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Dead Men (and Women) Should Tell Tales: Narrative, Intent, and the Construction of Wills

Karen J. Sneddon

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I. Introduction

The will is one of the most personal legal documents that an individual may ever create. The will is written in first person, present tense. Yet most wills reveal little of the person, the personality, or the personal. The inclusion of the testator's relationships with people, entities, and property does little to convey the testator's wishes, hopes, or fears. Some may assert that as a formal legal document, the will should be impersonal and be built using standardized, formulaic phrasing. Not only does such position overstate the accuracy of standardized, formulaic phrasing, but such position also ignores the foundational principle of succession: intent.

Intent is a foundational principle that is referenced in many varied aspects of succession.[1] This article will focus on the role of intent in will construction proceedings where intent is referred to as the "touchstone" and "pole star." When an issue arises as to the meaning of a provision in a will admitted to probate, the probate court must undertake a construction proceeding. Interpreting intent can and does pose problems as courts must seek to divine actual intent when the language of the will reveals little of the individual testator. All too often, courts must fall back on principles developed from attributed intent because the language of the will does not provide sufficient direction. Attributed intent, also referred to as presumed intent, is by its nature an approximation of what some decedents would like. Depending upon the circumstances and jurisdiction, the court may admit extrinsic evidence to facilitate the inquiry into actual intent. Such extrinsic evidence may be fragmentary and contradictory leading to wooden constructions or construction of false narratives.

This article posits that a will naturally forms a narrative that courts use when interpreting and construing the language of the will. This natural narrative form and tendency for courts to reference narrative during construction proceedings can be more effectively leveraged by the will-drafter in a manner that is consistent with succession's intent-serving policies. When the drafter approaches the will as a narrative and uses narrative techniques to inform the customization of what may be one of the oldest forms of legal documents, the resulting document becomes more meaningful for the testator, the beneficiaries, the personal representative, and, if needed, the court. To illustrate, this article presents standard will construction cases and ways to revise the problematic testamentary language using narrative-based drafting techniques.

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[1] *See, e.g.*, John V. Orth, *Intention in the Law of Property: The Law of Unintended Consequences*, 8 Green Bag 2d 59, 59 (2004) ("Intention is a pervasive concept in the law.").

This intent-effectuating approach to drafting promotes the ultimate implementation of the testator's intent, especially when a construction proceeding is initiated by an interested person. The construction proceeding, after all, seeks to determine and give effect to the testator's intent. The narrative-based approach to drafting will support the court's inquiry by providing more context and more meaning to the language of the will. This customization refers to the deliberate sequencing of provisions, accurately enhancing the description of the relationships and property, and even including a statement of purpose. This article acknowledges the potential dangers raised by using narrative-based drafting techniques. But, as this article stresses, narrative-based drafting does not refer to the inclusion of language that injects uncertainty and confusion in testamentary instruments. Instead, narrative-based drafting brings the person, the personality, and the personal into wills. Testators should tell tales.

II. NARRATIVE

Narratives are everywhere. Whether advertisements, novels, public awareness campaigns, or television shows, individuals are daily presented with narratives.[2] The human brain is considered to have a "predisposition to organize experience into a narrative form . . . ."[3] Individuals not only process presented narratives every day, but individuals actively construct narratives every day.[4] Individuals construct narratives about events and people they encounter.[5] Social media platforms, like

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[2] As Mieke Bal, professor of literary theory and influential scholar, wrote,

> practically everything in culture has a narrative aspect to it, or at the very least, can be perceived, interpreted as narrative. In addition to the obvious predominance of narrative genres in literature, a random handful of places where narrative "occurs" includes lawsuits, visual images, philosophical discourse, television, argumentation, teaching, history-writing.

MIEKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE 225 (3d ed. 2009); *see also* Linda L. Berger, *The Lady, or the Tiger?: A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 281 (2011) (stating that "storytelling becomes central to our ability to make sense out of a series of chronological events that we otherwise would experience as discrete and lacking in coherence and consistency").

[3] JEROME BRUNER, ACTS OF MEANING 45 (1990).

[4] *See, e.g.*, Marshall Grossman, *The Subject of Narrative and the Rhetoric of the Self*, 18 PAPERS ON LANGUAGE & LITERATURE 398, 398 (1982) ("The construction of narrative is an essential activity of the human mind."). *But see* Gérard Genette, *Boundaries of Narrative*, 8 NEW LITERARY HIST. 1, 1 (1976) (cautioning that "to accept, perhaps dangerously, the idea or the feeling that the origins of narrative are self-evident, that nothing is more natural than to tell a story or to arrange a group of actions into a myth, a short story, an epic, a novel" may be overstating the prevalence of narrative).

[5] "Individuals construct past events and actions in personal narratives to claim identities and construct lives." 30 CATHERINE KOHLER RIESSMAN, NARRATIVE ANALYSIS: QUALITATIVE RESEARCH METHODS 2 (Judith L. Hunter ed., 1993); *see also* Jerome

Facebook, Instagram, and Snapchat, encourage construction of narratives.

The narrative form is thus used to disseminate information, to process information, and to recall information. The prevalence of narratives in society and the ways in which individuals both process and construct narratives affect how testamentary instruments are composed, how they are interpreted, and how they are construed. This section will attempt to define the term "narrative" and share how testamentary instruments are narratives.

A. The Term "Narrative" Defined

The prevalence of narrative in various modes of communication can make the term difficult to define. Narrative is an intentionally malleable form that may be adapted for a variety of uses. Some may equate the term "narrative" with the word "story" or the word "tale."[6] While these words are synonyms for narrative, automatically equating the term to these words restricts the term to fiction and "make believe."[7] Such a narrative definition is not only limiting but inaccurate as narratives may draw from fictional events, non-fictional events, statistics, or a combination of all.[8] A basic definition of narrative is a series of events relayed by a narrative agent, i.e., the storyteller.[9]

This definition is broader than the identification of the four elements of fiction.[10] While some may equate "narrative" to an extensive novel with a range of characters, a particular narrative arc, and one of a set number of conflicts, these aspects of narrative need not be present in a narrative. For example, a narrative may be only one line as presented in the following famous example: "The king is dead."[11] As E.M. Forster

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Bruner, *Life as Narrative*, 71 Soc. Rsch. 691, 692 (2004) ("We seem to have no other way of describing 'lived time' save in the form of a narrative.").

6 *See, e.g.*, Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 Buff. L. Rev. 141, 145 (1997) (noting that in law the "undisciplined use" of "story," "rhetoric," and "narrative" creates both "confusion and exaggeration").

7 *See* Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 Legal Commc'n & Rhetoric 81, 82-85, 93–94 (2012) (arguing that "narrative," "story," and "storytelling" are ambiguous, overused terms and instead the appropriate term to be used is "narrativity"); *see also* Baron & Epstein, *supra* note 6, at 145.

8 *See, e.g.*, Genette, *supra* note 4, at 1 (defining narrative "as the representation of a real or fictitious event or series of events by language, and more specifically by written language.").

9 *E.g.*, Robert Scholes et al., The Nature of Narrative 4 (40th anniversary ed. 2006).

10 *See generally* David Herman, Basic Elements of Narrative ch. 1 (2009) (exploring various definitions of narrative).

11 *See* Patrick O'Neill, Fictions of Discourse: Reading Narrative Theory 18 (1994).

wrote in "Aspects of the Novel," a narrative makes the audience want to know what happens next.[12] To provide some parameters, however, narrative can be described as being comprised of two components: "the *what* of the story told and the *how* of its presentation."[13] The "what" refers to the nature of the events selected, the setting constructed, the characters developed, and the themes to be illuminated.[14] The "how" refers to medium selected, such as the selection of written text, images, sounds, or combination thereof.[15] Thus, when considering narrative, it is important to remember that narrative refers to the broader definition of the story to be told from the narrative aspects, that is, the techniques used to tell the story.

Because of the prevalence and usefulness of narrative as a method of disseminating, processing, and recalling information, the narrative form has been used in a variety of fields beyond literary theory and composition. For instance, narrative can be used in the fields of medicine and the law to both inform and persuade.[16]

In the field of medicine, narrative has been used to inform medical education, to guide doctor-patient interactions, and to structure public education campaigns.[17] Dr. Rita Charon, who first used the phrase "narrative medicine," stated that narrative helps doctors have "the capacity to recognize, absorb, metabolize, interpret, and be moved by stories of illness."[18] Focusing on narrative and narrative skills in the medical context has been found to offer three primary benefits.[19] The first benefit is

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12 E.M. Forster, Aspects of the Novel and Related Writings ch. 2 (Rosetta Books 2010) (1927).

13 O'Neill, *supra* note 11, at 13 (emphasis in original).

14 *Id.* at 13-14.

15 *Id.* at 13-17, 19-20.

16 *See* Rita Charon, Narrative Medicine: Honoring the Stories of Illness 6-13 (2006); Rita Charon, *At the Membranes of Care: Stories in Narrative Medicine*, 87 Acad. Med. 342, 342-346 (2012); *see also* John Launer, Narrative-Based Primary Care: A Practical Guide 1-5, 183-87 (2002).

17 Dr. Charon has advocated for narrative medicine and medical education training in "narrative competence," which she defines as "the set of skills required to recognize, absorb, interpret, and be moved by the stories one hears or reads." Rita Charon, Narrative and Medicine (2004), *reprinted in* Bioethics: An Introduction to the History, Methods, and Practice 202, 203 (Nancy S. Jecker et al. eds., 2d ed. 2007); *see also* Leslie J. Hinyard & Matthew W. Kreuter, *Using Narrative Communication as a Tool for Health Behavior Change: A Conceptual, Theoretical, and Empirical Overview*, 34 Health Educ. & Behav. 777, 777 (2007) (asserting that narratives are greater motivators for behavioral change than statistical evidence, probability analysis, and appeals to logic).

18 Rita Charon, Commentary, *What to Do with Stories: The Sciences of Narrative Medicine*, 53 Can. Fam. Physician 1265, 1265 (2007) (sharing reflections on the foundational principles of narrative medicine).

19 *Id.*

the increased ability for doctors and other medical professionals to process stories shared by patients.[20] The second benefit is increased ability for doctors and other medical professionals to then describe the symptoms, develop treatment plans, and express patient wishes.[21] The third benefit is the increased ability for doctors and other medical professionals to use affective responses, such as empathy, when working with the patient and others toward treatment goals.[22] These three benefits illustrate the power of narrative to help individuals process information, promote increased comprehension of information, and subsequent recall of the information. In addition, these three benefits show that narrative can help with re-telling the narrative to others but applying the concepts in the narrative to another situation.[23] Furthermore, narrative can help with encouraging future action that is inspired by the responses to the narrative.

Similar to the influence of narrative in the field of medicine, the field of law has used narrative to inform legal education, to guide lawyer-client relationships, and to facilitate public awareness campaigns. With legal education, narrative helps draw the person into the law.[24] Narrative can help lawyers engage with clients to better hear and then

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20 *Id.* at 1265-66 (describing this skill as "attention" to the narrative). The mission statement for Columbia Narrative Medicine recites as follows:

> The Division of Narrative Medicine fortifies clinical practice by training practitioners to recognize, interpret, and glean insights relevant to patient care and clinician performance from the study of humanities, the arts, and creative work. Narrative Medicine helps physicians, nurses, social workers, mental health professionals, chaplains, academics, and everyone interested in person-centered, respectful health care to deepen their self-awareness, clinical attunement, collaborative skills, and creative capacities through rigorous narrative training and practices.
>
> Our mission: to conceptualize, evaluate, and propagate these ideas and practices nationally and internationally.

Division of Narrative Medicine, COLUM. U. DEP'T OF MED. HUMANS. & ETHICS, https://www.narrativemedicine.org/about-narrative-medicine/ [https://perma.cc/B76E-HU2R].

21 *See* Charon, *supra* note 18, at 1266-67 (describing this skill as "representation" of the narrative).

22 *See id.* at 1267 (describing this skill as "affiliation").

23 *Id.*

24 *See, e.g.*, Hugh M. Mundy, *A Story Is the Truth Well Told: Integrating Narrative Thinking Skills into the First-Year Curriculum Using Live Client Pro Bono Cases*, 17 SEATTLE J. FOR SOC. JUST. 25, 27-29 (2018); Randy D. Gordon, *How Lawyers (Come to) See the World: A Narrative Theory of Legal Pedagogy*, 56 LOY. L. REV. 619, 638 (2010); Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 LEGAL COMMC'N & RHETORIC *37, *39-40 (2010).

reflect their stories.[25] With public awareness and political campaigns relating to legislative reform, narratives have been powerful influencers for change.[26]

Despite the almost thirty-year history of explorations of applicability of narrative to law, narrative and the law may still seem an unusual combination.[27] When initially describing legal documents as narratives, individuals may immediately think of litigation-based documents. Pleadings in the trial court both present a narrative and become part of a broader narrative.[28] Likewise, an appellate brief is a narrative.[29] Litigation-based documents may be perceived as the legal documents that permit the writer to use narrative techniques, such as characterization of the client, in the creating of litigation documents.[30] Indeed, litigators are frequently told to find the "theme" of the case.[31] While accurate to view litigation-based documents as narratives, these documents are only one type of the legal documents that may be considered narratives. Legal correspondence, such as emails and letters, and transactional documents

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25 *See* John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 101-02 (1999).

26 *See, e.g.*, Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1253-55 (2014); Yofi Tirosh, *Three Comments on Paternalism in Public Health*, 46 CONN. L. REV. 1795, 1815-16 (2014).

27 *See, e.g.*, Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMMC'N & RHETORIC 247, 249 (2015); Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 754-57 (2011); George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 696-99 (1999); Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808, 810 (1993).

28 *See, e.g.*, Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 3-4, 15 (2009); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 33-34, 53-54 (2014).

29 *See, e.g.*, Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 132, 162 (2008).

30 *See generally* RUTH ANNE ROBBINS ET AL., YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING (2d ed. 2019) (presenting persuasive legal writing so that the client-sought relief may be granted); Sherri Lee Keene, *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, 58 HOW. L.J. 845 (2015) (showing the importance of characterization due to the impact it may have on a jury); 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 (2006) (illustrating characterizations techniques for both the client and opposing party).

31 *See, e.g.*, Mary Ann Becker, *What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 GONZ. L. REV. 575, 580 (2011).

are also examples of legal documents that may be conceptualized and presented as narratives.[32]

One reason that some may be reluctant to consider legal correspondence and transactional documents to be narrative is because these documents are frequently considered to be examples of expository texts. Expository texts are highly structured texts that are characterized by texts that deliver information.[33] Instruction manuals are examples of expository texts. Texts are frequently a mix of different forms. All legal documents, including litigation-based documents, legal correspondence, and transactional documents, have characteristics of both expository and narrative texts.[34] Ignoring the narrative aspect does not allow the writer and the reader to fully engage with these texts. Narratives are simply a form in which information can be shared, processed, and retained. As a result, a wide range of legal documents may be narrative.

B. Classifying Testamentary Instruments as Narratives

This article focuses on testamentary instruments,[35] that is, wills and codicils.[36] As described below, testamentary instruments naturally form

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32 *See generally* Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263 (2016) (stating that conceptualizing transactions as narratives ultimately benefits the enforceability of a transactional document).

33 *E.g.*, Arthur C. Graesser et al., *What Do Readers Need to Learn in Order to Process Coherence Relations in Narrative and Expository Text?*, *in* RETHINKING READING COMPREHENSION 82, 86 (Anne Polselli Sweet & Catherine E. Snow eds., 2003); *see also* Ruth A. Berman & Bracha Nir-Sagiv, *Comparing Narrative and Expository Text Construction Across Adolescence: A Developmental Paradox*, 43 DISCOURSE PROCESSES 79, 79-80 (2007) (comparing expository texts with narrative texts).

34 *See, e.g.*, Susan M. Chesler & Karen J. Sneddon, *Happily Ever After: Fostering the Role of the Transactional Lawyer as Storyteller*, 20 TRANSACTIONS 491, 493 (2019).

35 *See generally* Olin L. Browder, *Giving or Leaving—What Is a Will?*, 75 MICH. L. REV. 845 (1977) (exploring the nature of will substitutes and wills).

36 Wills and codicils are unilateral declarations that dispose of probate property and nominate fiduciaries. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. a (AM. L. INST. 1999).

narratives.[37] Wills are often the focus of drama, both in fiction[38] and real life.[39] But wills themselves are narratives.[40] Consider what E.M. Forster also wrote of what a narrative does. He wrote, "what a story does is to narrate the life in time."[41] That narrative may be deliberately, or expressly, told. That narrative may be construed based upon presented information.

To equate a will to a narrative may appear to be stretching the meaning of a narrative.[42] But consider the following testamentary language: "All my property to Isabel." This sentence is the corollary to Forster's "The king is dead" narrative. The will's audience wants to know what property is encompassed by the language "all my property." That interest includes the monetary value, the sentimental value, and the history of acquisition. Likewise, the audience wants to know the identity of Isabel, the relationship the testator has to Isabel, and the relationship that Isabel may have with the testator's heirs. Even though such details are not referenced in the one sentence, the audience will project its own narrative when faced with such a sentence. The audience

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37 Although this article is focused to testamentary instruments, this analysis would apply to revocable trusts. For an examination of narrative and revocable trusts, see David W. Wick, *The Expressive, Protective Estate Planning Strategy: A New Paradigm for Estate Planning Design and Administration*, 27 ELDER L.J. 115, 115-16 (2019). Likewise, this analysis would apply to charitable gift agreements. *See, e.g.*, Warren K. Racusin, *How to Create a Well-Designed Gift Agreement: Donors and Philanthropic Institutions Should Work Together to Try to Mesh Their Differing Goals*, 158 TR. & EST. 40, 41 (2019). Additionally, this analysis may be applied to irrevocable trusts. *See, e.g.*, Barbara R. Grayson et al., *Drafting Trusts to Stand the Test of Time*, 158 TR. & EST. 30, 33 (2019) ("Although the settlor's intent should be clearly expressed through the trust's dispositive, distributive and administrative provisions, practitioners should also consider including a holistic articulation of the settlor's intent to guide the fiduciaries in the administration of the trust.").

38 Wills are often a critical catalyst in novels. For instance, determining whether a beneficiary survived the testator was a central aspect of Dorothy Sayers' murder mystery *The Unpleasantness at the Bellona Club*. Likewise, the lack of a testamentary gift motivates much of the character's actions in Jane Austen's *Sense and Sensibility*. *See generally* DOROTHY L. SAYERS, THE UNPLEASANTNESS AT THE BELLONA CLUB (1928); JANE AUSTEN, SENSE AND SENSIBILITY (1811).

39 *See, e.g.*, KAJA WHITEHOUSE, WHAT YOUR LAWYER MAY *NOT* TELL YOU ABOUT YOUR FAMILY'S WILL: A GUIDE TO PREVENTING THE COMMON PITFALLS THAT CAN LEAD TO FAMILY FIGHTS ch. 2 (2009); Harry Hibschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932).

40 For an examination of both real and fictional wills as cultural documents, see generally CATHRINE O. FRANK, LAW, LITERATURE, AND THE TRANSMISSION OF CULTURE IN ENGLAND 1837-1925 (2010).

41 FORSTER, *supra* note 12, at 19.

42 Wills can be part of a broader narrative. *See, e.g.*, Carolyn Grose, *Beyond Skills Training Revisited: The Clinical Education Special*, 19 CLINICAL L. REV. 489, 501 (2013) ("This story can be told through the creation and administration of wills, trusts, nonprobate instruments, guardianships, healthcare directives, and powers of attorney.")

will fill in the gaps of the narrative when the narrative is so lightly sketched.

The nature and structure of the will naturally forms a personal narrative. That is, at least in part, because making a will is a memento mori experience where the individual must confront his or her mortality, assess his or her life choices, and contemplate his or her legacy.[43] The will, for all its legal requirements, is a personal document for the individual testator.[44]

As to structure, the will begins with a first-person statement of identity and articulation of purpose.[45] The introduction, also called the exordium or preamble, begins by identifying the testator.[46] The following is a typical introduction:

> I, [insert name of the testator] of this [insert name County] and this [insert name State where the testator was domiciled at the time of the will's execution] make this will.

The first-person "I" establishes both the identity of the testator and the speaker of the document. The name is typically the full, legal name of the individual. Other names used by the testator may also be recited in the introduction too. The testator then asserts a domicile, with the place chosen to live something that often speaks to the identity of the individual. Where an individual lives also reflects an aspect of the individual's identity, either because the individual is employed in the area, has family in the area, or enjoys an activity in the area. The language proclaiming "make this will" establishes the purpose of the document. The introduction is often followed by an overture identifying the testator's family members.[47] This identifies not only individuals but relationships that are meaningful to the testator.

The dispositive provisions of the will identify property, people, and entities in the testator's life. The dispositive provisions include pre-residuary gifts and residuary gifts. The pre-residuary gifts may include general gifts and specific gifts, particularly specific gifts of tangible personal

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43 *See generally* Karen J. Sneddon, *Memento Mori: Death and Wills*, 14 WYO. L. REV. 211 (2014).

44 *See, e.g.*, Lynn B. Squires & Robert S. Mucklestone, *A Simple "Simple" Will*, 57 WASH. L. REV. 461, 461 (1982) ("A will is a highly personal document."); *see also* Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 397-98 (2011).

45 *See, e.g.*, Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665, 667-702 (2011) (exploring the historical and modern conventions for the will's introduction).

46 *E.g.*, KEVIN D. MILLARD, DRAFTING WILLS, TRUSTS, AND OTHER ESTATE PLANNING DOCUMENTS: A STYLE MANUAL 64 (2014).

47 *See, e.g.*, THOMAS L. SHAFFER ET AL., THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 197-202 (5th ed. 2007).

property. The property an individual owns can be a seen as a reflection of identity.[48] For example, the absence of any reference to books or manuscripts in the Last Will and Testament of William Shakespeare is used as evidence that the William Shakespeare of Stratford-Upon-Avon is not the author of plays.[49] The reasoning is that books and manuscripts would be critically important to any author of such a caliber.[50] When family members are provided for, such as carving out a portion for an elderly parent, the reader will assume particular traits about the testator. In the case of an elderly parent, the reader may assume that the testator served as a diligent caregiver. Similarly, when charitable gifts are provided for, the reader will assume the testator was charitable.

Likewise, identification of people and entities will be part of the narrative. The relationships formed and maintained reflect identity. For instance, marriage can be seen to be expressive,[51] meaning that who is chosen to be a life partner expresses the individual's personal fulfillment and self-development.[52] The identification of beneficiaries reveals who or what organization had a relationship with the testator. Omission of a family member also references a story. Who is identified by name compared to identified by class also references a story. The dispositive provisions may create a testamentary trust. The sequencing of these provisions can project a narrative.

The nomination provisions of the will ask individuals or entities respected by the testator to continue the testator's legal existence. These individuals or entities, as the case may be, are being asked to supervise, manage, and take care of the testator's property and loved ones. The nomination provisions show whom the testator trusted to undertake what becomes a most personal task.[53] As such, a court will typically de-

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48 *See* Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1041-50 (2001) (exploring Locke's and Hegel's theory of property and sharing that "[p]roperty expresses one's self-conception in ways that others recognize and respond to").

49 For an examination of authorship of the plays, see David Lloyd Kreeger, In re *Shakespeare: The Authorship of Shakespeare on Trial*, 37 AM. U. L. REV. 609 (1988).

50 For arguments about the potential "real" authors, see H. N. GIBSON, THE SHAKESPEARE CLAIMANTS: A CRITICAL SURVEY OF THE FOUR PRINCIPAL THEORIES CONCERNING THE AUTHORSHIP OF THE SHAKESPEAREAN PLAYS COLLECTED (2013).

51 *See, e.g.*, Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 1004-05 (1989).

52 *See, e.g.*, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 58 (2011); June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 50.

53 Arguments have been made that the testator may not have fully considered the implications of the nomination provision. For that reason, an argument may be made that the will beneficiaries should have a greater role in the ultimate appointment of the per-

fer to a testator's decision when considering the appointment of the personal representative.[54]

Even the boilerplate provisions form part of the narrative just as the mundane—yet often important—details form part of a life lived.[55] The boilerplate is often the place for key definitions that will affect how the terms of the wills are interpreted and ultimately implemented. For example, the testator may select which method of representation applies, which alters how the shares will be calculated and distributed. The testator may also select how survivorship is to be determined and whether a substituted beneficiary may be determined in the event of lapse.

The will ends with a reflection in the closing.[56] The closing, also referred to as the testimonium, appears before the testator's signature.[57] The following is an example of a modern closing of an attested will.[58]

> IN WITNESS WHEREOF, I, [insert name of testator] sign this will on [insert month, day, and year when the testator signed the will].

The closing begins with the recitation "in witness whereof," that the testator is to sign in the presence of witnesses. This reinforces the importance of the purpose of the document. The closing then repeats the statement of identity from the introduction with the use of "I" and repetition of the testator's full name. The closing concludes with the specific month, day, and year on which the document was signed. The closing underscores that an important legal document is being created.

Wills have a beginning, a middle, and an end, a noted characteristic of narratives since Aristotle's *Poetics*.[59] But even a more specific definition of narrative, which also fits the form of the will, expands upon a key characteristic of narrative. Narrative can be defined as "a rhetorical mode that consists of a telling of events linked by a cause-and-effect relationship."[60] In other words, a narrative is more than a random com-

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sonal representative. *See, e.g.*, Robert Whitman, *Commentary: A Law Professor's Suggestions for Estate and Trust Reform*, 12 QUINNIPIAC PROB. L.J. 57, 59 (1997).

54 *See generally* 31 AM. JUR. 2D *Executors and Administrators* § 183 (2020).

55 For an analysis of various critical boilerplate provisions, see Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663, 675 (2018).

56 Sneddon*, supra* note 45, at 708.

57 MILLARD, *supra* note 46, at 66.

58 The general requirements for an attested will are (1) writing, (2) signature by testator, and (3) two attesting witnesses. *See, e.g.*, UNIF. PROB. CODE § 2-502(a) (UNIF. L. COMM'N 2019) (using the term "witnessed will").

59 RIESSMAN, *supra* note 5, at 17 (referencing Aristotle's *Poetics*).

60 JACK MYERS & MICHAEL SIMMS, LONGMAN DICTIONARY AND HANDBOOK OF POETRY 206 (1985).

pilation of events. The events are selected to tell a particular story. A curated series of linked events represents what the will is. The will is not recitation of all property ever owned by the testator or all relationships that the testator has had. Instead, the will seeks to identify certain critical wishes as to the property disposition and nominations. The sequencing of these provisions is deliberate with the provisions both fitting together and building upon each other. As a result, the will can be considered a curated series of events and identification of particular individuals or entities who have both a relationship and a meaning to the testator. The will is not only a representation of the testator's wishes, but also a representation of the testator himself or herself.[61]

Although the will naturally forms a narrative, the narrative aspects can be enhanced to further the goals of the testator and estate planning more broadly. Enhancing the natural narrative aspect of the testamentary instrument benefits the testator's connection to the document, the beneficiaries' connections to the court document, the personal representative's ability to implement the terms of the will and, if needed, the court's ability to interpret the will.[62] Narrative-techniques can help the beneficiaries recognize the testator's voice.[63] These techniques include, but are not limited to, the sequencing of provisions, the description of property, people, and entities; and the inclusion of expressive language.[64] Precatory language, such as "hope," "wish," and "desire," are examples of expressive language,[65] but expressive language refers to a broader category of phrasing.[66] Expressive language[67] refers to a wide

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61 Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 400 (2012); *see also* Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 311 (2016).

62 Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 698-710 (2011).

63 *See, e.g.*, ROBERT A. ESPERTI & RENNO L. PETERSON, LOVE, MONEY, CONTROL: REINVENTING ESTATE PLANNING 8 (Eileen Sacco et al. eds., 2004) ("Estate planning also lets people have one last 'conversation' with the ones they love.").

64 *See* Susan M. Chesler & Karen J. Sneddon, *Telling Tales: Transactional Lawyer as Storyteller*, 15 LEGAL COMMC'N & RHETORIC 119, 127-42 (2018) (presenting practical drafting techniques that leverage the power of narrative).

65 For an analysis of the use of precatory language in wills and its gendered dimensions, see Alyssa A. DiRusso, *He Says, She Asks: Gender, Language and the Law of Precatory Words in Wills*, 22 WISC. WOMEN's L.J. 1, 35-36 (2007).

66 For an examination of the language of wills and J.L. Austin's philosophy of language, see Diane J. Klein, *How to Do Things with Wills*, 32 WHITTIER L. REV. 455, 480-81 (2011).

67 *See generally* Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1566-67 (2015) (explaining how expressive language "provides supplemental language to . . . explain a provision in a Will"); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 380-81 (2011) (explaining the contribution that expressive language brings to drafting a will).

range of language choices that provide explanation or enhanced descriptions beyond what is legally required.[68] The expressive language may reference directly or indirectly events, property, or people who relate to the overall narrative of the will.

Recognizing the narrative nature of wills and considering enhancing the narrative aspects in wills is consistent with succession's intent-serving policies. Intent-serving policies have been at the heart of recent re-evaluations, modifications, and reforms of existing doctrines in all aspects of succession.[69] How to update intestate succession statutes,[70] whether to expand the forms of permissible wills,[71] and how to modify irrevocable trusts[72] are just a few examples of re-evaluations in light of intent-based policies. How to harmonize intent-effecting approaches across all aspects remains elusive.[73]

Consideration of narrative reinforces the importance of form and choice of language. Form and language play a central place in the law of wills.[74] In the infamous formulation, Professor Gulliver and Professor Tilson pose the question as follows: "Does this remark indicate finality of intention to transfer, or rambling meditation about some possible fu-

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68 Explanations may be provided for a variety of reasons. In arguing for intent-defeating rules in succession, Professor Kreiczer-Levy argues, "intent-defeating rules in inheritance encourage the testator to give reasons, design a full and complete distributive plan, disclose information and opinions in the nature of the relations, and generally assure responsibility for consequences to others." Shelly Kreiczer-Levy, *Deliberate Accountability Rules in Inheritance Law: Promoting Accountable Estate Planning*, 45 U. MICH. J.L. REFORM 937, 938 (2012).

69 The first of the four themes for the 1990 Uniform Probate Code was "the decline of formalism in favor of intent-serving policy." UNIF. PROB. CODE Prefatory Note (UNIF. L. COMM'N 2019). For an argument about prioritizing intent over the formalities, see Jeffrey Daniel Haskell, Note, *When Axioms Collide*, 15 CARDOZO L. REV. 817, 820-21 (1993).

70 *See, e.g.*, Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 78-79 (2009).

71 *See, e.g.*, Anne-Marie Rhodes, *Notarized Wills*, 27 QUINNIPIAC PROB. L.J. 419, 430 (2014).

72 *See, e.g.*, Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 263 (2015).

73 *See, e.g.*, Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 915 (1992) ("Although the 1990 UPC strives for consistency when administering the intent-serving policy, it does not always demonstrate accurately what the intent-serving result should be."). Professor Kreiczer-Levy argues that succession should also consider "intent-defeating rules" that would "promote a responsible and accountable estate planning procedure." Kreiczer-Levy, *supra* note 68, at 938.

74 David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 78-79 (2012) (stating that "testation is deeply expressive").

ture disposition?"[75] "Remark" refers to the language used. Interpretation and construction of the will requires analysis of the language used.

III. The Role of Intent in Succession

Intent is by no means a legal concept that is only applicable in the area of succession.[76] Intent is the "touchstone" or "pole star"[77] in succession. More than that, intent is the foundational principle for the U.S. system of succession.[78]

The Uniform Probate Code and the Restatement are replete with references to intent. The word "intent," or variations thereof,[79] is used 221 times in the Uniform Probate Code.[80] The Uniform Probate Code proclaims that one of its purposes is "to discover and make effective the intent of a decedent in distribution of the decedent's property."[81] In the Restatement (Third) of Property: Wills and Other Donative Transfers, the word "intent," or variations thereof, is used over 200 times.[82] As recited by the Restatement, "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."[83]

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75 Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 3 (1941).

76 The entry for "intent" in the Eleventh Edition of *Black's Law Dictionary* includes nineteen entries. In addition to listing testamentary intent and donative intent, the entry also includes criminal intent and legislative intent. *Intent*, Black's Law Dictionary (11th ed. 2019).

77 II James Schouler, Law of Wills Executors and Administrators § 855, at 967 (Arthur W. Blakemore rev., 6th ed. 1923) ("[T]he plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy or of statute prohibition. . . . Courts have spoken of such intention as the 'law,' the 'pole star' or the 'sovereign guide,' . . . ."); *see also* Daniel H. Redfearn, A Practical Treatise on the Law of Wills and the Administration of Estates in Georgia § 129 (1923) ("The cardinal rule of construction is that the intention of the testator shall govern so far as that intention is legal, however unjust the will may appear.").

78 *See* Alison Reppy & Leslie J. Tompkins, Historical and Statutory Background of the Law of Wills: Descent and Distribution, Probate and Administration 47-48 (1928) (summarizing the history of freedom of disposition in the United States).

79 The count includes use of the words "intent," "intention," "intentional," "intentionally," and "unintentionally."

80 Unif. Prob. Code (Unif. L. Comm'n 2019). This count includes use of the word in the code provisions and the comments.

81 *Id.* § 1-102(b)(2).

82 *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers (Am. L. Inst. 2003).

83 *Id.* § 10.1. *But see* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 Ariz. L. Rev. 235, 236-37 (1996) (asserting that courts may twist intent-effecting doc-

For all the reference to the word "intent" in the area of succession, the meaning of the word and the nature of the inquiry varies depending upon the context.[84] The word "intent" itself may refer to a number of things. For instance, the word "intent" could refer to a design or purpose.[85] The word "intent" could also refer to a state of mind.[86] Another meaning of "intent" refers to a clear plan.[87] As an adjective, the word "intentional" could mean deliberate or measured.[88]

The multi-faceted nature of the word "intent" is evidenced in the various contexts in which the word appears in succession. Intent appears in the context of creating a valid will[89] and identifying what components constitute the valid will.[90] Intent appears in the context of validly revoking a will.[91] Intent also appears in the slayer statute with focus on an intentional and felonious killing.[92] The phrase "intent-effecting doctrine" is used to refer to ademption by satisfaction,[93] pretermitted heir statutes,[94] and republication by codicil.[95] Prefacing the word "intent" with a modifier does not necessarily clarify the meaning.

The term "testamentary intent," for instance, can have slightly different meanings. The law starts to use "testamentary intent" to refer to

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trines to undermine the testator's intent to favor socially preferred dispositions of property).

84 *See generally* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988) (discussing issues courts must consider when determining nature of inquiry of word "intent" in area of succession); Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305 (2011) (explaining circumstances in which inquiry will extend beyond document's face).

85 *Intent*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/intent [https://perma.cc/2W5S-LNJH]; *see also* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 61 (2009) (equating "intention" with "plan").

86 MERRIAM-WEBSTER, *supra* note 85.

87 *Id.*

88 *Id.*

89 *E.g.*, UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019) (harmless error rule). Even the signature must be done with the "intent" to authenticate. *Id.* § 1-201(45) (defining "sign").

90 *E.g.*, *id.* §§ 2-510, -513.

91 *E.g.*, *id.* § 2-507(a)(2). The comments to this section state, "To effect a revocation, a revocatory act must be accompanied by revocatory intent." *Id.* § 2-507 cmt.

92 *See, e.g.*, *id.* § 2-803(b).

93 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.4 cmt. a (AM. L. INST. 1999) ("The doctrine of ademption by satisfaction is an intent-effecting doctrine.").

94 *See, e.g.*, *id.* § 9.6 cmt. i (noting that pretermitted heir statutes only apply in the absence of contrary intent).

95 *See, e.g.*, *id.* § 3.4 cmt. b (using the phrase "intent-effecting doctrine").

different concepts.[96] The term "testamentary intent" may also be used to refer to the "animus testandi."[97] That is the understood general requirement that an individual who is attempting to create a valid will understands that he or she is creating a legal document that disposed of property upon death.[98] Part of the confusion may be the law's insistence that "no particular words are necessary to show a testamentary intent."[99] A will does not need to bear a title or use any "magic words."[100] The intent is to be divined by individuals and entities who were unlikely to be present when the document was created or have first-hand knowledge of the circumstances under which the document was created.

The same term, "testamentary intent," has another meaning. "Testamentary intent" may refer to the testator's intent to make choices as to the disposition of his or her property or the nominations of his or her fiduciaries. This intent may be expressed by the language choices in the document. Or, if the jurisdiction permits, additional evidence may be used.[101] This additional evidence is referred to as extrinsic evidence because the evidence is external to the language of the will.[102]

The focus on the meaning of the language and, if permitted, the consideration of circumstances external to the will, is considered an inquiry into the testator's "actual intent."[103] In other words, the inquiry is what the particular testator wished to have happen with the disposition of his or her property in light of the particular language used and the particular extrinsic evidence.

Where the language of the will is considered to be inadequate, such as when the language is ambiguous or the provisions fail to take into

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96 Professor Mark Glover has proposed a taxonomy of intent that would parse the different aspects of intent, such as distinguishing between operative testamentary intent and substantive testamentary intent. Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 588-89, 595-96 (2016).

97 *Animus testandi*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that "animus testandi" is Latin for "testamentary intent"); *see* Glover, *supra* note 96, at 571.

98 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. g ("Whether the decedent executed a document with testamentary intent is a question of fact on which evidence of intention may be considered.").

99 Mitchell v. Donohue, 34 P. 614, 615 (Cal. 1893).

100 *See, e.g.*, MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA § 7:5 (2019) ("As no particular form of words is necessary to constitute a will, any writing expressing the intention of the testator and duly executed may be a will, provided it is intended by such instrument to convey no interest until after death.").

101 *See, e.g.*, N.J. STAT. ANN. § 3B:3-33.1 (West 2020).

102 *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 (AM. L. INST. 2003).

103 *Id.* § 10.2 cmt. a ("The donor's intention is sometimes referred to in this Restatement as the donor's *actual* intention, in order to contrast it with the intention that is *attributed* to the donor by an applicable constructional preference or rule of construction.") (emphasis in original).

account changes of circumstances, the focus shifts from "actual intent" of the testator to the "presumed intent" of general testators.[104] Presumed intent is an "attributed intent."[105] The court then references the rules of construction, which are built upon presumed intent.[106] This need to rely upon presumed intent nevertheless continues the focus of succession on intent. As Professor Katheleen Guzman wrote, "[i]ntent is indisputably the heart of the will."[107] Judicial assistance is sometimes needed to determine what was the testator's intent and what the testator's intent means as to the implementation of the terms of the will.[108]

IV. Construction Proceedings

The following quote is well-known by estate planners and scholars: "Death is not the end. There remains the litigation over the estate."[109] Litigation may occur at various stages involving the estate. For a will to have legal effect, all of the following must occur:

1. the purported will must have been properly created by a testator with the requisite capacity;[110]
2. the purported will must not have been not properly revoked;[111]
3. the purported will's existence is known to someone other than the testator such that its existence is discoverable after the testator's death;[112]

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104 *See id.* § 10.2 cmt. i.

105 *See id.* § 10.2 cmt. a (using the term "attributed intent" rather than "presumed intent").

106 *See, e.g.*, Glover, *supra* note 96, at 596.

107 Guzman, *supra* note 84, at 309; *see also* Katheleen Guzman, *Wills Speak*, 85 Brook. L. Rev. 647 (2020).

108 *See* Glover, *supra* note 96, at 570.

109 Ambrose Bierce, The Collected Works of Ambrose Bierce, Volume 8, at 167 (Aeterna 2010).

110 For an examination of the formalities, see generally John V. Orth, *Wills Act Formalities: How Much Compliance is Enough?*, 43 Real Prop. Tr. & Est. L. J. 73 (2008). *See also* James Lindgren, *The Fall of Formalism*, 55 Alb. L. Rev. 1009, 1023 (1992); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. Pa. L. Rev. 1033, 1334 (1994); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. Rev. 541 (1990); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 491 (1975).

111 In general, a will may be revoked by subsequent writing executed with the requisite formalities or by physical act on the original will. *See, e.g.*, 20 Pa. Cons. Stat. § 2505 (2020). Revocation may also occur by operation of law. For an examination of revocation by operation of law as a result of divorce, see Naomi R. Cahn, *Revisiting Revocation Upon Divorce*, 103 Iowa L. Rev. 1879, 1883 (2018).

112 States do have procedures to handle "lost" wills. *See, e.g.*, Okla. Stat. tit. 58, § 82 (2020) ("No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator or is shown to have been

4. the original[113] purported will must be located after the testator's death within a set period of time;
5. the original purported will must be properly submitted to the relevant probate court;[114]
6. the original purported will must admitted to the probate court as the valid will;[115] and,
7. the testator died owning probate property.[116]

These steps determine the legal validity of the document that has the ability to direct the transfer of property ownership. Some have argued that a more expansive and forgiving view of the Wills Act formalities and compliance with the Wills Act formalities support the testator's intent to transfer ownership of his or her property.[117] The Wills Act formalities have become increasingly streamlined[118] and the arguments supporting the harmless error rule,[119] which might be described as a per-

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fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."). If a "lost will" is proven, a copy of may be admitted to probate. *See, e.g.*, *id.*

113 When the testator has executed duplicate original wills, issues can arise when only one of the two duplicates is located. In certain circumstances, a copy of a will may be probated if evidence suggests that the will was "lost" without the intent of being revoked. *See* Lonnie Beard, *Questioning the Practice of Executing Duplicate Original Wills*, 2013 ARK. L. NOTES 1030 (2013).

114 *E.g.*, ALA. CODE § 43-8-162 (2020). For an examination of the competing policy considerations in determining the validity or invalidity of submitted wills, see Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016).

115 As articulated in the Restatement, "the term *probate estate* or *probate property* refers to assets subject to administration under applicable laws relating to decedents' estates, unless the context indicates that the term 'probate' refers to the procedure of 'probating' (proving) a decedent's will." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. a (AM. L. INST. 1999). Thus, when the will is "probated," the court has determined the will to be valid. *See id.*

116 For an examination of nonprobate property, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). For an examination of the newest will substitutes, i.e., the transfer upon death deed, see Danaya C. Wright & Stephanie L. Emrick, *Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide*, 78 MD. L. REV. 511 (2019).

117 *See* Jeffrey A. Dorman, *Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule*, 30 QUINNIPIAC PROB. L.J. 36, 37 (2016) (concluding that Connecticut should "admit wills to probate that are noncompliant but represent a testator's testamentary disposition."). *But see* David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 573 (2017) (noting that "[e]lectronic wills vividly illustrate why policymakers cannot calibrate formalities with the sole objection of facilitating a decedent's intent.").

118 For an examination of "testamentary formalism," see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1060-1114 (1996).

119 The harmless error rule provides that if the purported will does not strictly comply with the formalities, the document may nevertheless be admitted to probate if clear

missive interpretation of the formalities,[120] has garnered much attention.[121] More wills would probably be admitted to probate if compliance with the formalities was relaxed.[122] Relaxing the formalities or compliance with the formalities, however, focuses on the creation of a legally enforceable document. The Wills Act formalities are not the only way to support the testator's intent.[123] Not only must the document be admitted to probate,[124] the language of the document must accurately express the testator's intent.[125] In other words, creation and funding are only two potential problems that may arise.

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and convincing evidence shows that the decedent intended the document to be his or her will. *See* UNIF. PROB. CODE § 2-503 (UNIF. L. COMM'N 2019). In contrast, the substantial compliance doctrine provides that if the purported will does not strictly comply with the formalities, the document may nevertheless be admitted to probate if clear and convincing evidence shows that the functions of the formalities were meet. For a discussion on substantial compliance, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975). For an examination of the three methods of measuring compliance (i.e., strict compliance, substantial compliance, and the harmless error rule), see Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337 (2017).

120 *See generally* Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3 (2016) (exploring the courts' use of the clear and convincing standard in the context of compliance with the formalities and reformation); Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills*, 64 S.C. L. REV 403 (2012) (highlighting the opportunities and problems presented by reformation).

121 *See, e.g.*, Horton, *supra* note 117. *But see* Peter T. Wendel, *Wills Act Compliance and Harmless Error Approach: A Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337 (2017) (arguing that probate courts may take less formulistic approaches to both compliance with the wills act formalities and reformation).

122 For an examination of testacy and intestacy, see Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012); Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009).

123 *E.g.*, John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1 (2012). *See also* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 328 (2018) (arguing that formalism results in donative errors that disproportionally affect those who are already experiencing social or economic disadvantages); Guzman, *supra* note 84, at 308 (stating that an understanding of intent "is more critical now than ever given the enhanced role that intent plays in reducing a will's formalities and tempering or even excusing documentary defects"); Jane B. Baron, *Fixed Intentions: Wills, Living Wills, and End-of-Life Decision-Making*, 87 TENN. L. REV. 375, 412-16 (exploring how the fixed intention paradigm in both wills and living wills may be limiting the expression of actual, accurate, and current of individuals).

124 *See, e.g.*, Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 82, 589, 595 (2016) (presenting a taxonomy of intent that consists of "donative testamentary intent," "operative testamentary intent," and "substantive testamentary intent").

125 As Professor Glover argues, policy makers

The testator's wishes expressed within the properly-created will must be interpreted in order to implement the wishes. This implementation requires the appropriate interpretation of the language, as the will could be considered a series of instructions.[126] In order to be substantively operative, the language of the will, which has been referred to as the contents of the will,[127] must accurately and completely dispose of the testator's probate property.[128] The contents of the will may include mistakes, have gaps in provisions, use ambiguous phrasing, or be outdated when considering changes in the testator's personal and financial circumstances. This raises the roles of the personal representative, the beneficiaries, and the court.[129]

A. The Term "Construction" Defined

Ideally, a will would not be the subject of a construction proceeding. Lawyers should strive to make the intent of the testator clear such that judicial involvement is not needed. As one scholar wrote, "[a] well-drafted will should contain an express provision resolving each anticipated problem. Such wills need no statutory rules of construction."[130] Such aim may be unattainable.

The ability of the will to be substantively operative is hampered by language. Even though legal terminology and vocabulary is considered

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> should consider both the benefits and the costs of authenticating a will in which the testator's intent is expressed. One the one hand, accurate will-authentication decisions produce the benefit of fulfilling the testator's intent. On the other hand, the court's task of deciphering the testator's intent can generate costs in the form of time, money, and effort expended during the probate process.

Mark Glover, *The Timing of Testation*, 107 KY. L.J.221, 223-24 (2018).

126 In some instances, the court may need to interpret the language of a document to determine whether the individual intended to create a will at all. *See* RADFORD, *supra* note 100, § 7:5 (focusing on the construction proceeding that occurs after the will has been admitted to probate).

127 *See, e.g.*, PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 92 (2d ed. 1994) (referring to "content and construction of wills"); *see also* REPPY & TOMPKINS, *supra* note 78, at 22 (describing an internal mistake relating to the contents of the will as "those cases in which the testator has full knowledge of the contents of the will, but fails to understand the legal effect of the various provisions.").

128 *See, e.g.*, Guzman, *supra* note 84, at 307 (noting that "testamentary intent is central to a document's admission to probate and its construction thereafter").

129 For a summary of the origins and development of probate courts in the United States, see Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965 (1943), *reprinted in* LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW: INCLUDING A MODEL PROBATE CODE AND MONOGRAPHS 385 (1946). For a more recent exploration of probate courts, see PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS 145-50 (2003).

130 Richard W. Effland, *Will Construction Under the Uniform Probate Code*, 63 OR. L. REV. 337, 348 (1948).

to be precise, language itself is inexact.[131] As articulated by John Wigmore, "[w]ords *always* need interpretation."[132] This interpretation is a search for meaning. But, as was described, "interpretation is far more than a dictionary translation of words."[133]

Historically, a distinction existed between use of the term "interpretation" and the term "construction."[134] As one commentator in 1936 asserted,

> There is a substantial difference between construction and interpretation, the latter being employed for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression. Before construction of a will can take place, interpretation must be resorted to, if there is doubt as to the testator's meaning from the words used.[135]

While the distinctive use of the words "interpretation" and "construction" may be lost today, the two steps to the process still occur in the judicial proceeding. The court would first start with the inquiry about the meaning of the words used to determine the testator's actual intent.[136] An interested party may raise the issue that the words are am-

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131 *See* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 290-398 (1963); Susan N. Gary, *Definitions of Children and Descendants: Constructing and Drafting Wills and Trust Documents*, 5 EST. PLAN. & CMTY. PROP. L.J. 283, 287 ("The difficulty donors face is that words are slippery.").

132 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 404 (1923) (emphasis added). For a further examination of interpretation in wills, see Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CAL. L. REV. 921 (1964); Richard W. Power, *Wills: A Primer of Interpretation and Construction*, 51 IOWA L. REV. 75 (1966).

133 Daniel M. Schuyler, *The Art of Interpretation of Wills*, PROBATE IN MIDCENTURY: TRANSITION, TAXATION & TRENDS 101 (1975).

134 GEORGE W. THOMPSON, THE LAW OF WILLS AND THE MANNER OF THEIR DRAFTING, EXECUTION, PROBATE AND INTERPRETATION TOGETHER WITH TESTAMENTARY FORMS 269 (2d ed. 1936); *see also* SCHOULER, *supra* note 77, § 837, at 942 ("It is sometimes said that there is a difference between rules governing the interpretation of wills which are universal, and rules governing their construction which are local in origin and operation and there can be no judicial construction of a will until the interpretation of the words used is ascertained."). For an exploration of the distinction as relates to constitutional law, see Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

135 THOMPSON, *supra* note 134, at 269.

136 *Id.* at 270 ("The purpose of construction and interpretation being the ascertainment of the testator's intention, it follows that where such intention is expressed in the will in clear and unequivocal language, there is no occasion for judicial construction and interpretation, and it should not be resorted to or allowed.").

biguous or even suggest that the words should have an alternate meaning.[137] As to the court's role,

> [i]n interpretation it is the duty of the court to bring the written expression of the testator in harmony with the intention, and if the language of the will is plain and unambiguous, no rules of construction are required to aid in its interpretation, and the usual and ordinary meaning will be given to the words and terms unless a contrary meaning be clearly shown by the context.[138]

Only if the meaning is unclear should the court then use the rules of construction to determine the meaning and consequences of the words.[139] Indeed, "[w]ills are frequently inartificially drawn, and for this reason they should receive greater liberality of construction than is to be given to ordinary legal instruments . . . ."[140] As seemingly complete and thorough the will's language may be, instances arise when the language of the will has gaps, includes mistakes, has ambiguities, or does not reflect the present circumstances. For instance, a word processing error may have resulted in a typographical glitch that omitted part of a provision. In those instances, the language of the will must be construed. The description of a beneficiary or an item of property make lack sufficient detail to allow for proper identification. Or an identified beneficiary may have predeceased the testator or an identified item of property may have been sold, lost, stolen, or given away.

When a question arises about the meaning of the words of the will, a construction proceeding is needed.[141]

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137 *See, e.g.*, Schuyler, *supra* note 133, at 101 (stating "that frequently even very carefully drawn clauses are not free from ambiguity").

138 THOMPSON, *supra* note 134, at 270-71; Lee-ford Tritt, *The Stranger-to-the Marriage Doctrine: Judicial Construction Issues Post-*Obergefell, 2019 WIS. L. REV. 373.

139 *See, e.g.*, THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLE OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES 807 (2d ed. 1953) ("When the intention is not apparent from these sources, the will should be construed in accordance with the rules of construction adopted by the courts.").

140 *In re* Glavkee's Estate, 34 N.W.2d 300, 305 (N.D. 1948).

141 "If this process fails to disclose the testator's intent, construction of the will is the next step. Construction in contrast to interpretation, is the process of attributing intention to the words used by the testator with the aid of the rules of construction and constructional preferences." Richard F. Storrow, *Dependent Relative Revocation: Presumption or Probability?*, 48 REAL PROP. TR. & EST. L.J. 497, 526 (2014).

B. The Nature of Construction Proceedings

The personal representative[142] or any interested party may petition[143] the probate court or other relevant court[144] for a construction proceeding.[145] More accurately, the party is petitioning the relevant court for construction and direction.[146] A petition typically includes a prayer for relief that asks "[t]hat the court construe the will of _____ and direct petitioner to whom, and in what manner" the property should be distributed.[147] When warranted, the court may itself begin a construction proceeding if required for the resolution of an issue in administration.[148] The costs of the proceeding may be (1) charged against the estate or (2) the petitioning parties as the court determines to be fair and reasonable.[149]

In a construction proceeding, the foundational principles of freedom of disposition continue.[150] As the Restatement provides,

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142 The Uniform Probate Code defines the "personal representative" as including the "executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status." UNIF. PROB. CODE § 1-201(36) (UNIF. L. COMM'N 2019).

143 *See, e.g.*, GA. CODE ANN. § 23-2-92 (2020) ("In cases of difficulty in construing wills, in distributing estates, in ascertaining the persons entitled, or in determining under what law property should be divided, the representative may ask the direction of the court, but not on imaginary difficulties or from excessive caution.").

144 Depending upon the jurisdiction, the petition may be filed in the probate court or superior court. *See, e.g.*, GA. CODE ANN. § 9-10-30. This authority must be statutorily authorized. For instance, the New York Surrogate's Court has had the power authorized by statutes to construe wills since 1879. *See* 1 WILLIS E. HEATON, THE PROCEDURAL AND LAW OF SURROGATES' COURTS OF THE STATE OF NEW YORK 213 (1909) (noting the power came originally from the courts of equity).

145 *See, e.g.*, ARK. CODE ANN. § 28-26-101(b) (2020). This proceeding has been substantially the same for approximately 100 years. For instance, Model Probate Code § 60 provides as follows:

> The court in which a will is probated shall have jurisdiction to construe it at any time during the administration. Such construction may be made on the petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to interested persons.

SIMES & BASYE, *supra* note 129, at 88-89.

146 For a form petition, see RADFORD, *supra* note 100, § 17:136.

147 *Id.* § 17:136(e) (explaining that the blank line in the sentence comes from the original source and indicates where the name of the testator would be).

148 *See id.* § 17:136.

149 *E.g.*, GA. CODE ANN. § 53-7-78.

150 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) (linking the focus on intent with the freedom of disposition). The freedom of disposition is not unlimited. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 (AM. L. INST. 2011);

> American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention.[151]

The construction proceeding then turns to implementing the testator's intent. But the court may limit the evidence that it may consider during the construction proceeding.

1. *The Goals of Construction Proceedings*

The goals of the construction proceeding are straightforward and twofold:[152] "to determine and give effect to the testator's intent."[153] Yet, these goals are difficult to accomplish. As the U.S. Supreme Court wrote, "[n]o two wills, probably, were ever written in precisely the same language throughout; . . . it would be . . . unjust to expound the will of one man, by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it."[154] Nonetheless, the court must attempt to achieve these goals and does so by referencing a two-step process.[155]

The court's first step is to interpret the language of the will, which focuses on the words of the will itself.[156] This inquiry is often described as an inquiry into actual intent. In this context, intent refers to the testa-

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see also Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643-44 (2014); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1128, 1133 (2013).

151 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003); *see also* Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977 (2010) (identifying problems of identifying and implementing donor intent in the context of charitable trusts).

152 *See, e.g.*, Peter B. Tiernan, *Understanding the Limits of and Exceptions to Intent*, 88 FLA. B.J. 39, 39 (2014) (describing the rule that an "individual's intent controls" to be one that "seems pretty straight forward" but "continues to be a challenge").

153 *E.g.*, CRAIG HOPPER & D'ANA H. MIKESKA, O'CONNOR'S TEXAS PROBATE LAW HANDBOOK § 3 (2021). The goal may also be phrased as follows: "In construing a will, the purpose of the courts is to discover and give effect to the intent of the testator." Fenzel v. Floyd, 347 S.E.2d 105, 107 (S.C. Ct. App. 1986).

154 Bosley v. Wyatt, 55 U.S. 390, 397 (1852).

155 *See, e.g.*, ATKINSON, *supra* note 139, § 146, at 809 (using the phrase "two processes" to distinguish between interpretation and construction).

156 *See also id.*, § 146, at 807 ("If possible, a will should be interpreted according to its terms viewed in the light of the general circumstances surrounding the testator in order to effectuate his intention.").

tor's wishes regarding the handling, management, and disposition of his or her property. Only "[i]n the absence of a finding of contrary intention, [do] the rules of construction . . . control the construction of a will."[157] Thus, the court begins by reviewing the "four corners" of the document.[158] As one commentator wrote, "[i]n wills, therefore, a testator's meaning is the great criterion, so far as mere interpretation is concerned. What he [or she] intended the courts strain to discover."[159]

This raises the concern about whose intent is being determined. The testator is the speaker of the will but is not the author. Although, as one scholar described, a will "purports to set forth the ideas and desires of one person."[160] The language of a will is seldom, if ever, the exclusive choice of the testator. Even if the testator were to draft his or her own will, the language used will be drawn from form books or even commonly-held perceptions about what a will should sound like. Often, the will is written by a lawyer who draws upon forms and form books.[161] The testator must accurately convey his or her wishes to the lawyer who must then accurate translate those wishes into legally operative language.[162]

2. *Selected Canons of Construction Highlighted*

The interpretation of language poses problems. As one composition scholar wrote, "[w]ords alter and are altered by surrounding words in a sentence as well as shifting in meaning over time and context, or historically."[163] To bring both guidance and predictability to construction pro-

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157 UNIF. PROB. CODE § 2-601 (UNIF. L. COMM'N 2019). The previous version of this section began with the following sentence: "The intention of a testator as expressed in his [or her] will controls the legal effect of his [or her] dispositions." UNIF. PROB. CODE § 2-601 cmt. (UNIF. L. COMM'N 2010). The Editors' Note clarified that "[d]eleting this section did not signify a retreat from the widely accepted proposition that a testator's intention controls the legal effect of his or her dispositions." UNIF. PROB. CODE § 2-601 Editors' Note (UNIF. L. COMM'N 2019).

158 *E.g.*, THOMPSON, *supra* note 134, at 277; *see also* Hood v. Todd, 695 S.E.2d 31, 32 (Ga. 2010) (using the phrase "four corners").

159 SCHOULER, *supra* note 77, § 849 at 957.

160 Richard R. Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 207 (1939).

161 *See, e.g.*, Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 243, 244-245 (2017) (summarizing the use of forms and formbooks in transactional practice).

162 *See, e.g.*, Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 645 (1992) ("[C]ommonly, the language of a will is the testator's only by adoption; he [or she] forms an intention that he [or she] communicates to his [or her] lawyer, and he [or she] relies upon the lawyer to draft the appropriate language.").

163 DARSIE BOWDEN, THE MYTHOLOGY OF VOICE 68-69 (Charles I. Schuster ed., 1999) (quoting M.M. BAKHTIN, THE DIALOGIC IMAGINATION).

ceedings, rules and canons of constructions have developed.[164] These rules and canons, however, are to serve as helpful guides rather than mandatory rules.[165] The following are examples of canons of will construction.

i. *Determining the Meaning of Words*

The words of the will are to be given their standard meaning.[166] This means that unless the will provides otherwise, words will not be given an idiosyncratic meaning.[167] Words will have their ordinary meaning. For example, the word "monies" would not be interpreted to refer to real property.[168]

When those words are terms of art, the words will be given their standard legal meaning.[169] For instance, the word "heir," unless otherwise defined in the will, will be defined by referencing the relevant state's intestate succession statute and applying the statute to the testator's family. For instance, the definitions section of a will may provide a definition of "descendants," "survive," or "representation" than would typically be read in reference to the applicable state statutes.[170]

Conflict can arise when terms of art may not correspond with what is considered to be the testator's intent. As one commentator noted, "the testator's intention[,] as gathered from the will shall prevail against the technical meaning of words or phrases, so far as may consist, at least, with the rules of sound policy, and however imperfectly such intention was in a technical sense expressed."[171]

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164 As one treatise described, "the courts have laid down certain more or less artificial and arbitrary canons or rules of construction, which are actually devices for securing uniformity of decision and for giving effect to the probable intent of the testator when the will fails to give any sufficient indication of his or her actual intent." 18 FLA. JUR. 2D *Decedents' Property* § 318 (2020).

165 *See, e.g.*, 27B CARMODY-WAIT 2D *Construction and Interpretation of Wills* § 162:33 (2020) ("They are not hard and fast rules, like rules of property, to be applied rigidly in every case.").

166 *See, e.g.*, SCHOULER, *supra* note 77, § 865, at 984.

167 *See, e.g.*, *id.* § 865, at 985 (stating that "the court will give the words of the will a meaning other than their ordinary meaning when necessary to find a rational scheme of disposition and a secondary meaning which the testator himself [or herself] attached to them may be given") (citations omitted).

168 *See, e.g.*, *In re* Hinds, 61 N.Y.S.2d 748, 749 (App. Div. 1946) ("The general rule is that a simple bequest, in the absence of anything in the context to show that the word 'money' is used out of its ordinary or popular signification, will not include personal estate in general, but will be confined to money strictly so called.").

169 *See, e.g.*, SCHOULER, *supra* note 77, § 868, at 987.

170 *E.g.*, 11 DONALD J. MALOUF ET AL., WEST'S TEX. FORMS, ESTATE PLANNING § 9:5 (4th ed. 2020) (cautioning that "[d]rafters should use definitions that are appropriate for the client's will").

171 *See, e.g.*, SCHOULER, *supra* note 77, § 868, at 988.

ii. *Interpreting the Will as a Whole*

As Justice Holmes wrote, "[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."[172] The context thus becomes important in determining the meaning of the language. The language of the will is to be interpreted as part of an entire document rather than interpreting the phrasing in isolation.[173]

This canon means that the overall testamentary scheme will inform the construction of individual provisions.[174] In addition, the court will give consistent meaning to phrasing used in different provisions. Courts do recognize that when used under different circumstances with a different context, the same words may express different intentions.[175] But in general, words will be given consistent meaning throughout. This requires the court to consider how a word or phrase may be used in multiple provisions and how the provisions relate to each other. For example, if the word "descendants" is used in two different provisions of the will, the same meaning will apply. Likewise, the inclusion of particular phrasing in one provision and the absence of that particular phrasing in another provision will be construed to reflect a change in the testator's intent. For instance, if one gift of tangible personal property provides for an alternate beneficiary and another gift of tangible personal property does not provide for an alternate beneficiary, the court will not assume that the testator wanted an alternate beneficiary for the second gift of tangible personal property.

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172 Towne v. Eisner, 245 U.S. 418, 425 (1918) (analyzing constitutionality of a tax statute).

173 *See, e.g.*, 64 CAL. JUR. 3D *Construction and Interpretation* § 368 (2020); SCHOULER, *supra* note 77, § 898, at 1031. A commentator described the approach in Florida, which is consistent with the approach of other states, as follows:

> Florida law is very clear that isolated words, phrases, and even paragraphs are not the determining factors regarding someone's intent. The whole document must be considered. The overall plan or scheme gleaned from a reading of the entire instrument sets forth the tone of how specific provisions should be construed.

Tiernan, *supra* note 151, at 39-40.

174 *See, e.g.*, *In re* Birdsell's Will, 63 N.Y.S.2d 146, 149 (App. Div. 1946) ("The intention which controls in the construction of a will is that which is manifested, either expressly or by necessary implication, from the language of the will. That intent must be gathered from the four corners of the instrument; that is to say from the whole will—the whole frame of the will; the whole scheme of the testatrix manifested by the will, taking into consideration and giving due weight to every word in the will.").

175 *See, e.g.*, *In re* Dwight's Estate, 134 A.2d 45, 49 (Pa. 1957).

iii. *Giving Effect to All Words and Clauses*

To the extent possible, all provisions, clauses, and words of the will are to be given effect. For instance, a will may provide that a gift of property is to be given to "such of my grandchildren as may be living at the time of my death."[176] The phrase "as may be living at the time of my death" will be interpreted to mean that grandchildren born after the testator's death are not to be allocated any property. Otherwise, the phrase "as may be living at the time of my death" would have not meaning. This holistic view reflects the nature of language.[177]

On occasion, however, a court may construe the phrasing that appears to be contrary to the testator's intent. The Handbook for the Georgia Probate Judges provided that "[t]he judge trying the case may, when clear and convincing proof of the intent is shown, transpose sentences or clauses, change conjunctions, and supply or delete words when a sentence or clause is unintelligible or inoperative in context."[178] Nevertheless, when the words can be given effect, the words should be given effect.

iv. *Avoiding Intestacy*

The will is also interpreted to result in the complete disposition of probate property and avoid partial intestacy.[179] Courts thus presume, in the absence of language to the contrary, that in making a will, the testator intended to dispose of all of his or her probate property.[180] Issues can arise when descriptions of property are not inclusive of all of the property rights or may have a broader meaning when applied to the testator's property. For instance, a testator's will may provide as follows: I give my bank accounts to Arun. When the testator dies, the testator has a checking account, a savings account, and a brokerage account.[181] All the accounts were in the testator's sole name. If the court deter-

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176 *See, e.g.*, *In re* Estate of Houston, 421 A.2d 166, 166, 169 (Pa. 1980) (construing a provision reading "to such of my children as may be living at the time of my death and to the issue then living of such of them as may then be deceased" to exclude grandchildren born after the testator's death).

177 *See, e.g.*, SCHOULER, *supra* note 77, § 836, at 941 (stating "our policy being to give the greatest possible scope to each dying owner's wishes, provided he executed the will with due formalities and within his legal rights").

178 THE REVISED HANDBOOK FOR PROBATE JUDGES OF GEORGIA 3-86 (2010), http://www.judgejordan.com/binder1.pdf.

179 *See* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1468 (2013); Ronald R. Volkmer, *Construing a Will to Avoid Intestacy*, 39 EST. PLAN. 46, 47 (2012).

180 *E.g.*, Rastle v. Gamsjager, 153 S.E.2d 403, 407 (W.Va. 1967).

181 *See e.g.*, *In re* Estate of Crater, 689 N.Y.S.2d 605, 607 (Sur. Ct. 1999) (construing a will that provided for the disposition of "my savings account" when the testator had various accounts).

mines that "my bank accounts" referred only to the testator's checking account and saving accounts, then the testator would die partially intestate. The property in the checking account and savings account would pass to Arun, but the property in the brokerage account would pass via intestacy to the testator's intestate heirs. If intestacy could be avoided by awarding a broader definition to the property, such as interpreting "savings account" to refer to all accounts held at financial institutions, the court will do so.[182] Courts are constrained to follow the language of the will. So, for instance, the absence of a residuary clause in a will may still result in partial intestacy.

3. *The Role of Extrinsic Evidence*

The issue arises as to whether the court is limited to the language of the will or may consider the evidence outside of the four corners of the will to supplement the interpretive process. This outside evidence, collectively referred to as extrinsic evidence, may include other writings or testimony by family members. Indeed, the extrinsic evidence may also

> include background facts to aid an understanding of the language actually used by a testator and the meaning which the testator's words had to him or her, proof of such facts being regularly taken because such facts bear directly on the actual meaning of the words used in the will as the deceased understood them.[183]

The extrinsic evidence may be direct or circumstantial. Direct evidence of intent would include the testator's own written or oral statements and notes from the drafting lawyer's files.[184]

Tensions arise as to whether the court is restricted to the language of the will or whether the court can consider extrinsic evidence. Some scholars and commentators suggest that the testator's intent can be better discerned by considering both the language of the will and the extrinsic circumstances.[185] As articulated in one critique, "[t]o insist upon

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182 *Id.*

183 27B CARMODY-WAIT 2D *Construction and Interpretation of Wills* § 162:103 (2020).

184 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 cmt. f (AM. L. INST. 2003).

185 As one scholar wrote,

> The law of wills seems to set itself an impossible task. It is premised on the importance of effectuating a person's wishes as to the disposition of his or her property after death. . . . To ascertain the intent of persons who can no longer communicate with us directly, we must attempt, on some level, to know them, to enter into their personal experiences and the thoughts and feelings resulting from such experiences.

a will so self-contained and self-sufficient as to make resort to things extrinsic needless in every possible contingency is to lose sight of the significance of language, its function, and capabilities."[186] Language, after all, has limitations.[187] The language may benefit by considering extrinsic evidence to divine the author's intent. Other scholars and commentators raise the concern extrinsic evidence may be fragmentary and contradictory.[188] Not only may the various extrinsic evidence conflict, but the extrinsic evidence may contradict the language in the will. For instance, the testator may have made various statements to a number of individuals for various reasons, none of which really were an intent to alter a testamentary provision.

Despite the concern, there are some instances where the totality of the extrinsic evidence seems to present a particular interpretation of the language of that will. In that instance, the issue becomes whether the court may reform the words of the will to better reflect the testator's wishes as informed by that extrinsic evidence.[189]

In the event the court is unable to determine the meaning of the language used, the court moves to the second step: construction. In construction, the meaning of the words and phrases of the will is "constructed"[190] by reference to the rules of construction.[191] In what reads today to be tongue-in-check, the Maryland Court of Appeals wrote in 1912, "[t]he rules of construction are simple and readily understood."[192] Although the rules of construction may have the aim of being clear, these rules can become complicated and have the potential for producing varying results.[193] These rules of construction are a product of de-

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Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1043 (1987).

186 27B CARMODY-WAIT 2D *Construction and Interpretation of Wills* § 162:70.

187 As one scholar wrote, "Too many drafting errors are purely semantic in that the language may not be too clear or it may be merely incomplete or perhaps otherwise ambiguous, thus failing to state its intent effectively." Henry M. Grether, *The Little Horribles of a Scrivener*, 39 NEB. L. REV. 296, 305-06 (1960).

188 27B CARMODY-WAIT 2D *Construction and Interpretation of Wills* § 162:71 (describing the limited value of a drafter's testimony who routinely and carelessly used pre-printed forms).

189 For an analysis of reformation in the context of addressing mistakes, see John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

190 The words "construe" and "construct" have the same derivation. *See* Thomas Thacher, *Construction*, 6 YALE L.J. 59, 59 (1896).

191 *See, e.g.*, CAL. PROB. CODE § 21102(b) (West 2020) ("The rules of construction in this part apply where the intention of the transferor is not indicated by the instrument.").

192 Barnett v. Barnett, 83 A. 160, 162 (Md. 1912).

193 *See, e.g.*, SHAFFER ET AL., *supra* note 47, at 188 (stating that the rules of construction "range from insight to sophistry").

cades of judicial cases, legislative efforts, and scholarly input.[194] These rules rely upon what is believed to be presumed intent of most testators.[195]

C. The Existing and Potential Role of Narrative in Construction Proceedings

As described above, intent plays a central role in construction proceedings. As recited in a 1936 treatise,

> It means also the actual personal intent of the testator, not a mere conventional intent inferred from his [or her] use of any set phrase or form of words used; the evident intent of the testator, his [or her] real intent, that intention which is expressed by the language of the will, and not that which existed in the mind of the testator; not a mere conjecture as to his [or her] intention, not what he [or she] meant to say, but what he [or she] actually did say; what was apparently or presumably in his [or her] contemplation when he [or she] executed his [or her] will. . . .[196]

> Intention, if legal, is the law of the instrument, the supreme test, the controlling factor, the touchstone of interpretation, and the courts look upon it as the guiding or polar star to direct them in construing the instrument.[197]

In refuting the commonly-accepted assertion that intent is the "polar star," one commentator wrote, "I have heard of the rule that intention is the polar star in construing wills, but may I also say that more often than not, at least in troublesome cases, the rule is bunk."[198] That is because construction proceedings are often needed to fill gaps or re-

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194 *See, e.g.*, Schuyler, *supra* note 133, at 103 (linking the rules of construction to instances of "frequent judicial construction of similar expressions"); *see also* SHAFFER ET AL., *supra* note 47, at 192 ("The interpretative process that turns on precedent amounts to manufacturing intention.").

195 "Rules of construction are court-created presumptions of what an ordinary testator would have intended ambiguous terms to mean and are merely a court's own assessments of what the person probably meant when the provision was drafted." 36 ILL. LAW & PRAC. WILLS *Construction* § 152 (2020). A testator does not need to understand the rules of construction for the rules to apply. *See, e.g.*, Given v. Hilton, 95 U.S. 591, 596 (1877) ("A testator . . . does not often have in mind any particular rule of construction as applied to other wills.").

196 THOMPSON, *supra* note 134, at 274.

197 *Id.* at 275.

198 Schuyler, *supra* note 133, at 102.

spond to circumstances that were not directly considered by the testator.[199] As the one commentator further elaborated,

> and it should never be forgotten that intention is always inferred—never absolutely ascertained—even in cases where only one result seems possible. For intention is a state of mind, difficult enough to know when we are dealing with the living, and impossible to know with certainty when he whose mind we are searching has gone in search of his final reward.[200]

Determining intent can be so baffling because of the constraints restricting a legal instrument. As a formal document, stock phrasing is used.[201] But even the use of stock phrasing cannot erase the personal that is both presented or implied. In considering the use of legal terminology, Professor Lawrence Freidman wrote the following:

> The typical will, too, has always been full of jargon. Yet, its customary language was not just legal blather. And for all their technicality, wills were never as dry and pedantic as, say, the typical insurance policy. The will, after all, was an instrument of giving, of love, often, too it was an instrument written in the shadow of death.[202]

The focus on narrative, both the existing narrative and the potential enhanced narrative, is intent-serving and consistent with the Wills Act formalities and the plain meaning rule.[203] Indeed, narrative already plays a role in estate planning—and in construction proceedings. As Professor Baron wrote, "[i]f there is any legal field in which the appropriateness of attending to individuals' stories would seem to be obvious, one would think it would be the area of will interpretation."[204] Even in the absence of narrative within the text of the will, courts will construct a narrative about the events. Narrative is a prevalent way of processing information, one which is innate.[205] The sequencing of provisions, the identification of some family members but not others, and the detailed

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199 *E.g.*, *id.* at 102 ("The truth is that we are not infrequently trying to determine what a dead man would have done if he had thought about something that he did not think about.").

200 *Id.*

201 *See, e.g.*, Daphna Hacker, *Soulless Wills*, 35 L. & SOC. INQUIRY 957, 965-68 (2010).

202 FRIEDMAN, *supra* note 85, at 63.

203 The narrative is not restricted to language in the will. Some of the narrative may be included in ethical wills or side letters. *See* Deborah S. Gordon, *Letters Non-Testamentary*, 62 U. KAN. L. REV. 585 (2014).

204 *See, e.g.*, Baron, *supra* note 161, at 669.

205 *See id.* at 660.

description of an heirloom will project a narrative—whether or not such a narrative was intended by the testator.

Inclusion of more language that enhances the already-present narrative in wills may facilitate the transfer of probate property by providing more clarity about the testator's intent. Focusing on the language to determine meaning is consistent with the plain meaning rule. The plain meaning rule refers to the exclusion of extrinsic evidence that will contradict the plain meaning of the words of the will.[206] One of the justifications for the plain meaning rule relates to the timing of events. A will only speaks at death.[207] This means that "the testator cannot corroborate or deny evidence that the words of the will are contrary to the testator's intent."[208] Denying the power of narrative disregarded how narrative is already part of a construction proceeding. Courts will construct their own narratives during a construction proceeding. Each will tells a story; whether that story is accurate is another matter. Whether restricted to the language of the document or aided by extrinsic evidence, the court will project a narrative that it perceives applicable to the testator.

The case that is typically used to showcase the perils of the plain meaning rule is the 1933 case of *Mahoney v. Grainger*.[209] In referencing the plain meaning rule, the Supreme Judicial Court of Massachusetts stated, "[w]here no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for extrinsic evidence; the will must stand as written."[210] The issue arose when extrinsic evidence cast doubt on whether the words of the will accurately reflected the intent of Helen Sullivan, the testator.

Helen Sullivan executed a will ten days before her death in 1931.[211] Ill, Helen sent for a lawyer to visit her home with the express purpose of having the lawyer create a will.[212] Helen gave the lawyer instructions

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206 *See* ATKINSON, *supra* note 139, § 146, at 809-10.

207 *E.g.,* Dawn Watkins, *The (Literal) Death of the Author and the Silencing of the Testator's Voice*, 24 L. & LIT. 59, 64 (2012) ("Somewhat ironically, the will comes into force only at the death of its author and at the very same time, it takes on a life of its own and becomes the central focus of the court's attention.").

208 Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP., PROB. & TR. J. 811, 815 (2001) (providing a summary of the arguments relating to the plain meaning rule and its application).

209 Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933). The case is frequently included in casebooks and treatises. *See, e.g.*, LLOYD BONFIELD ET AL., WILLS, TRUSTS, AND ESTATES: A CONTEMPORARY APPROACH 182-84 (2019); ALFRED L. BROPHY ET AL., EXPERIENCING TRUSTS AND ESTATES 471-73 (2017); FRIEDMAN, s*upra* note 85, at 74.

210 *See Mahoney*, 186 N.E. at 87.

211 *Id.* at 86.

212 *Id.*

about various gifts.[213] The lawyer asked Helen what was to become two critical questions: "Whom do you want to leave the rest of your property to? Who are your nearest relations?"[214] Helen responded that she had "about twenty-five first cousins . . . let them share it equally."[215] The lawyer drafted the will and then read the text to Helen.[216] The resulting residuary clause read as follows:

> All the rest and residue of my estate, both real and personal property, I give, devise, and bequeath to my heirs at law living at the time of my decease, absolutely; to be divided among them equally, share and share alike; provided, however, that the real property which I own at my decease shall not be sold or disposed of until five (5) years after my decease, unless there is no sufficient personal property at the time of my decease to pay my specific legatees; in which case said real property may be sold. The income from said property during said five (5) years is to be distributed among my heirs at law as I have directed.[217]

The lawyer used the legal term of art "heirs at law" and not Helen's language of "first cousins."

The will was submitted to the probate court and admitted to probate.[218] When implementing the terms of the will, an issue arose as to the meaning of "heirs at law" in light of how the legal term applied to Helen's family.[219] Helen was survived by one maternal aunt and about twenty-five first cousins.[220] Some of the twenty-five first cousins submitted a petition asserting that they were entitled to the property in the residue.[221] When the court applied the standard legal meaning to "heirs at law," the court determined that only one individual meet the legal definition: the aunt.[222] Some of the first cousins appealed the trial court's decree dismissing their petition for distribution.[223]

On appeal, the term of art "heirs of law" continued to be interpreted with reference to its legal meaning.[224] The court noted, "[c]onfessedly they [the words "heirs at law living at the time of my

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213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.*
219 *Id.*
220 *Id.*
221 *Id.* at 87.
222 *Id*. at 86-87.
223 *Id.* at 87.
224 *Id.*

decease"] refer alone to the aunt of the testratrix and do not include her cousins."[225] The use of "confessedly" acknowledges the conversation between Helen and her lawyer. Helen informed her lawyer that she wanted her first cousins to inherit the property, not her aunt, when Helen told her lawyer that her closest relatives were her "about twenty-five first cousins."[226] The lawyer then misused a term of art "heirs at law." Perhaps the lawyer was unaware of the aunt's existence because Helen did not share that information during their conversation. Or perhaps the lawyer mistakenly believed that the first cousins would have priority over the aunt because of the lawyer's own misunderstanding of how the term of art would apply to Helen's situation. In any event, the lawyer's decision to use the term of art "heirs at law" contradicted Helen's intent that the first cousins receive her property.

The court did note that Helen's "relations with her aunt who was her sole heir and with several first cousins was cordial and friendly."[227] The court stressed that "[t]he aunt alone falls within that [legal] description" of heirs at law.[228] Nonetheless, the only evidence that supports the conclusion the aunt should receive the residuary property is the lawyer-drafter's misuse of the term of art.

The court relied upon the plain meaning rule to guide its interpretation and construction. To justify the application of the plain meaning rule, the court reasoned as follows:

> The will must be construed as it came from the hands of the testatrix . . . . Proof that the legatee actually designated was not the particular person intended by the one executing the will cannot be received to aid in the interpretation of a will . . . . When the instrument has been proved and allowed as a will oral testimony as to the meaning and purpose of a testator in using language must be rigidly excluded.[229]

The case of *Mahoney v. Grainger* became a tale of the inequities of the plain meaning rule. A term of art, which likely had limited meaning to the testator, is used inaccurately by the lawyer-drafter. This use undermined the testator's expressed intent to the lawyer-drafter to favor her cousins, not her aunt. Although a reconsideration of the plain meaning rule may be appropriate,[230] this case also supports the use of narrative. For instance, the provision may have been drafted as follows:

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225 *Id.*

226 *Id.* at 86.

227 *Id.*

228 *Id.* at 87.

229 *Id.*

230 *See, e.g.*, Cornelison, *supra* note 207, at 812-15.

> All the rest and residue of my estate, both real and personal property, I give in equal shares to my first cousins who survive me. I have a closing and loving relationship with my first cousins, and my intent is to make them my primary beneficiaries.

Instead of the term of art "heirs at law," the class designation of "first cousins" is used. The generic class designation, which is how Helen described these individuals, is followed by the phrase "close and loving relationships." This reflect Helen's response was to the lawyer's question "who are your nearest relatives" with "nearest" referring to relatives with whom Helen had the strongest relationship.

The case of *Mahoney v. Grainger* is not a unique case that presents the inequities produced by rigid adherence to the plain meaning rule. The court must ignore information about the particular testator's wishes if that information is not accurately included within the components of the will. The court, with incomplete or even misleading information, then constructs a narrative that is false. As with Helen Sullivan, the court cobbles together the use of the term of art "heirs at law" and the "cordial and friendly relations" with her aunt to justify its determination that the aunt was Helen's closest relative and the intended sole beneficiary.[231] Although a logical narrative based upon the admissible evidence, that narrative is not the narrative intended by Helen.

Scholars and commentators point out the plain meaning rule, despite its seemingly clear focus, does not get applied by all courts in the same manner.[232] Courts struggle with the constraints—especially when courts realize that they would be constructing a partial narrative using limited and potentially misleading information. For instance, some courts stretch to admit extrinsic evidence by finding a mistake. This has occurred when a scrivener's error appears to be undermining the testator's intent[233]—despite the fact that no ambiguity exists on the face of the document.[234] Courts are motivated to make such stretches because

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231 *Mahoney*, 186 N.E. at 86.

232 Cornelison, *supra* note 207, at 845. *See also* James L. Robertson, *Myth and Reality—Or, Is it "Perception and Taste"?—In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1046 (1993) ("In cases of texts of even modest complexity, lawyers and supposedly disinterested judges could often argue almost too easily for sharply conflicting, yet credible, notions of the author's intent.").

233 *See generally* Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scrivener's Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1 (1990) (explaining that the testator's intent overrides the majority "no reformation for mistake" rule to allow extrinsic evidence to correct an error).

234 *See, e.g.*, Pamela R. Champine, *My Will Be Done: Accommodating the Erring and Atypical Testator*, 80 NEB. L. REV. 387, 407-22 (2001) (explaining seven "classic" cases of mistake and how courts address them).

restricting the interpretation to existing language does not accurately present the testator's intent.

As Professor Baron wrote, "the task of interpretation is focused not on discovering the testator's wishes, but rather on decoding his words—a different inquiry."[235] This could cause frustration when the court is interpreting a poorly-drafted document that does not accurately convey the testator's wishes. Narrative can aid the accurate "decoding" of the language. When the drafter supplies the narrative, the will can be more accurately interpreted by the court. The narrative could increase the transparency of the wishes with necessary qualifications and enhanced descriptions. The narrative can not only promote testator engagement, such that the testator confirms the accuracy of the description of the beneficiaries, but also helps prevent the cobbling together of extrinsic evidence to present a false narrative.

V. Analysis of Typical Construction Problems and How Narrative Could Be Used to Help Resolve the Construction Problems

Using "intent" as the guiding star is complicated not only by limiting the evidence admissible but is complicated by the limitations of language itself. This section presents the analysis of various construction issues and explores how narrative could be used to facilitate the construction of wills in an intent-serving manner.

As stated above, language will be an imperfect medium. The following describes the issues that such an imperfect medium may present.

> Language often inadequately describes intention because (1) it is inherently imperfect and inadequate to express all phases of thought, (2) it may be unskillfully or improperly used, (3) the human mind is unable to foresee all contingencies, and (4) the meaning of words may be altered or eroded by the passage of time.[236]

These issues arise because of incomplete, inadequate, or confusing language used in the wills or failure to take into account changes of circumstances between the date of the will's execution and the date of the will's implementation. This section groups these issues into three major topics. Specifically, this section explores (1) ambiguities and mistakes, (2) lapse and class gifts, and (3) ademption and abatement.

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235 Baron, *supra* note 161, at 637.

236 Schuyler, *supra* note 133, at 102.

A. Ambiguities and Mistakes

Language is generally acknowledged to be an imperfect medium.[237] Not surprisingly,[238] ambiguities and mistakes arise.[239] Ambiguities exist when the words do not accurately and definitely express the intent of the testator.[240] Mistakes exist because the words are incorrectly used.[241] The issue becomes whether and under what circumstances the courts may resolve the ambiguity or correct the mistake in an attempt to effectuate the testator's intent.[242] Under conventional rules, extrinsic evidence could be introduced to resolve latent ambiguities, but not to resolve patent ambiguities.[243] Today, the distinction between patent ambiguity and latent ambiguity has not been maintained by all courts.[244] Under conventional rules, extrinsic evidence could not be used to correct a mistake. These rules may undermine the testator's intent.

Turning first to ambiguities, an ambiguity may be latent. A latent ambiguity is defined as an ambiguity that is not apparent on the face of the document.[245] Instead, the ambiguity is only revealed when the provision is attempted to be implemented by the personal representative. The

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237 S. Alan Medlin, *Even a Single Word Can Affect the Construction of a Trust*, PROB. PRAC. RPRT., June 2008, at 1, 1 (stating that "it is difficult[,] if not impossible[,] to draft a perfectly clear document"); Jiri Janko, *Linguistically Integrated Contractual Interpretation: Incorporating Semiotic Theory of Meaning-Making into Legal Interpretation*, 38 RUTGERS L.J. 601, 602 (2007); Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 65-66 (2005); Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 534-35 (2005); Scott T. Jarboe, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1368-70 (2002).

238 *See* Medlin, *supra* note 237, at 1.

239 Even seemingly unambiguous wills can present issues with interpretation of intent when extrinsic evidence suggests that the testator has an alternate meaning than is conveyed in the plain meaning of the language. *See, e.g.*, Brent Debnam, Comment, *Deadly Intentions: Posthumously Modifying Unambiguous Wills to Protect the Actual Intentions of Texas's Testators*, 8 EST. PLAN. & CMTY. PROP. L.J. 461, 470-71 (2016); William P. LaPiana, *Milestones in the Law of Reformation of 'Unambiguous' Wills*, 42 EST. PLAN. 42, 43-44 (2015).

240 *See* Schuyler, *supra* note 133, at 102.

241 *Id.*

242 *See, e.g.*, Ronald R. Volkmer, *Will Construction Involving a Unilateral Mistake*, 40 EST. PLAN. 48 (2013).

243 *See Testator's Declarations of Intent Excluded in Resolving Patent Ambiguity*, 14 STAN. L. REV. 409, 410-12 (1962) (referencing Lord Bacon's writings to support the distinction and the different approaches to resolving the ambiguity).

244 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmt. a (AM. L. INST. 2003); *see also* Mark J. Phillips, *Plain Ambiguity*, L.A. LAW., Nov. 2015, at 26, 26 (stating that courts continue to grapple with resolving ambiguities).

245 *See* Phillips, *supra* note 243, at 26.

description of the beneficiary or the property does not exactly match one beneficiary or match one item of property.[246]

In terms of describing a beneficiary, the testator may have used a first name that matches several relatives, friends, or acquaintances of the testator.[247] The will may also have used a name that does not accurately match anyone or any organization. For example, a testator's will identified one of her beneficiaries as the "Society for the Prevention of Cruelty to Animals (Local or National)."[248] No charity exactly matched the description. As a result, numerous humane societies filed claims to receive the gift, which had to be resolved by a thirteen-day trial in the probate court.[249] Injection of narrative could be used in such situations to showcase the connection between the testator and the beneficiary. For instance, the provision may have been written as the "Society for the Prevention of Cruelty to Animals that I supported during my lifetime." The testator need not specify the exact amount or nature of the support. Instead, the testator, in his or her own words, includes in the will the type of information that would likely be the extrinsic evidence the court would consider, which charity had a connection to the testator. Just as clarifying the nature of the connection between the beneficiary and the testator may help prevent a latent ambiguity, clarity about the nature of the property interest can prevent a latent ambiguity.

An enhanced description of the property would likewise be helpful to prevent a latent ambiguity. Listing property incorrect can actually create the ambiguity, such as in the case of a will that identifies real property using an incorrect street addresses or lot number.[250] But describing the property by using narrative, such as "the house where I spent my childhood" or "the lake property that I inherited from my mother" could both identify the property and show to the personal representative, the beneficiaries, and court which property was to be given to the beneficiary.

In contrast to a latent ambiguity, which is revealed only when applying the terms of the will, a patent ambiguity is identifiable reading

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246 For an argument that document automation software may prevent various drafting errors, including latent ambiguities, see William E. Foster & Andrew L. Lawson, *When to Praise the Machine: The Promise and Perils of Automated Transactional Drafting*, 69 S.C. L. REV. 597, 625-26 (2018).

247 In the Agatha Christie novel *Peril at End House*, the murder centers on the latent ambiguity of identified individuals with the same name. *See* AGATHA CHRISTIE, PERIL AT END HOUSE (Dodd, Mead & Co. 1932).

248 Ventura Cnty. Humane Soc'y v. Holloway, 115 Cal. Rptr. 464, 466 (Cal. Ct. App. 1974).

249 *Id.*

250 *See, e.g.*, Spencer v. Gutierrez, 663 P.2d 371, 373-74 (N.M. Ct. App. 1983) (incorrect lot numbers).

the document.[251] The patent ambiguity exists on the face of the will. A typically-used example of such a gift reads as follows: "I give one-half of my residuary to Ava, one-half of my residuary to Brianna, and one-half of my residuary to Clem." It is not possible to have three one-halves, so the ambiguity is on the face of the document.

A mistake in the will may be related to an ambiguity. When the beneficiaries are improperly identified, or the property description is inaccurate are two examples of both ambiguities and mistakes. But a mistake may also refer to typographical mistakes.[252] A provision may have been inadvertently omitted. For example, a drafter may omit a provision relating to real property so that an intended beneficiary must divide the real property with the residuary takers.[253] A drafter may have even omitted the name of the residuary beneficiaries, leaving a blank in the properly executed will.[254] The law does not typically allow for the correction of mistakes, whether those mistakes were by the drafter or based upon mistaken beliefs by the testator.[255]

The classic case of *In re Gibbs* involving construction of both ambiguities and mistakes.[256] Lena and George Gibbs were diligent estate planners. They made a series of wills from the early 1950s until their deaths in 1960.[257] Lena and George died within one month of each other. The provision that created issues was seemingly clear. The provision provided for a percent of the residuary to be distributed as follows:

> To Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin, if he survives me, one percent (1%).[258]

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251 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 cmt. b (AM. L. INST. 2003).

252 *See, e.g.*, Robert D. Lang, *A Fast Road to Disaster: Mindless Cutting/Copying and Pasting*, N.Y. ST. BAR ASS'N J., Feb. 2017, at 36, 37.

253 *See, e.g.*, Young v. Williams, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007).

254 *See, e.g.*, *In re* Estate of Herceg, 747 N.Y.S.2d 901, 902 (Sur. Ct. 2002). For an analysis of the *Herceg* case, see Michelle A. Malone, *Repairing Errors—Case Comment: In re* Estate of Herceg, 18 QUINNIPIAC PROB. L.J. 311 (2005).

255 *See, e.g.*, James R. Walker, *Correcting Documentary Misdescription with Reformation*, 39 COLO. LAW., Aug. 2010, at 97, 98 (2010); Angela M. Vallario, *Shape Up or Ship Out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents*, 26 WHITTIER L. REV. 59, 68 (2004).

256 *In re* Estate of Gibbs, 111 N.W.2d 413, 414, 416 (Wis. 1961). The *Gibbs* case is featured in several trusts and estates casebooks. *E.g.*, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS 358-61 (6th ed. 2019); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 337-40 (10th ed. 2017); ROGER W. ANDERSON & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 156-58 (4th ed. 2012). The *Gibbs* case is also featured in various treatises and books. *See, e.g.*, FRIEDMAN, *supra* note 85, at 78.

257 *In re Gibbs*, 111 N.W.2d at 416.

258 *Id.* at 415.

This provision, identified as Subparagraph 2, (9) of Article Third, identified an individual with a first name, middle initial, and last name. The individual was further identified as living as a particular address as of the date of the will's execution. Despite this seemingly clear provision, it created an issue because the provision was built upon a mistake.

On the face of the document, no problem appeared. An individual named Robert J. Krause who lived at the address was located, but the Gibbs did not have a relationship with Robert J. Krause who lived at that address.[259] The Gibbs did have a relationship with a person named Richard W. Krause. A drafting mistake occurred. As the court recited, "[t]he difficult question is whether the court could properly consider such [extrinsic] evidence in determining testamentary intent."[260] The court specifically considered whether a latent ambiguity existed, which would permit the introduction of extrinsic evidence to resolve the ambiguity.[261]

A gift to an individual named "Robert Krause" had been included in several wills executed by the Gibbs.[262] A will executed in 1953 included a gift to "Robert Krause of Milwaukee, Wisconsin."[263] A will executed in August 1955 contained the same provision to "Robert Krause of Milwaukee, Wisconsin."[264] In 1957, the gift to Robert Krause was modified to read "Robert Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin."[265] In 1958, the provision was then "Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin."[266] In addition to the series of wills, the court also learned that the drafter had kept a handwritten note from George Gibbs for the 1958 will that stated "Bob, 1%."[267] A telephone book listed fourteen individuals with the name Robert Krause who lived in Milwaukee.[268]

The broader issue was who the testators intended to benefit in their will. Two Robert Krauses claimed to be the intended beneficiary. Robert W. Krause had first met George Gibbs in approximately 1928, which

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259 *Id.*

260 *Id.* at 417.

261 The Restatement defines an ambiguity as follows: "An ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.1 (AM. L. INST. 2003).

262 *In re Gibbs*, 111 N.W.2d at 416.

263 *Id.*

264 *Id.*

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

was more than thirty years before George died.[269] George called Robert W. Krause "Bob."[270] Then for nineteen years, from 1930 to 1949, Bob was employed at a steel warehouse that belonged to the Gibbs Steel Company.[271] George was a supervisor at the steel warehouse.[272] When the steel warehouse was sold in 1945, George remained as a supervisor for four years.[273] Bob continued his employment with the steel warehouse until 1960.[274] Over twenty years, from 1935 to 1955, Bob did work at the Gibbs residence, and Bob also paid a few social visits at the Gibbs residence.[275] The Gibbs' long-time housekeep testified that George shared information about his will.[276] Specifically, he shared that he made gifts for a number of individuals, including "the boys at the shop" who he referred to as "Mike, Ed and Bob."[277] Robert J. Krause did live at the address listed in the will. Robert J. Krause was a part time taxi driver recalled a lengthy taxi trip in June 1955 that he asserted involved Lena Gibbs.[278] Although he could not remember all of the details of the trip, he did present the argument that this individual was Lena Gibbs.[279] The description he shared of Lena Gibbs did not match the description of her given by others.[280] Robert J. Krause did not present any connection with George Gibbs.[281]

When faced with this issue, the court could have simply directed distribution to the Robert J. Krause who lived at the address in the will. That distribution satisfies the language of the will. But that distribution did not match the broader narrative of who the Gibbs would like to benefit. The court stretched traditional doctrine to permit the court to consider extrinsic evidence. More specifically, the court determined that the details of the middle initial and address that identified "the other" Robert Krause, meaning not the Robert Krause who worked with George Gibbs, could be disregarded. The court required that "proof establish[ ] to the highest degree of certainty that a mistake was, in fact, made."[282] The extrinsic evidence could then be presented to resolve

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269 *Id.* at 415.
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.*
275 *Id.*
276 *Id.*
277 *Id.*
278 *Id.* at 416.
279 *Id.*
280 *Id.*
281 *See id.*
282 *Id.* at 418.

which Robert Krause should receive the gift.[283] Presumably, the long-time employee would then receive the gift.

Most, if not all, would agree that the court reached the proper result. The long-time employee would receive the gift after the lower court had the opportunity to consider all the relevant evidence. That reading is consistent with the narrative of the individuals who had meaningful connections to the Gibbs, but the language of the will itself could also have presented that narrative.

The provision may be rewritten to directly include a reference to narrative as follows:

> I give 1% of my residuary estate to each of the individuals with whom I have had a professional and personal relationship. . . . Bob Krause, a long-time employee of the steel warehouse, if he survives me.

Bob was included in the will because of his relationship with the Gibbs. So that is what the provision could reference: the relationship rather than a street address. The provision uses the name that the Gibbs used to refer to him, which was Bob, not Robert. The Gibbs do not need to recite the exact number of years, which details may be inaccurate. Instead of relying upon the drafters to supply the identifying information, which apparently was made by reference to a telephone book, the lawyer would be prompted to ask questions of the testators to have the testators supply the information and confirm the accuracy of the information.[284]

It may be impossible to draft any testamentary instrument that is free from all mistakes and potential ambiguities. Providing context for the gifts and nominations can help support interpretation of the language without having to resort to consideration of potentially fragmentary and conflicting extrinsic evidence.

B. Class Gifts and Lapse

The language of the will should attempt to take into account various contingencies and changes of circumstances. Nonetheless, individuals, both testators and drafters, are hampered by the inability to foresee various future circumstances.[285] Class gifts and lapse are two concepts that attempt to provide for various future circumstances. Beneficiaries may be identified by name in the will. Likewise, what happens if the

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283 *Id.*

284 As one scholar stated, "An estate planner must identify appropriate questions and provide different drafting solutions based on a client's preferences. Using one generic form will not provide the best outcome for all clients." Gary, *supra* note 131, at 286.

285 *See* Schuyler, *supra* note 133, at 102.

individual does not survive the testator can be stated in the will. Often, the testator does not include the beneficiary's name using a class designation, and the testator does not consider the potential death of the individuals before the testator. This raises issues of class gifts and lapse.[286]

Class gifts are used frequently in estate planning documents. The appeal of class gifts is supported by the connection between a testator's intent and the ability to customize the class designation.[287] As was recited in 1899, "[y]ou may define a class in a thousand ways: anybody may make any number of things or persons a class by setting out an attribute more or less common to them all and making that the definition of a class."[288] A class gift is a gift in individuals who are members of a group, such as children or nephews, who share an identifying characteristic.[289] Each member of the class receives a proportional share of the gift.[290] Interpretation issues can arise as to whether the class is sufficiently defined, with "friends" being a class example of an unascertainable class.[291] The group label does not provide an identifying characteristic. A testator may know a number of individuals who could fit the label that range from a childhood friend to someone the testator met moments before his or her death. Even when a commonly used class designation,[292] such as "issue" or "descendants" is used,[293] issues

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286 *See, e.g.*, Piccione v. Arp, 806 S.E.2d 589, 592-94 (Ga. 2017) (examining an issue of lapse and class gifts).

287 *See* Frederic S. Schwartz, *Misconception of the Will as Linguistic Behavior and Misperception of the Testator's Intention: The Class Gift Doctrine*, 86 U. DET. MERCY L. REV. 443, 473-74 (2009). *See generally* A. James Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin": Increase in the Class Membership*, 51 HARV. L. REV. 254 (1938) (analyzing problems with the determination of class membership with the use of group designation such as "children," "grandchildren," "brothers" or "sisters"); Thomas M. Cooley, II, *What Constitutes a Gift to a Class*, 49 HARV. L. REV. 903 (1936) (explaining the interpretation and nuances of using certain class descriptions for gifting).

288 *In re* Moss, [1899] 2 Ch. 314, *aff'd*, [1901] App. Cas. 187 (H.L).

289 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1(a) (AM. L. INST. 2011); *see also* Frederic S. Schwartz, *The New Restatement of Property and Class Gifts: Losing Sight of the Testator's Intention*, 22 QUINNIPIAC PROB. L.J. 221, 223 (2009); Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993, 995-96 (2007).

290 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1(a) ("Taking as members of a group means that the identities and shares of the beneficiaries are subject to fluctuation.").

291 *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 46 cmt. a (AM. L. INST. 2003) ("A class of persons is indefinite under the rule of this [s]ection if the identity of all individuals comprising its membership cannot be ascertained.").

292 The use of a class designation, also called a group label, raises a presumption that a class gift was intended. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1(b).

293 *See* Merrill I. Schnebly, *Testamentary Gifts to "Issue,"* 35 YALE L.J. 571, 571 (1926).

can arise as to whether the commonly accepted understanding of the class label accurately reflects the testator's intent.[294] The issue becomes "a question of the transferor's intent."[295]

Lapse, although not exclusively limited to class gifts, is often raised in conjunction with class gifts because each concept takes into account changes of circumstances. In the case of lapse, a beneficiary identified in the will, who is alive at the time of the will's execution, does not survive the testator. The focus then is on what happens to the property that the predeceased beneficiary would have otherwise been entitled to receive.[296] As with all issues involving the will, the first consideration is to determine what the will provides.[297] The will could always provide a substitutional beneficiary for the contingency of lapse. In the event the will does not directly state what happens to the property,[298] the court may reference an antilapse statute.[299] Antilapse statutes vary from state to state.[300] The statutes cannot prevent the lapse from occurring. Instead, the statutes will provide an alternate beneficiary under certain circumstances. Some statutes apply to a broad range of predeceased individuals and others do not.[301] Whatever the formulation of the state

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294 *See* Megan McIntyre, *I Knew Him as My Daughter: The Impact of Gender Changes on Sex-Based Benefits from Class Gifts*, 11 EST. PLAN. & CMTY. PROP. L.J. 191, 205-06 (2018); *see also* Ashleigh C. Rousseau, Note, *Transgender Beneficiaries: In Becoming Who You Are, Do You Lose the Benefits Attached to Who You Were?*, 47 HOFSTRA L. REV. 813, 813 (2018); Frederic S. Schwartz, *Misconception of the Will as Linguistic Behavior and Misperception of the Testator's Intention: The Class Gift Doctrine*, 86 U. DET. MERCY L. REV. 443, 473-74 (2009); Cameron Krier, *Heir on the Side of Exclusion?: Addressing the Problems Created by Assisted Reproductive Technologies to the Inheritance Rights of a Class Named in a Funded Trust or Probated Will*, 20 QUINNIPIAC PROB. L.J. 47, 48 (2006).

295 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13 cmt. b.

296 *See* Alan Newman, *When the Beneficiary Predeceases: A Primer on Ohio's Wills and Trusts Antilapse Statutes*, 27 OHIO PROB. L.J., Mar./Apr.2017, at 4.

297 *See, e.g.*, *Courts Determine if Anti-lapse Statute Applies*, 33 EST. PLAN. 55, 56 (2006).

298 A significant construction problem is posed by how the testator may opt-out of the antilapse statute. *See, e.g.*, Jeffrey A. Cooper, *A Lapse in Judgment:* Ruotolo v. Tietjen *and Interpretation of Connecticut's Anti-lapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 209-13 (2007) (critiquing the Connecticut Appellate Court's approach to require more than survivorship language for a testator to opt out of the state antilapse statute).

299 *See, e.g.*, UNIF. PROB. CODE § 2-603 (UNIF. L. COMM'N 2019).

300 For a historical consideration of the Uniform Probate Code's antilapse statute, see Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992) and Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269 (1994).

301 For an argument about expanding the scope of the antilapse statute, see Courtney Chaipel Pugh, Note, *The Modern Family: Why the Florida Legislature Should Remodel its*

specific antilapse statute, the goal is the same: to carry out what is the presumed intent of the testator.[302]

The Uniform Probate Code provides for a substituted beneficiary only under certain circumstances.[303] Where a beneficiary does not survive the testator, no alternate is provided and the predeceased beneficiary is either a descendant of a grandparent of the testator or a stepchild of the testator, the descendants of the predeceased beneficiary will receive the gift.[304] The assumption is that if the predeceased beneficiary has a particular familial relationship to the testator, such as a child, the testator would prefer the child's gift to pass to the child's children, that is the testator's grandchildren.[305] The Uniform Probate Code's approach to lapse has been criticized in its applicability.[306] The approach has not been criticized for its reliance upon familial relationships as a proxy for intent.[307] Instead, the Uniform Probate Code's approach has been criticized for what will be an almost automatic application of its antilapse statute.[308] As a default rule, the antilapse statute should apply only in the event that the testator has not specifically provided for the possibility of lapse.[309] Most states will find that if the gift is qualified upon the beneficiary's survivorship, that is including phrasing like "if she survives me," the antilapse statute will not apply.[310] The Uniform Probate Code requires more than words of survivorship to constitute an opt-out.[311] This approach is contrary to the majority of jurisdictions that

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Antilapse Statute for Wills to Reflect the Changing Familial Structure, 46 STETSON L. REV. 659 (2017).

302 *See, e.g.*, Piccione v. Arp, 806 S.E.2d 589, 592 (Ga. 2017) (reciting the goal of the antilapse statute is to "obviate the effect of lapse by carrying out what the legislature has presumed the testator's intent would have been as to the disposition of the testamentary gift had the testator foreseen the possibility that the taker named in the will would die during the testator's lifetime") (internal brackets omitted).

303 UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N 2019).

304 *Id.* § 2-603(b)(1).

305 *See id.*§ 2-603 cmt.

306 *See, e.g.*, Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 642-49 (1993).

307 *See id.* at 641 n.13 (complimenting UPC's 1990 revision dealing with surviving spouse's elective share).

308 *See id.* at 653, 656-57.

309 *See id.* at 651 (explaining that most estate planners understand that antilapse statutes do not apply if terms of bequest require survival of beneficiary).

310 *See, e.g.*, FLA. STAT. § 732.603 (2020). Indeed, the statute also specifically provides that when applying the antilapse statute, "Words of survivorship in a devise or appointment to an individual, such as 'if he survives me,' or to 'my surviving children,' are a sufficient indication of an intent contrary to the application of [the antilapse statute]." *Id.* § 732.603 (3)(a).

311 UNIF. PROB. CODE § 2-603(b)(3) ("For the purposes of Section 2-601, words of survivorship, such as in a devise to an individual 'if he [or she] survives me,' or in a devise

provide an express condition of survivorship operates as an opt-out of the default rules of the antilapse statute. This disagreement shows that there is uncertainty about what actual intent will be. For instance, few testators will understand the nuances of any jurisdiction's antilapse statute. Even with the factual scenarios of predeceased beneficiaries, many testators will not have contemplated the death of a beneficiary before the tension. So, the issue is what language should the court be considering when analyzing a provision that raises a factual issue not even considered by the testator or the drafting attorney directly.[312]

A case that brings together both lapse and class gifts is *Dawson v. Yucas*.[313] Nelle G. Stewart died leaving a duly executed will that became the subject of a construction proceeding.[314] The provision at the heart of the construction proceeding, Clause Two of the will, read as follows:

> Through the Will of my late husband, Dr. Frank A. Stewart, I received an undivided one-fifth (1/5) interest in two hundred sixty-one and thirty-eight hundredths (261.38) acres of farm lands located in Section Twenty-eight (28), Twenty-nine (29), Thirty-two (32) and Thirty-three (33) in Township Fourteen (14) North, Range Four (4) West of the Third Principal Meridian in Sangamon County, Illinois, and believing as I do that those farm lands should go back to my late husband's side of the house, I therefore give, devise and bequeath my one-fifth (1/5) interest in said farm lands as follows: One-half (1/2) of my interest therein to Stewart Wilson, a nephew, now living in Birmingham, Michigan and One-half (1/2) of my interest to Gene Burtle, a nephew, now living in Mission, Kansas.[315]

The property is properly described. The property description is specific by using the government survey system.[316] The origin of Nelle's ownership is explained by reference to her inheritance from her husband. The recitation is not legally required to identify the property, and the testa-

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to 'my surviving children,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.").

312 Ascher, *supra* note 305, at 642 (stating that the position that general words of survivorship are not sufficient for an opt-out of the antilapse statute "reveal[s] an excessive concern for the decedent's unexpressed intent").

313 Dawson v. Yucus, 239 N.E.2d 305, 306 (Ill. Ct. App. 1968). The case also appears in casebooks. *See, e.g.*, SUSAN N. GARY ET AL., CONTEMPORARY TRUSTS AND ESTATES 272 (3d ed. 2017); SITKOFF & DUKEMINIER, *supra* note 255, at 369-71.

314 *Dawson,* 239 N.E.2d at 306.

315 *Id.*

316 The following three property descriptions may be used: (1) metes and bounds, (2) government survey system, or (3) recorded plat. The government survey system divides land into sections and townships and is commonly used in the Midwest. *See* CARYL A. YZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS § 6:19 (1991).

tor needs not to explain his or her choices in order for the provision to be legally operative. Expressive language can enhance the narrative of the will by providing context or providing additional information.[317] The two individuals are properly identified with their first names and last names.[318] The individuals are further identified by their familial relationship to the testator and their cities-states of residence at the time of the will's execution. The provision also looks complete with the length of the provision, 659 characters not including spaces. The provision has the formal conventions typically associated with wills. The fractions are presented using both letters and numbers. The word "therein" is used, as is the formal "give; bequeath and devise."

When Nelle executed her will on March 3, 1959,[319] she would probably have thought that her wishes were clear, that all contingencies were addressed, and that the wishes would be easily implemented. Yet, when Nelle died on May 29, 1965, this provision created interpretation and construction.

One of the identified beneficiaries, Gene Burtle, predeceased Nelle. This issue becomes what happens to the lapsed gift.[320]

Given that the testator's words should control, the court first considers whether the will directs what happens if a lapse were to occur. The will may, for instance, provide for an alternate taker.[321] The will may include a residuary clause that captures all lapsed pre-residuary gifts. If the will is silent, meaning that the issue of lapse is not addressed, states will have anti-lapse statute that, under certain circumstances, will re-direct the lapsed gift to an alternate beneficiary.[322]

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317 *See generally* Chesler & Sneddon, *supra* note 64, at 132-35 (providing guidance on how to effectively incorporate expressive language into a range of transactional documents).

318 *Dawson*, 239 N.E.2d at 306.

319 *Id.*

320 UNIF. PROB. CODE § 2-603 cmt. (UNIF. L. COMM'N 2019). For an examination of lapse and various issues involving lapse, see Richard F. Storrow, *Wills and Survival*, 34 QUINNIPIAC L. REV. 447, 448 (2016); Eloisa C. Rodriquez-Dod, *"I'm Not Quite Dead Yet!": Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift*, 61 CLEV. ST. L. REV. 1017, 1018 (2013); Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 324-25 (1988); Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801, 803, 805 (1985).

321 For an exploration of the importance of considering the issue of deaths and births as contingencies in wills, see John L. Garvey, *Drafting Wills and Trusts: Anticipating the Birth and Death of Possible Beneficiaries*, 71 OR. L. REV. 47, 48, 50 (1992).

322 For an examination of antilapse statutes, see Pugh, *supra* note 301, at 661-62; Cooper, *supra* note 297, at 205; Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 270 (1994); Patricia J. Roberts, *Lapse Statutes: Recur-*

Clause Two of Nelle's will did not expressly condition the gift upon survivorship, but survivorship is an implied condition.[323] That means for Gene to receive his gift, he must have survived Nelle. Clause Two was silent as to what would happen if either Stewart or Gene or both did not survive. Although Clause Two did not specifically address lapse, another provision of Nelle's will did address lapse. Nelle's residuary clause read as follows:

> the rest, residue and remainder of my property . . . of whatever kind and character and wheresoever situate, including void or lapsed legacies . . . into cash . . . and the proceeds divided equally between Ina Mae Yucus and Hazel Degelow, or to the survivor or survivors of them, should any of said named persons predecease me.[324]

As a result of the failure to address lapse in Clause Two and the express inclusion of "void of lapsed legacies" in the residuary clause,[325] Gene's lapsed gift would be added to the residuary provision.[326]

Adding Gene's lapsed gift to the residuary is a reading consistent with the terms of the document. Nevertheless, Stewart, the other identified beneficiary in Clause Two, sought a construction proceeding. Stewart asserted that another meaning was intended. Stewart argued that Clause Two created a class gift. This would mean that Gene's lapsed share would pass not to the residuary beneficiary but would pass to the other surviving members of the class, that is the entire one-fifth share of the property should pass to Stewart. This would mean that Stewart would receive the entire one-fifth share rather than merely one-half of the one-fifth share. Stewart's goal was to pass one-half of that share to Gene's two surviving children rather than retain the entire one-fifth share for himself.[327]

Stewart's arguments that Clause Two created a class gift were undermined by the language of Clause Two. Clause Two described the specific shares to pass to Stewart and Gene. Each were designated to receive one-half each of the one-fifth interest.[328] Both were identified

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ring Construction Problems, 37 EMORY L.J. 323, 324, 328 (1988); Susan F. French, *Antilapse Statutes are Blunt Instruments: A Blueprint for Reforms*, 37 HASTINGS L.J. 335, 335 (1985).

323 *See* Raymond C. O'Brien, *Analytical Principle: A Guide for Lapse, Survivorship, Death Without Issue, and the Rule*, 10 GEO. MASON U. L. REV. 383, 390-91 (1988).

324 Dawson v. Yucus, 239 N.E.2d 305, 306 (Ill. Ct. App. 1968).

325 *Id.*

326 *Id.* at 310.

327 *Id.* at 306.

328 *Id.* at 309.

by name without a class designation used.[329] Moreover, Stewart and Gene do not naturally form a class. Nieces and nephews can be a valid class designation.[330] Even though both Stewart and Gene were nephews, they were not Nelle's only nephews.[331] Nelle had four nephews, two of whom were Stewart and Gene, and one niece. Witnesses shared that Nelle was close only to Stewart and Gene, not the other nephews or niece.[332] As the court stated, "[t]here is nothing in the language of the will that indicates the testatrix intended to create a class or survivorship gift."[333] That interpretation is consistent with most, but not all, of the language of the will. But that interpretation does not consider Nelle's broader intent.

The residuary gift does include the contingency of only one of two beneficiaries surviving the testator, a contingency that is missing from Clause Two. The absence of survivorship language does not, however, necessarily mean that Nelle wanted any lapsed gift to fall to the residuary estate. The difference in ages may be the reason that Nelle did not contemplate the possibility that Stewart or Gene would predecease her. The court does note that Gene died in 1963, two years before Nelle died in 1965.[334] Nelle did not update her will. Individuals frequently fail to update their estate plans. One reason may be a misremembering of the details of the provision.

Moreover, Clause Two was prefaced with Nelle's belief. The provision stated, "believing as I do that those farm lands should go back to my late husband's side of the house . . . ."[335] The court oddly remarked that while the language "recites testatrix' desire . . . [h]er intention to return the farm to her husband's side of the house was fulfilled when she named Stewart Wilson and Gene Burtle as the donees of the interest."[336] Nelle's intention is not fulfilled by recitation of this language in the will. Nelle's intention that the lands "should go back to [her] late

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329 *See, e.g.*, Snellings v. Downer, 18 S.E.2d 531, 534 (Ga. 1942) ("If a gift is made to beneficiaries by name, prima facie the gift is not one to a class, but to the beneficiaries as individuals, even though the persons named may possess some quality in common; and if no contrary intention appears from the context or other parts of the instrument, the beneficiaries will take as individuals, and not as a class.").

330 The class designation of "nieces and nephews" can create interpretative issues. For example, the issue may be raised whether the nieces and nephews of the testator's spouse should be included in a gift in the testator's will to nieces and nephews. *In re* Estate of Carroll, 764 S.W.2d 736, 738 (Mo. Ct. App. 1989).

331 *Dawson*, 239 N.E.2d at 307.

332 Whether the testator is close to a particular individual or not is an example of extrinsic evidence. *See* Schuyler, *supra* note 133, at 104.

333 *Dawson*, 239 N.E.2d at 309.

334 *Id.* at 306-07.

335 *Id.* at 306.

336 *Id.* at 309.

husband's side of the house" would only be fulfilled if the entire one-fifth share passed to one or more members of her husband's family. Her intention would not be satisfied if part of the one-fifth interest passed to individuals like Ina Mae and Hazel, the residuary beneficiaries, who had no familial relationship with Nelle's husband Frank. The court essentially ignored this phrasing and instead relied upon other canons of construction. Specifically, the court considered the overall testamentary scheme.

Residuary beneficiaries are often the individuals whom the testator intended to favor most. Applying this general assumption, the court noted, "there is a general testamentary scheme favoring the beneficiaries of the residue of Mrs. Stewart's estate; namely, Ina Mae Yucus and Hazel Degelow . . . ."[337] Applying this general assumption does not reflect this particular testator's intent as it relates to the farm lands. It disregards the Clause Two statement "believing as I do that those farm lands should go back to my late husband's side of the house."[338] The court constructed a narrative that does not fit the particular circumstances of the testator.

Now, if Nelle's intent was that the one-fifth share pass to Stewart and Gene, or to the other if only one of them survived, the provision should have been written in two ways. First, the provision could have read "One-half (1/2) of my interest therein to Stewart Wilson, a nephew, now living in Birmingham, Michigan and One-half (1/2) of my interest to Gene Burtle, a nephew, now living in Mission, Kansas, or all my One-fifth (1/5) if only one of them survives me."

The provision could have also been written to leverage the power of the narrative. The narrative could have been expanded to the following provision:

> Through the Will of my late husband, Dr. Frank A. Stewart, I received an undivided one-fifth (1/5) interest farm lands. That property is legally described as two hundred sixty-one and thirty-eight hundredths (261.38) acres of farm lands located in Section Twenty-eight (28), Twenty-nine (29), Thirty-two (32) and Thirty-three (33) in Township Fourteen (14) North, Range Four (4) West of the Third Principal Meridian in Sangamon County, Illinois.
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> 2. I believe that those farm lands should go back to my late husband's family.

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337 *Id.* at 310.
338 *See id.*

> 3. As a consequence, I direct that my one-fifth (1/5) interest in the farm lands to be divided equally among my nephews who survive me and who have an ownership interest in the farm lands. As of the date of this will's execution, those nephews are Stewart Wilson, who now living in Birmingham, Michigan, and Gene Burtle, a nephew, now living in Mission, Kansas.
>
> 4. If I am not survived my any nephews who have an ownership interest in the farm lands, I direct that my one-fifth (1/5) interest in the farm lands be divided equally among my nieces and nephews who are also nieces and nephews of my late husband.

The enumeration separates out the different components of the gift with point number three being just one sentence that references Nelle's intent. Point four clarifies the nature of the class who are not only nephews of Nelle but also individuals who own an interest in farm lands. Point five provides for the contingency that no nephew who holds an interest in the farm lands survives Nelle. These alternate takers, unlike Nelle's residuary takers, will have both a familial relationship to Nelle and to her late husband Frank. This revision brings in the narrative that reflects Nelle's intent about the history of the farm lands and the connection that not only Nelle but the beneficiaries have with the land. This revision demonstrates that "once upon a time" is phrasing that enhances the narrative in wills. The additional language adds meaning and clarity in a manner that furthers, not frustrates, the testator's intent.

Class gifts and lapse are doctrines that seek to determine the testator's intent in light of changed circumstances, just as the following doctrines of ademption and abatement seek to do.

C. Ademption and Abatement

When a will is executed by the testator, the will has only the potential to be legally operative. At the time the will is created, no transfer of property is made by the dispositive provisions and no fiduciary obligations attach to the nominations. The purported will has legal effect, if at all, only after the testator has died. This means that days, weeks, months, years, or even decades may separate the will's execution and the will's implementation. Just as changes in circumstances may relate to changes in beneficiaries and nominated fiduciaries may change, so may the testator's property change. The concepts of ademption and abatement address the changes in property that may occur as a result of the

gap in time between execution and implementation[339] when the meaning of words has been "eroded by the passage of time."[340] Classification of the type of gift influences the court's application of the doctrines of ademption and abatement.[341]

The issue of ademption occurs when specifically identified property that was owned by the testator at the will's execution and is the property is not in the testator's estate.[342] There are two types of ademption.[343] One is ademption by extinction[344] and the other is ademption by satisfaction.[345]

Two theories of ademption by extinction attempt to resolve how to handle the issue of the disappearance of a property designated as a specific gift in a will.[346] Those theories are the identity theory and the intent theory.[347] The identity theory of ademption provides that if the specifically identified property is not in the testator's estate at the time of the testator's death, the gift is extinguished.[348] The intent theory of ademption provides that if the specifically identified property is not in the testator's estate because of some involuntary action on behalf of the testator, the beneficiary may receive either a substituted gift or the cash value of the identified property.[349] Actions that would be involuntary to

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339 *See generally* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (presenting a framework for the revision of wills that testators have not altered despite changes in circumstances).

340 *See* Schuyler, *supra* note 133, at 102.

341 The following are the four typical classifications of testamentary gifts: (1) specific, (2) general, (3) demonstrative, and (4) residuary. *See, e.g.*, 11A ILL. FORMS LEGAL & BUS. *Wills* § 35:360 (2020).

342 For a self-described "not-too-scholarly overview of ademption," see J. Milton Coxwell, Jr., Note, *The Case of the Vanishing Devise, or in the Alternative, Praise the Lord! It's Not Adeemed*, 69 ALA. LAW., Sept. 2008, at 326, 327. *See also* Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 741 (1961) ("The term 'ademption' describes a result under the law of wills: When a distinct object or right has been bequeathed but is not found in the testator's estate at the time of his death, the legatee of such object or right receives nothing.").

343 *See, e.g.*, *When Is Ademption Doctrine Applied*?, 33 EST. PLAN. 45, 45 (2006).

344 UNIF. PROB. CODE § 2-606 cmt. (UNIF. L. COMM'N 2019). For an analysis of this section, see Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1067-68 (1992).

345 UNIF. PROB. CODE § 2-609; s*ee also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.4 (AM. L. INST. 1999).

346 *E.g.*, MASS. GEN. LAWS ch. 190B, § 2-606 (2020).

347 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.2 cmt. b; *see also* Raley L. Wiggins, *Adeemed if You Do, Adeemed if You Don't: The Testator's Intent to Passively Revoke a Specific Devise*, 61 ALA. L. REV. 1163, 1167 (2010); Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 GONZ. L. REV. 105, 107-08 (1993).

348 Wiggins, *supra* note 346, at 1167.

349 *Id*.

the testator include if the property was stolen, lost, destroyed, or sold by a conservator.[350] Some issues of ademption are addressed by interpreting, or construing as the case may be, the will as of the time of the testator's death. For example, when the testator gifted "my home place" to a beneficiary, the home that was owned at the testator's death—and not the property owned by the testator at the date of the will's execution, was given to the beneficiary.[351]

A case that examined both what should be classified as a specific gift and how ademption by extinction applies is *McGee v. McGee*.[352] Claire McGee's will included a gift to a "good and faithful friend" and to the descendants of her three "beloved" sons.[353] The provisions at issue were the following Clause Eleventh and Clause Twelfth, which read

> CLAUSE ELEVENTH:
> I give and bequeath to my good and faithful friend FEDELMA HURD, the sum of Twenty Thousand ($20,000) Dollars, as an expression to her of my appreciation of her many kindnesses.
>
> CLAUSE TWELFTH:
> I give and bequeath all of my shares of stock in the Texaco Company, and any and all monies standing in my name on deposit in any banking institution as follows:
>
> (a) My Executor shall divide the shares of stock, or the proceeds thereof from a sale of same, with all of my monies, standing on deposit in my name, in any bank, into three (3) equal parts and shall pay 1/3 over to the living children of my beloved son, PHILIP; 1/3 to the living children of my beloved son, RICHARD and 1/3 over to the living children of my beloved son, JOSEPH. Each of my grandchildren shall share equally the 1/3 portion given to them.[354]

The conflict arose because the testator's estate had insufficient assets to fund both of these gifts. When the will was executed, Claire had "a substantial sum of money" on deposit in her name at the People's Savings Bank in Providence.[355] Five weeks before her death, her son

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350 *See, e.g.*, *In re* Estate of Mason, 397 P.2d 1005, 1007 (Cal. 1965) (addressing sale of property by a guardian when the testator was incompetent).

351 Milton v. Milton, 10 So. 2d 175, 177 (Miss. 1942).

352 McGee v. McGee, 413 A.2d 72 (R.I. 1980). This case is frequently included in casebooks. *See, e.g.*, STERK & LESLIE, *supra* note 255, at 311-17.

353 *McGee*, 413 A.2d at 73.

354 *Id.*

355 *Id.*

Richard undertook some financial planning using a duly executed power of attorney.[356] Using the power of attorney, Richard withdrew approximately $50,000 and applied nearly $30,000 of these withdrawn funds to purchase four U.S. Treasury bonds.[357] These bonds, which are commonly referred to as flower bonds, were purchased by Richard in an attempt to minimize federal estate tax liability.[358] The remaining withdrawn funds of approximately $20,000 were held in two accounts for Claire's expenses.[359] The issue was whether the $30,000 in flower bonds should be used to fund the gift to Fedelma or the gift to the grandchildren.[360]

The grandchildren argued that the design of Claire's estate plan was to favor her family over "outsiders."[361] They referenced the purchase of the flower bonds as an attempt to minimize federal estate tax liability such that funds would still be available for the family gifts.[362] Richard, who was also Claire's personal representative, asserted that he purchased the bonds to minimize the potential federal estate tax liability and that his mother was only informed after the purchase of the flower bonds.[363] Richard also claimed that the bonds were "monies standing" in his mother's name "on deposit in a banking institution."[364] Thus, the argument was advanced that the form of the legacy to the grandchild changed but the essential character, quality, and substance remained the same.[365] To this, Fedelma asserted that a voluntary act by Claire through her duly authorized agent operated as ademption by extinction of the grandchildren's gift. The flower bonds should thus be used to fund her gift rather than the grandchildren's gift.[366]

The Rhode Island Supreme Court began by classifying the types of gifts. The gift to Fedelma of $20,000 was a general gift. In contrast, the gift to the grandchildren was a specific gift because that was Claire's intent. Although Claire did not use the language "specific gift," the provision specifically identified the Texaco stock and described the funds with "sufficient accuracy and satisfiable only out of the payment of such

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356 *Id.*

357 *Id.*

358 *Id.* at 73-74. This planning was not necessary as no federal estate tax liability was incurred.

359 *Id.* at 74. One account was a checking account in Claire's name; the other account was a savings account in Richard's name. *Id.*

360 *Id.*

361 *Id.*

362 *Id.*

363 *Id.*

364 *Id.*

365 *Id.*

366 *Id.* at 74-75.

fund."[367] Even though Claire did not identify a particular bank in the provision, the court noted that she did give all the money in her name "in any bank."[368] The court held that the gift to the grandchildren was specific one and turned to the issue of whether the gift was adeemed by extinction.[369]

The court recognized that "a merely nominal or formal change" in the character of the property will not trigger ademption by extinction.[370] The court, however, determined that the change was of substance, not form. More specifically as to intent, the court remarked, "There is no language in the will that can be construed as reflecting an intention of the testatrix to bequeath a gift of bond investments to her grandchildren."[371] The "plain and explicit direction" was for the grandchildren to receive whatever funds remained in any account at any banking institution.[372] With no funds in any bank account in Claire's name, the specific gift was adeemed.[373] In other words, the bonds were not monies "at any banking institution."[374] Funds of the sale of the flower bonds were thus directed to satisfy Fedelma's gift with the balance of the funds to pass via the residuary clause with no funds to be used for even partial funding of the gift to the grandchildren.[375]

Claire's will included some expressive language. Fedelma was described as a "good and faithful friend" with the general gift "an expression to her of my appreciation for her many kindnesses," which evidenced a close relationship between the friends.[376] Likewise, Claire's will showed a close relationship with her family with each of her three sons described as "my beloved son."[377] Ultimately, this language was of limited value in helping the court resolve the construction issue.

Narrative could have been leveraged to clarify the intent and avoid the need for the construction proceeding. For example, if the testator's intent was indeed to favor her family, the following provision might have been included in the will.

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367 *Id.* at 75.

368 *Id.* at 76.

369 *Id.*

370 *Id.*

371 *Id.* at 77.

372 *Id.*

373 *Id.* The court also stressed that Richard's actions, as Claire's agent, bore Claire's ratification. Claire was not incapacitated when Richard was properly exercising the power. *Id.*

374 *Id.* at 73, 77.

375 *See id.* at 78.

376 *Id*. at 73.

377 *Id.*

> Although my hope is that all the gifts in my will to my family and friends are able to be fully satisfied, in the event such is not possible, I intend to favor the gift to my grandchildren in Clause Twelfth over the gift to my dear friend in Clause Eleventh.

Like ademption by extinction, ademption by satisfaction is "an intent-effecting doctrine."[378] Ademption by satisfaction occurs when a testator gives during his or her lifetime property to a named will beneficiary in lieu of the testamentary gift identified in the will.[379] Issues arise when the testator during his or her lifetime gave a slightly different gift than the gift that was identified in the will.

The case of *YIVO Institute for Jewish Research v. Zaleski* showed the difficulty of determining intent when contradictory writings and statements emerge.[380] Dr. Jan Karski was a Polish resistance fighter during World War II.[381] Following the war, Dr. Karski emigrated to the United States where he settled in Maryland.[382] During his life, he developed relationships with various charitable organizations, including The Kosciusko Foundation, The American Center for Polish Culture, and the YIVO Center for Jewish Research.[383] In 1992, Dr. Karski entered into an agreement with YIVO to establish an endowment fund.[384] The endowment fund was to support an annual monetary award to authors "whose works focused on or otherwise described contributions to Polish culture and Polish science by Poles of Jewish origin."[385] A letter agreement was created that referenced a pledge of $100,000 to be made "in my will, or in cash and/or marketable securities of the same total market value during my lifetime."[386]

Eight months after the letter agreement, Dr. Karski properly executed a will. The Second Article of the will read as follows:

> I hereby give and bequeath to YIVO-Institute for Jewish Research (tax exempt organization Dr. Lucjan Dobroszycki and Dr. Ludwik Seideman) all my shares of Northern States Power (N.St.Pw.) of which 400 share certificates are located in Riggs

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378 *E.g.*, YIVO Institute for Jewish Research v. Zaleski, 874 A.2d 411, 420 (Md. 2005). For casebooks referencing this case, see ROGER W. ANDERSON & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 230-32 (4th ed. 2012) and SUSAN N. GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 559 (2011).

379 *E.g.*, UNIF. PROB. CODE § 2-609(a) (UNIF. L. COMM'N 2019).

380 *Zaleski*, 874 A.2d at 420-21.

381 *Id.* at 414.

382 *Id.*

383 *Id.* at 413-14.

384 *Id.* at 414.

385 *Id.*

386 *Id.*

> National Bank, Friendship Branch (4249 block of Wisconsin Avenue), Safe Deposit Box 240, and the rest approximately 1,780 shares, is held by Northern States Power as automatic reinvestment. All these shares (approximately 2,180) should be transferred (not sold) to YIVO.[387]

When the will was executed on October 25, 1993, the referenced shares were valued at $100,000.[388] Over a two month period from November 1995 to January 1996, Dr. Karski made a series of lifetime gifts to YIVO.[389] The value of the gifts totaled $99,997.69 and consisted of gifts of shares of New York State Electric & Gas Corporation, shares of Ohio Edison Company, and cash.[390] Dr. Karski then gave YIVO a check in the amount of $2.31, which brought the total value of the lifetime gifts to exactly $100,000.[391] What Dr. Karski did not do, however, was revoke or in any way update his will.[392]

When Dr. Karski died four years later on July 12, 2000, his estate included the Northern States Power Company shares that were referenced in the YIVO letter agreement.[393] YIVO submitted a request to Dr. Karski's personal representative for payment of the testamentary gift.[394] The personal representative denied the request and YIVO filed a petition for an order directing the distribution of the property.[395]

The Maryland Court of Appeals articulated the issue on appeal as follows: "The question here is whether there was an ademption by satisfaction and whether it has occurred is most certainly a matter of testator intent."[396] If the testator intended the lifetime gift to extinguish the testamentary gift, the testamentary gift is adeemed by satisfaction.[397] Where the testator does not have a parent-child relationship with the beneficiary, the lifetime gift is presumed not to adeem the testamentary gift.[398] That presumption may be rebutted by extrinsic evidence.[399]

The court described ademption by satisfaction as "an intent-effecting doctrine" that is designed "to prevent the legatee from receiving a

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387 *Id.*

388 *Id.* at 414-15. At the time of Dr. Karski's death, the stocks increased in value and were valued at $113,527.64. *Id.* at 415.

389 *Id.*

390 *Id.*

391 *Id.*

392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.*

396 *Id.* at 417.

397 *Id.*

398 *Id.*

399 *See id.*

double gift against the testator's wishes."[400] The lower court determined that Dr. Karski's purpose with the testamentary gift was "to fulfill or otherwise provide security" for the commitment to YIVO in the letter agreement.[401] The appellate court agreed with this conclusion.[402] The appellate court then proceeded to consider whether the lifetime gift was substantially different in kind.[403] No evidence existed that the particularly identified stock in the letter agreement had any significance to either Dr. Karski or to YIVO.[404] Thus, the purpose of the lifetime gift and the kind of property given were the same as in the testamentary gift. The Maryland Court of Appeals held that the lower court did not abuse its discretion to find that the presumption was rebutted and the testamentary gift to YIVO was adeemed by satisfaction.[405]

This case demonstrates the issue that arises when narrative is excluded from the will. Consider how the following language could have addressed the issue and reduced the potential that court resolution was needed.

1. I have a number of relationships with charitable organizations, including YIVO-Institute for Jewish Research, a tax-exempt organization run by Dr. Lucjan Dobroszycki and Dr. Ludwik Seideman ("YIVO"). My goal has been to support organizations to that promote Polish culture.
2. In recognition of the letter agreement I signed on 1992 with YIVO, I hereby give and bequeath to YIVO all my shares of Northern States Power (N.St.Pw.) of which 400 share certificates are located in Riggs National Bank, Friendship Branch (4249 block of Wisconsin Avenue), Safe Deposit Box 240, and the rest approximately 1,780 shares, is held by Northern States Power as automatic reinvestment.
3. All these shares (approximately 2,180) should be transferred (not sold) to YIVO unless I otherwise give to YIVO during my lifetime an amount to satisfy the letter agreement pledge.

This language could not only have resolved the issue without court resolution, but could have served as a reminder to Dr. Karski about the connection between the letter agreement and the pledge. The language also shares Dr. Karski's philanthropic support. Testators may have diffi-

400 *Id.* at 420.
401 *Id.* at 421.
402 *Id.*
403 *Id.*
404 *Id.*
405 *Id.*

culties fully understanding the contents of their will. As Professor Fellows described, "Although a good lawyer will try to explain the various provisions to the client, the level of detail and 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."[406] Prefacing the operative language with Dr. Karski's broader goals by situating the gift among many that he has made during his lifetime and in his will would have clarified the bequest. The conclusion also reinforces Dr. Karski's intent to have one gift, whether lifetime or testamentary, not two gifts to YIVO. Infusing narrative helps the testator engage with the will in a meaningful and memorable way that furthers intent.

The testator's will may specify the order of abatement that should apply in the event that the testator's probate estate is insufficient to fund all of the gifts.[407] If the will does not specify, state statutes outline the general starting point for abatement.[408] The order of abatement may be altered by the court in the following circumstances:

> If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.[409]

The Editors' Note[410] clarifies that "[t]he statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his [or her] purpose. Hence subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways."[411]

That purpose could be supplied by a narrative. For example, the will may directly articulate the testator's primary purpose, which could then inform the order of abatement. For instance, the introduction of the will may be followed by an identification of the testator's family, such as the identification of the testator's spouse and children. Included in that provision may be the following sentence.

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406 Fellows, *supra* note 84, at 634.

407 *E.g.*, ARIZ. REV. STAT. ANN. § 14-3902(B) (2020).

408 *E.g.*, *id.* § 14-3902(A); *see also* UNIF. PROB. CODE § 3-902(a) (UNIF. L. COMM'N 2019).

409 This approach appeared in the proposed 1946 Model Probate Code. MODEL PROBATE CODE § 184(b) *in* LEWIS M. SIMES & PAUL E. BASYE, MICHIGAN LEGAL STUDIES 172-73 (Hessel E. Yntema ed., 1946).

410 UNIF. PROB. CODE § 3-902 cmt; *see also* ARIZ. REV. STAT. ANN. § 14-3902(B).

411 UNIF. PROB. CODE § 3-902 cmt.

> In making this will, my primary purpose is to support my family, who are [insert identification of family that corresponds to the testator's meaning of family]. I do wish to recognize other individuals and entities who are important to me, but only in the event that such property is not needed to satisfy the gifts to my family.

That statement could be used to facilitate interpretation and construction of the entire will. If the testator's probate estate has insufficient property to fund all of the gifts, this statement can be referenced for abatement of testamentary gifts to non-family members, such as friends or charitable organizations, before testamentary gifts to family members are abated. Some may suggest that the language above is little more than an extension of typical testamentary language. This language shows that the will already is a narrative and slight changes can enhance that natural narrative without injecting uncertainty, erroneous language, or diatribes.

VI. Acknowledgment of Concerns About Enhancing Narrative Aspects of Testamentary Instruments

Wills are not novels. Techniques and approaches that would be appropriate for some narratives do not translate to will-drafting. When considering the examples above and narrative-based techniques more generally, some may be concerned about the potential negative consequences. Many associate expressive language with the Texas Court of Appeals Case of *Lipper v. Weslow*.[412] While the case itself focused on potential undue influence from the testator's son, who was both the drafting lawyer and a main beneficiary, the case is frequently recalled for its infamous statement of reasons.[413] The case, however, is a not an example of appropriate use of narrative-based drafting.

In *Lipper*, the eighty-one-year-old Sophie Block executed her last will twenty-two days before her death.[414] Her son Frank Lipper drafted the will that divides the majority of Sophie's estate between her two surviving children.[415] No provision was made for gifts to the children or spouse of her predeceased son Julian Weslow.[416] What was included in the will about Julian and Julian's family was an extensive statement de-

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412 369 S.W.2d 698 (Tex. Civ. App. 1963). This case is frequently included in trusts and estates casebooks. *See, e.g.*, Bonfield et al., *supra* note 208, at 72-77; Brophy et al., *supra* note 208, at 359-65; Sitkoff & Dukeminier, *supra* note 255, at 296-301.

413 *Lipper*, 369 S.W.2d at 699-701.

414 *Id.* at 699, 701.

415 *Id.* at 700-01.

416 *Id.*

tailing the reasons why Julian's family was not included in the will.[417] Cluttered with legalese and jargon, the provision not only read as though someone other than the testator composed the provision, but included factual inaccuracies.[418] Effective narrative-based technique draws in the testator's authentic voice.[419] Likewise, effective narrative-based techniques rely on accurate statements. No testamentary instrument is a place for rambling, incomplete statements,[420] accusatory diatribes, or inaccurate recitations.[421]

Drafters' hesitancy to incorporate language or take drafting approaches that may be classified as "non-traditional" may be motivated by several reasons. There may be an over-estimation of the value and accuracy of time-tested language. They may also increase the transaction costs, both of creating the will and of ultimately probating the will. Such concern may be influenced by the reluctance to more directly bring the personal into drafting.[422]

The drafter should be cautious. Wills drafted today may be admitted to probate decades from now. The provisions must accurately reflect the testator's current relationships with individuals, entities, and property. Additionally, the provisions must also take into account changes of circumstances in those relationships. While some may worry that transaction costs may increase by requiring further customization, translation and customization are the roles of the drafting lawyer.[423] Drafters already consider the sequence of provisions, the descriptions of beneficiaries, and the descriptions of property. This also means using Plain English,[424] such as using the term "descendants" rather than "issue" or

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417 *Id.* For an examination of the no contest clause, see Karen J. Sneddon, *Voice, Strength, and No Contest Clauses,* 2019 WIS. L. REV. 239, 258-61.

418 *Lipper*, 369 S.W.2d at 700-01; *see also* Sneddon, *supra* note 416, at 260-61 (analyzing the statement of reasons in Sophie Block's will).

419 *See* Sneddon, *supra* note 62, at 746-47 (exploring the problems of inauthentic voice as illustrated by J. Seward Johnson's will).

420 For a collection of unusual wills, see ROBERT S. MENCHIN, WHERE THERE'S A WILL: A COLLECTION OF WILLS—HILARIOUS, INCREDIBLE, BIZARRE, WITTY . . . SAD 20-21 (1979); VIRGIL M. HARRIS, ANCIENT, CURIOUS, AND FAMOUS WILLS 1-9 (1911); Harry Hibschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362-69 (1932).

421 *See* Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749, 761-62 (1994).

422 *See, e.g.*, Sneddon, *supra* note 67, 1550-83 (exploring the intersection of gender and testamentary language).

423 *See* Rivka Grundstein-Amado, *Narrative Inquiry: A Method for Eliciting Advance Health Care Directives*, 8 HUMANE MED. 31, 31-32, 35-38 (1992) (acknowledging that the use of narrative will take more time but noting that the benefit is "responsible evaluation and self-critical reflection").

424 The following ten elements are typically components of Plain English: "(1) a clear, organized, easy-to-follow outline or table of contents; (2) appropriate caption or headings, (3) reasonably short sentences, (4) active voice, (5) positive form, (6) subject-

the potentially misunderstood term "heirs."[425] As Thomas Shaffer wrote, "No lawyer's job is so small that craftsmanship in the use of language is unjustified. At the most immediate and appealing level, that is so because we have human lives and fortunes in our hands."[426]

Considering if and how to enhance the natural narrative aspect of testamentary instruments relates to the counseling and drafting aspect of estate planning. This consideration can help the drafter during discussions with the testator to better process and then with the drafting to better reflect the client's wishes. As one commentator opinioned, "the chief fault with most estate plans is that they are based upon incomplete facts and that emphasis is wrongly placed; insufficient attention is given to those things which in human affairs ought to come first."[427] It has been stated that "[t]he most important dimension in all of this [estate planning] is not litigation or taxes or even property distribution; it is counseling."[428] In describing the role of the lawyer, one commentator admonished, estate planning "cannot be fulfilled with a fill-in-the-blanks system of will interviews, and lawyers who insist on operating their wills practice as if they were taking driver-license applications should get into another line of work."[429]

Even though the will is written in first person and present tense, the testator does not select the form of the document, the order of the provisions, or even the language within the document. The testator will rely

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verb-object sequences, (7) parallel construction, (8) concise words, (9) simple words, and (10) precise words." George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 945 (1983). For an examination of Plain English, see JOSEPH KIMBLE, LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE (2006).

425 JOHN R. PRICE, CONTEMPORARY ESTATE PLANNING TEXT AND PROBLEMS 173 (1983). Using the more widely understood term "descendants" rather than "issue" is not a new recommendation. In analyzing an example will in a 1983 student casebook, the author states "[t]he term 'descendants' is used in the instrument rather than 'issue' because the former term is more understandable to lay persons." *Id.*

426 SHAFFER ET AL., *supra* note 47, at 176.

427 JAMES F. FARR & JACKSON W. WRIGHT, JR., AN ESTATE PLANNER'S HANDBOOK 2 (4th ed. 1979) (quoted in JOHN R. PRICE, CONTEMPORARY ESTATE PLANNING TEXT AND PROBLEMS 2 (1983)).

428 THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH 12 (1970). For other considerations of the lawyer's role as counselor, see Larry O. Natt Gantt II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 365 (2005); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 213 (1990); Mary Clements Pajak, *Counseling Fiduciaries on How to Avoid Beneficiary Complaints and Quickly and Fairly Settle Complaints*, SC85 ALI-ABA 21, 24-28 (1998).

429 SHAFFER, *supra* note 427, at 98; *see also* Avi Z. Kestenbaum & Amy F. Altman, *Have We Got It All Wrong?: Rethinking the Fabric of Estate Planning*, TR. & EST., Feb. 2016, at 29, 29.

upon forms and the lawyer's expertise in the drafting process. Wills may be one of the oldest areas of law and "[t]he general idea, the ways of expressing the idea, even the language itself, seems deeply rooted in custom."[430] That does not mean that the testator does not want his or her personal narrative to inform the drafting. Whether the testator composes the language of the will himself or herself or works with lawyer, the will should be a reflection of the testator.[431]

The reluctance to deviate from so-called standard phrasing is a relatively recent phenomenon. For it used to be frequently stated that, as the New York Court of Appeals stated in 1911, "No will has a brother."[432] The court continued, "the language of every testator must be studied by itself in order to learn his intention."[433] Likewise, as one commentator in 1936 wrote, "exactly the same language will rarely be found in any two wills . . . ."[434] This same commentator further asserted that "each will must be construed in the light of its own particular phraseology and the facts and circumstances surrounding the testator at the time of its execution."[435]

This quote supports the inference that the focus on standardization of language is a relatively recent phenomenon. Thus, drafters should not automatically reject the inclusion of narrative in the will because of some false adherence to the will's past.[436]

Not only is the emphasis on the importance of standardized language inconsistent with the history of will drafting, such reluctance to modify the language actually can undermine the estate planning process.[437] As one writer states, "It is an article of faith among lawyers who write wills that rigid adherence to words and phrases that have survived

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430 FRIEDMAN, *supra* note 85, at 62.

431 *See, e.g.*, Lynn B. Squires & Robert S. Mucklestone, *A Simple "Simple" Will*, 57 WASH. L. REV. 461, 461 (1982) ("A will is a highly personal document. Not only should the testator understand it, but he or she should also be able to explain its contents to others, especially family members who may be affected by it.").

432 Meeker v. Draffen, 94 N.E. 626, 628 (N.Y. 1911). Similarly, a will is declared to have no "twin." ATKINSON, *supra* note 139, § 146, at 808.

433 *Meeker*, 94 N.E. at 628.

434 THOMPSON, *supra* note 134, at 272.

435 *Id.*

436 *See* David W. Wick, *The Expressive Protective™ Estate Planning Strategy: A New Paradigm for Estate Planning Design and Administration*, 27 ELDER L.J. 115, 145 (2019) ("Lawyers should not be afraid to deliberately deviate from standard forms to include expressive statements . . . . The issue is where an estate planning attorney can provide added value for clients. The attorney can ensure the re-narrated events are accurate by acting as an objective observer . . . .").

437 For a summary of various drafting errors and tips to avoid those errors, see L. Paul Hood, Jr., *How to Avoid Common Sources of Drafting Errors*, 45 EST. PLAN. 32, 34 (2018).

for centuries will lead to less ambiguity and therefore fewer will contests."[438] Drafters continue to "worship at the shrine of evolutionary perfection," meaning that the drafter's actions are, in part, "dictated by the experiments and mistakes of the past."[439] This may instill an overconfidence in the commonly used forms and form language.[440] Overconfidence may interfere with the lawyer's understanding of the relevance and applicability of the forms and form language. There is no evidence that leveraging the power of narrative drafting techniques would increase succession litigation.[441] Judicial involvement does frequently occur in succession. The balance of fairness and efficiency may require individualized court inquiries. But such is the focus of succession. The individual's intent is paramount.

In fact, attention to drafting may actually decrease some litigation.[442] While some may posit an increase in will contests should testamentary language be more narrative-based, such language may reduce the need for lengthy construction proceedings.

The dismissal of narrative-based techniques may also stifle drafting innovation. Rigid adherence to language of the past does not match the needs of current testators.[443] The meaning of language does change over time. Using outdated language may frustrate the intent of a modern testator. A willingness to alter language when appropriate is a required skill of drafters.[444] Increasing transaction costs is a legitimate concern. Nonetheless, replicating outdated, ambiguous, or incomplete language may simply delay the cost. The cost of creating such a will may ulti-

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438 ADAM FREEDMAN, THE PARTY OF THE FIRST PART: THE CURIOUS WORLD OF LEGALESE 148 (2007).

439 Albert Martin Kales, *The Will of an English Gentleman of Moderate Fortune*, 19 GREEN BAG 214, 224 (1907).

440 *See, e.g.*, FREDERICK K. HOOPS ET AL., 1 FAMILY ESTATE PLANNING GUIDE, *Drafting Wills* § 17:1 (4th ed. 2019) ("Although all lawyers pride themselves on their expert draftsmanship, the growing number of will contests and will construction proceedings belie this belief.").

441 *See, e.g.*, Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659 (1993) (disputing the argument that litigation increases if the courts focus on intent).

442 *See, e.g.*, R. Kevin Spencer, *Good Estate Planning Process: A Panacea for Litigation*, 11 EST. PLAN. & CMTY. PROP. L.J. 137, 138, 140-41 (2018).

443 *See, e.g.*, Jeffrey N. Pennell, *The Joseph Trachtman Lecture-Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J. 2, 2-3, 5-8 (2008) (using demographic information to argue that planning strategies for one generation of clients do not necessarily fit the goals of another generation of clients).

444 *See, e.g.*, Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 109 (2000) (acknowledging that revising or altering form language does raise risks but positing that such revisions and alterations produce "clearer and more accurate" documents).

mately lead to an increase in costs for court proceedings and delay the estate administration.

As demonstrated above, even where the drafter refrains from including any of the personal in a testamentary document, the personal is embedded into the nature and structure of testamentary instruments.

VII. Conclusion

A will may be one of the most personal legal documents that anyone ever creates written in first person and present tense. The will speaks directly to an individual's loved ones and guides the handling of an individual's probate estate. For that reason, the readers of wills will process the information presented as a narrative, a story of the testator. Ignoring the narrative of wills can frustrate the intent of the testator.

The will-drafter, whether lawyer or testator, can leverage the will's natural form in an intent-effectuating manner by using narrative techniques. Narrative-based language is not mere surplusage language that injects uncertainty, mistakes, and confusion in testamentary instruments. The term "narrative" refers to how the provisions are ordered and constructed. Increasing the narrative in testamentary instruments is an intent-serving approach that is consistent with the foundational principles of succession. In that respect, narrative informs interpretation and construction in a manner that advances—not undermines—the testator's intent. Testators do and should tell tales.