Foster, *supra* note 21, at 206–07 (“The rules of intestate succession—the default rules that apply in the absence of a will—provide rigidly for inheritance by status. The decedent’s closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent.”); Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 551–52 (2008) (“Testators who write wills . . . generally have a strong view about how their assets should be distributed. Often, they have rejected the off-the-rack distribution furnished by intestate succession statutes in favor of a distribution that departs from social norms” and they “want[] to assure that [their] wishes are respected.”); cf. Hacker, *supra* note 147, at 16–17 (reviewing twenty-three empirical studies on inheritance from around the world and concluding that women write wills as frequently as men).

243. See, e.g., Champine, *supra* note 46, at 428–30 (describing how preferences and default rules jeopardize the testamentary plans of atypical testators, such as unmarried or same-sex couples); Davis, *supra* note 88, at 236 (describing how testamentary freedom allowed one property holder to alter the norms of race, sex, and property imposed in the antebellum South); Fajer, *supra* note 68, at 578; Spitko, *supra* note 11, at 1077–80.

244. See *supra* text accompanying notes 24–26.

245. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 276–77 (1984) (“We are in part the products of our language, but each time we speak we remake it. . . . One is perpetually telling one’s story to oneself and others, trying to shape things so that the next step fits with what has gone before, ceaselessly claiming significance for one’s experience and actions, and the question always is, in what language can (or must) one do these things? What are the implications—the adequacies and inadequacies—of our common ways of describing the world, of constituting relations, of feeling injury, of acting socially, and of aspiring to what is not yet? The language marks the

of the language she acquires but also the sculptor of such language, White recognizes that we are “perpetually” asking “[w]hat are the implications—the adequacies and inadequacies—of our common ways of describing the world, of constituting relations, of feeling injury, of acting socially, and of aspiring to what is not yet?”<sup>246</sup> Rather than despairing that “we live in an incoherent and elemental flux in which no reasoning, no meaning, is possible,” writers must recognize that “in our actual lives we show that we know how to read and speak, to live with language, texts, and each other, and to do so with considerable confidence.”<sup>247</sup> Language should not be abandoned as inadequate, or reduced to formula, but rather “[w]hen we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.”<sup>248</sup>

Being deliberate about the writing process contributes substantially to the product ultimately generated and therefore to the growing body of substantive law. This recognition applies to wills just as it does to any form of writing, legal or otherwise. In fact, in no other field more than in the study and practice of wills, where life and death are constant concerns, is one reminded more of circles: we cannot read and interpret without having something to read, and we cannot write without the knowledge that it will be read. This depiction of a spiraling process of reviewing and rethinking evokes a 1933 essay by Virginia Woolf entitled “Twelfth Night at the Old Vic.”<sup>249</sup> Reviewing a production of Shakespeare’s pastoral comedy, Woolf considers the division among Shakespeareans into “those who prefer to read Shakespeare in the book; those who prefer to see him acted on the stage; and those who run perpetually from book to stage gathering plunder.”<sup>250</sup> Woolf recognizes how Shakespeare writes “not with the whole of his mind mobilized and under control but with feelers left flying that sport and play with words,” so that “the play seems as we read it to tremble perpetually on the brink of music.”<sup>251</sup> After tantalizing her reader with the “lights and body of the mind’s stage,” Woolf wonders why we should “imprison” the evocative words within the “bodies of real men and women.” She describes the trepidation she feels in entering the theatre and anticipating “the ruins of

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mind, and one will normally see that one’s language is contingent, not necessary, only if one experiences a basic cultural dislocation: the sense that words have lost their meaning.”).

246. *Id.*

247. *Id.* at 278.

248. *Id.*

249. VIRGINIA WOOLF, *Twelfth Night at the Old Vic*, in *THE DEATH OF THE MOTH AND OTHER ESSAYS* 45 (Harvest/HBJ 1970).

250. *Id.*

251. *Id.*

the play, at the travesty of the play” but then responds to her own query by describing how the play is acted by deft and experienced performers whose “bodies together, take our play and remodel it between them” to give “the word . . . a body as well as a soul.”<sup>252</sup> But no sooner does Woolf describe how the actors “make the moment . . . one of intense and moving beauty,”<sup>253</sup> than she recognizes the limits of their performances.<sup>254</sup> Ultimately, she concludes “back we must go” to the written word so that the comparison feeds our understanding and appreciation.

This recursive dance between reading and viewing that Woolf describes is an apt metaphor for the relationship between writing and reading wills and for the value of expressive language generally. The author, in other words the testator or drafter, attempts the difficult goal of creating and communicating thoughts that her reader will understand. Each opportunity to revisit and rethink language, to re-view it, contributes to the ideas and intent behind the words. Woolf was not expecting (nor even wishing) that Shakespeare could rewrite his play; rather, she was commenting on the relationship between creation—the writing—and interpretation—the reading or viewing. By seeing the work in a new way, the audience understands the work in a new way. Similarly, the writing of those who are able to consider their ideas—both in how they are formulated and how they are expressed—ultimately benefits. The lesson of Woolf’s essay is a lesson in expressiveness. The better an author is at recognizing the limits of her language, the more she can strive to exceed those limits, formulating her own ideas and communicating them to her community. Why should we who practice and study the law of wills insist on insulating “last words,” with all of their possibility, from this process?

By questioning the assumptions that competent drafters can easily anticipate and effectuate the testator’s wishes, and then by examining whether the use of any particular language in will drafting is potentially more successful in achieving the decedent’s important goals, whatever they might be, wills scholars will further the vital but elusive goal of effectuating the testator’s intent and, in so doing, help her establish her personal legacy and create an expression of her individual self and a testament to those she leaves behind.

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252. *Id.* at 47.

253. *Id.* at 48.

254. She explains that in the performance a continuity of perception is lacking whereas the “mind in reading spins a web from scene to scene, compounds a background from apples falling, and the toll of a church bell, and an owl’s fantastic flight.” *Id.* at 49.

## Appendix A

### Undue Influence Cases December 31, 2004–January 1, 2010

#### I. CASES THAT CONTAINED “EXPRESSIVE LANGUAGE”

1. *Pirtle v. Tucker*, 960 So. 2d 620 (Ala. 2006).
2. *Sloan v. Segal*, C.A. No. 2319-VCS, 2009 WL 1204494 (Del. Ch. Apr. 24, 2009).
3. *Kersey v. Williamson*, 670 S.E.2d 405 (Ga. 2008).
4. *Rothwell v. Singleton*, 257 S.W.3d 121 (Ky. Ct. App. 2008).
5. *Graham v. Fulkerson*, 187 S.W.3d 324 (Ky. Ct. App. 2005).
6. *In re Succession of Hollis*, 987 So. 2d 387 (La. Ct. App. 2008).
7. *In re Succession of Culotta*, 900 So. 2d 137 (La. Ct. App. 2005).
8. *Conrad v. Gamble*, 962 A.2d 1007 (Md. Ct. Spec. App. 2008).
9. *In re Will of Carter*, 948 So. 2d 455 (Miss. Ct. App. 2007).
10. *Allee v. Sigeers Estate*, 182 S.W.3d 772 (Mo. Ct. App. 2006).
11. *Chapman v. Varela*, 213 P.3d 1109 (N.M. 2009).
12. *In re Will of Ryan*, 824 N.Y.S.2d 20 (App. Div. 2006).

#### II. CASES THAT CONTAINED “OTHER LANGUAGE”

1. *Medlock v. Mitchell*, 234 S.W.3d 901 (Ark. Ct. App. 2006).
2. *In re Estate of Clementi*, 82 Cal. Rptr. 3d 685 (Ct. App. 2008).
3. *In re Estate of Wiltfong*, 148 P.3d 465 (Colo. App. 2006).
4. *In re Ingersoll Trust*, 950 A.2d 672 (D.C. 2008).
5. *Lillard v. Owens*, 641 S.E.2d 511 (Ga. 2007).
6. *In re Succession of Deshotel*, 10 So. 3d 873 (La. Ct. App. 2009).
7. *In re Estate of Holmes*, 961 So. 2d 674 (Miss. 2007).
8. *In re Will of Kistler*, 22 So. 3d 1209 (Miss. Ct. App. 2009).

9. *In re Estate of Greenwald*, 849 N.Y.S.2d 346 (App. Div. 2008).
10. *Patterson v. Patterson*, No. 17-04-07, 2005 WL 1074809 (Ohio Ct. App. May 9, 2005).
11. *Bajakian v. Erinakes*, 880 A.2d 843 (R.I. 2005).
12. *In re Estate of Pringle*, 751 N.W.2d 277 (S.D. 2008).
13. *In re Estate of Schisler*, 316 S.W.3d 599 (Tenn. Ct. App. 2009).
14. *Parish v. Kemp*, 179 S.W.3d 524 (Tenn. Ct. App. 2005).
15. *In re Estate of Russell*, 311 S.W.3d 528 (Tex. Ct. App. 2009).
16. *In re Estate of Henry*, 250 S.W.3d 518 (Tex. Ct. App. 2008).

### III. CASES WHEREIN COURT FOUND UNDUE INFLUENCE

1. *In re Freeland*, 360 B.R. 108 (Bankr. D. Md. 2006).
2. *Mullin v. Brown*, 115 P.3d 139 (Ariz. Ct. App. 2005).
3. *In re Estate of Odian*, 51 Cal. Rptr. 3d 390 (Ct. App. 2006).
4. *David v. Hermann*, 28 Cal. Rptr. 3d 622 (Ct. App. 2005).
5. *Lavigne v. Loulakis*, No. TTDCV074007053S, 2009 WL 660211 (Conn. Super. Ct. Feb. 19, 2009).
6. *Madrigal v. Madrigal*, 22 So. 3d 828 (Fla. Dist. Ct. App. 2009).
7. *Bean v. Wilson*, 661 S.E.2d 518 (Ga. 2008).
8. *Dorsey v. Kennedy*, 668 S.E.2d 649 (Ga. 2008).
9. *King v. Brown*, 632 S.E.2d 638 (Ga. 2006).
10. *Trotman v. Forrester*, 621 S.E.2d 724 (Ga. 2005).
11. *In re Estate of Schoppe*, No. 05-0147, 710 N.W.2d 258, 2005 WL 3115916 (Iowa Ct. App. Nov. 23, 2005) (unpublished table decision).
12. *Cousatte v. Lucas*, 136 P.3d 484 (Kan. Ct. App. 2006).
13. *In re Succession of Pardue*, 915 So. 2d 415 (La. Ct. App. 2005).
14. *Hernon v. Hernon*, 908 N.E.2d 777 (Mass. App. Ct. 2009).
15. *In re Estate of Moretti*, 871 N.E.2d 493 (Mass. App. Ct. 2007).
16. *In re Estate of Torgersen*, 711 N.W.2d 545 (Minn. Ct. App. 2006).
17. *In re Estate of Laughter*, 23 So. 3d 1055 (Miss. 2009).
18. *In re Dissolution of Demoville P'ship*, 26 So. 3d 366 (Miss. Ct. App. 2009).

19. *In re Estate of Pope*, 5 So. 3d 427 (Miss. Ct. App. 2008).
20. *Howell v. May*, 983 So. 2d 313 (Miss. Ct. App. 2007).
21. *In re Estate of Lightfield*, 213 P.3d 468 (Mont. 2009).
22. *Monroe v. Marsden*, 207 P.3d 320 (Mont. 2009).
23. *In re Estate of Hedke*, 775 N.W.2d 13 (Neb. 2009).
24. *In re Estate of Stockdale*, 953 A.2d 454 (N.J. 2008).
25. *In re Neary*, 843 N.Y.S.2d 689 (App. Div. 2007).
26. *In re Pellegrino*, 817 N.Y.S.2d 121 (App. Div. 2006).
27. *In re Will of Turner*, No. COA08-1564, 687 S.E.2d 319, 2009 WL 2780009 (N.C. Ct. App. Sept. 1, 2009) (unpublished table decision).
28. *Calame v. Treece*, No. 07CA0073, 2008 WL 4404538 (Ohio Ct. App. Sept. 30, 2008).
29. *Edwards v. Urice*, 220 P.3d 1145 (Okla. Civ. App. 2008).
30. *Harris v. Jourdan*, 180 P.3d 119 (Or. Ct. App. 2008).
31. *In re Mampe*, 932 A.2d 954 (Pa. Super. Ct. 2007).
32. *In re Estate of Stafford*, No. 530 AP 2002, 2005 WL 352530 (Pa. Ct. C.P., Philadelphia County Jan. 13, 2005).
33. *In re Estate of Duebendorfer*, 721 N.W.2d 438 (S.D. 2006).
34. *La Court v. Krause*, 766 N.W.2d 241 (Wis. Ct. App. 2009).

#### IV. CASES WHEREIN COURT DID NOT FIND UNDUE INFLUENCE

1. *Furrow v. Helton*, 13 So. 3d 350 (Ala. 2008).
2. *Bailey v. Sawyer*, 991 So. 2d 725 (Ala. Civ. App. 2007).
3. *Bell v. Hutchins*, 268 S.W.3d 358 (Ark. Ct. App. 2007).
4. *In re Estate of Romero*, 126 P.3d 228 (Colo. Ct. App. 2005).
5. *Larocque v. O'Connor*, 876 A.2d 1229 (Conn. Ct. App. 2005).
6. *Morico v. Morico*, No. CV040490866S, 2006 WL 1230094 (Conn. Super. Ct. Apr. 19, 2006).
7. *Diaz v. Ashworth*, 963 So. 2d 731 (Fla. Ct. App. 2007).
8. *Zoldan v. Zohlman*, 915 So. 2d 235 (Fla. Ct. App. 2005).
9. *Lipscomb v. Young*, 672 S.E.2d 649 (Ga. 2009).
10. *Morrison v. Morrison*, 655 S.E.2d 571 (Ga. 2008).
11. *Barber v. Holmes*, 653 S.E.2d 448 (Ga. 2007).
12. *Bailey v. Edmundson*, 630 S.E.2d 396 (Ga. 2006).



13. McCormick v. Jeffers, 637 S.E.2d 666 (Ga. 2006).
14. Pope v. McWilliams, 632 S.E.2d 640 (Ga. 2006).
15. Smith v. Liney, 631 S.E.2d 648 (Ga. 2006).
16. Curry v. Sutherland, 614 S.E.2d 756 (Ga. 2005).
17. Glaze v. Lemaster, 613 S.E.2d 617 (Ga. 2005).
18. Horton v. Hendrix, 662 S.E.2d 227 (Ga. Ct. App. 2008).
19. Hamilton v. Hamilton, 858 N.E.2d 1032 (Ind. Ct. App. 2006).
20. Meyer v. Wright, 854 N.E.2d 57 (Ind. Ct. App. 2006).
21. Outlaw v. Danks, 832 N.E.2d 1108 (Ind. Ct. App. 2005).
22. Otteros v. Otteros, No. 07-1115, 755 N.W.2d 144, 2008 WL 2522128 (Iowa Ct. App. June 25, 2008) (unpublished table decision).
23. Hicks v. Eubanks, No. 2005-CA-001009-MR, 2006 WL 3333481 (Ky. Ct. App. Nov. 17, 2006).
24. Hughes v. Hughes, No. 2005-CA-000308-MR, 2006 WL 2457418 (Ky. Ct. App. Aug. 25, 2006).
25. *In re* Succession of Rachal, 7 So. 3d 132 (La. Ct. App. 2009).
26. *In re* Succession of Spitzfaden, 30 So. 3d 88 (La. Ct. App. 2009).
27. *In re* Succession of Berman, 937 So. 2d 437 (La. Ct. App. 2006).
28. *In re* Succession of Polk, 940 So. 2d 895 (La. Ct. App. 2006).
29. *In re* Succession of Walters, 943 So. 2d 1165 (La. Ct. App. 2006).
30. O'Rourke v. Hunter, 848 N.E.2d 382 (Mass. 2006).
31. Rostanzo v. Rostanzo, 900 N.E.2d 101 (Mass. App. Ct. 2009).
32. Germain v. Girard, 892 N.E.2d 754 (Mass. App. Ct. 2008).
33. Maimonides Sch. v. Coles, 881 N.E.2d 778 (Mass. App. Ct. 2008).
34. Rempelakis v. Russell, 842 N.E.2d 970 (Mass. App. Ct. 2006).
35. *In re* Estate of Rangel, No. 283516, 2009 WL 1442387 (Mich. Ct. App. May 21, 2009).
36. *In re* Estate of White, Nos. 279866, 279867, 281420, 2008 WL 4927106 (Mich. Ct. App. Nov. 18, 2008).

37. *In re* Estate of Berg, No. 268584, 2006 WL 2482895 (Mich. Ct. App. Aug. 29, 2006).
38. *In re* Estate of Fischer, No. A05-176, 2006 WL 163492 (Minn. Ct. App. Jan. 24, 2006).
39. Estate of Rutland v. Rutland, 24 So. 3d 347 (Miss. Ct. App. 2009).
40. Hill v. Harper, 18 So. 3d 310 (Miss. Ct. App. 2009).
41. *In re* Caspelich, 22 So. 3d 1199 (Miss. Ct. App. 2009).
42. *In re* Estate of Hall, 32 So. 3d 506 (Miss. Ct. App. 2009).
43. McCorkle v. Beeson, 27 So. 3d 1180 (Miss. Ct. App. 2009).
44. *In re* Will and Testament of Boyles, 990 So. 2d 230 (Miss. Ct. App. 2008).
45. *In re* Estate of Chapman, 966 So. 2d 1262 (Miss. Ct. App. 2007).
46. Williams v. Cheeks, 961 So. 2d 65 (Miss. Ct. App. 2007).
47. *In re* Estate of Minor, 939 So. 2d 861 (Miss. Ct. App. 2006).
48. *In re* Estate of Thornton, 922 So. 2d 850 (Miss. Ct. App. 2006).
49. *In re* Estate of McQueen, 918 So. 2d 864 (Miss. Ct. App. 2005).
50. *In re* Estate of Saucier, 908 So. 2d 883 (Miss. Ct. App. 2005).
51. Stanton v. Wells Fargo Bank Mont., 152 P.3d 115 (Mont. 2007).
52. *In re* Estate of Harms, 149 P.3d 557 (Mont. 2006).
53. *In re* Eastman, 880 N.Y.S.2d 157 (App. Div. 2009).
54. *In re* Klingman, 875 N.Y.S.2d 554 (App. Div. 2009).
55. *In re* Rudolph, 874 N.Y.S.2d 250 (App. Div. 2009).
56. *In re* Estate of Colverd, 860 N.Y.S.2d 254 (App. Div. 2008).
57. *In re* Coopersmith, 852 N.Y.S.2d 247 (App. Div. 2008).
58. *In re* Estate of Murray, 853 N.Y.S.2d 680 (App. Div. 2008).
59. *In re* Estate of Turner, 866 N.Y.S.2d 429 (App. Div. 2008).
60. Am. Comm. for the Weizmann Inst. of Sci. v. Dunn, 827 N.Y.S.2d 134 (App. Div. 2007).
61. *In re* Estate of Castiglione, 837 N.Y.S.2d 360 (App. Div. 2007).
62. *In re* Estate of Malone, 846 N.Y.S.2d 782 (App. Div. 2007).
63. *In re* Estate of Ruparshek, 828 N.Y.S.2d 623 (App. Div. 2007).

64. *In re* Zirinsky, 841 N.Y.S.2d 637 (App. Div. 2007).
65. *In re* DiCorcia, 827 N.Y.S.2d 170 (App. Div. 2006).
66. *In re* Estate of Friedman, 809 N.Y.S.2d 667 (App. Div. 2006).
67. *In re* Estate of Korn, 808 N.Y.S.2d 48 (App. Div. 2006).
68. *In re* Estate of Fellows, 792 N.Y.S.2d 664 (App. Div. 2005).
69. *In re* Weltz, 791 N.Y.S.2d 141 (App. Div. 2005).
70. *In re* Neuman, 789 N.Y.S.2d 182 (App. Div. 2005).
71. *In re* Will of Jones, 655 S.E.2d 407 (N.C. Ct. App. 2007).
72. *In re* Estate of Stave, 729 N.W.2d 706 (N.D. 2007).
73. *Neumeyer v. Penick*, 906 N.E.2d 1168 (Ohio Ct. App. 2009).
74. *Holt v. Sawyer*, 905 N.E.2d 213 (Ohio Ct. App. 2008).
75. *Kidwell v. Pitts*, No. 22370, 2008 WL 3990827 (Ohio Ct. App. Aug. 29, 2008).
76. *Knowlton v. Schultz*, 902 N.E.2d 548 (Ohio Ct. App. 2008).
77. *Lazelle v. Crabtree*, 225 P.3d 11 (Okla. Civ. App. 2009).
78. *Slusarenko v. Slusarenko*, 147 P.3d 920 (Or. Ct. App. 2006).
79. *In re* Estate of Fritts, 906 A.2d 601 (Pa. Super. Ct. 2006).
80. *Kern v. Kern*, 892 A.2d 1 (Pa. Super. Ct. 2005).
81. *In re* Estate of Rosato, No. 0604-1431, 2007 WL 3775923 (Pa. Ct. C.P., Orphans' Ct., June 25, 2007).
82. *In re* Estate of Lista, No. 1474 AP of 2003, 2006 WL 321189 (Pa. Ct. C.P., Philadelphia County Jan. 26, 2006).
83. *In re* Estate of Anderson, 674 S.E.2d 176 (S.C. Ct. App. 2009).
84. *In re* Estate of Price, 273 S.W.3d 113 (Tenn. Ct. App. 2008).
85. *Urbanczyk v. Urbanczyk*, 278 S.W.3d 829 (Tex. Ct. App. 2009).
86. *Turner v. Hendon*, 269 S.W.3d 243 (Tex. Ct. App. 2008).
87. *Birmingham-Queen v. Whitmire*, No. 04-05-00646-CV, 2006 WL 1539587 (Tex. Ct. App. Jun. 7, 2006).
88. *Long v. Long*, 196 S.W.3d 460 (Tex. Ct. App. 2006).
89. *Cotten v. Cotten*, 169 S.W.3d 824 (Tex. Ct. App. 2005).
90. *In re* Estate of Knowles, 143 P.3d 864 (Wash. Ct. App. 2006).
91. *In re* Estate of Smart, No. 2007AP2501, 769 N.W.2d 572, 2009 WL 1151987 (Wis. Ct. App. Apr. 30, 2009) (unpublished table decision).

92. Retz v. Siebrandt, 181 P.3d 84 (Wyo. 2008).

V. OTHER UNDUE INFLUENCE CASES (INCLUDING CASES WHERE APPELLATE COURT REVERSED SUMMARY JUDGMENT AND REMANDED FOR FURTHER DETERMINATION OF UNDUE INFLUENCE)

1. Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654 (S.D.N.Y. 2005).
2. Bernard v. Foley, 139 P.3d 1196 (Cal. 2006).
3. Sandford v. Metcalfe, 954 A.2d 188 (Conn. Ct. App. 2008).
4. RBC Ministries v. Tompkins, 974 So. 2d 569 (Fla. Ct. App. 2008).
5. Parker v. Melican, 684 S.E.2d 654 (Ga. 2009).
6. Lasater v. House, 841 N.E.2d 553 (Ind. 2006).
7. Gast v. Hall, 858 N.E.2d 154 (Ind. Ct. App. 2006).
8. B.W. v. J.W., 853 N.E.2d 585 (Mass. App. Ct. 2006).
9. Peralta v. Peralta, 131 P.3d 81 (N.M. Ct. App. 2005).
10. *In re* Will of Jones, 669 S.E.2d 572 (N.C. 2008).
11. Barbee v. Johnson, 665 S.E.2d 92 (N.C. Ct. App. 2008).
12. *In re* Will of Priddy, 614 S.E.2d 454 (N.C. Ct. App. 2005).
13. Prievo v. Urbaniak, 882 N.Y.S.2d 796 (App. Div. 2009).
14. *In re* Estate of Paigo, 863 N.Y.S.2d 508 (App. Div. 2008).
15. *In re* Estate of Adamo, 838 N.Y.S.2d 906 (App. Div. 2007).
16. *In re* Greenberg, 826 N.Y.S.2d 119 (App. Div. 2006).
17. *In re* Neenan, 827 N.Y.S.2d 164 (App. Div. 2006).
18. Disciplinary Counsel v. Tomlan, 885 N.E.2d 895 (Ohio 2008).
19. Ament v. Reassure Am. Life Ins. Co., 905 N.E.2d 1246 (Ohio Ct. App. 2009). Cook v. Reising, 910 N.E.2d 1 (Ohio Ct. App. 2009).
20. Lavoie v. Ne. Knitting, Inc., 918 A.2d 225 (R.I. 2007).
21. Howard v. Nasser, 613 S.E.2d 64 (S.C. Ct. App. 2005).
22. *In re* Estate of Brevard, 213 S.W.3d 298 (Tenn. Ct. App. 2006).
23. Carvalho v. Carvalho, 978 A.2d 455 (Vt. 2009).
24. Lawyer Disciplinary Bd. v. Ball, 633 S.E.2d 241 (W. Va. 2006).