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Tales From a Form Book: Stock Stories and Transactional Documents

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ARTICLES

TALES FROM A FORM BOOK: STOCK STORIES AND TRANSACTIONAL DOCUMENTS*

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I. INTRODUCTION

Legal transactions are stories. They are the stories of marriages, business partnerships, acquisitions, births, and deaths. These stories are built around the hopes, fears, wishes, and concerns of the particular parties to the transaction. But at their core, these stories are not just about the individual circumstances of those parties. At the core of each of these individual stories is a stock story. Virtually every transactional document starts with a form. And stock stories are embedded within each form document. The forms feature ingénues, tricksters, misers, and sages who undertake journeys, confront mutinies, and at times achieve glory.

This article examines the tales of transactions by examining the stock stories within transactional document forms. This article will first define the term "stock story," highlighting the applicability of the term "stock story" to the law and its primary focus to date on litigation-based legal documents.

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This article will then identify and analyze the stock stories embedded within a variety of transactional form documents, such as wills, trust agreements, employment contracts, premarital agreements, and advance directives. Specifically, the article will analyze the (a) stock characters, (b) stock plots, (c) stock situations, and (d) stock inevitable outcomes of transactional form agreements. This article will then address the possibilities and pitfalls related to recognition of the stock stories embedded within these transactional forms.

With the use of stock stories by lawyers in any situation, there is a concern about misrepresenting the unique nature of the individual transaction, as well as the potential for overreliance on the stock story, which may ultimately lead to hindering drafting innovation. Yet to the contrary, the recognition of stock stories in transactional form documents may also allow for effective narrative shortcuts, providing valuable guidance to the formation of the transaction as well as enabling a better understanding of the transaction by the parties, drafters, and courts. Rather than undercut or negate the value of utilizing transactional form documents and transactional form books, this article seeks to use the understanding of transactional form documents as stock stories to better appreciate how to most effectively use such forms in practice.

II. Stock Stories and the Law

A. Stock Stories Defined

Stock stories are story types. Stock stories are conventional stories that rely upon stock characters, stock situations, stock plots, and stock outcomes to evoke a stock response.[1] Stock stories are generic stories conveyed in broad brushstrokes that are readily understood by audiences. They are culturally specific and represent the conventions of the particular genre in which the story arises.[2] Thus, stock stories are not particular stories about individuals but rather are stylized stories that become templates for the subsequent creation of particular stories.[3] Once a stock story has been triggered in the mind of the audience, that individual's perception of the events and

1. Anthony G. Amsterdam & Jerome Bruner, Minding the Law 45–47, 117–18, 121–22 (2000).

2. For instance, the commedia dell'arte is built upon a variety of stock stories. *E.g.*, Paul Kuritz, The Making of Theater History 170 (1988) (describing the commedia dell'art as an acting troupe using stock characters and stock situations to improvise the performance). Fairy tales and pantomimes also rely upon stock stories. Jennifer Schacker, Folktales and Fairy Tales: Traditions and Texts from Around the World 759 (Anne E. Duggan, Donald Haase & Helen Callow eds., 2d ed. 2016).

3. *See, e.g.*, Linda H. Edwards, *Speaking of Stories and Law*, 13 Legal Comm. & Rhetoric 157, 171 (2016) [hereinafter Edwards, *Speaking of Stories*].

circumstances will be based, at least in part, on the stock situations embedded in that story and the perceived inevitable stock outcome.[4] Stock stories thus serve as patterns and models for the crafting of individual stories. Indeed, the ubiquitous nature of stock stories is found in copyright law. Stock stories, including standard plot devices and standard character types, are not protectable by copyright.[5]

B. Stock Stories and the Rules of Law

The law itself may be conceptualized as a story.[6] The law represents society's ideals and attempts to resolve problems based on cultural, economic, and historical experiences. Those problems are both actual disputes and potential disputes. Stories, also referred to as narratives, play a role in shaping the law.[7] Courts, for example, may rely upon narratives to interpret laws.[8] Indeed, the concept of stare decisis involves reducing individual cases to patterns and matching those patterns to existing cases.[9] By reducing individual cases to repeating patterns, the law compresses individual narratives into stock stories. In other words, the core narrative of the law is a stock story.

Most of the scholarly attention about stock stories and the law has been focused on litigation practice and, specifically, on the use of story-

4. Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 192–93 (2012).

5. *See, e.g.*, 17 U.S.C. §§ 101, 102, 106 (2012); Cavalier v. Random House, Inc., 297 F.3d 815, 824 (9th Cir. 2002); Lewinson v. Henry Holt & Co., 659 F. Supp. 2d 547, 567 (S.D. N.Y. 2009).

6. Stephen Paskey, *The Law Is Made of Stories*, 11 LEGAL COMM. & RHETORIC 51, 52 (2014) (declaring that the "rule by which a decisionmaker can grant a remedy, impose a punishment, or confer some benefit has the underlying structure of a *stock story")* (emphasis in original); *see also* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997); Joshua A. Newberg, *The Narrative Construction of Antitrust*, 12 S. CAL. INTERDISC. L.J. 181 (2003).

7. Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996); Erin Sheley, *The "Constable's Blunder" and Other Stories: Narrative Representation of the Police and the Criminal in the Development of the Fourth Amendment Exclusionary Rule*, 2010 MICH. ST. L. REV. 121 (2010).

8. *E.g.*, Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009); Sherri Lee Keene, *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, 58 HOW. L.J. 845, 846–47 (2015); J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM. & RHETORIC 67, 67–68 (2013); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1756–57 (1990).

9. *See, e.g.*, LINDA ALVAREZ, DISCOVERING AGREEMENT: CONTRACTS THAT TURN CONFLICT INTO CREATIVITY 8 (2016) (observing that the recognition of patterns may result in the imposition of a pattern "regardless of whether the prescribed result is actually beneficial or wise in the fuller, deeper, particular context of the real-life parties and circumstances").

telling to persuade audiences.[10] It has repeatedly been shown that a variety of audiences, including juries,[11] trial judges,[12] and appellate judges,[13] are more likely to be persuaded by a lawyer's arguments or a client's position through the effective use of storytelling techniques.[14] Lawyers can better persuade their audiences by incorporating or countering, as the case may be, stock stories in a wide array of written and oral communications, such as opening and closing arguments,[15] pleadings,[16] and briefs.[17]

While much less focus has been placed on examining the use of storytelling in the law for the purpose of developing the law, at least one author has declared that the "rule by which a decision-maker can grant a remedy, impose a punishment, or confer some benefit has the underlying structure of a *stock story*."[18] Professor Stephen Paskey posits that "every governing legal rule" contains "the essential elements of a story—events, characters, and plot."[19] This theory applies to rules of law enacted both by statute and developed through common law.[20] Professor Linda Edwards counters that

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10. *E.g.*, J. Christopher Rideout, *Storytelling*, *Narrative Rationality*, *and Legal Persuasion*, 14 LEGAL WRITING 53 (2008).

11. *E.g.*, Lisa Kern Griffin, *Narrative*, *Truth*, *and Trial*, 101 GEO. L.J. 281, 285 (2013); Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 311 (2012); *see also* BOB GIBBINS & A. RUSSELL SMITH, Jury's Stock Stories, 4D American Law of Products Liability 3d § 72:7 (2004).

12. *E.g.*, Amy Bitterman, *In the Beginning: The Art of Crafting Preliminary Statements*, 45 SETON HALL L. REV. 1009, 1010–11 (2015); Berger, *supra* note 8, at 259.

13. *See* Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief As Story*, 14 J. LEGAL WRITING 127 (2008); Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397 (2016); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); 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, 768–69 (2006).

14. *E.g.*, Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 278, 280–82 (2014).

15. *See* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 58 (1992); Philip N. Meyer, *"Desperate for Love III": Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715, 716–17 (1999).

16. *E.g.*, Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 LEGAL WRITING: J. LEG. WRITING INST. 3, 4 (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, 2–3 (2014).

17. *See* Paskey, *supra* note 6, at 58.

18. Paskey, *supra* note 6, at 52 (emphasis in original); *see also* Peter Brooks, *"Inevitable Discovery" – Law*, *Narrative*, *Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 72 (2003); Linda H. Edwards, *Once Upon a Time in Law: Myth*, *Metaphor and Authority*, 77 TENN. L. REV. 883, 883–85 (2010); Lorie M. Graham & Stephen M. McJohn, *Cognition*, *Law*, *Stories*, 10 MINN. J.L. SCI. & TECH. 255, 258 (2009); Christine Metteer Lorillard, *Stories that Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251, 252 (2005).

19. Paskey, *supra* note 6, at 52.

20. *Id.* at 78.

rules themselves are not stories.[21] Instead, Professor Edwards posits that rules of law *contain* stock stories. The rule of law may not itself represent a story, but the rules have been shaped by stories relayed in prior cases or produced by society, and both stories and rules may use similar structures.[22]

Whether or not public laws are stories, private laws may be conceptualized as stories. Private law is generally created when individuals or entities voluntarily enter into legally enforceable agreements.[23] Contracts and estate planning documents are in essence the private law between the parties that agree to be legally bound by them.[24] These documents rely upon stories: both the particular stories of the involved parties and the stock stories embedded within their structure.

C. Stock Stories and Litigation-based Legal Documents

Whether the law is recognized to be a story or not, the value of using narrative techniques to develop legal documents has been widely recognized.[25] The events of a life may not be a purposive narrative that follows "Chekov's canon"[26]—meaning that a person's life story does not only include events purposeful to the forming of a cohesive, unified narrative. However, life is lived in a series of narrative moments. Legal documents relay some of those narrative moments. The narrative moments, or stories, come from the parties, the drafter, and the genre of the legal document produced.[27] As a consequence, those stories represent not only the actual, individual stories but also stock stories that are more broadly applicable.

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21. Edwards, *Speaking of Stories*, *supra* note 3, at 174.

22. *Id.* at 173–74.

23. *See, e.g.*, MARGARET TEMPLE-SMITH & DEBORAH CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS 96 (2013) (defining the drafter of a contract as a "lawmaker").

24. *E.g.*, Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1873–74 (2011); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2181–82 (2011); Nathan B. Oman, *Promise and Private Law*, 45 SUFFOLK U. L. REV. 935 (2012); Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 133 (2015).

25. For a bibliography of applied legal storytelling, see J. Christopher Rideout, *Applying Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC 247 (2015).

26. ALAN M. DERSHOWITZ, *Life Is Not a Dramatic Narrative*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 99, 100 (Peter Brooks & Paul Gewirtz eds., 1996) (observing that life events, unlike a constructed narrative, include meaningless and random events). Chekhov's canon refers to dramatic principle that a narrative should include only characters, details, and events related to the narrative. Irrelevant information is not included in the narrative. *See, e.g.*, Aden Ross, *Stumped, by Debora Threedy, A Playwright's Perspective*, 81 UMKC L. REV. 833, 834 (2013).

27. For an exploration of genre and legal writing, see Katie Rose Guest Pryal, *The Genre Discovery Approach: Preparing Law Students to Write Any Legal Document*, 59 WAYNE L. REV. 351 (2013); Bret Rappaport, *A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts by Constraining Writers' Choices and Influencing Readers' Perceptions*, 22 J.L. & POL'Y 197 (2013); Jennifer Murphy Romig, *Legal Blogging and the Rhetorical Genre of Public Legal Writing*, 12 LEGAL COMM. & RHETORIC 29 (2015); Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*,

The power of stock stories has been widely recognized in the drafting of litigation-based documents.[28] This work has been informed by cognitive science and psychology.[29] Stories may help the audience engage with the facts of a particular case by helping them to better remember those facts and by projecting a meaning to the facts based on a recognizable, pre-existing stock story.[30] A lawyer's reference in a document to a recognizable stock story enables the reader to put the client's specific facts of the case into a frame of reference and lends credibility, or persuasiveness, to the client's story.[31] Scholars have explored the constraining nature of stock stories on the litigation-based documents produced.[32] Scholars also explored the potential need to re-frame a narrative to counter a stock story that the audience would interpret, perhaps incorrectly, as applicable to the presented narrative.[33]

Just as narrative techniques may be used to craft litigation-based documents, so too may narrative techniques be used to craft transactional docu-

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29 QUINNIPIAC L. REV. 665 (2011); Jeff Todd, *Genre Theory for Product Instructions and Warnings*, 54 WASHBURN L.J. 303, 304 (2015).

28. *E.g.*, Diana Lopez Jones, *Stock Stories*, *Cultural Norms*, *and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings*, 5 PHOENIX L. REV. 457, 460 (2012).

29. *E.g.*, Lea B. Vaughn, *Feeling at Home: Law*, *Cognitive Science*, *and Narrative*, 43 MCGEORGE L. REV. 999, 1007 (2012) (examining how stories facilitate learning and memory).

30. *E.g.*, Jennifer Sheppard, *Once Upon a Time*, *Happily Ever After*, *and in a Galaxy Far*, *Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259–61 (2009) (examining how lawyers can use stock stories to draft persuasive court documents).

31. *See* Rideout, *supra* note 10, at 67.

32. *See, e.g.*, Randy Gordon, *Institutionalizing Exemplary Narratives: Stories as Models for and Movers of Law*, 25 LAW & LIT. 337, 338 (2013); Nicole Smith Futrell, *Vulnerable*, *Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1604 (2015).

33. *See, e.g.*, Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 945 (2006); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 866–67 (1992); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 78 (2008); Carolyn Grose, *Of Victims*, *Villains and Fairy Godmothers: Regnant Tales of Predatory Lending*, 2 NE. U. L.J. 97, 101–02 (2010); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners*, *Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 850; Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 211–13 (2012); Katherine Lusby, *Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story*, 25 U. TOL. L. REV. 911, 912 (1995); Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 697 (1994); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials*, *the Unwritten Law*, *and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 397 (1999); Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123 (1997).

ments.[34] The actual stories of the parties and stock stories will, therefore, be embedded within transactional documents.

III. Transactional Form Documents as Stock Stories

The use of form documents and form books by lawyers is perhaps as old as the law itself.[35] Many trace the development of legal forms and form books to the Middle Ages.[36] Although the term "form book" may seem anachronistic in this digital age, form books are not mere relics of the past. Form books have evolved with the practice of law and are available for a variety of practice areas. Compilations of forms may be in hard copy or digital copy.[37] Form documents may be produced by commercial publishers,[38] shared as part of Continuing Legal Education materials,[39] enacted as statutory sections,[40] and created through personal use. Legal research databases include downloadable and searchable form documents for a wide variety of practice areas, such as Asset Purchase Agreements, Employment Agreements, Leases, Publishing Agreements, and Trust Agreements.[41] For purposes of this article, a compilation of form documents, whether commercially or personally prepared, and whether in hard copy or digital form, will be referred to as a form book.[42]

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34. Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques in Drafting*, 68 Okla. L. Rev. 263, 264 (2016).

35. *See generally* Adam Freedman, The Party of the First Part: The Curious World of Legalese 25–30 (2007) (attributing the spread of the first form books to the invention of the printing press).

36. Darsie Bowden, The Mythology of Voice 28–29 (1999) (referencing medieval form books); Lisa Ede & Andrea Lunsford, Singular Texts/Plural Authors: Perspectives on Collaborative Writing 77 (1990) (referencing James J. Murphy, Rhetoric in the Middle Ages (1974); Judson Boyce Allen, The Friar as Critic: Literary Attitudes in the Later Middle Ages (1971)).

37. For insight into the transition from exclusively hard copy to electronic access, see Gerald J. Robinson, *The Birth of Forms on Disk—Confessions of a Formbook Author*, 9 Law. PC 6 (1992).

38. *E.g.*, 5 Am. Jur. Legal Forms 2d *Prenuptial Property Agreement—Barring All Rights in Property of Other Spouse—Reserving Property of Both for Themselves—Subject to Certain Payments to Wife* § 61.19 (2004); 2 Frederick K. Hoops, Frederick H. Hoops III, & Daniel S. Hoops, Family Estate Planning Guide Appendix 25 Spendthrift Trust (4th ed. 2000).

39. *E.g.*, Philip D. Weller, *Drafting 1.01 (with Real Estate Examples and Resources)*, 30 Prac. Real Est. Law. 21, 21 (Jan. 2014).

40. *E.g.*, Me. Rev. Stat. Ann. tit. 18-A, § 2–514 (West 2017); Mich. Comp. Laws Ann. § 700.2519 (West 2016); *see also* Unif. Stat. Will Act (1984). For an examination of statutory wills, see Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 Or. L. Rev. 769, 772 (1993); Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?* 94 Dick. L. Rev. 231, 234 (1990).

41. From Bloomberg DealMaker Search. A description of this service is available at DealMaker, Bloomberg Law, https://perma.cc/FLA2-SF8J (last accessed March 27, 2017).

42. A compilation for forms may also be called a form file.

The prevalence and continued use of forms evidences the value of such forms in the practice of law.[43] Whether a solitary provision from one form document, an amalgamation of a variety of form documents, or the wholesale adoption of a form, no transactional document begins with a blank screen or a blank sheet of paper.[44] Acknowledging the use of form documents does not undercut the value of the drafting attorney to the transaction[45] or negate the customization that tailors the form document to the unique facts and circumstances of the parties and transaction.[46] Instead, form documents represent the starting point of most transactional drafting and can provide valuable guidance throughout the drafting process.[47]

Although the use of form books is not restricted to the drafting of transactional documents,[48] most legal drafters will start with a form.[49] As one author wrote, "The repetitive nature of much of legal drafting makes

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43. *See* Victor P. Goldberg, *The "Battle of the Forms": Fairness*, *Efficiency*, *and the Best-Shot Rule*, 76 OR. L. REV. 155, 157, 164 (1997); Claire A. Hill, *Why Contracts are Written in "Legalese,"* 77 CHI.–KENT L. REV. 59, 70–71 (2001) ("Using time-tested forms, and changing them as little as possible, makes sense for many reasons, even where the forms are unwieldy and convoluted.").

44. *See* Lisa L. Dahm, *Practical Tips for Drafting Contracts and Avoiding Ethical Issues*, 46 TEX. J. BUS. L. 89, 96–97, 100 (2014).

45. *See* Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 492–94 (2007).

46. Dahm, *supra* note 44, at 100 ("As a contract drafter, the successful transactional attorney will have numerous form contracts on which he/she can rely, but will use them only with caution and only as a starting point to create unique contracts for each client and transaction."); Kirsten K. Davis, *Legal Forms as Rhetorical Transaction: Competency in the Context of Information and Efficiency*, 79 U. MO. KAN. CITY L. REV. 667, 677–78 (2011).

47. *See* Davis, *supra* note 46, at 682 ("For example, in the Second Edition of Forms Under Article 9 of the UCC, written by the ABA Section of Business Law Uniform Commercial Code Committee, forms are described as the 'nuts and bolts' of 'most secured transactions,' which suggests completeness, and also as 'starting point[s]' to be adapted and revised for 'the specifics of [a] particular secured transaction,' which suggests incompleteness . . . authors admonish that '[f]orms are intended to serve as examples and must always be tailored to the facts and legal requirements of each situation.' ").

48. *See, e.g.*, Kevin D. Collins, *The Use of Plain-Language Principles in Texas Litigation Formbooks*, 24 REV. LITIG. 429, 438–44 (2005); *see also* George Hathaway, *Review of Michigan Causes of Action Formbook*, 76 MICH. B.J. 86 (1997).

49. One author describe the process of drafting as follows:

> The process of legal drafting typically begins with an associate dragging examples out of the firm's form file and changing the names, dates, and description of the transaction. (Drafting is perhaps the only form of writing in which plagiarism is considered a positive.) Particular provisions are then modified to suit the singularities of the business deal. When the deal is done, the new document is added to the form file, ready for the next associate.

HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING xi (2d ed. 2008).

In legal education, a debate about the use of forms in drafting class continues. *E.g.*, Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming "The Form Book Problem,"* 38 U. DAYTON L. REV. 195 (2012); *see also* William E. Foster & Emily Grant, *Memorializing the Meal: An Analogical Exercise for Transactional Drafting*, 36 U. HAW. L. REV. 403 (2014) (arguing that transactional drafting courses need to foster flexibility and creativity as components of the drafting process).

the use of form documents economically efficient."[50] Form documents, and the compilation of form documents into a form book, are thus generalized documents to cover a broad range of situations.[51] Transactional form documents are recognizable by lawyers and non-lawyers alike[52] and use repeating patterns.[53] In other words, form books are compilations of stock stories. Stock stories are readily recognizable, generalized patterns.

This section thus examines the characteristics of stock stories embedded within transactional form documents. Specifically, this section focuses on four key characteristics of the stock story: (a) characters, (b) plots, (c) situations, and (d) outcomes. Various transactional form documents are used to identify the stock story aspects embedded within form documents.[54]

A. Characters

Stories are populated with characters. Form documents are populated with stock characters. A stock character may be defined as "a conventional character that is expected to appear in certain literary forms, such as the 'Prince Charming' in fairy tales."[55] Stock characters are one-dimensional, recurrent character types.[56] Stock characters rely upon a single stereotypical

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50. M.H. Hoeflich, *Law Blanks & Form Books: A Chapter in the Early History of Document Production*, 11 GREEN BAG 2d 189, 191 (2008).

51. In addressing the "conventional dispositive patterns of wills," Professor Jane Baron wrote:

> Even if a testator chooses not to conform to conventional dispositive patterns, those patterns may nonetheless exert an influence on the terms of his [or her] will. The testator is likely to be aware that the world of others for whom he writes is also familiar with the conventional patterns of wills and that, based on these patterns, those others may have expectations about what the will is likely to or should say. The testator may write to meet those expectations or to explain why those expectations are being defeated.

Jane B. Baron, *Intention*, *Interpretation*, *and Stories*, 42 DUKE L.J. 630, 652 (1992) (footnotes omitted).

52. *E.g.*, Baron, *supra* note 51, at 657–58 ("The perception of wills as a story-type or stock story helps explain why and how individuals unsophisticated about law 'know' what a will is and what it does.").

53. *E.g.*, WAYNE M. GAZUR & ROBERT M. PHILLIPS, CASE STUDIES IN ESTATE PLANNING WITH ABRIDGED STUDENT FORMS 72 (2004) (describing the form documents of wills and trusts as "recurring patterns").

54. The purpose of this article is to focus on the stock stories embedded within the forms of form books. For that reason, the analysis of this article focuses exclusively on the forms of transactional documents from a variety of form books. Documents used as part of actual transactions are not used as examples in this article.

55. CHRISTINA MYERS-SHAFFER, THE PRINCIPLES OF LITERATURE: A GUIDE FOR READERS AND WRITERS 182 (2000); *see also* GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 92 (revised ed. 2003) (identifying the "cruel stepmother and prince charming [as] stock characters in fairy tales").

56. J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 864–65 (4th ed. 1998). Some overlap between stock characters and archetypes exists. Archetypes represent a "basic model from which copies are made; therefore a prototype." CUDDON, *supra* note 56, at 53–54. An archetype is a universal character that "represents the most typical and essential characteristics." CUDDON, *supra* note 56. The traitor, the femme fatale, and the country bumpkin are presented as archetypes but are also stock characters. CUDDON, *supra* note 56.

trait that is readily identifiable by the audience.[57] Stock characters include the ne'er-do-well, the wicked stepmother, the rich fop, the hermit, the braggart, the coward, and the buffoon.[58] Other stock characters include the vamp, the seductress, the miser, the trickster, the prodigal son, and the ministering angel.[59] At first consideration, these stock characters seem limited to fictional narratives and have limited relevance, if any, to transactional documents. Yet, these stock characters do indeed inhabit a variety of form transactional documents, as this section showcases.

Will forms are examples of transactional form documents that are peopled with a wide range of stock characters. The will is a unilateral declaration as to the transfer of property upon the property owner's death and a designation of fiduciaries who will oversee the transfer of the property.[60] The will may be the most personal of all legal documents that an individual creates,[61] and all wills are based upon one or more form documents.[62] The testator, the beneficiaries, and the fiduciaries are represented in will forms as stock characters.

The various will forms present variations of the stock characters, with sometimes a great variety of stock characters presented within one will form. Consider, for example, the common will form that identifies the testator's spouse as the sole, primary beneficiary. The two versions of the common will form gives all of the testator's probate property outright to a spouse[63] or leaves all of the testator's probate property in trust for a

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57. JACK MYERS & MICHAEL SIMMS, THE LONGMAN DICTIONARY OF POETIC TERMS 289 (1989) (defining a stock character as "a conventional character or stereotype whose traits have been established by many authors"). The word stereotype is derived from Greek for "solid" and "type." MYERS & SIMMS, *supra* note 57, at 288. In narrative, a stereotype is defined as a "clichéd characterization . . . without development of nuance." MYERS & SIMMS, *supra* note 57.

58. CUDDON, *supra* note 56, at 864–65; MYERS & SIMMS, *supra* note 57, at 289.

59. For an examination of how the ministering angel stock character may undermine the weight accorded to the professional opinion of nurses, see Mary Chiarella, *Silence in Court: The Devaluation of the Stories of Nurses in the Narratives of Health Law*, 7 NURSING INQUIRY 191, 192–93, 198 (2000).

60. The Restatement (Third) of Property defines a will as:

> a donative document that transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. The term "will" includes a codicil. A codicil is simply a will that amends or supplements a prior will.

RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANS. § 3.1, cmt. A (1999).

61. *See, e.g.*, Harry Hibschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932) (describing wills as "human documents in which men give away themselves . . . "); *see also* Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L. J. 355 (2013).

62. *See generally* ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION (Callaghan & Co. 1928); *On the Origin and History of Wills*, 1 LEGAL REPORTER 223 (1841).

63. For examples of this form, see 2 MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA § 17:33 (7th ed. 2008) (all to spouse with joint children as contingent beneficiaries); 6A ERIC ZIEGENHORN, MO. PRAC., LEGAL FORMS § 20:28 (3d ed.); 10 FLA. JUR. FORMS LEGAL & BUS.

spouse.[64] In both versions of this common will form, the spouse is flattened to become a stock character. In one form, giving everything to the spouse with contingent beneficiaries being the joint children, the spouse is presented as a ministering angel who is a deserving caregiver and will use the testator's property to care for their joint children.[65] In the other form, creating a trust to manage all of the property, the spouse is the stock character of either the damsel in distress or the seductress.[66] The property subject to the trust is more than the portion needed to be held in trust to leverage tax savings. By directing that all of the property be held in trust, the spouse is presented as being unable to responsibly handle the property or morally incapable of handling the property.[67] These form documents, as all stock stories do, reduce the individual into a one-dimensional stock character. Neither of these choices reflect an option of dividing the property upon the testator's death among the spouse and other beneficiaries. The options are both all to the spouse.[68] While this may convey the importance of the spouse in some families, this pattern does not convey the range of options.[69] For example, a testator may wish to divide property proportionally—or even disproportionally—between the spouse, the testator's descendants from a previous relationship, and the joint descendants of the spouse and the testator. The testator may wish to divide the property between the spouse and the testator's parents or even between the spouse and a charita-

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§ 35:126. The contingent beneficiaries are often the testator's descendants. The testator's descendants are not necessarily the spouse's descendants.

64. 2 NANCY SAINT-PAUL, TEX. LEGAL PRACTICE FORMS § 29:7 (2d ed.); 8C NICHOLS CYC. LEGAL FORMS § 217:317 (2009).

65. Although this stock character is not exclusively female, this stock character may be considered to be "Suzy Homemaker." Suzy Homemaker was the name of a 1960s toy line by Topper Toy. The series included a toy refrigerator. *See* Judith Gradwohl, *Suzy Homemaker*, *a slice of life from the 1960's*, O SAY CAN YOU SEE? STORIES FROM THE NATIONAL MUSEUM OF AMERICAN HISTORY (Sept. 15, 2014), https://perma.cc/8PZN-ZJKW; *see also* GARY CROSS, KIDS' STUFF: TOYS AND THE CHANGING WORLD OF AMERICAN CHILDHOOD 120 (Harv. Univ. Press 1997).

66. Despite the feminized names, these stock characters are not restricted to wives. For an exploration of gender bias and the QTIP trust, see Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734 (1998); Wendy C. Gerzog, *Solutions to the Sexist QTIP Provision*, 35 REAL PROP. PROB. & TR. J. 97, 97–99 (2000); Wendy C. Gerzog, *Estate of Clack: Adding Insult to Injury*, *or More Problems with the QTIP Tax Provisions*, 6 S. CAL. REV. L. & WOMEN'S STUD. 221, 222 (1996); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 306 (1995).

67. *See, e.g.*, Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 315–16 (1996).

68. All to the spouse in trust may not convey the trust of a spouse. For an exploration of the dynamics of testamentary gifts to a spouse, *see generally* Ordower, *supra* note 67, at 347.

69. *See, e.g.*, Bobbi J. Bierhals & Kim Kamin, *Planning Considerations for the Post-Nuclear Family*, 155 NO. 8 TR. & EST. 17 (Aug. 2016); *see also* Joan M. Burda, *The Neighbors: Nontraditional Families*, *Nontraditional Estates*, 19 GEN. PRAC. SOLO & SMALL FIRM LAW. 22, 26 (July/Aug. 2002) ("Many actions taken for granted by traditional families are potential sources of problems for nontraditional family members.").

ble organization. The spouse need not be the sole primary beneficiary despite the numerous presentations of this decision in will forms.[70]

The spouse is often the main stock character in will forms, but other characters, including secondary stock characters, also inhabit will forms. For instance, other beneficiaries may be characterized as buffoons and braggarts who need discretionary trusts to hold their inheritance to protect them from themselves. These comic characters, in the mold of Shakespeare's Falstaff,[71] provoke laughter, not inspire confidence. The fiduciary, whether executor or trustee, is portrayed as the wise sage or faithful servant who undertakes the overseeing and protecting of the testator's property. This character values the trust bestowed and may be reluctant to rely upon the judgment of others.

Form trust documents, whether trust declarations or trust agreements, also rely upon stock characters to shape the form. Frequently the settlor, the person who is creating the trust, is portrayed as the stock character of the miser and the trust beneficiary is portrayed as the stock character of the ne'er-do-well. One of the most popular trust forms,[72] whether testamentary or inter vivos, is the discretionary trust.[73] With a discretionary trust, the trustee has the authority to distribute all, some, or none of the trust property.

A trust is a fiduciary relationship with respect to property created by the settlor to give legal title to the trustee and equitable title to the beneficiary.[74] Although the trustee may acknowledge his or her acceptance in a trust agreement, a trust agreement is not a bilateral agreement where multiple parties negotiate the terms of the trust relationship. Instead, the trust instrument is a statement from the settlor to the trustee as to his or her intent and goals relating to the management, distribution, and administration of the trust property.[75]

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70. Testamentary dispositions that are not consistent with a martial agreement or applicable state law are subject to challenge. A decedent spouse may not unilaterally disinherit a surviving spouse. *E.g.*, UNIF. PROB. CODE § 2–202 (2008).

71. *See, e.g.*, Northrop Frye, *Characterization in Shakespearian Comedy*, 4 SHAKESPEARE QUARTERLY 271, 272–75 (1953).

72. A trust may be presented in testamentary trust provisions where the terms of the trust are recited in the terms of a valid will. L. RUSH HUNT & LARA RAE HUNT, BALDWIN'S KY. WILLS AND TRUSTS § 16:1 (2016). A lifetime trust, in contrast, will be recited in a trust declaration or trust agreement. VINCENT DI LORENZO & CLIFFORD R. ENNICO, BASIC LEGAL TRANSACTIONS § 40:42 (2010).

73. *E.g.*, HELENE S. SHAPO, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, BOGERT: THE LAW OF TRUSTS AND TRUSTEES § 228 (2016); Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 567, 568–69 (2005).

74. RESTATEMENT (THIRD) OF TRUSTS § 2 (2002) (Definition of Trust). For an examination of the legal fiction of title-splitting, see Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 81–82 (2012); Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181, 183–85 (2009).

75. For examination of the settlor's intent, see Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1171–74

A discretionary trust bestows upon the trustee the discretion, often "the absolute" discretion, to make distributions to and among the trust beneficiaries. As observed in a recent estate planning trade magazine, "[i]n the context of modern trust planning," the age that trust beneficiaries receive trust property, the proportion of trust property received by a beneficiary, or the age when the trust beneficiary receives a formal role in the management of trust property is a critical client decision.[76] The discretionary trust form establishes a lengthy trust duration, restricts distributions of trust property, and does not permit the trust beneficiary to become involved in the management of the trust property, such as becoming an investment advisor, trustee, or trust proctor.[77]

The discretionary power of distributions provided in form trust documents includes the trustee's decision to make no distribution. Trustees are typically cautious with authorizing distributions because unforeseen, future events may prove earlier distributions to have been unwise.[78] The coupling of discretionary power and natural reluctance of trustees to authorize distributions results in the beneficiaries of many discretionary trusts receiving little, if any, trust property.[79] The creator of the trust has thereby promoted the hoarding of property rather than the distribution and use of the property. The beneficiary of the trust, with equitable title and yet limited—if any—ability to compel a distribution from a discretionary trust, is thus presented as unable to handle the responsibility of property. The spendthrift trust[80] is one extreme use of the miser and ne'er-do-well as stock characters.[81]

(2008); Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 AM. C. TR. EST. COUNS. L.J. 1, 2–3 (2014); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 651–54 (2005); Benjamin D. Patterson, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent*, 43 CREIGHTON L. REV. 905, 905–07 (2010).

76. Stanley H. Teitelbaum & Martin M. Shenkman, *Psychological Issues of Bequests*, 155 TR. & EST. 13, 14–15 (2016).

77. Even though the revisions to the tax code have altered the value of trusts solely for tax purposes, trusts continue to be a popular mechanism to ensure property management and asset protection. *See generally* Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257 (2015).

78. *See, e.g.*, Ronald R. Volkmer, *Standard for Finding Abuse of Trustee's Discretion*, 41 EST. PLAN. 42, 42–43 (Mar. 2014); *see also* Eric A. Manterfield, *Lurking Liability for Trustees—And Their Counsel Too*, 41 EST. PLAN. 3, 6 (Oct. 2014) ("Which individual or which corporate fiduciary will actually carry out the terms of the estate plan can have immense implications for the trust and its beneficiaries.").

79. *See generally* Shyla R. Buckner & Michelle Rosenblatt, *A Rose by Any Other Name: Utilizing and Drafting Powers for Trustees*, *Trustee Advisors*, *and Trust Protectors*, 8 EST. PLAN. & CMTY. PROP. L.J. 41, 44, 101 (2015).

80. UNIF. TRUST CODE § 103 (16) (2016) (defining the spendthrift provision).

81. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 58 (2003). For an examination of the rise and implications of spendthrift trust, see Mary Louise Fellows, *Spendthrift Trusts: Roots and Relevance for Twenty-First Century Planning*, 50 REC. ASS'N B. CITY N.Y. 140 (1995); J. Paul Fidler, *Spendthrift Provisions: Wouldn't You Like to Be a Spendthrift Too?*, 23 OHIO PROB. L.J. 9 (2012); Adam J. Hirsch,

Stock characters also permeate contract form documents. One example is the force majeure clause, a standard contract clause found in a variety of form contracts, such as sales agreements, real estate transactions, acquisition agreements, and employment contracts, as well as in standalone boilerplate form provisions.[82] A force majeure clause (French for "superior force") allows a contracting party to suspend or terminate its performance obligations when certain circumstances arise that make performance commercially impracticable or impossible.[83] Virtually all of these forms describe the circumstances giving rise to the party's ability to rely on the force majeure clause to escape its contractual obligations as ones "beyond its reasonable control."[84] These forms provide illustrative examples of the types of circumstances considered beyond the parties' control, generally including "acts of God, war, terrorism, criminal acts of third parties, embargo, strikes or other labour disputes."[85] Other standard force majeure forms delineate "earthquakes; fires; . . . epidemics; . . . computer (hardware or software) or communications service; accidents"[86] as other examples of circumstances beyond the parties' control. Thus, the contracting party resembles the stock character of the innocent bystander, one who is in the wrong place at the wrong time through no fault of his own. Alternatively, the contracting party resembles the ingénue, an endearingly innocent and wholesome character (usually female) who is often naïve and dependent, necessitating the need to rely on others.

In the instance of the force majeure clause, recognition of these stock characters may serve to best understand the purpose behind the clause—that is, to protect an "innocent" contracting party from having to perform, or risk being in breach and subject to damages, only when the reasons for its failure to perform are in fact not its fault. Some form clauses even take this idea one step further by requiring the party asserting the force majeure clause to provide "clear and convincing evidence" of the existence of those circumstances rendering performing impractical or impossible, or requiring the party to use its best efforts to "remove such disability" if possible.[87]

Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 WASH. U. L.Q. 1, 2–3 (1995); Kellsie J. Nienhuser, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 552–53 (2015); Soled & Gans, *supra* note 77, at 287–89.

82. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2016); *see also* Peter Siviglia, *Force Majeure*, 68 N.Y. ST. B. J. 52, 52 (1996).

83. *See 12. Limitation of Liability*, *b. Force Majeure*, BLOOMBERG LAW (database updated November 2016).

84. *See 12. Limitation of Liability*, *b. Force Majeure*, *Article 10. Miscellaneous*, *10.1 Force Majeure*, Bloomberg Law (database updated November 2016); *13. General Provisions*, *13.2 Force Majeure*, BLOOMBERG LAW (database updated November 2016).

85. *13. General Provisions*, *13.2 Force Majeure*, *supra* note 84.

86. *12. Limitation of Liability*, *b. Force Majeure*, *supra* note 83.

87. *Article 10. Miscellaneous*, *10.1 Force Majeure*, *supra* note 84.

Focus on stock characters, however, may instead lead to misinterpretation of the actual parties involved. As Mieke Bal wrote, "[c]haracters resemble people."[88] Although there may be much resemblance between characters and actual parties to a transaction, characters "are fabricated creatures made up from fantasy, imitation, memory: paper people, without flesh and blood."[89] Identification of actual parties as stock characters can result in failure of recognizing the goals, needs, and intent of the parties. Consider the example of the discretionary trust. Extrinsic evidence, meaning facts and circumstances not referenced in the written trust instrument, may tell a different story. For example, the settlor and beneficiary may have a close, supportive relationship. The settlor may have selected the form due to tax-related provisions also included in the form, never understanding that broad discretionary powers may not be exercised freely by the trustee.[90] The language within the trust instrument which focuses solely on the settlor and beneficiary, with little if any recognition of the actual parties carrying those labels, will triumph over any extrinsic evidence that the settlor would approve of distributions. In other words, the settlor is a covetous miser and the beneficiary is the irresponsible ne'er-do-well. The trustee's actions are thus influenced by those characters and the actions attributed to those characters.

This misinterpretation of the parties can also occur with the form force majeure clause. While in most instances, the party seeking to enforce the clause did not cause or have any control over the circumstances that now make its performance impracticable or impossible (thus mirroring the embedded stock characters of the innocent bystander or ingénue), that may not always be the case. Instead, it is possible, for example, that the actions of a contracting manufacturer may have led, in whole or in part, to the labor disputes that now make it impossible or commercially impracticable to perform. Alternatively, the contracting party may be an oil company or polluting factory that has greatly contributed to the types of "extreme weather" identified in the form force majeure clause, or it may be a governmental entity not taking aggressive measures to mitigate climate change.[91] Did the contracting parties intend that the force majeure clause apply under those

88. MIEKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE 113 (3d ed. 2009).

89. BAL, *supra* note 88, at 113.

90. The benefits to creating a trust, whether during one's lifetime or in one's will, is not limited to maximizing tax benefits. For example, the use of trusts allows for property management, sharing of enjoyment of the property, and creditor protection. *E.g.*, Jonathan G. Blattmachr & Martin M. Shenkman, *Planning in a Time of Uncertainty: Part II*, 156 TR. & EST. 31, 34–35 (Feb. 2017) (reciting the benefits to trust planning beyond tax incentives); Howard M. Zaritsky, *Top Ten 2016 Tax Developments for Estate Planners*, 29 NO. 1 PROBATE PRACTICE REPORTER 1, 8 Jan (2017) (identifying the number one tax development as the potential repeal of the estate tax and reciting the non-tax benefits to trusts).

91. *See* Myanna Dellinger, *An "Act of God"? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 HASTINGS L. J. 1551 (2016).

circumstances, where the party may not actually be wholly "innocent"? The recognition of embedded stock characters in those instances may lead to a misinterpretation of the actual parties involved and may misalign contract interpretation from the parties' actual intent.

The stock characters participate in the series of events, the stock plots, as discussed in the next section.

B. Plots

A stock plot is "a standard conflict or predicament that is easily recognized by an audience."[92] The stock plots progress in a familiar manner to audiences that track the "typical" story. A widely-recognized stock plot is boy meets girl, boy loses girl through a misunderstanding, and boy reunites with girl.[93] Other examples of stock plots include "the journey of the prodigal son," "rags-to-riches," "the exchange of identities," and "the seductive vamp beguiling the innocent."[94] Employment contracts, premarital agreements, and even private foundations draw from the catalogue of stock plots.

A typical employment form contract[95] embodies a stock plot that is similar to the stock plot used in the story of David and Goliath. The widely-recognized biblical story of David and Goliath conveys the predicament of the underdog who needs to overcome great obstacles to secure a victory that is against all odds. It involves the triumph of the young Israelite shepherd, David, armed only with his slingshot and some stones, against the armored nine-foot-nine warrior, Goliath. This David and Goliath stock plot is embedded within many employment form documents. When one hears the phrase "David and Goliath," what immediately comes to mind is an unfair match, or, in the terms of contract transactions, unequal bargaining power between the parties. While the reader may be rooting for the underdog David in this story, in terms of an employment contract, once the language is drafted in favor of the more powerful Goliath, or employer, it becomes incredibly difficult for the underdog employee to overcome that unequal bargaining power.

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92. MYERS & SIMMS, *supra* note 57, at 289–90.

93. For an examination of various stock plots in movies, see 2 BEYOND THE STARS: PLOT CONVENTIONS IN AMERICAN POPULAR FILM (Paul Loukides & Linda K. Fuller eds., 1991).

94. MYERS & SIMMS, *supra* note 57, at 289–90; *see also* L. MONIQUE PITTMAN, AUTHORIZING SHAKESPEARE ON FILM AND TELEVISION: GENDER, CLASS, AND ETHNICITY IN ADAPTATION 147–48 (2011) (observing that the Shakespeare's Romantic Comedies rely upon the stock plot of "'boy meets girl, boy loses girl, and boy gets girl'" (citation omitted)).

95. *E.g.*, Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 451 (2009).

This unequal bargaining power can be evidenced within many different standard employment contract form documents. For example, a typical form termination clause provides:

> Employer shall continue to employ employee for such time as employer is in need of, or desirous of, the services of employee. It is agreed between employer and employee that the duration of employment is unspecified and solely rests in the discretion of the employer.[96]

Another standard form contract clause in employment agreements is the "right to inventions" term, under which the employer obtains exclusive ownership of the employee's ideas or inventions. Such form documents often provide for employer ownership even when the invention was not created during working hours and regardless of whether the inventions are even within the scope of employer's business operations or relate to any of employer's work or projects.[97] Yet another typical clause in form employment contracts requires the employee to agree that all of her claims or disputes against the employer will be decided by arbitration, while the employer makes no such reciprocal promise.[98] The employer, with its greater bargaining power and strength, is entitled to pursue any claims it may have against the employee by jury trial, bench trial, or arbitration without any contractual limitations. In all of these form documents, the stock story of David and Goliath emerges—the story of the powerless employee pitted against the powerful employer, where any potential "victory" of the employee is unlikely as against her employer and would require her to defeat all odds.[99]

A twist in the use of this particular stock plot is that the true story of David and Goliath is quite opposite to the meaning attributed to the words "David and Goliath,"[100] just like actual employment transactions. According to Malcolm Gladwell, among others, the story of David and Goliath is not one about an underdog's unlikely victory against a mighty warrior because, for one, David was not an underdog. He was a skilled shepherd experienced in the use of the devastatingly effective weapon of a sling.[101]

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96. 7B AM. JUR. LEGAL FORMS 2d § 99:172 (2004).

97. *Id.* § 99:249

98. 24A WEST'S LEGAL FORMS, EMPLOYMENT § 2.52 (2003).

99. In a similar vein, certain form employment contracts feature the stock story of the battle between Odysseus and his disloyal servants in the sense that the form contract terms were drafted with a presumption that the employee or "servant" will be disloyal to his employer. For example, a typical form contact term, often titled "Noncompetition and Loyalty," contains restrictions on the employee's ability to have an interest in any business similar to employer's business and is based on the premise that an employee is likely to be "disloyal" to his employer's interests. *See* 7B AM. JUR. LEGAL FORMS 2d § 99.8 (2004).

100. MALCOM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS (Little Brown 2015). The TED Talk on this topic is available at Nat'l Pub. Radio, *What's the Real Story of David and Goliath*, TED RADIO HOUR, (Nov. 15, 2013), https://perma.cc/UFP5-NZKX.

101. GLADWELL, *supra* note 100.

Secondly, Goliath was not a mighty warrior with superior armor, but a "sitting duck" suffering from a medical condition of acromegaly or gigantism with resulting poor vision and slow reflexes. Along the same lines, this counter-story to the traditionally-relayed narrative of David and Goliath better represents many employment transactions. The employee and employer are not always in such unequal bargaining positions; this is particularly true in many executive employment transactions. Therefore, the characterization of this relationship between the parties in form employment agreements is often at odds with the mutually beneficial relationship between the actual parties. The two interpretations to the stock plot of "David and Goliath" illustrates the potential problem with stock plots. The audiences' expectations of the characters' relationships and the actual series of events may differ significantly from the stock plot.

One transactional form that would seem to progress along a commonly accepted stock plot is the premarital agreement. Variations of the "boy-meets-girl" plot underlie many form premarital agreements. Yet likewise, the stock plots may be twisted slightly from audience expectations. A premarital agreement is a bilateral agreement between two parties in advance of marriage whereby the parties outline the rights and responsibilities with respect to property before, during, and after the marriage.[102] The focus of form premarital agreements is not the creation of the marriage or structuring the life of the marriage.[103] The focus of most form premarital agreements is the termination of the marriage—whether upon dissolution proceeding or death.[104] The focus upon termination influences the sequence of events in the form to influence the progression and sequence of events in the plot. The termination of the marriage runs counter to the "happily ever after" that most audiences will project onto the "boy-meets-girl" stock plot.

The climax of the "boy-meets-girl" stock plot occurs when the relationship is jeopardized. The falling action and resolution centers on the "rescue" of the relationship. Yet, the "rescue" of the premarital agreement is not the re-affirming of the relationship and the unification of the parties. The "rescue" of the premarital agreement is the saving of one party and the

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102. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(5) (UNIF. LAW COMM'N 2012); *see also Uniform Premarital and Marital Agreements Act*, 46 FAM. L.Q. 345 (2012).

103. Some scholars are urging a re-characterizing of premarital agreements to foster harmony and stability during the relationship. *See, e.g.*, Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 355, 355 (2016) (asserting that allowing couples to "arrange their financial affairs would have an overall positive effect on relationship stability and equality of money management within the relationship").

104. *E.g.*, Alison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 894–96 (1997); Peter M. Walzers & Jennifer M. Riemer, *Premarital Agreements for Seniors*, 50 FAM. L.Q. 95 (2016); Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage*, *Employment Contracts*, *and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 766–67 (2009).

damnation of the other party. Two variations of the rescue exist. In one variation of the plot line, one party is the seductive vamp, or temptress, who has beguiled the innocent into marriage for the vamp's own financial benefit. The stock plot centers on saving the innocent from the catastrophe of his or her folly, i.e., the marriage, by preserving the separation of assets upon the termination of the relationship. This plot can be identified in the common form premarital agreement that presents a total waiver of rights upon the termination of the marriage.[105] Consider the following example:

> The parties contemplate marriage and desire to fix their respective rights and entitlements regarding each other's property.
>
> Each party waives the right to:
>
> 1. Share in each other's estate on death, whether by will, dower, curtesy, statutory share, statutory right, whether such right now exists by statute or case law.
> 2. To sharing in any pension, profit sharing, government or military pension plan.
> 3. To the sharing in the increase in marital assets regarding separate property during marriage.
> 4. To spousal support, whether permanent or rehabilitative, separate maintenance, or in any other form, or division of property due to their status of marriage or former marriage.[106]

Thus, the provisions of the form where both spouses waive all interests progress along the plot line by protecting the spouse, or rather the other family members of the spouse, from the disastrous folly that was the union. The other spouse will receive limited financial benefit upon the termination of the marriage, whether that termination is by death or dissolution proceeding. In other words, the wealth of the spouses, or the lack thereof, remains relatively unchanged. The wealthier spouse is therefore "saved" from his or her folly in partnering with the less-wealthy spouse.

Another variation of the plot line, which even more explicitly seeks to protect the innocent spouse from the femme fatale, provides punishments for a misbehaving spouse. In that form, punishments for the spouse who pursues dissolution proceedings or the spouse who is found to be unfaithful during the marriage exist in the form of forfeiture, or reduction, of spousal support or the release of interests in certain marital assets.[107] The plot centers on the rescue of the boy from the girl, a twist on the romantic version of the plot "boy meets girl."

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105. *E.g.*, 26 IND. PRAC., ANDERSON'S WILLS, TRUSTS & ESTATE PLANNING § 8:26 (2016–2017 ed.); 15 TEXAS FORMS LEGAL & BUS. § 32:14; 2 FREDERICK K. HOOPS, FREDERICK H. HOOPS III & DANIEL S. HOOPS, FAMILY ESTATE PLANNING GUIDE Appendix 21 (4th ed. 2014).

106. 4 MICH. LEGAL FORMS § 11:10; *see also* 4 ARIZ. PRAC., CMTY. PROP. LAW § 2.11 (3d ed.).

107. Some jurisdictions will not enforce such a provision. *E.g.*, Diosdado v. Diosdado, 97 Cal. App. 4th 470, 497 (Cal. Ct. App. 2002).

Employment contracts and premarital agreements may seem like easy form documents to harbor stock plots. Yet, a great variety of transactional forms rely upon a stock plot structure. For instance, the rags-to-riches stock plot, or perhaps more universally known as "poor-boy-makes-good,"[108] underscores the form documents relating to charitable giving, including the creation of a private foundation. A private foundation is a charitable organization that is not publically supported[109] and may be created as a trust[110] or a corporation.[111] A wealthy individual or family member creates the private foundation to provide grants for charitable purposes or other charitable organizations.[112] For example, private foundations have been created by Bill Gates and often bear the name of the wealthy individual or family who created the foundation.[113] Beneficial tax treatment is part of the reason why high net worth individuals may create private foundations. But the overriding reason, whether motivated by personal reflection or societal pressure, is to "give back" and epitomizes "the responsibilities of wealth."[114] For example, the mythology surrounding Andrew Carnegie exemplifies the "rags to riches" stock story.[115] In Carnegie's *Gospel of Wealth*, he contributes to the

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108. Orrin E. Klapp, *The Folk Hero*, 62 NO. 243 J. AMER. FOLKLORE 19, 24 (Jan.–March 1949) (observing that the "'poor boy makes good' is 'part of the biographies of successful men'"). The works of Horatio Alger rely upon this stock plot. *E.g.*, M.H. ABRAMS & GEOFF GALT HARPHAM, A GLOSSARY OF LITERARY TERMS 379 (10th ed. 2012). For an example of Alger's work and use of the stock plot, see HORATIO ALGER, JR., RAGGED DICK OR, STREET LIFE IN NEW YORK WITH BOOT BLACKS (The John Winston Co.: Philadelphia 1896).

109. 26 U.S.C.A. § 508 (West 2006). For an exploration of the rules applicable to charitable organizations, see Philip T. Hackney, *Charitable Organization Oversight: Rules v. Standards*, 13 PITT. TAX REV. 83 (2015).

110. *E.g.*, 10 ILL. FORMS LEGAL & BUS. § 33:199; MYRON KOVE, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, BOGERT'S TRUSTS AND TR. § 1231.

111. *E.g.*, 11 OHIO FORMS LEGAL & BUS. § 31:47 (2016 ed.); *see also* Stephanie B. Casteel, *My Way: What Is the Donor's Best Charitable Game?*, SX025 ALI-CLE COURSE MATERIALS J. 875 (2016) (highlighting options in structuring private foundations).

112. Trevor Findley, Comment, *Tax Treatment of Private Charitable Foundations: A Call to Simplify the Excise Tax*, 49 WILLAMETTE L. REV. 477, 478–80 (2013); *see also* Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 923 (1997) ("Private foundations attract so much attention because they typically consist of a fund of investment assets, were initially funded by a single donor, are managed by that donor or his or her family or close associates, and exist commonly to make grants to other charities rather than to conduct charitable activities directly.").

113. *See, e.g.*, William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 236, 264, 266 (2010).

114. *See generally* Carl J. Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J.L. & PUB. POL'Y 355, 376–77 (2006). *See also* Rene Bekkers & Pamela Wiepking, *A Literature Review of Empirical Studies in Philanthropy: Eight Mechanisms that Drive Charitable Giving*, 40 NO. 5 NONPROFIT AND VOLUNTARY SECTOR QUARTERLY 924, 927 (2011).

115. A recent biography of Andrew Carnegie references the "rags-to-riches" stock story with the following beginning: "In 1848, Andrew Carnegie was an impoverished and barely educated thirteen-year-old Scottish immigrant, whose first American job was bobbin boy in the Anchor Cotton Mill in Allegheny City, Pennsylvania."

SAMUEL BOSTAPH, ANDREW CARNEGIE: AN ECONOMIC BIOGRAPHY xi (2015).

perpetuation of this stock story by extolling that "he who dies rich, dies disgraced."[116] Carnegie's meteoric "rise from a poverty-stricken Scottish youth to an international industrial leader, philanthropist, and peace advocate"[117] presents a favorable narrative and glosses over the negative actions relating to his business policies that contributed to his accumulation of wealth. Similarly, the presence of the stock plot embedded within the form private foundation document glosses over the potentially negative consequences to the creation of a private foundation rather than an outright charitable gift. The form private foundation document[118] progresses along the stock plot that focuses on the generosity of the individual who shares the fruits of his or her labor with the community.[119] The rosy stock plot may encourage a rosy interpretation of the donor's actions and the subsequent actions taken by parties associated with the private foundation. After all, the donor, and by extension the private foundation, is sharing the good fortune accrued by the donor.

The stock plot is a pattern of events that are set against the stock situations, as discussed in the next section.

C. Situations

Stock situations "are recurrent types of incidents or sequences of actions in a drama or narrative. Instances range from single situations to events."[120] Stock situations become the stock scenes that structure the stock plot.[121] Because the audience recognizes the stock situation and its role in the stock story, the stock situation need not be developed or presented in full detail, but the stock situation will be vital to the progression of events in the stock plot.[122] For instance, the lurking eavesdropper, who hears only a snippet of conversation, misconstrues the conversation, and then causes mischief, is an example of a stock situation relevant to the progression of

116. ANDREW CARNEGIE, THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 43 (The Century Co.: New York 1901).

117. BOSTAPH, *supra* note 115, at ix.

118. Beth D. Tractenburg, *Creating a Private Foundation Offers Many Advantages*, 23 EST. PLAN. 249, 250–51 (1996) (identifying the advantages to include tax benefits and sharing philanthropic goals with family members).

119. For an exploration of some of the issues underlying private foundations, see Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite De Tocqueville's Democracy*, 6 WM. & MARY POL'Y REV. 1, 3–4 (2015); Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1665–69 (2015); Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.–KENT L. REV. 571, 573–74, 576 (2010).

120. ABRAMS & HARPHAM, *supra* note 108, at 379.

121. CUDDON, *supra* note 56, at 865 (defining a stock situation as a "well-tried, recurrent pattern in fiction or drama").

122. MARIO KLARER, AN INTRODUCTION TO LITERARY STUDIES 190 (3d ed. 2013) (defining a scene as "the smallest unit in the overall structure of a play").

the stock plot.[123] The "suddenly discovered will,"[124] the unknown pregnancy,[125] mistaken identity,[126] and mutiny are other examples of stock situations which are key scenes to propel forward the events in the stock plot. These stock plots seem to be taken from a Victorian melodrama,[127] but they exist in will forms and contract forms.

Form documents use a number of stock situations. Default provisions, especially the so-called boilerplate provisions,[128] of form documents can be considered stock situations. The boilerplate provisions, whether the perpetuities saving clause in a will[129] or the force majeure clause of a contract,[130] represent a set scene that needs to be included in the stock story for the events to progress. Stock situations in form documents refer to more than the existence of the so-called standard provisions. The stock situation refers to the reasons why such provisions become standard.

The betrayal or mutiny is a stock situation presented in a variety of form estate planning documents. For example, many will forms include provisions that are attempting to brace for the will contest. This includes the no-contest clause. Consider the following example:

> If any beneficiary under this will contests or attacks this will or any of its provisions in any manner, directly or indirectly, any share or interest in my estate given to the contesting beneficiary under this will is revoked and must be disposed of as if the contesting beneficiary had predeceased me *[if appropriate, add:* without issue*].*[131]

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123. ABRAMS & HARPHAM, *supra* note 108, at 379; *see also* PRINCE, *supra* note 55, at 92 (defining a stock situation as a "conventional situation").

124. ABRAMS & HARPHAM, *supra* note 108, at 379. The television show "Downton Abbey" crafted episodes using stock situations. For example, Matthew Crawley suddenly—and unexpectedly—inherits from his deceased fiancée's father to save Downton Abbey. *Matthew Crawley*, DOWNTON ABBEY WIKI, https://perma.cc/U3SR-R8PE (last visited Apr. 2, 2017); *see also* Jessica Fellowes, The World of Downton Abbey (2011). Wills were used extensively as stock situations in Victorian novels. *See generally* CATHERINE O. FRANK, LAW, LITERATURE, AND THE TRANSMISSION OF CULTURE IN ENGLAND, 1837–1925, at 65–102 (2010) (exploring use of Wills in novels by Emily Bronte, Wilkie Collins, Charles Dickens, and George Eliot).

125. PARLEY ANN BOSWELL, PREGNANCY IN LITERATURE AND FILM (2014).

126. MYERS & SIMMS, *supra* note 57, at 289–90.

127. The will was a "mainstay of the Victorian novel." *Id.* at 78. As one author describes the will, "It has a cast of characters: orphans and illegitimate children, heiresses and widows, heroes and villains; it deals with alliances and animosities; fortunes and conditions set down that alter the life-course of survivors." *Id.* at 78.

128. *E.g.*, Jonathan C. Lipson, *What's Amiss?: The Lawyering Interest in "Miscellaneous" Contract Provisions*, 65 CONSUMER FIN. L.Q. REP. 151, 151–54 (2011).

129. *E.g.*, Verner F. Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 277–79 (1982) (exploring the value of a perpetuities savings clause); *see also* David M. Becker, *Tailoring Perpetuities Provisions to Avoid Problems*, ABA PROB. & PROP. 11, 13 (Mar./Apr. 1995) (exploring both the value of and common problems with a perpetuities savings clause).

130. Thomas Black, *Sales Contracts and Impracticability in a Changing World*, 13 ST. MARY'S L.J. 247, 251–55 (1981) (examining the value of a force majeure provision).

131. EDITH C. SCHAFFER, 1 CAL. TRANSACTIONS FORMS–ESTATE PLANNING § 6:116 (2016).

The beneficiary who is objecting to the probate of the will or objecting to a provision of the will is presented as betraying the testator. The imagery of weapons drawn is even more developed in the following no-contest provision for a form declaration of trust:

> If any beneficiary under this Declaration of Trust, either alone or with other persons or entities, shall in any manner directly or indirectly *contest*, *attack*, *thwart*, or otherwise seek to *impair* or invalidate any part or provision of the "Settlor's Estate Plan," then any share or interest under this trust instrument set aside for that beneficiary is revoked and shall be disposed of in the same manner as if the contesting beneficiary, as provided in this instrument, had predeceased the Settlor *[if applicable, add: without issue]*.[132]

The form then itemizes ten actions that would constitute a "contest," "attack," "thwart," or "impair[ment]" of the estate plan.[133] Beneficiaries banding together to betray the testator's written wishes, and thus forming a mutiny, is represented in the following form no-contest clause:

> If any beneficiary shall contest the probate or validity of this will or any provision thereof, or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this will or to prevent any provision thereof from being carried out in accordance with its terms (regardless of whether such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary ("the contesting beneficiary") are revoked and such benefits shall pass to the residuary beneficiaries of this will other than "the contesting beneficiary" in the proportion that the share of each such residuary beneficiary bears to the aggregate of the effective shares of the residuary.[134]

The party who did not institute the objection but nevertheless became part of the objection, is thus joining the mutiny.

The inclusion of an exculpatory clause in will forms and trust agreements also represents the inclusion of the betrayal stock situation.[135] The exculpatory clause, also called an exoneration clause, exonerates a trustee from some breaches of the trustee's fiduciary obligation.[136] A typical exoneration clause reads as follows:

> None of my executors or trustees shall be liable to the estate or any beneficiary thereof for any act or omission to act in connection with the execution of

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132. JOHN A. DUNCAN, 1 CAL. TRANSACTIONS FORMS–ESTATE PLANNING § 2:55 (2016) (emphasis added).

133. DUNCAN, *supra* note 132. This list includes the traditional grounds for a will contest, an action in quantum meruit, and objection to the appointment of a fiduciary.

134. MARTIN W. O'TOOLE, ET AL., HARRIS 6TH N.Y. ESTATES: ESTATE PLANNING & TAXATION § 2:17 (6th ed.).

135. Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 71–75, 85, 94–99 (2005).

136. *See generally* Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIPIAC PROB. L.J. 261, 262–67 (2016).

> any of the powers or trusts hereunder except for actual fraud, wilful default, or gross negligence.[137]

Another exoneration clause reads as follows:

> My [individual] fiduciaries shall not be liable for any error of judgment or mistake or for any action taken or omitted, either by them or by any agent or attorney employed by them, or for any loss to or depreciation in the value of my estate or any trust, except in the case of willful misconduct. Any [individual] successor fiduciary is relieved of any duty to examine the transactions of any prior fiduciary. Any [individual] successor fiduciary shall be responsible only for those assets which are actually delivered to such fiduciary.[138]

Exculpatory provisions thus presuppose that the trustee, who has been placed in a position of trust, will participate in minor misdeeds that betray the trust provisions and the trustee's fiduciary obligation.[139] The Restatement (Third) of Trusts[140] and Uniform Trust Code[141] expressly validates such clauses. The inclusion of the exculpatory provisions may thereby contribute to an over-confident trustee who is less careful with the administrative details of record keeping and emboldened with the power to make riskier investments. The documents anticipate and brace for the betrayal, whether minor or major, of those closest to the testator. Yet, by anticipating such a stock situation, the document may unintentionally prime the audience. Priming refers to the use of a word, phrase, or action that will provoke an automatic response to a later use of that same word, phrase, or action.[142] By including the exculpatory clause, the audience may be anticipating minor misdeeds by the trustee and become less focused on monitoring the administration of the trust and the actions of the trustee. In fact, the presence of the exculpatory clause may mean that a subsequent issue of mis-

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137. ROBERT W. KEATS, 4A KY. PRAC. METHODS OF PRAC. § 25:58 (2016).

138. RALPH H. FOLSOM, DRAFTING WILLS IN CONN. § 15:5 (2d ed.).

139. Louise Lark Hill, *Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?*, 45 U. MICH. J.L. REFORM 829, 831–34 (2012).

140. Restatement (Third) of Trusts provides as follows:

> (1) A provision in the terms of a trust that relieves a trustee of liability for breach of trust, and that was not included in the instrument as a result of the trustee's abuse of a fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee
>
> (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or
>
> (b) of accountability for profits derived from a breach of trust.
>
> (2) A no-contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.

RESTATEMENT (THIRD) OF TRUSTS § 96 (2009).

141. THE UNIFORM TRUST CODE § 1008 (b) (2010) provides as follows: "An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor."

142. *See generally* NOBUAKI HSU & ZACHARIAS SCHUTT, PSYCHOLOGY OF PRIMING (2012).

management does not elicit ire but is accepted as an anticipated occurrence. In contrast, the inclusion of a will contest clause may actually trigger the filing of a will contest. Beneficiaries and heirs see the provision and then respond with "there's no smoke without fire." The inclusion of the clause does not then prevent a will contest but actually inspires one.

Similarly, the standard default damages provisions in form contracts represent the recurring sequence of events that structure the stock plot of the transaction. The inevitable ending of a contract form may focus on the unavoidable "war" with contracting parties as enemies at termination. For example, Linda Alvarez characterized the typical contract as follows: "The contract is used in a duel to the death over competing interpretations and counter-accusations of breach."[143]

The stock situation of the war can be seen represented in virtually every form document through the standard clauses dealing with the administration of that war, which is necessary for the parties' progression towards that final battle scene.[144] For example, a typical form clause in a real estate transaction often allows the parties to seek equitable damages, either instead of or in addition to monetary damages:

> The Purchaser agrees that this contract does authorize the Seller to enforce the remedy of specific performance. The Seller agrees that this contract does authorize the Purchaser to enforce the remedy of specific performance.[145]

A liquidated damages provision in a typical form contract for services may state:

> For each and every day work contemplated in this contract remains uncompleted beyond the time set for its completion, Contractor shall pay to the owner the sum of $____, as liquidated damages and not as a penalty. This sum may be deducted from money due or to become due to Contractor as compensation under this Contract.[146]

This clause can be seen not only as a way the victor of the battle can be rewarded monetarily, but also as a means of providing funding for the battle itself.

Additionally, a standard contract termination clause in a form contract often permits one contracting party to prematurely end the relationship between the parties. In the following example, the government is the contracting party that may prematurely end the relationship:

> 49.402–1 The Government's right.

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143. ALVAREZ, *supra* note 9, at 6.

144. *E.g.*, *id.* at 4 ("The contract document is considered the expression of the parties' relationship, comprising hard-fought deal points and whatever weapons and shelters the lawyers have managed to embed in the boilerplate (those murky paragraphs usually disregarded by the parties and left to the lawyers to parse and haggle over).").

145. Scott J. Burnham, *How to Read A Contract*, 45 ARIZ. L. REV. 133, 165–66 (2003).

146. Burnham, *supra* note 145, at 166.

> Under contracts containing the Default clause at 52.249–8, the Government has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to—
>
> (a) Make delivery of the supplies or perform the services within the time specified in the contract,
>
> (b) Perform any other provision of the contract, or
>
> (c) Make progress and that failure endangers performance of the contract.[147]

These form clauses, and numerous others like it, presuppose that the contracting parties will end up in a dispute or war, necessitating ways of determining how the "rules of engagement" will play out, whether the parties terminate their contractual relationship or battle it out for damages in court.

The stock situations are the set scenes that facilitate the progression of the stock plot toward the stock outcome, as discussed in the next section.

D. Inevitable Outcomes

The stock story relies upon stock characters in stock situations to move forward in a stock plot towards an inevitable stock outcome. The stock outcomes, also called "inevitable outcomes," are the consequences of the actions of the characters and the final plot point.[148] In fairy tales, which rely heavily upon stock stories, the inevitable outcome can be summed up with the words "happily ever after."[149]

The form Advance Directive of Health Care addresses the inevitable consequence of life: death.[150] The form document presents a more nuanced outcome, however. The form Advance Directive for Health Care presents the inevitable outcome of life as "the good death."[151] The good death refers to the societally "acceptable" way of dying that occurs through a series of

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147. *Subpart 49.4—Termination for Default*, ACQUISITION.GOV, https://perma.cc/3E8N-4W7G.

148. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 95 (2000) (positing that a "successful storyteller" presents an "ending [that] seems inevitable").

149. For an examination of the similarities and distinctions among myths, folktales, and fairy tales, see BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES 25 (1976). For an examination of the power of fairy tales, see JACK ZIPES, THE IRRESISTIBLE FAIRY TALE: THE CULTURAL AND SOCIAL HISTORY OF A GENRE (2012); JACK ZIPES, WHY FAIRY TALES STICK: THE EVOLUTION AND RELEVANCE OF THE GENRE (2006).

150. *See, e.g.*, FREDERICK PARKES WEBER, ASPECTS OF DEATH AND CORRELATED ASPECTS OF LIFE IN ART, EPIGRAM, AND POETRY 1 (Paul B. Hoeber ed., 3d ed. 1918) ("One might, indeed, define [c]ivilized man as the animal who knows that animals must die; for man (i.e., [c]ivilized man) is probably (almost certainly) the only animal who does know it."); *see also* THOMAS S. LANGNER, CHOICES FOR LIVING: COPING WITH FEAR OF DYING 4 (2002) (observing that although animals other than humans may experience fear when sensing a predator, animals do not appear to contemplate death).

151. For an examination of the myth of "death with dignity" and the advance directives, see Rebecca Dresser, *Shiavo and Contemporary Myths About Dying*, 61 U. MIAMI L. REV. 821, 821, 845 (2007); Steven I. Friedland, *The Health Care Proxy and the Narrative of Death*, 10 J.L. & HEALTH 95, 100–01, 106–08, 144 (1995–1996).

events, rather than a single event.[152] Thus, the good death requires an awareness of the dying process and an involvement in the dying process.[153] The good death is an inevitable stock outcome that is a component of many stock plots.[154]

The Advance Directive for Health Care is the unilateral declaration as to the wishes of an individual, called the declarant, about medical decisions. The Advance Directive also designates a surrogate to carry out those declarations in the event the declarant is unable to participate in the medical decision-making process. Compared to form documents like wills,[155] the Advance Directive is a relatively new form document. The advancement in the field of medicine has raised new points about the issues surrounding death and dying, specifically the role of autonomy in dying;[156] however, the issue is a long-standing one.[157]

States have enacted statutory forms of the Advance Directive for Health Care.[158] While the form documents do have some variations, all of the forms share a similar construction. The statutory forms include a series of choices for the declarant, the individual who is creating the Advance Directive, to record his or her wishes. A series of options are presented to the declarant, including decisions relating to end-of-life.[159] For example, one form document presents the declarant with two options about the withdrawal of life support. The declarant will initial one of two choices: the "choice not to prolong life" or the "choice to prolong life."[160] Another form

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152. *E.g.*, PHILIPPE ARIES, THE HOUR OF OUR DEATH: THE CLASSIC HISTORY OF WESTERN ATTITUDES TOWARD DEATH OVER THE LAST ONE THOUSAND YEARS (Helen Weaver trans., 1982); *see also* Beverly McNamara, Charles Waddell, & Margaret Colvin, *The Institutionalization of the Good Death*, 39 NO. 11 SOC. SCI. & MED. 1501, 1501–02 (Dec. 1994).

153. McNamara, Waddell, & Colvin, *supra* note 152, at 1503–04; *see also* Werner Gruber, Note, *Life and Death on Your Terms: The Advance Directives Dilemma and What Should Be Done in the Wake of the* Schiavo *Case*, 15 ELDER L.J. 503 (2007).

154. *See generally* Tony Walter, *Historical and Cultural Variants on the Good Death*, 327 BRITISH MED. J. 218 (2003).

155. For a brief history of the will, see Barbara R. Hauser, *The Tale of the Testament*, 12 ABA PROB. & PROP. 58, 59–60 (Sept./Oct. 1998).

156. For an exploration of death and dying in modern America, see ANN NEUMANN, THE GOOD DEATH: AN EXPLORATION OF DYING IN AMERICA (2016). For the now-classic critique of dying in America and the funeral industry, see JESSICA MITFORD, THE AMERICAN WAY OF DEATH (1963).

157. The *Ars Moriendi* refers to a collection of medieval texts detailing the "art of dying." *E.g.*, Margaret Aston, *Death*, FIFTEENTH-CENTURY ATTITUDES: PERCEPTIONS OF SOCIETY IN LATE MEDIEVAL ENGLAND 207 (Rosemary Horrox ed., Cambridge Univ. Press 1994); Karen Ingham, *Tissue to Text: Ars Moriendi and the Theatre of Anatomy*, 15 NO. 1 PERFORMANCE RESEARCH: J. PERFORMING ARTS 48 (2010); *see also* Fritz Knaack, *Shelf Life*, 88 Wis. Law. 65 (Nov. 2015) (reviewing DYING IN THE TWENTY-FIRST CENTURY: TOWARD A NEW ETHICAL FRAMEWORK FOR THE ART OF DYING WELL).

158. *E.g.*, ALA. CODE § 22–8A–4; WEST'S ANN. CAL. PROB. CODE § 4701; GA. CODE ANN. § 31–32–4; DEL. CODE ANN. TIT. 16, § 2505; MISS. CODE ANN. § 41–41–209.

159. *But see* Jessica Wehrle Nester, *Function Over Form: When Completing Advance Directives, Lawyers Need a More Personal Approach*, W. VA. LAW. 26, 27 (Feb. 2007).

160. MISS. CODE ANN. § 41–41–209(2)(6).

document further breaks down the choice not to prolong life by allowing the declarant to identify that he or she does not want: life extended by any of the following means:

_____ breathing machines (ventilator or respirator)
_____ tube feeding (feeding and hydration by medical means)
_____ antibiotics
_____ other medications whose purpose is to extend my life
_____ any other means.[161]

The form document also allows the declarant to initial the statements "I want care that preserves my dignity and that provides comfort and relief from symptoms that are bothering me" and "I want pain medication to be administered to me even though this may have the unintended effect of hastening my death."[162]

In the good death, the individual "is the central actor, who ideally maintains autonomy throughout the dying trajectory."[163] "The good death" is thus one in which the individual has methodically expressed his or her wishes to preserve autonomy and bodily integrity.[164] By presenting these options, the form document of the Advance Directive presents the inevitable outcome of the document as "the good death."[165] And yet, the outcome that is presented as inevitable, may not be so.

The inevitable outcome of a "good death" does not necessarily reflect the reality of the outcome envisioned by the form. The Advance Directive, and the treatment preferences expressed in the Advance Directive, may not even be consulted or respected in all situations.[166] First, the declarant or agent must notify the health care provider of the existence of the Advance

161. VT. ADMIN. CODE § 12–5–15: APPENDIX A(4).

162. *Id.*

163. McNamara, Waddell, & Colvin, *supra* note 152, at 1504.

164. *See generally* Kathryn Proulx & Cynthia Jacelon, *Dying with Dignity: The Good Patient Versus The Good Death*, 21 NO. 2 AM. J. HOSP. PALLIT. CARE 116, 118 (Mar./Apr. 2004) ("These authors suggest that, increasingly, hospitals and healthcare providers are urged to allow dying patients to maintain a sense of autonomy and control over their lives, with the freedom to choose a style of dying."); Bethne Hart, Peter Sainsbury & Stephanie Short, *Whose Dying? A Sociological Critique of "The Good Death"*, 3 NO. 1 MORTALITY 65, 65 (1998) (noting that the concept of the good death "underpins many of the challenges to the medical management of dying and death that have emerged through the patients' rights movement and the right to die movement").

165. Norman L. Cantor, *Making Advance Directives Meaningful*, 4 PSYCHOL. PUB. POL'Y & L. 629, 630 (Sept. 1998) ("By focusing on the elements of indignity that commonly concern dying persons, drafters of advance directives can prepare forms that are relevant and meaningful to most people.").

166. Daniel P. Hickey, *The Disutility of Advance Directives: We Know the Problems, But Are There Solutions?*, 36 J. HEALTH L. 455, 457–63 (2003) (identifying the failure of medical providers to follow the terms of the Advance Directive as a problem with the implementation of the terms of Advance Directives); *see also* Sheniece Smith & Leslie Lindgren, *End of Life Choices: What Does Dying with Dignity Mean to You?*, 58 ORANGE CO. LAW. 36 (Aug. 2016) (explaining that physicians can opt out of California's new End of Life Option Act, California Health and Safety Code § 443, which allows for the prescription of medications to end life of the terminally ill).

Directive.[167] Second, the expressed treatment preferences on the document may be overridden by the designated health care agent.[168] Third, medical professionals may not consult the treatment preferences or consult with the designated health care agent in all circumstances.[169] The form is designed to accomplish a purpose that in fact will not be accomplished.

Another illustration of an inevitable stock outcome embedded within a transactional form can be seen in form clauses and agreements relating to incentive-based executive compensation. Often embedded in these forms is the stock story of the Quest of the Dragon Slayer, based on the myth of Sigurd from Nordic legends.[170] According to Norse legend, Sigurd accepted the quest of seeking the return of gold that had once belonged to Sigurd's father from Fafnir, who had been cursed and turned into a dragon. Sigurd's quest based on his loyalty to his deceased father was ultimately successful and earned him the name of Dragon Slayer as well the reward of invulnerability and, ultimately, the gift of prophecy.[171] This "reward" stock outcome is contained in a variety of employee incentive stock option and stock purchase plan form documents. For example, a typical form recital provides:

> The proper execution of the duties and responsibilities of the executives and employees of XYZ, Inc. (the "Corporation") and its Subsidiaries is a vital

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167. *E.g.*, GA. CODE ANN. § 31–32–8.

168. *E.g.*, GA. CODE ANN. § 31–32–14(d). This is particularly true with respect to the withholding or withdrawal of life sustaining procedures, the directions of the designated health care agent will prevail over the written instructions expressed in the Advance Directive, unless otherwise provided by the Advance Directive. GA. CODE ANN. § 31–32–14(d).

169. *E.g.*, Doctors Hosp. of Augusta v. Alicea, 788 S.E.2d 392, 397 (2016). In a deposition about the doctor's consideration of the terms of the Advance Directive and the role of the designated health care agent, a doctor stated as follows:

> If the family does not want her on the respirator, well, we can just pull the tube out. And, you know, we've wasted an hour or two of her staying in the hospital ICU but, on the other hand, if we try to make calls she'd be dead. I mean I can't call the family. . . . I said, well, let's just do what's right for the patient. My God, we can always undo it. But . . . if the patient dies, you know, that's my ultimate loss. There's no way I can get her back. So when this happened I really didn't go into any of the code/no code/do not intubate/resuscitate. Save the patient's life first and then we'll do whatever it takes to make the family and that patient whatever, but we can't undo death. So that's what I was thinking.

Doctors Hosp. of Augusta, 788 S.E.2d 397 at n.3; *see also* Barbara A. Noah & Neal R. Feigenson, *Avoiding Overtreatment at the End of Life: Physician-Patient Communication and Truly Informed Consent*, 36 PACE L. REV. 736, 737–38, 742 (2016); Donna A. Casey & David M. Walker, *The Clinical Realities of Advance Directives*, 17 WIDENER L. REV. 429, 433 (2011). For an examination of *Doctors Hospital of Augusta v. Alicea*, see Krysta Rae Tate, Case Note, *An Advance Directive: The Elective, Effective Way to be Protective of Your Rights*, 68 MERCER L. REV. 521 (2017).

170. *See* JESSE L. BYOCK, SAGA OF THE VOLSUNGS, (University of California Press 1990) (Iceland n.d.); VOLSUNGA SAGA. THE SAGA OF THE VOLSUNGS. THE ICELANDIC TEXT ACCORDING TO MS NKS 1824 *b*, *4°* (Kaaren Grimstad trans., 2nd ed., AQ-Verlag, Saarbrücken 2005).

171. *See* JESSE L. BYOCK, SAGA OF THE VOLSUNGS, (University of California Press 1990) (Iceland n.d.); VOLSUNGA SAGA. THE SAGA OF THE VOLSUNGS. THE ICELANDIC TEXT ACCORDING TO MS NKS 1824 *b*, *4°* (Kaaren Grimstad trans., 2nd ed., AQ-Verlag, Saarbrücken 2005).

> factor in the continued growth and success of the Corporation. Toward this end, it is necessary to attract and retain effective and capable individuals to assume positions that contribute materially to the successful operation of the business of the Corporation and its Subsidiaries and to provide incentive compensation opportunities that are competitive with other similar businesses. It will benefit the Corporation, therefore, to bind the interests of these persons more closely to its own interests by offering them an attractive opportunity to acquire a proprietary interest in the Corporation . . . This stock option and restricted stock plan is intended to serve these purposes.[172]

Other form documents specifically provide that the executive may acquire additional stock options on an ongoing basis based on her continuous employment with the company, i.e. additional stock option opportunities become available with each continued year of faithful service to the employer.[173] Thus, the executive can be viewed as the Dragon Slayer. She is provided with incentive (much like Sigurd) to go on a "quest" based on loyalty, which provides her with rewards for her successful and faithful service, much the way Sigurd earned the reward of prophecy for his successful retrieval of the stolen treasure from the dragon.

The stock outcome is the culmination of the stock situations and the stock plot. Also called the inevitable outcome, the stock outcome is the ending that was always anticipated by the audience. This sets the stage for the benefits and pitfalls of the stock stories embedded within the form documents and the audience's perception of the stock stories.

IV. Transactional Form Books as Story Books

Stock stories shape expectations and responses.[174] In a similar manner, transactional forms and form books shape expectations and responses. By their nature, form documents are not intended to cover all possible circumstances of eventualities and are not intended to represent all possible transactions. Indeed, the preface in form books often explicitly state that the form documents contained within the form book are provided for reference and inspiration.[175]

Form documents play a valuable and vital role in the drafting of transactional documents. Recognizing form books as a compilation of stock stories allows for the better use of form books. Interpreting form documents as

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172. *Portfolio 239: Stock Options and Other Equity-Based Compensation Arrangements*, *Worksheet 1 XYZ*, *Inc. Stock Option and Restricted Stock Plan*, Bloomberg BNA.

173. *See* 24A West's Legal Forms § 2.28 (2016).

174. Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 5–7 (1984).

175. *E.g.*, George W. Thompson, The Law of Wills and the Manner of their Drafting, Execution, Probate and Interpretation Together with Testamentary Forms iii (2d ed. 1936) (explaining that the forms "are presented with a view of enabling the busy lawyer to obtain such hints and suggestions as will guide him [or her] in formulating and drafting a testamentary instrument").

stock stories does not negate the value of form books. This section showcases both the possibilities and pitfalls of recognizing such embedded stock stories to the parties, to the court, to other parties, and to society in general.

A. Possibilities

Forms, and the compilations of forms into form books, are valuable resources to drafting attorneys, transacting parties, courts, and other third parties.[176] One author described forms books as "a boon for attorneys."[177] Another author described form documents as "the accumulated wisdom of many."[178] Form books, as the compilation of form documents, are like story books in that a variety of form documents are presented to the drafter. The drafter can then evaluate a variety of form documents to select the most appropriate base form document to use.

The widespread recognition of patterns in form transactional documents is similar to the widespread recognition of patterns of stock stories, and this recognition becomes a narrative short cut. The stock story is readily identifiable by the audience; the story need not be told in detail for the audience to understand the story, whether that means the identification of the characters, the plot, the situations, or the outcomes. Shorthand references and allusions will be understood by the audience. In a similar manner, form documents are narrative short cuts. The title of a form immediately conveys to the audience the purpose of the document. For example, a document titled "Last Will and Testament" will be interpreted by the audience to be the testator's will, and a form titled "Commercial Lease Agreement" will be understood to address a lease for commercial, rather than residential, purposes. When interpreting the provisions in the transactional document, the parties to the transaction, third parties, and the court can—and will—rely upon the shorthand references. The narrative short cuts not only facilitate the interpretation, but also reduce the time and cost needed to develop the documents in the first place.[179] The parties to the transaction and the drafter can rely upon the form document to structure the parameters of the transaction and supply some of the details.

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176. *E.g.*, WILLIAM K. SJOSTROM, JR., AN INTRODUCTION TO CONTRACT DRAFTING 44 (2d ed., 2013) (identifying the first step in the drafting process as "locat[ing] a form or sample contract (often called a precedent) to use as the starting point for your contract"); TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 335 (2007) ("Think of a precedent as a template that you tailor for each transaction.").

177. Tom Gaylord, *Forms and Drafting Resources for Illinois Attorneys*, 100 ILL. B.J. 496, 496 (2012).

178. Hill, *supra* note 43, at 59.

179. *E.g.*, DARMSTADTER, *supra* note 49, at 213 ("It's comforting to pontificate that every document should be poured over by highly trained lawyers bent on absolute perfection. The truth, however, is that clients often prefer Quick, Cheap, and No Surprises.") (capitalization in original).

The form document can also serve to guide the formation of the transaction and the development of the transactional documents. The form document provides a series of prompts and reminders, encouraging the parties to the transaction and the drafters to insert key information that otherwise may be neglected, omitted, or forgotten.[180] In terms of a form, the stock plot and inevitable outcome anticipate contingencies and events so that the drafter does not neglect to include a key provision. For example, an executive employment agreement form document includes terms regarding salary, bonus, fringe benefits, and stock options, aimed towards an inevitable outcome of "happily ever after." On the other hand, such form documents also often include terms relating to involuntary termination, covenants not to compete, and non-disclosure obligations, aimed towards the inevitable outcome of a "battle among enemies." This is especially valuable considering that many transactional form documents are drafted without the assistance of an attorney and the forms created are replicated from transaction to transaction.

The use of forms can also promote confidence in the document created. The existence of provisions within the form convey the value of "time-tested" provisions.[181] This can alleviate a level of uncertainty to the parties to the transaction. The use of the form documents with their embedded stock stories enables the parties to better comprehend the most likely, inevitable course of events of this type of transaction and how they likely end.

The recognition of the stock stories within the transactional forms is particularly beneficial because many transactions do in fact follow the narrative, or pattern, of the stock story. The stock story thus is an accurate representation of the intended transaction. Part of the power of stock stories is that the pattern does in fact fit so many narratives. For example, the nonfamily caregiver may in fact be the trickster who is attempting to deceive the testator for the caregiver's own benefit. The contracting parties often do end battling about the meaning of particular provisions in the contract. Thus, the stock plots of the form agreement addressing attorneys' fees, choice of forum, and choice of law governing contract disputes are both beneficial and efficient ways to determine these relevant issues before the battle begins.

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180. *E.g.*, Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323 (2013).

181. The value of "time-tested" language may be overstated. *See* KEVIN D. MILLARD, DRAFTING WILLS, TRUSTS AND OTHER ESTATE PLANNING DOCUMENTS: A STYLE MANUAL 16 (2006) ("Lawyers are busy, cautious people, and they cannot afford to make mistakes. The old, redundant phrase has worked in the past; a new one may somehow raise a question. To check it in the library will take time, and time is the lawyer's most precious commodity."); *see also* DARMSTADTER, *supra* note 49, at xi ("In the turmoil that surrounds most transactions, lawyers are reluctant to dispense with standard phraseology no matter how obscure. Anyone who questions a provision may be told, in all sincerity, that the provision and its language are time- or court-tested.").

In sum, transactional form documents are not only widely-used but offer many possibilities. Recognizing the stock story embedded within the particular form document to be used results in a more nuanced use of the form document that furthers the intent of the parties to the transaction and prevents misinterpretation of the document produced.

B. Pitfalls

Despite the benefits afforded by the range of form documents available, a transactional form document could be improperly used, either because the form document is not properly executed or the form document used does not represent the anticipated transaction.[182] This section explores not the improperly used form but the pitfalls related to the recognition of stock stories embedded within form transactional documents.

A concern with all stock stories is the compression of the narrative in a manner that squashes, distorts, or misrepresents the individual story. The stock story is a flat narrative which, by definition, does not represent the uniqueness of the individual parties, the personalized scenes, the unique sequence of events, or the particular outcome. The stock story necessarily relies upon generic stock characters, stock situations, stock plots, and stock outcomes. By the nature of stock stories, for example, the characters are presented with generic characteristics rather than actual names. Continuing use of the form conventions perpetuate the stock story. As a consequence, continuing to use roles rather than actual names, like using the word "spouse" in a will form rather than the name of the spouse, or using "buyer" and "seller" in a sales contract rather than the actual names of the contracting parties, facilitates the flattening of the parties into stock characters.

Supplementing the stock story or altering the stock story requires deliberate drafting choices. When relating stock stories to transactional form documents, the compression may unintentionally direct the drafting of the transactional document such that the drafter fails to fully customize the document for the individual parties and instead relies upon standard provisions.[183] For example, reliance on the basic discretionary trust form

182. For an analysis of forms and form use, see Davis, *supra* note 46.

183. For an exploration of the need to develop documents to reflect individuals, see Avi Z. Kestenbaum & Amy F. Altman, *Have We Got It All Wrong?: Rethinking the Fabric of Estate Planning*, 155 No. 2 Tr. & Est. 29 (Feb. 2016); Thomas L. Stover, *Will the Tax Tail Still Wag the Estate Planning Dog?*, 41 Est. Plan. 3 (2014); James H. Siegel, *The Importance of Analyzing Family Dynamics to Provide Clients with Appropriate Trust and Estate Plans*, Aspatore, 2012 WL 4964459 (2012); *see also* Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 Syracuse L. Rev. 451 (2015); Avi Z. Kestenbaum, Jeffrey A. Galant, & K. Eli Akhaven, *The State of Estate Planning*, 150 No. 3 Tr. & Est. 35, 39 (Mar. 2011) ("Instead of concentrating on particular estate planning techniques and forcing their clients into these same techniques over and over again, estate planners will now be compelled to focus on each individual and unique client.").

presents the trustee as the wise soldier who must protect the settlor's property from the buffoon of a beneficiary. The trustee's decision to authorize no trust distributions or to withhold trust distributions corresponds to the stock characterization of the trustee and the beneficiary. Yet, the settlor may not have intended to embolden the trustee or to minimize the beneficiary's financial capabilities. Thus, the drafter must pay careful attention to whether the stock story embedded within the form actually corresponds with the parties' intent.

The existence of the stock story within the transactional form document may also hinder drafting innovation. Form documents have always been intended to function as a base for the customization and personalization of the form.[184] Instead of focusing on innovation when designing the transactional document,[185] a drafter may force a transaction into a stock story that is ill-fitting. As one author wrote, "It is easy to make the mistake of finding a form for a particular kind of document, such as a will, and then using that form uncritically over and over."[186] For example, the discretionary trust form that provides no direction to the trustee may work in some situations but not others. The use of this form may limit the drafter's ability to consider alternate structures and additional directions or other limitations to the discretionary authority granted to the trustee. For example, with the form premarital agreement, a drafter may rely upon the rescue stock plot structure despite the equal bargaining power and comparable financial net worth of the two parties.

The mechanical replication may produce a document that is incomplete or even undermines the goals of the specific parties to the transaction.[187] Where the individual transaction does not fit precisely within a stock story, the resulting document may be an unruly amalgamation of a variety of form provisions that lacks a unified narrative. The provisions within the document can create tension and ambiguity. The replication of forms may also encourage the inclusion of "sticky provisions," provisions that are replicated from transaction to transaction because, in part, they cor-

184. ALVAREZ, *supra* note 9, at 153 ("It can be very tempting to just drop a provision from the last document one drafted into the next that is being created for another client. . . . *Resist the urge to copy and paste*.") (italics in original).

185. *E.g.*, Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 171 (2013) (exploring contract innovation and the role that courts play in promoting and hindering contract innovation).

186. MILLARD, *supra* note 181, at xiii.

187. *E.g.*, William A. Scott, *Filling in the Blanks: How Computerized Forms Are Affecting the Legal Profession*, 13 ALB. L.J. SCI. & TECH. 835 (2003) (exploring the pros and cons of fill-in-the-blank legal forms for both lawyers and laypersons).

respond to audience expectations,[188] even where there is little direct benefit to the particular transaction's parties or relevance to the particular transaction.[189] For example, the form clause in a real estate transactional document allowing parties to seek liquidated damages pits the contracting parties against each other in a battle. Yet the need or even possibility of awarding equitable damages may not be called for by the particular transaction.

Moreover, the recognition and identification of stock stories produces an instant and strong response. Stock stories provoke stock responses.[190] A stock response relies upon "a standard pattern of behavior" that involves "[n]o critical judgment."[191] The response is thus automatic, such as "cheering the hero and booing the villain." The strong response to a stock story means that triggering an alternate response may be difficult.[192] After all, as Anthony Amsterdam and Jerome Bruner wrote in their influential book *Minding the Law*, "We are quicker to see the expected than the unexpected."[193] For instance, the non-wealthy spouse may be viewed with suspicion when objecting to the enforceability of a premarital agreement. This spouse may be viewed as the stock character of the trickster or the femme fatale, the person who needs to be punished, not the person who needs to be protected from the over-reaching of his or her partner. The trustee who fails to authorize distributions may be assumed to be the wise sage safeguarding property until the student, in this case the trust beneficiary, is ready—despite actual financial hardship faced by the real beneficiary of the trust. The employee in an employment agreement may be assumed to be the unfaithful servant, in need of being restrained from acting disloyal towards his employer, instead of the faithful servant in need of protection or even reward.

The readily recognizable stock story in a form document may thus make an attempt to project an alternate story difficult, especially if the alternate story runs counter to the expected stock story.[194] As narratologist

188. ALVAREZ, *supra* note 9, at 127 (asking drafting attorneys the following: "How often have you received a form contract that contains nonsensical terms, clauses containing sentences without subjects or objects, broken fossils of ancient cut-and-paste jobs that no one noticed were incomplete?").

189. *See, e.g.*, Kenneth A. Adams, *Dysfunction in Contract Drafting: The Causes and A Cure*, 15 TRANSACTIONS: TENN. J. BUS. L. 317 (2014) (observing the over-confidence that may be produced by relying on forms or previously used documents); Larry E. Ribstein, *Sticky Forms*, *Property Rights*, *and Law*, 40 HOFSTRA L. REV. 65, 68 (2011) ("One reason for not changing a contract clause that has stopped making sense is that the costs of change outweigh the benefits"); *see also* Robert E. Shapiro, *Do Lawyers Think about What They're Doing?*, 41 NO. 2 LITIGATION 59 (2015) ("These provisions have now become routine, done because always done.").

190. A "stock response" is defined as "the predictable, shallow reaction to standard and commonly recognized characters, settings, situations, or symbols." MYERS & SIMMS, *supra* note 57, at 289.

191. CUDDON, *supra* note 56, at 865.

192. *Id.*

193. AMSTERDAM & BRUNER, *supra* note 1, at 47.

194. Bret Rappaport, *A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts by Constraining Writers' Choices and Influencing Readers' Perceptions*, 22 J.L. & POL'Y 197 (2013).

Mieke Bal wrote, "We tend to notice only what we already know, unless the deviation from the expectation is strongly enhanced."[195] Because of the immediate recognition of stock stories by the audience, the audience may use the stock story to fill in gaps in the narrative. The audience may project an intent of the parties to the transaction that is not representative of the actual intent. The audience may react to the malicious intent of the spouse seductress in the premarital agreement or the joie de vivre of the "poor-boy-makes-good" despite any evidence of such intent. The audience may also interpret, or even re-interpret, events and actions in the actual story by referencing a stock story.

This may occur even if the form document does not expressly contain the stock story. For example, during will contests, contestants, those individuals who are objecting to the validity of a will, may share a story that runs counter to the text of the written will but often corresponds with a stock story.[196] The stock character of "the wicked stepmother" is referenced in will contests.[197] This stock character is not necessarily representative of the actual individual or the family relationship during the life of the testator. Indeed, the source of the stock character for "the wicked stepmother," the Grimm Brothers, represents a deliberate revision of the characters in the source folk tales and wonder tales from biological mothers to step-mothers so as not to disrespect their own mother.[198] Yet, the replication of the "wicked stepmother" encourages audiences to project that stock character—even when the step-parent is not in fact "wicked." In a similar way, the non-family caregiver who receives a gift under the will may be interpreted as the stock character of the trickster,[199] even without facts that would suggest the

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195. BAL, *supra* note 88, at 122.

196. As one scholar wrote, "Indeed, the ability to contest a will or appeal a legal case shows that the law is regularly used to alter rather than endorse the testator's text when its readers cannot accept a particular 'will story.'"

FRANK, *supra* note 124, at 62.

For an overview of the mechanics of a will contest, *see generally* Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY'S L.J. 97 (2012). For an exploration of strategies to minimize the success of a will contest, see Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1 (2013); Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7 (2000).

197. *See, e.g.*, Martin D. Begleiter, *Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521 (2014–2015). For an examination of the rights and responsibilities of stepparents in family law and succession, see Peter M. Bryniczka, *Rights, Responsibilities & Liabilities of a Stepparent*, 36 FAM. ADVOC. 26 (Summer 2013).

198. JACK ZIPES, WHY FAIRY TALES STICK: THE EVOLUTION AND RELEVANCE OF A GENRE 114 (2006) (sharing that the Brothers Grimm replaced biological mother villain of folk tales with the step-mother villain of fairy tales to avoid disrespecting their own mother).

199. For an exploration of non-family caregivers and Wills, see Robert Barton, Lisa M. Lukaszewski, & Stacie T. Lau, *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, ABA PROB. & PROP. 22 (May/June 2015); Kirsten M. Kwasneski, Comment, *The*

non-family caregiver is a trickster.[200] The characteristics of the stock character are thus superimposed upon the actual individual referenced in the transactional document. In the example of an employment agreement, the audience may automatically project the employer as a Goliath or as an army preparing for battle, when in reality, it may be a gracious and generous employer attempting to protect itself, its shareholders, or its employees from the potential harms caused by a "bad hire." Thus, from the perspectives of the transactional drafters and the parties to these agreements, this recognition of stock stories must be accompanied by the understanding that, at times, the stock story may need to be deliberately altered or even omitted.

Because stock stories are so readily identifiable and provoke a stock response, a reference included in the document may miscue a judicial audience and lead to misinterpretation. For instance, reliance on stock stories may tempt a court to interpret a transactional document by referencing the stock story that would be presented in the form transactional document rather than individual transactional document produced.[201] A court may interpret the meaning of the contract term based on the stock plot embedded within the document. For example, the court may liberally interpret a provision relating to a stock incentive plan, in line with the stock outcome of the just reward earned by a conquering hero on a dragon quest. This liberal interpretation may occur contrary to the parties' actual intent or the precise language of their agreement.

Parties to the transactions, and even courts, may assume that certain provisions would be included, even if the provisions have not been, because of the existence of the stock story. For example, they may assume that a force majeure clause will be triggered in a particular situation that is not specifically addressed in the force majeure clause or even when such a clause must be implied in its entirety. Similarly, a court may interpret a transactional document by adding a provision from the form document that is missing from the transactional document produced, or it may interpret the provision in relation to the stock story—despite the presence of language to the contrary in the transactional document. This could unintentionally lead to an interpretation of the contract by a court in a manner that differs from the parties' actual intent at the time of contracting.

The best form document is susceptible to misuse. Ignoring the stock story embedded within the form document selection or dismissing the stock

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Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend, 36 GOLDEN GATE U. L. REV. 269 (2006).

200. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129 (2008) (asserting that the law should respect a testator's decision to disinherit family and favor a non-family caregiver).

201. Baron, *supra* note 51, at 666–67 (suggesting that individual testator's stories "in all their richness and detail" should be the basis for interpreting wills—rather than reliance on stock stories).

story that may be projected by the audience is done at the peril of the transacting parties. Recognizing the intended purpose of the form document and the stock story contained within the form document facilitates the effective use of the form document.

V. Conclusion

Form books do not begin with "once upon a time." Yet the compilation of forms, whether hard copy or digital copy, into a form book creates, in essence, a story book. Embedded within those form documents are stock stories that rely upon stock characters, stock plots, stock situations, and stock inevitable outcomes to produce a stock response. Far from undermining the value of transactional form documents in form books, recognizing form books as compilations of stock stories facilitates the effective use of form documents. Recognizing that the individual story of a transaction will be built upon a stock story facilitates the selection of the document form, engagement with the document form, and ultimately produces a document that better promotes the goals of the transactional parties. Form books are valuable resources for parties to transactions, drafters of transactional documents, and third-party audiences of transactional documents. Accordingly, form books should be used to facilitate the crafting of individual transactional documents to produce the "happily ever after."