

## THE WILL AS PERSONAL NARRATIVE

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*A locket. A stamp collection. The lake house. Our sister. Our best friend. Our alma mater. The things we keep. The people and entities we associate with are a reflection of self. The legal document that addresses these is our last will and testament. Yet all too often, the will is viewed by a testator as a dreary, dense, mechanical document that reflects little of his or her personality, hopes, and fears. This Article seeks to reconceptualize this most personal of legal documents as a personal narrative. To situate this assertion, the author considers the intersection of narrative and law. The Article then explores the origin of the will as a spoken document, termed the “vessel of truth” in Ancient Rome. Examples and illustrations are drawn from probated wills, both infamous (such as the wills of Alfred Nobel, Doris Duke, Bing Crosby, and Jerry Garcia) and ordinary. In an area of law that centers on the intent of the testator, the last will and testament should be a reflection of self. The examples reported here form the basis for recommendations to promote clients’ goals, enrich the effectiveness of estate planning documents, and better serve the purposes of estate planning representation.*

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#### I. Introduction

“Le marchand de la mort est mort.” “The merchant of death is dead” ran the headline of an April 1888 obituary published in a French newspaper.<sup>1</sup> The obituary began with the statement that “Dr. Alfred Nobel, who became rich by finding ways to kill more people faster than ever before, died yesterday.”<sup>2</sup> But Dr. Alfred Nobel did not die in April 1888.<sup>3</sup> The French newspaper had discovered the death of a Nobel on April 12, 1888 and mistakenly assumed that it was Alfred Nobel who died when in fact it was Alfred’s brother Ludvig who died on April 12, 1888.<sup>4</sup> As a consequence, Dr. Alfred Nobel read his own obituary.<sup>5</sup> This obituary

1. KENNE FANT, *ALFRED NOBEL: A BIOGRAPHY* 207 (Marianne Ruuth trans., Arcade Publ’g 1993) (1991).

2. Ellen Johnson Sirleaf, *Alfred Nobel’s Legacy to Women*, N.Y. TIMES, Dec. 13, 2011, <http://www.nytimes.com/2011/12/13/opinion/Nobels-Legacy-to-Women-Johnson-Sirleaf.html>.

3. FANT, *supra* note 1.

4. *Id.*

5. Alfred Nobel died on December 10, 1896. FANT, *supra* note 1, at 313–14, 316. For an upbeat look at the modern world of obituary writers, see MARILYN

supposedly “pained him so much he never forgot it.”<sup>6</sup> The “merchant of death” version of his life story projected by the obituary was at odds with how Alfred Nobel saw himself, for he saw himself as a great inventor who benefited humankind.<sup>7</sup> He saw his legacy as one of great benevolence, not death.<sup>8</sup> Indeed, his invention of dynamite made possible the building of the Panama Canal.<sup>9</sup> After the publication of the obituary, Alfred Nobel chose to rewrite his will to include the funding and awarding of Nobel prizes.<sup>10</sup> In the words of a recent biography, Alfred Nobel “bequeath[ed] most of his fortune to a cause upon which no future obituary writer would be able to cast aspersions.”<sup>11</sup>

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JOHNSON, *THE DEAD BEAT: LOST SOULS, LUCKY STIFFS, AND THE PERVERSE PLEASURES OF OBITUARIES* (2006). For compilations of obituaries of the famous and the not so famous, see IAN BRUNSKILL, *THE TIMES GREAT LIVES: A CENTURY OF OBITUARIES* (2007); IAN BRUNSKILL, *THE TIMES GREAT VICTORIAN LIVES: AN ERA IN OBITUARIES* (2008); KEITH COLQUHOUN & ANN WROE, *THE ECONOMIST BOOK OF OBITUARIES* (2008); *THE LAST WORD: THE NEW YORK TIMES BOOK OF OBITUARIES AND FAREWELLS: A CELEBRATION OF UNUSUAL LIVES* (Marvin Siegel ed., 1997); ROBERT MCG. THOMAS JR., *52 MCGS.: THE BEST OBITUARIES FROM LEGENDARY NEW YORK TIMES REPORTER ROBERT MCG. THOMAS JR.* (Chris Calhoun ed., 2008). See also Stephanie Reitz, *Quirky Obituary Endears Connecticut Professor to New Audience*, LAS VEGAS REV. J., Dec. 2, 2011, <http://www.lvrj.com/news/quirky-obituary-endears-connecticut-professor-to-new-audience-134930498.html> (presenting an obituary that caught the Facebook and Twitter crowd through its personalized insight into the life of Robert Spiegel, retired English professor). M.C. Mirrow & Bruce A. McGovern, *An Obituary of the Federal Estate Tax*, 43 ARIZ. L. REV. 625, 625 (2001) (manipulating the genre of the obituary to structure a commentary on the estate tax from its birth in 1916 to its “untimely death at the age of eighty-five” on June 7, 2001).

6. FANT, *supra* note 1, at 207. While the obituary may not be the sole reason for the creation of the Nobel Prize, no version of his will before the 1888 obituary included the prizes. See Sirleaf, *supra* note 2.

7. See FANT, *supra* note 1, at 207, 319.

8. *Id.* at 2.

9. *Id.* at 56–57, 94, 251–52.

10. RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 87* (Yale Univ. Press 2010) (relating the reputed connection between the false obituary and the motive for the will of Alfred Nobel as “[t]he desire to make—or remake—one’s identity has no doubt provided a strong inspiration for much charitable giving.”); see also ALEXANDER A. BOVE, JR., *THE COMPLETE BOOK OF WILLS, ESTATES, & TRUSTS 2* (3d ed. Henry Holt & Co. 2005). “After all, wills are almost universally regarded as a sort of permanent memorial, a person’s final statement to the world, offering, in many cases, a touch of immortality. A perfect illustration of this is the will of Alfred Nobel, who truly immortalized himself through the provisions of his will.” *Id.* at 1.

11. FANT, *supra* note 1, at 207. This story is often repeated in a variety of contexts. For example, an author of a self-help book wrote:

At this point, Nobel could understandably have become quite upset. He might have spent months lamenting his life’s work, his legacy of death. Apparently, however, his spirit would have none of that. He

Wills can provide motive for murders, such as that of Maggie Buckley,<sup>12</sup> and often serve as a catalyst for a series of unfortunate events.<sup>13</sup> Fiction books, including Charles Dickens's *Bleak House*,<sup>14</sup> Robert Louis Stephenson's *Dr. Jekyll and Mr. Hyde*,<sup>15</sup> Jane Austen's *Sense and Sensibility*,<sup>16</sup> George Eliot's *Middlemarch*,<sup>17</sup> Henry James's *Portrait of a Lady*,<sup>18</sup> and Agatha Christie's *Peril At End House*,<sup>19</sup> use wills as plot devices. This fascination of writers and pop culture reflects the real interest in wills;<sup>20</sup> for, "[t]he fictional stories that become part of

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decided to do something wonderful for the world and put money into a fund that would award prizes to those who promote peace in the world—the antidote to his dynamite killing force.

M. GARY NEUMAN & MELISA NEUMAN, IN GOOD TIMES & BAD: STRENGTHENING YOUR RELATIONSHIP WHEN THE GOING GETS TOUGH AND THE MONEY GETS TIGHT 30 (John Wiley & Sons, Inc. 2010). It is unclear whether the obituary was the sole cause for the creation of the Nobel Prize. See, e.g., CRAIG SILVERMAN, REGRET THE ERROR: HOW MEDIA MISTAKES POLLUTE THE PRESS AND IMPERIL FREE SPEECH 169 (Sterling Publishing Co. 2007)

It would be interesting to find the first mention of the obituary being one reason for Alfred Nobel's decision to form a Prize, but so far I [a senior curator at the Nobel Museum in Sweden] have only found rather late statements that this should be the case. So far we have to conclude that this is only one among many rumors that tend to grow around famous historical persons

(quoting an email from Olov Amelin).

12. See AGATHA CHRISTIE, *PERIL AT END HOUSE* 239 (Collins Clear-Type Press 1966) (1932).

13. See LEMONY SNICKET, *A SERIES OF UNFORTUNATE EVENTS: THE BAD BEGINNING* (Harper Trophy 1999).

14. See CHARLES DICKENS, *BLEAK HOUSE* (Penguin Classics 1996).

15. See ROBERT LOUIS STEVENSON, *THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE* (Norton Critical Editions 2002).

16. See JANE AUSTEN, *SENSE AND SENSIBILITY* (Penguin Classics 2003).

17. See GEORGE ELIOT, *MIDDLEMARCH* (Penguin Classics 2003).

18. See HENRY JAMES, *THE PORTRAIT OF A LADY* (Penguin Classics 2003).

19. See AGATHA CHRISTIE, *PERIL AT END HOUSE* (Collins 1966) (involving a will as a plot device).

20. For example, "The Reading of the Will" is a murder mystery game where suspects are gathered, as the title of the game would imply, for the reading of the will. *The Reading of the Will*, MURDER MYSTERY GAMES, <http://www.murdermysterygames.net/games/reading-will> (thirty dollar price) (last visited Nov. 4, 2012). Part of the game puzzle involves whether to challenge the will or not. *Id.* Interest in the morbid includes interest in the funeral industry. See generally EVELYN WAUGH, *THE LOVED ONE: AN ANGLO-AMERICAN TRAGEDY* (Little, Brown & Co. 1948) (satirizing the commercialization of death with exploration of Whispering Glades and Happier Hunting Grounds, two funeral establishments). For an exploration of the disposition of human remains, see Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999); Megan C. Wells, Comment, *Dead Bodies Everywhere (Dun Dun Dun): Funeral Trends in this Recession and the Laws Regulating These Changes*, 2 EST. PLAN. & CMTY. PROP. L.J. 485 (2010). See also Ann M. Murphy, *Please Don't Bury Me Down in That Cold Cold Ground: The Need for Uniform Laws on the Disposition of Human Remains*, 15 ELDER L.J. 381 (2007); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763 (2009).

our cultural fabric and social mythology both reflect and shape our lives: the plots of novels and the “storied lives” of fictional characters influence our lives (and resemble them too).<sup>21</sup> Accordingly, wills are not simply convenient plot devices that serve as the *deus ex machina*. Rather, wills are themselves stories—or at least a well-drafted will is a personal narrative.

In general, a will is a unilateral written disposition of property to take effect upon death.<sup>22</sup> A will may also nominate guardians, executors, and trustees, those individuals (or entities)—at least to a certain extent—who perpetuate the legal existence of the testator.<sup>23</sup> Nevertheless, a will is more than a series of instructions. The will is one of the most personal legal documents an individual ever executes. One author in an article titled “Whimsies of Will-Makers” described wills as “human documents in which men give away themselves . . . .”<sup>24</sup> To quote Emily Dickinson, “I willed my Keepsakes—signed away / what portion of me be / Assignable . . . .”<sup>25</sup>

Even though an increasing amount of wealth is transferred by documents and devices other than wills, the will remains central to the estate planning process.<sup>26</sup> The will remains central to the process in which an individual confronts his or her mortality, assesses his or her life’s accomplishments and disappointments, and contemplates his or her legacy. As a result, the estate planning process becomes a journey of self-discovery. In a book about estate planning for business owners and entrepreneurs, the author notes, in a jesting tone, that with the estate planning process “you [the client] run the risk of understanding yourself as a parent, spouse, friend, and human being.”<sup>27</sup>

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21. John Rodden, *How Do Stories Convince Us? Notes Towards a Rhetoric of Narrative*, 35.1 COLLEGE LITERATURE 148 (2008); see also Gerard Genette, *Fictional Narrative, Factual Narrative*, 11:4 POETICS TODAY (1990) (exploring the similarities and differences between fictional and factual narratives).

22. See generally RESTATEMENT OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. a (1999). A will “purports to set forth the ideas and desires of one person.” Richard R. Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 207 (1938).

23. FREDERICK K. HOOPS ET AL., FAMILY PLANNING GUIDE § 2.2 (4th ed. 1994).

24. Harry Hibsichman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932).

25. EMILY DICKINSON, *I Heard a Fly Buzz—When I Died*, in THE COMPLETE POEMS OF EMILY DICKINSON 223, 224 (Thomas H. Johnson ed., Little, Brown & Co. 1960).

26. W. Rod Stern, ESTATE PLANNING, WILLS, AND TRUSTS FOR BUSINESS OWNERS AND ENTREPRENEURS 3–4 (2007).

27. *Id.*

This Article asserts that the last will and testament should be conceptualized and written as a personal narrative. This conceptualization facilitates the estate planning process to ultimately produce not only a stronger will but also produce a unified set of estate planning documents that are representative of the client's intent. To situate the assertion that a will should be conceptualized as a personal narrative, this Article briefly considers narrative and the law. This Article then explores the origins of the will as a spoken document. The effect of the conceptualization is examined in the context of the attorney-client relationship, the document, and the implementation. To ground this examination, this Article draws examples and illustrations from probated wills, both infamous and ordinary.

## II. Narrative and the Law

### A. In General

For the last thirty years, legal scholarship has been focusing on the value of storytelling to the field of law.<sup>28</sup> Much of this scholarship has been related to the techniques of advocacy,<sup>29</sup> but the applicability

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28. For an overview of "the storytelling debate in the legal academy," see Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 753 (2011); Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 37 (Peter Brooks & Paul Gewirtz eds., Yale Univ. Press 1996); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (providing an overview of the early legal storytelling movement while evaluating the movement's claims). For an early collection of essays about storytelling in the law, see NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David Ray Papke ed., Deborah Charles Publ'ns. 1991), a book reviewed by Jane B. Baron in *The Many Promises of Storytelling*, 23 RUTGERS L.J. 79 (1991). See also George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683 (1999) (exploring the importance of narratives to outsiders); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101 (1989) ("Empathy, human stories, and different voices should be woven into the tapestry of legal scholarship, legal training, law formulation, legal counseling and advocacy, and law application and enforcement."); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53 (2008) (exploring the persuasive properties of storytelling including narrative fidelity).

29. "It has long been recognized that storytelling is at the heart of the trial." Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 567 (1994) (Introduction to "Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law"). For examples of articles about narrative and advocacy, see Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Argument to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Leonard M. Baynes, *A Time to Kill*,

of narrative to the law is not confined to the techniques of advocacy. In the words of James Boyd White,

[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.<sup>30</sup>

Narrative has provided opportunity to achieve a new perspective on specific practice areas, such as corporate law<sup>31</sup> or nonprofit law.<sup>32</sup> Narrative has been used to reveal a perspective that is not typically represented.<sup>33</sup> Additionally, narrative has been suggested as a strate-

*The O.J. Simpson Trials and Storytelling to Juries*, 17 LOY. L.A. ENT. L. REV. 549 (1997); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRS. 1 (2010); Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 128 (2008); Tami D. Cowder, *Telling the Client's Story: Using Fiction Writing Techniques to Craft Persuasive Briefs*, 14 NEV. LAW. 32 (Sept. 2006); Sharon Creeden, *Telling Your Client's Story to the Jury*, TENN. B.J., May-June 1991, at 10; Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3 (2009); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L. J. 459 (2001); Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213 (2010); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559 (1991); Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77 (1990); David Ray Papke & Kathleen J. McManus, *Narrative Jurisprudence: Narrative and the Appellate Opinion*, 23 LEGAL STUDIES FORUM 449 (1999); 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 (2009); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

30. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND THE POETICS OF THE LAW* 168 (Univ. Wis. Press 1985); see also JAMES BOYD WHITE, *THE LEGAL IMAGINATION: ABRIDGED EDITION* 242 (U. of Chicago Press 1985) ("The Narrative Imagination and the Claim of Meaning.").

31. See, e.g., Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847; Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

32. See, e.g., Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989 (2009) (considering actual narrative and fictional narratives in nonprofit law to help readers better understand the subject of nonprofit law); see also Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL'Y 97 (2012).

33. Martinez, *supra* note 28, at 683. See, e.g., Martha-Marie Kleinhans, *Rewriting "Outsider" Narratives: A Renaissance of Revolutionary Subjectivities*, 2 CHARLESTON L. REV. 185 (2007); Marc A. Fajer, *Can Two Real Men Eat Quiche To-*

gy to involve the client more in the legal representation.<sup>34</sup> The use of narrative cultivates an empathetic<sup>35</sup> response in listeners and readers that the law has found useful.<sup>36</sup>

Narrative, by its nature, is an interdisciplinary topic.<sup>37</sup> While no consensus on the exact definition of “narrative” has emerged, for purposes of this Article a working definition of “narrative” is “a text in which a narrative agent tells a story.”<sup>38</sup> At least a few scholars, such

*gether? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Kathryn Abrams, *Hearing the Call of Stories*, 79 S. CAL. L. REV. 971 (1991) (examining the emergence of feminine narrative scholarship); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

34. See generally Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (drawing on case theory and narrative to promote client-centered counseling in the clinical context). See also John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer To Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85 (1999); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175, 1181 (1992) (stating the importance of lawyers “helping the client tell his or her story in a clear and compelling way”); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). For an exploration on the potential pitfalls and limits of narrative, see Steven J. Johansen, *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS’N LEGAL WRITING DIRS. 63 (2010); Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961 (2006); David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800 (1998) (observing that “[n]arrative is essentially a vehicle for anecdotal evidence”).

35. For an examination on the need for empathy in the practice of law, see Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 J. ASS’N LEGAL WRITING DIRS. 109 (2011); Kirstin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Law Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1 (2008); Emily J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, 36 VT. B.J. 23 (2010); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621 (2002).

36. See David Ray Papke, *Legitimate Illegitimacy: The Memoirs of Nineteenth-Century Professional Criminals*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 226 (David Ray Papke ed., 1991).

37. See, e.g., Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of Interdisciplinary Illusion*, 120 PMLA 442, 442-43 (2005). For some examples of narrative discussions in a variety of disciplines, see SUZANNE KEEN, *NARRATIVE FORM* (2003) (narrative form in fiction); Rita Charon, *Narrative Medicine: A Model of Empathy, Reflection, Profession, and Trust*, 286 JAMA 1897 (2001); David Lewis, *Truth in Fiction*, 15 AM. PHIL. Q. 37 (1978). See also *Lawyers as Storytellers & Storytellers as Lawyers: An Interdisciplinary Symposium Exploring the Use of Storytelling in the Practice of Law*, 18 VT. L. REV. 567 (1994).

38. MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* 15 (3d. ed. 2009); see also Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 144 (1997) (noting that in law, the “undisciplined use” of “story,” “rhetoric,” and “narrative” creates both “confusion and frustration”); Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 J. LEGAL WRITING 229 (2006) (highlight-



as Jerome Bruner, posit that narrative is an innate process of the human brain.<sup>39</sup> From this perspective, it is reasoned that

we dream in narrative, daydream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, construct, gossip, learn, hate, and love by narrative. In order really to live, we make up stories about ourselves and others, about the personal as well as the social past and future.

Narrative is certainly a predominant method employed to distill and disseminate information.<sup>41</sup> Even a cursory review of popular culture and media reveals extensive use, indeed reliance, on narrative.<sup>42</sup> The rich tradition of narrative does not necessarily dictate, however, that an understanding of narrative is an innate reaction.<sup>43</sup> Instead, the

ing relevant terminology and recommending resources regarding narrative). Narrative could also be defined “the representation of a real or fictitious event or series of events by language, and more specifically by written language.” Gerard Genette & Ann LeVonnas, *Boundaries of Narrative*, 8 *NEW LITERARY HIST.* 1 (1976) (providing an overview of Plato & Aristotle’s thinkings on narrative). *But see* F. Michael Connelly & D. Jean Clandinin, *Stories of Experience and Narrative Inquiry*, 19 *EDUC. RESEARCHER* 2 (1990) (“One theory in educational research holds that humans are storytelling organisms who, individually and socially, lead storied lives.”). Narratology is thus used to define “the ensemble of theories of narratives, narrative texts, images, spectacles, events; cultural artifacts that ‘tell a story’” in order to critically analyze, evaluate, and use narratives. BAL, *supra* note 38, at 3. *See also* Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1, 25 (2006) (“In sum, narratology helps us to understand the reach of narrativity in human consciousness, but also to ‘denaturalize’ narratives, to show their constructedness, how they are put together and what we can learn from taking them apart.”); Richard A. Posner, *Legal Narratology*, 64 *U. CHI. L. REV.* 737 (1997) (reviewing LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW).

39. JEROME BRUNER, *ACTS OF MEANING* 45 (1990) (referencing the human “predisposition to organize experience into narrative form”). *See also* Marshall Grossman, *The Subject of Narrative and the Rhetoric of Self*, 18 *PAPERS ON LANGUAGE & LITERATURE* 398, 398 (1982) (“The construction of narrative is an essential activity of the human mind.”).

40. Barbara Hardy, *Towards a Poetics of Fiction: An Approach Through Narrative*, 2 *NOVEL: F. ON FICTION* 5, 5 (1968).

41. In part, that is because

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

BAL, *supra* note 38, at 225; *See also* Linda L. Berger, *The Lady, or the Tiger?: A Field Guide to Metaphor and Narrative*, 50 *WASHBURN L.J.* 275 (2011).

42. Kuykendall, *supra* note 31, at 538 (marking that the use of narrative in popular culture “confirm[s] the hold of narrative on the imagination”).

43. Gerard Genette, *Boundaries of Narrative*, 8 *NEW LITERARY HISTORY* 1, 3 (1976) (cautioning that “to accept, perhaps dangerously, the idea or the feeling that the origins of narrative are self-evident, that nothing is more natural than to tell a story or to arrange a group of actions into a myth, a short story, an epic, a novel”);

prevalence as well as the sustainability of narrative underscores its usefulness.<sup>44</sup> Narrative empowers the tellers and provides an opportunity to present a text in an accessible, often memorable, manner.<sup>45</sup> Not surprisingly, this is of use to many fields, including the law.<sup>46</sup>

## B. Personal Narrative

Isak Dinesen addresses the issue of personal narrative in a story she relates in her work "Out of Africa."<sup>47</sup> With apologies to Isak Dinesen, the following is a paraphrase of her story, a parable she heard as a child.<sup>48</sup> A man lived in a round house with a round window that adjoined a triangular garden with a fish pond.<sup>49</sup> One night, the man was awakened by a noise: he left the house to investigate.<sup>50</sup> He ran in

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see also X.J. KENNEDY & DANA GIOIA, *INTRODUCTION TO FICTION*, at xvii (11th ed. 2010) ("The gift of narrative . . . is so deep and universal that it seems one of the attributes that most clearly separates humanity from other species. Dolphins may have vocabulary, but they do not create novels or short stories.").

44. See, e.g., Amy Vorenburg, *Essay: The Moral of the Story—The Power of Narrative to Inspire and Sustain Scholarship*, 8 J. ASS'N LEGAL WRITING DIRS. 257 (2011) (asserting that narrative provides an opportunity to complement traditional approaches to scholarship by facilitating personal connections among writer, subject, and reader).

45. Daniel Mahala & Jody Swilky, *Telling Stories, Speaking Personally: Reconsidering the Place of Lived Experience in Composition*, 16 JAC: J. OF COMPOSITION THEORY 363, 384 (1996) (referencing the use of storytelling in the composition classroom "to empower students within the dominant culture, but also as members of alternative or oppositional cultures who are capable of using established knowledge on their own behalf."); see also Massaro, *supra* note 28, at 2105 (observing that narrative "has a radical transformative potential.").

46. This focus on narrative is also shaping the field of medicine and the interactions between doctor and patient. See, e.g., JOHN LAUNER, *NARRATIVE-BASED PRIMARY CARE: A PRACTICE GUIDE* (2002).

Narrative Medicine fortifies clinical practice with the narrative competence to recognize, absorb, metabolize, interpret, and be moved by the stories of illness. Through narrative training, the Program in Narrative Medicine helps doctors, nurses, social workers, and therapists to improve the effectiveness of care by developing the capacity for attention, reflection, representation, and affiliation with patients and colleagues. Our research and outreach missions are conceptualizing, evaluating, and spear-heading these ideas and practices nationally and internationally.

*The Program in Narrative Medicine: College of Physicians and Surgeons, Columbia University*, <http://www.cumc.columbia.edu/dept/medicine/narrativemed/about/about.html> (last visited Nov. 4, 2012).

47. ISAK DINESEN, *OUT OF AFRICA* 259–65 (Modern Library 1992) (1937). For a biography of Isak Dinesen, see JUDITH THURMAN, *ISAK DINESEN: THE LIFE OF A STORYTELLER* 283 (St. Martin's Press 1982) (referencing the parable of the stork).

48. See DINESEN, *supra* note 47, at 259–65.

49. *Id.*

50. *Id.*

various directions in search of the noise until he discovered a leak from a dam near the fish pond.<sup>51</sup> The man repaired the dam, and worn from the searching and subsequent repair of the dam, the man trudged home.<sup>52</sup> Upon reviewing his dam repair in the morning, he noticed the convergence of line and shape on the ground.<sup>53</sup> The outline of a stork emerged from these seeming random lines and began to fade throughout the day.<sup>54</sup> Being given the temporary opportunity to see the convergence of a series of seemingly unconnected, undirected events was interpreted as the man's reward.<sup>55</sup> Upon relating this story, Isak Dinesen then asks the reader, "When the design of my life is complete, shall I, shall other people see a stork?"<sup>56</sup>

Personal narratives seek to explore the events of a life in an effort to divine purpose and meaning. A personal narrative captures the actions and thoughts of one individual, the narrator, in the act of remembering.<sup>57</sup> In a personal narrative, the writer draws on his or her own experience<sup>58</sup> to share with the reader the events that made the writer who she or he is and who she or he is not.<sup>59</sup>

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51. *Id.* at 260.

52. *Id.*

53. *Id.*

54. *Id.* at 260–61.

55. *Id.* at 261.

56. *Id.*; see also ADRIANA CAVARERO, *RELATING NARRATIVES: STORYTELLING AND SELFHOOD* 1–2 (Routledge 2000). Professor Cavarero uses the story from Isak Dinesen to illustrate the following: "Every human being is unique, an unrepeatable existence, which—however much they run disorientated in the dark, mixing accidents with intentions—neither follows in the footsteps of another life, nor repeats the very same course, nor leaves behind the same story." *Id.* at 2.

57. The definition of narrative in general can focus on the narrator. For example:

A narrative is an account, in any semiotic system, of a subjectivized and often entirely or partly fictionalized series of events. It involves a narrator—whether explicitly or implicitly self-referential, always a "first person"—a focalizer—the implied subject who "colors" the story—and a number of actors or agents of the events.

Mieke Bal, *First Person, Second Person, Same Person: Narrative As Epistemology*, 24 *NEW LITERARY HIST.* 293, 308 (1993).

58. "As part of any narrative, speakers [and writers] express the type of person they are to be taken to be, or the nature of the group in which they claim membership." Charlotte Linde, *Abstract to Private Stories in Public Discourse: Narrative Analysis in the Social Sciences*, 15 *POETICS* 183, 183 (1986). When one hears the phrase "personal narrative," one thinks of the word "memoir." One of the most famous memoirs was a two volume work penned by President and Civil War General Ulysses S. Grant. U.S. GRANT, *PERSONAL MEMOIRS OF U.S. GRANT* (Charles L. Webster & Co. 1885).

59. Linde, *supra* note 58, at 198 (describing personal narratives as sharing "[w]hat you must know to know me"). "Individuals construct past events and actions in personal narratives to claim identities and construct lives." CATHERINE

The use of first person in a personal narrative forms a direct connection between the reader and the writer<sup>60</sup> whereby “the use of a narrational *I* . . . seems to be the actual voice of the person who writes.”<sup>61</sup> In prefaces and introductions, authors often invoke first person to speak directly to their audience. The following example showcases such a use:

It is the privilege of an author in his Preface to drop the third person and to speak directly in the first person to those who may be interested in the genesis of his book and in the circumstances surrounding its preparation as well as in any other matters which he cares to state in explanation of his undertaking. . . . I gladly avail myself of this privilege to speak to those who may care to hear what I have to say about my [book].<sup>62</sup>

The first person and reliance on seemingly personal moments manufactures a sensation that the writer is speaking to the reader “confiding everything from gossip to wisdom.”<sup>63</sup> Although the universe of a personal narrative can seem confining, being that it is limited to the experience of one individual, the personal narrative forges a memorable connection between the reader and the writer.<sup>64</sup> This allows the reader to relate the writer’s personal experiences to that of the reader’s

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KOHLER RIESSMAN, *NARRATIVE ANALYSIS 2* (John Van Maanen et al. eds., 1993). See also BILL ROORBACH, *WRITING LIFE STORIES: HOW TO MAKE MEMORIES INTO MEMOIRS, IDEAS INTO ESSAYS, AND LIFE INTO LITERATURE 13* (Story Press 2000) (providing instructional exercises on how to write a memoir); Jerome Bruner, *Life as Narrative*, 71 *SOCIAL RESEARCH* 691, 692 (2004) (“We seem to have no other way of describing ‘lived time’ save in the form of narrative.”). When one thinks of “memoirs,” one also thinks of the “ghost writer.” ROORBACH, *supra*.

60. See, e.g., Joshua E. Perry, *The Ethical Costs of Commercializing the Professions: First-Person Narratives from the Legal and First-Person Narratives From the Legal and Medical Trenches*, 13 *U. PA. J.L. & SOC. CHANGE* 169, 169–201 (2010); see also Camilla Stivers, *Reflections on the Role of Personal Narrative in Social Science*, 18 *SIGNS* 408, 410 (1993).

61. KAREN SURMAN PALEY, *I-WRITING: THE POLITICS AND PRACTICE OF TEACHING FIRST-PERSON WRITING 13* (2001) (presenting an ethnographic study of the composition teachers at Boston College in the 1990s in order to explore the political and social significance of first-person writing in college freshman composition courses).

62. RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH*, at vii (1914); see also Jennifer Trahan, *Book Review*, 18 *CORNELL J.L. & PUB. POL’Y* 831, 832 (2009) (reviewing MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* (2008) stating that “the use of first-person narrative [in the reviewed book] lends a sense of immediacy that contributes to the gripping nature of the book”).

63. *THE ART OF THE PERSONAL ESSAY: AN ANTHOLOGY FROM THE CLASSICAL ERA TO THE PRESENT*, at xxiii (Philip Lopate ed. 1994) (“The hallmark of the personal essay is its intimacy.”).

64. *Id.* at xxiii.

personal experiences.<sup>65</sup> The reader becomes invested, inspired, and comforted by the narrative.<sup>66</sup> This sensation is perhaps why “[a]utobiography, the ‘personal essay,’ the memoir, the travelogue, and other written genres of storytelling have long enjoyed an important position in the pantheon of Western literary genres.”<sup>67</sup> Indeed, authors of fiction have found success manipulating the genre of personal narrative to capture readers.<sup>68</sup> Compelling uses of personal narratives in fiction include Daniel Defoe’s *Robinson Crusoe*,<sup>69</sup> Henry Fielding’s *Tom Jones*,<sup>70</sup> Charles Dickens’s *David Copperfield*,<sup>71</sup> William M. Thackeray’s *Vanity Fair*,<sup>72</sup> F. Scott Fitzgerald’s *The Great Gatsby*,<sup>73</sup> Ernest Gaines’s *A Lesson before Dying*,<sup>74</sup> Margaret Atwood’s *A Handmaid’s Tale*,<sup>75</sup> and Evelyn Waugh’s *Brideshead Revisited*.<sup>76</sup> More than any author, William Faulkner<sup>77</sup> manipulated personal narrative in *As I Lay Dying*, a work which is comprised of fifty-nine sections from the perspective of fifteen first person narrators.<sup>78</sup> In Faulkner’s work,

65. *Id.*

66. In considering the possibility of first person, one author observed that “first person fiction more readily evokes feeling responsiveness than the whole variety of third person narrative situations.” Suzanne Keen, *A Theory of Narrative Empathy*, 14 *NARRATIVE* 207, 215–16 (2006). For an examination of the identification of the first person in fiction, including *Moby Dick* and *The Great Gatsby*, see Henrik Skov Nielsen, *The Impersonal Voice in First-Person Fiction*, 12 *NARRATIVE* 134 (2004).

67. Mahala & Swilky, *supra* note 45, at 363. For an examination of first person narratives in film, see Jessica Silbey, *Cross Examining Film*, 806 *PLI/LIT* 971 (Oct. 29, 2009).

68. Mahala & Swilky, *supra* note 45, at 364.

69. See DANIEL DEFOE, *ROBINSON CRUSOE* (Simon & Brown 2011) (1719); see also Malinda Snow, *The Origins of Defoe’s First-Person Narrative Technique: An Overlooked Aspect of the Rise of the Novel*, 6 *J. NARRATIVE TECHNIQUE* 175 (1976).

70. See HENRY FIELDING, *TOM JONES* (Oxford World’s Classics 2008) (1798).

71. See CHARLES DICKENS, *DAVID COPPERFIELD* (Modern Library Classics 2000) (1850).

72. See WILLIAM M. THACKERAY, *VANITY FAIR* (Arcturus Paperback Classics 2010) (1848).

73. The novel begins with the following line: “In my younger and more vulnerable years my father gave me some advice that I’ve been turning over in my mind ever since.” F. SCOTT FITZGERALD, *THE GREAT GATSBY* 3 (Wordsworth Editions Limited 1993) (1925).

74. See ERNEST GAINES, *A LESSON BEFORE DYING* (Vintage 1997) (1993).

75. See MARGARET ATWOOD, *A HANDMAID’S TALE* (Everyman’s Library 2006) (1985).

76. See EVELYN WAUGH, *BRIDESHEAD REVISITED* (Bay Books 2008) (1945).

77. Faulkner won the Nobel Prize for Literature in 1949. *William Faulkner* NOBELPRIZE.ORG [http://www.nobelprize.org/nobel\\_prizes/literature/laureates/1949/faulkner-bio.html](http://www.nobelprize.org/nobel_prizes/literature/laureates/1949/faulkner-bio.html) (last visited Nov. 4, 2012).

78. WILLIAM FAULKNER, *AS I LAY DYING* (Modern Library 2000) (originally published 1930).

through the first person narratives, the reader hears the voices of the community, i.e., “the dialect of poor white Mississippi farmers, talk by small town shopkeepers, tense and fast-paced narrative, richly metaphorical digression, and philosophically charged speculation burdened by Latinate diction and convoluted syntax.”<sup>79</sup>

A personal narrative promotes the ability of the reader to see, to feel, and to experience the events through the eyes of the narrator and writer,<sup>80</sup> thereby invoking both reader empathy and sympathy.<sup>81</sup>

### III. The Will as Personal Narrative

Conceptualizing the will as a personal narrative acknowledges the history of the will and ensures the will remains a vital part of the estate planning process.

#### A. The Origins of the First Person “Vessel of Truth”

Wills are one of the oldest forms of legal documents.<sup>82</sup> While written wills can be found in Ancient Egypt,<sup>83</sup> the first wills likely

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79. Stephen M. Ross, “Voice” in *Narrative Texts: The Example of As I Lay Dying*, 94 PMLA 300 (1979).

80. First person is not the only technique that directs the reader to see the events through the eyes of the main character. For example, Jane Austen used a limited point of view to direct readers to see the world through Emma Woodhouse’s eyes. WAYNE C. BOOTH, *THE RHETORIC OF FICTION* 245 (1st ed. 1961) (“The solution to the problem of maintaining sympathy despite almost crippling faults was primarily to use the heroine herself as a kind of narrator, though in third person, reporting on her own experience.”). By tapping into the reader’s empathetic and sympathetic responses, Jane Austen ensured that while she may have been worried that Emma would become “a heroine whom no one but myself will much like,” JAMES EDWARD AUSTEN-LEIGH, *MEMOIR OF JANE AUSTEN* 157 (Oxford Univ. Press 1926) (1870), the world has been captivated with Emma’s foibles and growth through the novel.

81. See, e.g., Alessandro Giovannelli, *In Sympathy with Narrative Characters*, 67 J. AESTHETICS & ART CRITICISM 83 (2009) (“Sympathetic responses to characters are a pervasive form of narrative engagement, and they contribute importantly to what makes perceiving a narrative a rewarding experience.”).

82. For an historical overview of the will execution ceremony, see Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 415–20 (1988) (including references to will executions from the Book of Genesis, Ancient Egypt, Roman times, and the Normal conquest). See also George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L. J. 1280 (1942) (exploring America’s resistance to the institution of primogeniture).

83. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESACY AND ADMINISTRATION OF DECEDENTS’ ESTATES* 7 (2d ed. 1953) (“In 2548 B.C. we find an Egyptian executing an instrument on papyrus, witnessed by two scribes, settling certain property upon his wife, and appointing a guardian for his infant children. The document, par-

predate written history.<sup>84</sup> Wills developed as a spoken act usually made from the death bed.<sup>85</sup> During the later part of the Anglo-Saxon Period of England,<sup>86</sup> a distribution of property called “death-bed distribution” emerged.<sup>87</sup> Made to his confessor, this death-bed statement included a wish as to the disposition of property.<sup>88</sup> Although not bearing all the modern hallmarks of wills, such as being unilateral and ambulatory, these “wills” were intended to distribute property in accordance with the wishes of an individual.<sup>89</sup> Indeed, even written wills of the Anglo-Saxon period were most likely transcriptions or summaries of spoken wishes<sup>90</sup> because England was primarily an oral society from the fifth through the eleventh centuries.<sup>91</sup> Oral wills con-

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ticularly its attestation clause, seems to be in phraseology which might almost be used in a will at the present time.”). For a summary of an Egyptian will executed in 2550 B.C.E., see VIRGIL M. HARRIS, *ANCIENT, CURIOUS AND FAMOUS WILLS* 12–13 (Little, Brown & Co. 1911). See also *Oldest of Known Wills*, 2 GREEN BAG 547 (1890) (analyzing the same ancient Egyptian will and noting the limited number of ancient Egyptian wills identified). Roman law required the use of five or seven witnesses, depending on the terms of the document. MICHAEL M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND: FROM CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY* 177 (Toronto: Pontifical Institute of Mediaeval Studies 1963). Medieval wills returned to the practice of a minimum of two witnesses, in some instances requiring one witness to be a priest. *Id.* at 178–80.

84. For the highlights of probate’s history, see Julius A. Leetham, *Probate Concepts and Their Origins*, 9 WHITTIER L. REV. 763, 773 (1988) (“It should be remembered also, that it is likely that probate form and ritual existed as traditions handed down orally from generation to generation prior to written records.”).

85. See FREDERICK POLLOCK & FREDERIC W. MAITLAND, *HISTORY OF ENGLISH LAW* 252–381 (Liberty Fund) (2d. ed. 1898).

86. The Anglo-Saxon period was from 449 to 1066 B.C.E. ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 5 (1928).

87. *Id.* at 6. The “death-bed distribution” was also called *verba novissima*. *Id.*

88. *Id.*; see also Leetham, *supra* note 84, at 767–77 (“It is quite likely that the Church, through its representatives, was often present during the final days of its communicants. There must have been a considerable desire to execute the wishes of the dying persons, who chose to make gifts for religious purposes either by written or oral pronouncements.”).

89. See, e.g., Brenda Danet & Bryna Bogoch, *From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills*, 12 LANGUAGE & COMM. 98 (Apr. 1992).

90. When studying the text of Anglo-Saxon wills, it was noted that “[t]he very fact that the written wills are in the vernacular is some proof, although of course not conclusive proof, that the scribe was merely taken down what he has heard.” H.D. Hazeltine, *General Preface*, at xv *ANGLO-SAXON WILLS* (ed. & trans. Dorothy Whitelock 1973) (1930) (providing the text of thirty-nine Anglo-Saxon wills); see also Danet & Bogoch, *supra* note 89, at 95 (examining sixty-two Old English wills, including the wills in the collection edited by Dorothy Whitelock, in order to explore how written legal acts derived from oral legal acts).

91. Danet & Bogoch, *supra* note 89, at 96.

tinued to be made in Anglo-Norman England,<sup>92</sup> as men delayed making wills until death approached and fueled the superstition that making a will would result in imminent death.<sup>93</sup> Emerging from the Anglo-Norman period, written wills became more common. In particular, the church wanted a written record of gifts, which in turn promoted general written record keeping,<sup>94</sup> as the ecclesiastical courts gained control of the administration of wills.<sup>95</sup> The involvement of the church in these matters forever imprinted a “religious, magical element in the law and practice of succession.”<sup>96</sup> Indeed, a priest was often required to be present when a will was made.<sup>97</sup> As England emerged from the thirteenth century, the written will began to supplant the use of the oral will and displace the public ceremony of will execution with a private execution where details of the dispositions surfaced only upon death.<sup>98</sup>

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92. The Anglo-Norman period was from 1066 to 1540 B.C.E. REPPY & TOMPKINS, *supra* note 86 at 5. For an analysis of wills of the Anglo-Norman period, see SHEEHAN, *supra* note 83, at 20.

93. REPPY & TOMPKINS, *supra* note 86, at 8; *see also* SHEEHAN, *supra* note 83, at 179, 195. Admittedly, this practice area does take on a grim perspective, with “execution” being a rather unfortunate term to describe the formal signing of a will. From a related grim perspective, the word “cadaver” has been thought to derive from the Latin words *caro data vermibus*, flesh given to worms. NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 75 (2010) (noting that this derivation is somewhat disputed).

94. Danet & Bogoch, *supra* note 89, at 96 (“Initiated by the clergy as aids to remembering transfers of property in which the Church was a beneficiary, the use of documents eventually extended to records of other governmental and commercial transactions as well.”); *see also* SHEEHAN, *supra* note 83, at 3. For an examination of the doctrine of undue influence in the area of testamentary gifts to religious institutions, *see* Jeffrey G. Sherman, *Can Religious Influence Ever Be “Undue” Influence?*, 73 BROOK. L. REV. 579 (2008).

95. SHEEHAN, *supra* note 83, at 163, 167. For a historical consideration of the probate court in America, *see* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America*, in PROBLEMS IN PROBATE LAW 385 (1946). *See also* PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* (Northeastern Univ. Press 2003) (exploring further reforms of probate, including reforms in probate courts); James Findley, Note, *The Debate Over Nonlawyer Probate Judges: A Historical Perspective*, 61 ALA. L. REV. 1143, 1144 (2010) (exploring the “dying breed” of lay judges in probate courts).

96. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 373 [hereinafter *Law of the Living*]; *see also* Malcolm A. Moore, *The Joseph Trachtman Lecture—The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 AM. C. TR. & EST. COUNS. J. 159 (2006) (highlighting the role and influence of the church in the development of modern wills).

97. SHEEHAN, *supra* note 83, at 180 (“The fittingness of the reception of the last words of a dying man by his priest was an old and well honoured tradition” that became a canonical requirement for will executions).

98. *Id.* at 190.



The spoken, confessional nature has shaped our notions of the function of wills and left a lasting mark on the written document.<sup>99</sup> For example, the law of succession centers on the individual, acknowledging the importance of the testator's intent<sup>100</sup> and the Western concept of individualism of property.<sup>101</sup> Lawrence Friedman described the will as

the sole, authentic voice of a man who is dead. Its vitality begins when his life ceases, and it is an almost mystical extension of his personality after death.<sup>102</sup>

In Roman times, "the will was regarded as 'a vessel of truth,' providing a final accounting of the testator's likes and dislikes and revealing the essence of his [or her] character."<sup>103</sup> The Roman will was a vehicle to transfer property and "to honor or rebuke family, friends, and servants as they deserved"—or at least as the testator thought these individuals deserved.<sup>104</sup>

The terminology of wills also contains echoes of its spoken confessional origin. The individual who executes the will is called a *testator*, derived from the Latin *testis*, and related to the words *testify* and *testimony*.<sup>105</sup> *Testimonial* was defined by Samuel Johnson as a "writing

99. One author noted that the common law will emerged from three different traditions: Roman law, Germanic tribal law, and Christian ideals of charity. *Id.* at 303.

100. The touchstone of this area is often remarked to be the testator's intent. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).

101. Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 611 n.1 (1988); see also DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 10–11 (1989). George Washington handwrote his fifteen page will on his specially made 8 1/8 by 6 3/4 inch paper. THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY, TO WHICH IS APPENDED THE LAST WILL AND TESTAMENT OF MARTHA WASHINGTON, at iv (ed. John C. Fitzpatrick) (Mount Vernon Ladies' Association of the Union 1939), available at <http://www.gwpapers.virginia.edu/documents/will/text.html>.

102. *Law of the Living*, *supra* note 96, at 374.

103. Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 959, 966 (2006) (citations omitted); see also CHAMPLIN, FINAL JUDGMENTS: DUTY AND EMOTION IN ROMAN WILLS, 200 B.C.-A.D. 250, at 9–10 (Univ. of Cal. Press 1991) (writing that "only once in life did the Romans speak without reserve, in their wills . . . the will was indeed perceived as a vessel of truth, a document carefully weighed and written free of ordinary constraints and without fear or favor, since it became public knowledge only when its author was past caring.").

104. *Id.* at 21.

105. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 77 (Little, Brown & Co. 1963).

produced by any one as evidence of himself.”<sup>106</sup> The will can nominate a “personal representative”<sup>107</sup> who is the designated individual<sup>108</sup> who carries on the testator’s legal existence.<sup>109</sup> As one author wrote, executor in Russian translates to “spokesperson for the soul.”<sup>110</sup>

The oral will seems to have incorporated ritualistic incantations<sup>111</sup> foreshadowing the mimicry of written forms.<sup>112</sup> Just as a lis-

106. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. London: J. Ford C. Rivington 1785) (using “himself” in original to reflect typeset in 1700s).

107. The Uniform Probate Code defines the “personal representative” as including the “executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.” UNIF. PROBATE CODE § 1-201 (36) (1990).

108. A “person” may mean “an individual or an organization” under the Uniform Probate Code. UNIF. PROBATE CODE § 1-201 (35) (1990).

109. “The personal representative stands in the shoes of the deceased.” Frank G. Option, *DECEDENTS’ ESTATES, WILLS AND TRUSTS IN THE U.S.A.* 1 (Kluwer Law and Taxation Publishers 1987); see also SHEEHAN, *supra* note 83, at 215 (noting that the ecclesiastical courts of Medieval England attempted to make the personal representative’s “powers as much as possible like those of the person for whom he acted”).

110. BOVE, *supra* note 10, at 128. In addition to executors with traditional duties, the need of “digital executors” is growing. See, e.g., Colin Korzec & Ethan A. McKittrick, *Estate Administration in Cyberspace*, 150 TR. & EST. 61, 64 (2011) (“The role of digital executor typically comes with important responsibilities: closing email accounts, social networking accounts such as Facebook and Twitter and photo storage accounts such as Flickr. A digital executor should also shut down shopping accounts like Amazon, as they probably have credit card data on file.”). For additional information about digital estate planning, see Helen W. Gunnarson, *Plan for Administering Your Digital Estate*, 99 ILL. B.J. 71 (2011); Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINN. PROB. L. J. 376 (2011); Molly Wilkens, Note, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037 (2011); Patrick Marshall, *Digital Estate Planning Often Forgotten*, SEATTLE TIMES Jan. 7, 2012 [http://seattletimes.nwsourc.com/html/business/technology/2017171847\\_pfdigitalestates08.html](http://seattletimes.nwsourc.com/html/business/technology/2017171847_pfdigitalestates08.html).

111. “The essential patterns of the will were part of English folk law. These patterns recurred in the colonies, preserved in the memories of men and women far from home.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 30 (2005) [hereinafter *HISTORY OF AMERICAN LAW*].

112. The typical will, too, has always been full of jargon. Yet its customary language was not just legal blather. And for all their technicality, wills were never as dry and pedantic as, say, the typical insurance policy. The will, after all, was an instrument of giving, of love, often, too, it was an instrument written in the shadow of death. LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 63 (2009); see also CHAMPLIN, *supra* note 103, at 183 (“To every generalization an exception may be found and, no matter how formulaic, all Roman wills differed.”). For a compilation of narratives about wills from the perspective of testators, beneficiaries, and estate planners, see COLLEEN BARNEY & VICTORIA COLLINS, *BEST INTENTIONS: ENSURING THAT YOUR ESTATE PLAN DELIVERS BOTH WEALTH AND WISDOM* (2002).

tener would see the speaker of an oral will, the reader of a written will recognizes the presence of an individual testator behind each constructed provision.<sup>113</sup>

As demonstrated above with Alfred Nobel's will, testators' written wills recognize, at least on some level, the personal narrative opportunity encased in the will. Dr. Nobel's will was not simply an attempt to white-wash his image. Instead, his will served to promote his life-long interest in the human capacity for invention.<sup>114</sup> The will affords the opportunity to represent a sense of the personal values that are fundamental to the personal narrative.

### B. Impact on the Attorney-Client Relationship

Conceptualizing the will as a personal narrative is beneficial from the perspective of the individual testator. One estate planning attorney posited the following question: "What does a client want in a will?"<sup>115</sup> The author's response was "[p]robably an instrument that in *simple, direct language*, bearing her *personal mark*, tells her own story, that is also *legally correct*."<sup>116</sup> Hence, the expectation that the client brings to the representation is that the will, at least in some respect, will resemble a personal narrative. Even though the will is no longer the primary vehicle to transfer wealth upon death, the will remains the

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113. John De Morgan, *Wills—Quaint, Curious and Otherwise*, 13 GREEN BAG 567, 567 (1901). "The true index to a man's character is contained in his last will and testament," wrote an able jurist of the last century, and there is a great deal of truth in the statement." *Id.*

114. FANT, *supra* note 1, at 16 (noting that a plaque marking the site of Dr. Nobel's birth reads "inventor, supportor of culture, friend of peace"). In addition to the charitable nature of Dr. Nobel's will, other accumulators of wealth cemented or constricted a legacy of great philanthropy, such as Robert Wood Johnson and John D. Rockefeller. MADOFF, *supra* note 10, at 87 (listing founders of charitable organizations including Rockefeller, Ford, Carnegie, Stanford, Harvard, Yale, MacArthur, Pew, and Duke); see also Leslie Moscow McGranahan, *Charity and the Bequest Motive: Evidence from Seventeenth Century Wills*, 108 J. POL. ECON. 1270 (2000). For a recent exploration of charitable giving, see Roger D. Silk, *Lifetime Versus Testamentary Giving: Contemplating Three Non-Tax Implications*, 150 TR. & EST. 29, 1, 3-4 (exploring some issues with major charitable foundations, such as the Julius Rosenwald Foundation, Ford Foundation, and the John D. MacArthur Foundation).

115. Vincent L. Teahan, *Why Don't Our Clients Like Their Wills?*, 69 N.Y. ST. B.J., Nov. 1997, at 26.

116. *Id.* (emphasis in original); see also SUSAN L. BRODY ET AL., LEGAL DRAFTING 138 (1994) ("A client expects to be able to read and understand the documents and appreciates seeing that her concerns have been addressed in a logical way.").

focus of the practice of estate planning.<sup>117</sup> Demographic changes, such as increased longevity and transformation in property, are affecting patterns of testation.<sup>118</sup> Before the nineteenth century, few individuals executed wills or even left property requiring probate.<sup>119</sup> Throughout the nineteenth and twentieth centuries, “the base of testation broadened.”<sup>120</sup> This trend has continued, promoted by the rise of will substitutes. In a recent national survey, thirty-five percent of surveyed Americans reported having a will and fifty-one percent reported having some form of estate planning documents, such as a will, trust, or power of attorney.<sup>121</sup> Estate planning strategies must be responsive to the demographics of testators today.<sup>122</sup> Clients have varied forms of property, including the accumulation of digital assets.<sup>123</sup> In addition to recognizing the need for estate planning, current generations of testators crave personal attention, such as the employment of so-called “Life Celebrants.”<sup>124</sup> Certified Life Celebrants deliver unique eulogies; in the words of one Life Celebrant, “the crux of what we do is storytelling.”<sup>125</sup>

Also, the characterization of the will as a personal narrative reinforces to the client that the will and related documents will be part of his or her legacy, rather than the mere recitation of time-worn

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117. *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM, <http://press-room.lawyers.com/2010-Will-Survey-Press-Release.html> (last visited Nov. 4, 2012).

118. CAROLE SHAMMAS ET. AL, *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 147–62 (Rutgers Univ. Press 1987) (noting that “[i]nheritance decisions in the twentieth century are usually made by the elderly”); see also Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36 (2009) (positing that demographic data could be used to predict rates of testacy and intestacy).

119. *Law of the Living*, *supra* note 96, at 366.

120. *Id.* at 367.

121. LAWYERS.COM, *supra* note 117 (identifying the potential cause for the decrease in estate planning documents as the economic downturn).

122. For an exploration of the need to adjust estate planning techniques for individual testators and varying generations of testators, see Jeffrey N. Pennell, *The Joseph Trachtman Lecture—Estate Planning for the Next Generation of Clients: It’s Not Your Father’s Buick, Anymore*, 34 AM. C. TR. & EST. COUNS. J. 2 (2008).

123. Evan E. Carroll et al., *Helping Clients Reach Their Great Digital Beyond*, 150 TR. & EST. 66 (defining “digital assets” as “anything someone owns that’s in a digital file stored either on a device the person owns (that is, stored locally) or elsewhere on devices accessed by contract with the owner.”).

124. Jem Carney, *Life Celebrants Make Funeral More Personal*, MACON TEL., Nov. 19, 2011, at 1D.

125. *Id.* at 2D.

phrases.<sup>126</sup> This underscores the need for client participation in the evaluation, drafting, and review of documents. Conceptualizing the will as personal narrative taps into the “self-transforming role . . . that narrative language provides.”<sup>127</sup>

The estate planning process compels the contemplation of mortality. It is often repeated “that man is the only animal who is conscious (from time to time) that it must die.”<sup>128</sup> In the words of Thomas Shaffer, “the will-making experience is a *memento mori* as well as a routine law-office transaction.”<sup>129</sup> This “remembering of mortality” shapes the estate planning process, for the estate planning process is the confrontation of one’s own mortality, assessment of one’s life (both in terms of personal relationships and accumulation—or squandering of—assets), and contemplation of one’s legacy (both financial and nonfinancial).<sup>130</sup>

Although the estate planning process provides the opportunity for a personal exploration of legacy, the attorney performs a vital role. In the context of estate planning, the attorney drafts person “must be

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126. CHAMPLIN, *supra* note 103, at 26 (“All wills are effectually tacit pacts for remembrance . . .”). One do-it-yourself will drafting site is titled “Parting Wishes.” *Last Will and Testament*, PARTINGWISHES.COM <http://www.partingwishes.com/lastwillandtestament.aspx> (last visited Nov. 4, 2012).

127. Deborah Schiffrin, *Narrative as Self-Portrait: Sociolinguistic Constructions of Identity*, 25 LANGUAGE IN SOCIETY 167, 169 (1996) (analyzing displays of self and identity through the analysis of two narratives of families by Jewish-American women).

128. See, e.g., WILLIAM ERNEST HOCKING, THE MEANING OF IMMORTALITY IN HUMAN EXPERIENCE INCLUDING THOUGHTS ON DEATH AND LIFE 5 (Harper & Brothers rev. ed. 1957) (“Man is the only animal that contemplates death, and also the only animal that shows any sign of doubt of its finality.”); see also THE OXFORD BOOK OF DEATH, at xi (D.J. Enright ed., Oxford Univ. Press 1983) (anthology of material about death including poems, excerpts of essays, quotes, last words, and epigrams); SARAH CARR-GOMM, THE DICTIONARY OF SYMBOLS IN WESTERN ART 78 (Duncan Baird Publishers 1995) (“Death might be included in a painting as a reminder that no one is spared, regardless of age or status.”).

129. THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH 1 (1970). “Memento mori” roughly translates to “remember your mortality.” See also CHAMPLIN, *supra* note 103, at 1 (describing the will preparation process for an Ancient Roman testator as one in which “he or she contemplated personal extinction”).

130. “Estate planning is financial, retirement, business succession, charitable, medical, disability, legacy, and gift planning. Its scope is not daunting, as it might seem from this list; it is exciting and rich in opportunities.” ROBERT A. ESPERTI & RENNO L. PETERSON, LOVE, MONEY, CONTROL: REINVENTING ESTATE PLANNING (Quantum Press 2004), excerpted at [http://www.nnepa.com/files/LMC\\_nnepa\\_website.pdf](http://www.nnepa.com/files/LMC_nnepa_website.pdf).

more than a mere transcribing device.”<sup>131</sup> The drafting of wills is sometimes dismissed as the mere compilation of forms that results in a sanitized, mechanical document. The proliferation of do-it-yourself estate planning tools, such as LegalZoom.com, LawDepot.com, and Nolo.com, has led estate planning practitioners to re-examine their practices.<sup>132</sup> Although estate planning practice has undergone a period of growth,<sup>133</sup> some caution that the economics of law will soon impact the profession.<sup>134</sup> The president-elect of the National Conference of Bar Presidents remarked, “[w]hy is someone going to pay \$700 to have a lawyer prepare a will when they can get it for \$49 . . . ?”<sup>135</sup> To that end, the president-elect urged lawyers to consider the “value-adds” that lawyers could provide.<sup>136</sup> This “value-add” could be the renewed attention to the counseling component of the representation.<sup>137</sup>

131. FREDERICK K. HOOPS ET AL., *FAMILY ESTATE PLANNING GUIDE* § 17:1 (4th ed. 1994).

132. Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, 17 ALI-ABA EST. PLANNING COURSE MATERIALS J. 5, 5 (Aug. 2011), available at [http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/EPCMJ1108\\_Goffe\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/EPCMJ1108_Goffe_thumb.pdf); see also Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 AM. C. TR. & EST. COUNS. J. 1, 21–23, Ex. A (2010) (reporting on his experience “building” a will on LegalZoom for seventy-one dollars, including shipping, and including a copy of the resulting will in Exhibit A of the article).

133. See generally Amy Oxley et al., *Probate & Property Turns 25: A Look Back on a Quarter-Century of Death and Dirt*, 26 ABA PROB. & PROP. 11, 11 (2012) (assessing the steady growth of trusts and estate work since 1982).

134. Mark Curriden, *Future Law: Rethink Client Needs, or Else*, ABA JOURNAL, Mar. 1, 2011, [http://www.abajournal.com/magazine/article/future\\_law\\_rethink\\_client\\_needs\\_or\\_else/](http://www.abajournal.com/magazine/article/future_law_rethink_client_needs_or_else/).

135. *Id.* See also Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 813 (2002) (“Today, as our profession again faces economic challenges from a variety of sources [including document preparation websites], lawyers again must struggle to define what it is that they do for a living.”). The concern about the future of estate planning has actually been building for decades. See generally Jeffrey N. Pennell, *Whither Estate Planning*, 24 IDAHO L. REV. 339, 339 (1987–1988) (exploring the issues of “where is the estate planning practice headed, and what should estate planners be doing about it?” by examining legal education and legal practice) (emphasis in original).

136. Curriden, *supra* note 134; see also Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN’S L. REV. 85, 85 (1994) (identifying six causes for public dissatisfaction with the legal profession, including “commercialization, advertising and the contingent fee”).

137. See, e.g., Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 437 (2008) (“To be effective in working with clients, witnesses, judges, mediators, arbitrators, experts, jurors, and other lawyers, attorneys must have a good understanding of how people think and make decisions, and must

Estate planning is a client-centered practice area.<sup>138</sup> In the world of the practice of law, the subject matter of trusts and estates is generally styled by firms as “individual client services.”<sup>139</sup> In describing practice trends, one author remarked that “[c]lients must be given the opportunity to set their own priorities once they’re fully informed. . . . This new year, I will listen more and couple my advice with the profound respect I now have, understanding that my client knows about his family, his business and everything else—more deeply than I do.”<sup>140</sup> Thomas Shaffer, writing in 1971, wrote that estate planners have become positively “obsessed with manipulation and taxes, the professional fixation which diverts our observation from the here-and-now feelings of the men and women who consider death in [our] office.”<sup>141</sup> As Shaffer continued, “[o]ur clients are not as interested in taxes as we suppose them to be. Or, to put that idea positively, they are more interested in values and identification in their property which are not taxable, and in the people they leave.”<sup>142</sup> Forty years

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possess good people skills.”); Pennell, *supra* note 135, at 347 (positing that one change of estate planning might be “[a]dopting the role that some call ‘personal counselling’”). For other sources regarding client counseling, see John M.A. Dipippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 (2001); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996) (identifying the limits of client-centered approach for full client engagement in the representation).

138. As an author addressing the practice area of elder law wrote:

Lawyers cannot fully undertake their professional roles without first realizing that clients are individuals, and individuals are more than the sum of their problems. Seeing the client as multifaceted individual, whose relationships and objectives exist within broader family and social systems, promotes lawyering that is holistic rather than merely task driven.

Linda S. Whitton, *Everything You Ever Needed to Know about Good Lawyering. You Can Learn from Elder Law*, 40 STETSON L. REV. 73, 75 (2010); see also Christopher P. Cline, *“The Fault Dear Brutus, Is Not in Our Stars, But in Ourselves,” Some Thoughts on the Estate Planning Profession*, 33 AM. C. TR. & EST. COUNS. J. 34 (2007–2008).

139. See, e.g., *Individual Client Services*, REID AND REIGE P.C., COUNSELORS AT LAW, <http://www.rlawpc.com/?t=5&LPA=1259&format=xml&p=3527> (last visited Nov. 4, 2012) (“Our attorneys provide sound advice, personal service, technical proficiency and sensitivity to client needs.”); Starr, Gern, Davison & Rubin, P.C., Attorneys at Law, *available at* <http://www.starrgern.com/Individual-Client-Services/> (last visited Oct. 1, 2012) (“Our Estate Planning, Administration and Litigation Group develops estate plans individually suited to each of our client’s personal and professional goals.”).

140. Roy M. Adams, *Non-Tax Issues in Estate Planning: 2010 Lessons for 2011*, 150 TR. & EST. 9, 10 (2011); see also Avi Z. Kestenbaum & Rachel D. Mansdorf, *It’s Personal*, 148 TR. & EST. 23 (2009).

141. SHAFFER, *supra* note 129, at 1–2.

142. *Id.* at 2; see also Avi Z. Kestenbaum et al., *The State of Estate Planning*, 150 TR. & EST. 35, 39 (2011) (“Instead of concentrating on particular estate planning

later, estate planners are still cautioning that “our best discussions with our clients won’t begin with taxes; they will begin by helping families to explore and express their unique gifts and attributes, thus laying a foundation for financial wealth to be informed by and contribute to the rich intellectual, social and emotional attributes that define each of the families that we are privileged to serve.”<sup>143</sup> This resonating quote means that “[a]ttorneys need to embrace their role of counselors . . . .”<sup>144</sup> Because the will is the core document in the estate planning process, through the exploration of the terms of the will, the attorney drafts person<sup>145</sup> understands what is important to the individual client.<sup>146</sup> As Jesse Dukeminier and Stanley Johanson wrote in the first edition of their still widely used text book, “[e]ach case is a drama in human relationships—and the lawyer, as counselor, drafts-

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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.”)

143. R. Hugh Magill, *The Changing Face of American Wealth*, 150 TR. & EST. 46, 50 (2011).

144. Adam R. Gaslowtiz & Jennifer A. Ringsmuth, *Will Contest, Probate, and Fiduciary Litigation Trends: A Bird’s Eye View*, 17 ALI-ABA EST. PLAN. COURSE MATERIALS J. 19, 35 (Oct. 2011); see also Jason K. Cohen, *Know Your Client: Maximizing Advocacy by Incorporating Client-Centered Principles into Legal Writing Rhetoric Practice*, 1 CHARLOTTE L. REV. 253 (2009) (advocating the application of client-centered principles in legal writing to force a legal writer to focus on the client to produce documents that better represent the client’s perspective).

145. The term “draftsperson” is deliberately used throughout this Article. “Draftsman” is a gendered term that is not appropriate. See VAL DUMOND, *THE ELEMENTS OF NONSEXIST LANGUAGE: A GUIDE TO INCLUSIVE SPOKEN AND WRITTEN ENGLISH* 22 (Prentice Hall Press 1990). The term “drafter,” like the use of the term “chair” rather than “chairperson,” could be used. However, the “person” is used to remind the reader of the individual writer and the individual client in the representation.

146. For an insider’s perspective of the estate planning representation, see BARRY M. FISH & LEO KOTZER, *WHERE THERE’S AN INHERITANCE . . . STORIES FROM INSIDE THE WORLD OF TWO WILLS LAWYERS* (2009). The Carnegie Report specifically states that law students should be trained in narrative thinking and storytelling. WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 96-97* (2007); see also Mary Ann Becker, *What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 GONZ. L. REV. 575 (2010–2011); Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267 (2008); Marcia Canaven, *Using Literature to Teach Legal Writing*, 23 QUINNIPIAC L. REV. 1 (2004) (urging the use of literature to help law students transit from undergraduate writing to legal writing and legal storytelling); Karin Mika, *Innovative Teaching Methods and Practical Uses of Literature and Legal Education*, 18 WHITTIER L. REV. 815 (1997).



man, or advocate, is an important figure in the *dramatis personae*.<sup>147</sup> The attorney is representing the client. As one author pointed out, the word representation is “a word that means both the way something is portrayed and the lawyer’s decision to take on a client’s case,” the lawyer translates the client narrative in a “rewritten, renarrativized” series of events that is appropriate for the client’s goals of the representation.<sup>148</sup> Even for a “simple will,” the draftsman “will have to do more than dictate a note to [the draftsman’s] paralegal or secretary to pull up the appropriate form and set up a date for execution.”<sup>149</sup> The draftsman must forge a working relationship, in the words of two authors, “become a trusted advisor.”<sup>150</sup> Thus facilitated, the representation can then explore the changing nature of wealth and

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147. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES*, at xxxii (8th ed. 2009) (quoting the 1972 first edition of the casebook). In considering the role of the attorney, this language is similar to the Preamble to the Model Rules of Professional Conduct that states:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client and to others.

MODEL RULES OF PROF’L CONDUCT Preamble (2012).

148. Richard H. Weisberg, *Wigmore and the Law and Literature Movement*, 21 *LAW & LITERATURE* 129, 135 (2009) (noting that narrative is applicable to “last wills and testaments, contracts, pleadings, or memoranda”).

149. Marc S. Beckerman, *Points to Ponder for that “Simple Will”*, 44 *PRAC. LAW.* 43, 49 (1998). This concept is not new to the area of estate planning. See, e.g., Dermot Ives, *Suggestions for Modern Will Drafting*, in *VOL. 2 LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS* 537 (Arthur I. Winard ed., 1968) (admonishing drafters of wills not to simply “take[] instructions for wills”); see also Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 *J. ASS’N LEGAL WRITING DIRS.* 38, 57 (2010) (outlining her approach to infusing narrative into a variety of courses, including an estate planning course, so that “students are moved from seeing their jobs in drafting these forms as simply checking boxes and filling in blanks, to constructing stories that accurately reflected their client’s goals”).

150. Goffe & Haller, *supra* note 132, at 15; see also BARNEY & COLLINS, *supra* note 112, at 16 (recommending laypersons consider “trustworthiness” when selecting an estate planner); Ronald D. Aucutt, *Creed or Code: The Calling of the Counselor in Advising Families*, 36 *AM. C. TR. & EST. COUNS. J.* 669, 674–77 (2011) (listing the attributors of the counselor as follows: (1) understanding, (2) listening, (3) trust); Marla Lyn Mitchell-Cichon, *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Client’s Estate-Planning Goals*, 10 *ELDER L.J.* 289 (2002) (articulating principles of representation and observing that a “client-centered and collaborative approach” produces legal documents that serve the client’s individual goals and needs).

the changing family structure,<sup>151</sup> with non-family members holding bonds stronger than family members.<sup>152</sup> The disclaimer for LegalZoom states, “[t]he law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance.”<sup>153</sup> The law is a personal matter. The will is a personal matter. Although the will may no longer transmit the bulk of an individual’s wealth,<sup>154</sup> or in the case of a first-to-die spouse perhaps not even probated because the spouse has no probate estate, the will is the “centerpiece of any estate plan.”<sup>155</sup> In addressing the impact of the nonprobate revolution and the spurred probate reform, one author noted that

[r]ather than being a recipient of epithets and abuse—the whipping boy—the will is emerging (as it should) as the most efficient,

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151. See, e.g., Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89 (2011) (proposing an intestate scheme that uses factors to determine a parent-child relationship for purposes of granting inheritance rights); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (examining that the failure of inheritance law to adapt to new family structures); Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006) (noting that the long-term care of grandchildren by grandparents raises issues of inheritance); John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) (exploring the rise of “human capital”); Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159 (2010) (exploring the increased availability of reproductive technology and the resulting legal consequences); Peter J. Harrington, Note, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. CIV. RTS. & ECON. DEV. 323, 327 (2011) (advocating that a “committed partner” should be entitled to a surviving spouse’s share).

152. Adam R. Gaslowitz & Jennifer A. Ringsmuth, *Will Contest, Probate, and Fiduciary Litigation Trends: A Bird’s Eye View*, 17 ALI-ABA EST. PLAN. COURSE MATERIALS J. 19, 20–21 (2011) (noting that demographic and transience trends mean “more testamentary and nontestamentary property transfers are likely to go to nonrelatives or to just one caregiver relative”); see also Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129 (2008) (asserting that testators should have the freedom to benefit caregivers, even to the exclusion of certain family members).

153. *Disclaimer*, LEGALZOOM, <http://www.legalzoom.com/disclaimer-popup.html> (last visited Nov. 4, 2012).

154. For background on the growth of will substitutes, see generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). See also Olin L. Browder, *Giving or Leaving—What Is a Will?*, 75 MICH. L. REV. 845 (1977) (exploring the nature of testamentary transfers).

155. KAJA WHITEHOUSE, *WHAT YOUR LAWYER MAY NOT TELL YOU ABOUT YOUR FAMILY’S WILL: A GUIDE TO PREVENTING THE COMMON PITFALLS THAT CAN LEAD TO FAMILY FIGHTS* 11 (Warner Business Books 2006) (heading Chapter 2 as “Introducing the Will: The Centerpiece of Any Estate Plan”).

least complicated and most advantageous means of passing property at death; it is in fact becoming the workhorse.<sup>156</sup>

Accordingly, “wills ought to be, but are not [yet], understood as stories.”<sup>157</sup> A will is no longer a rich man’s document.<sup>158</sup> More individuals are aware of the opportunities and possibilities afforded by estate planning.<sup>159</sup> Conceptualizing the estate planning process, specifically the will, as a personal narrative helps an individual parse and process his or her life experiences, as in the Isak Dinesen story relayed above “to see the stork,” and facilitate the planning of his or her estate.

### C. Impact on the Document

A drafting attorney should not be afraid to deliberately deviate from forms. As one wrote:

It should be noted that the source of much of this legalese [in wills] is the form book or prior legal document which contains legal formulas which, at least superficially, appear to fit the factual situation. [A]t least with regard to the language in the form book, frequently their approval arises from the fact that they have been successfully tested in litigation. This does not recommend the language, on the contrary; the fact that it was unclear enough to be susceptible to litigation does little to recommend it for further use.<sup>160</sup>

True, a draftsperson needs to be cautious, but in dealing with individuals with unique backgrounds, experiences, and perspectives, a one-size-fits-all approach is not appropriate. In considering the will for an individual, “no two documents ever really express exactly the same purpose, an attempt to simply select various passages cannot produce the best product.”<sup>161</sup> The rise of technology and document assembly programs presents an opportunity for customization and tailoring that does not eradicate time-proven language but rather

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156. Malcolm A. Moore, *The Will Regenerate: From Whipping Boy to Workhorse*, 7 PROB. LAW. 5, 5 (1981).

157. Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 632 (1992).

158. See LAWYERS.COM, *supra* note 117.

159. *Id.*

160. LEONARD LEVIN, A STUDENT’S GUIDE TO WILL DRAFTING 11 (M. Bender 1987).

161. *Id.* at 12.

serves to complement the personal will.<sup>162</sup> In the following sections, this Article identifies examples that embody the personal narrative.

## 1. IDENTITY

### *a. First Person, Present Tense*

Henry David Thoreau's justification for use of the first person in *Walden* is applicable to wills. Thoreau wrote, "In most books the *I*, or first person, is omitted; in this it will be retained; that, in respect to egotism, is the main difference. We commonly do not remember that it is, after all, always the first person that is speaking."<sup>163</sup> The first person, although not typical in most genres of legal writing,<sup>164</sup> acknowledges the oral tradition of wills.<sup>165</sup> Referencing the personal narrative of wills, the use of first person in wills from the Anglo-Saxon period has been described as "indicat[ing] that testators and scribes were attempting to invest the written document with performative power."<sup>166</sup> Although not targeted to any legal document, this statement is directly applicable to the last will and testament, a document that should contain an assertion of self.<sup>167</sup> The will is the testator's last

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162. DANIEL B. EVANS, *WILLS, TRUSTS, AND TECHNOLOGY: AN ESTATE AND TRUST LAWYER'S GUIDE TO AUTOMATION* 94–95 (ABA 1996) (highlighting reasons to automate for the following three reasons: (1) "to save time," (2) "to reduce errors," and (3) "to increase customization").

163. HENRY DAVID THOREAU, *WALDEN* 1 (Jeffrey S. Cramer ed., Yale Univ. Press 2004).

164. First person is not typically used in academic writing. *But see* Kim Dayton, *The Accidental Elder Law Professor*, 40 *STETSON L. REV.* 97, 98 (2010) ("My story, told more or less in chronological order, is a first-person narrative of one woman's journey to achieve, if not academic renown, then at least personal satisfaction in the realm of the . . ."). The first person singular rarely has a place in legal writing during law school; indeed, it seems to be bred out of first-year students as they are introduced to this craft. Stacy Caplow, *Putting the I in Writing: Drafting An A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 *J. LEGAL WRITING INST.* 249, 249 (2008) (encouraging exploration of the use of first person in affidavits relating to asylum cases). *See generally* Alexander N. Pickands, *Writing With Conviction: Drafting Effective Stipulations of Fact*, *ARMY LAW.* 1, 8 n.56 (2009) ("Nothing prohibits the trial counsel from using a first-person narrative, which may be appealing for uncomplicated cases.").

165. *See supra* notes 85–93 and accompanying text regarding the oral tradition of wills.

166. Danet & Bogoch, *supra* note 89, at 102 (noting "the trend toward first-person renderings" in Anglo-Saxon wills in the study).

167. The use of first person in wills needs to be preserved and expanded. "[I]f you cannot be your true self in your own 'last will and testament,' when can you be? Surely, you should be allowed to speak your mind in your last comment in life." FENTON BRESSLER, *SECOND-BEST BED: A DIVERSION ON WILLS* 76 (Weidenfell & Nicolson 1983). For an exploration of the concept of self, see DAN ZAHAVI,

words.<sup>168</sup> As one composition scholar wrote, “I would like to advocate for all public forms of first-person writing. We (and our cultures, communities, families) need such assertions of self, such articulation of differences, as a way to fight against the depersonalized and homogenizing effects of globalization.”<sup>169</sup> This power of first person, with the connection between the writer and the reader, is demonstrated by the power of ethical wills written in first person.<sup>170</sup>

Some will forms minimize the use of first person.<sup>171</sup> The homogenization of forms may be a side effect of the rise of will substitutes,<sup>172</sup> such as revocable trusts and retirement savings accounts.<sup>173</sup> These trusts, contracts, and deeds have triggered the relaxation of the formalities<sup>174</sup> of execution.<sup>175</sup> The common preparation and use of will substitutes may also be creating an erosion of first person in form language. For example, a bequest that was once routinely written as “I give my diamond and emerald ring to my sister” is morphing into

SUBJECTIVITY AND SELFHOOD: INVESTIGATING THE FIRST-PERSON PERSPECTIVE 103–46 (2005).

168. See Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 696 (2011).

169. Jane Danielewicz, *Personal Genres, Public Voices*, 59 COLLEGE COMPOSITION & COMM. 420, 439 (2008).

170. BARRY K. BAINES, *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* app. I (2d ed. 2006). See generally SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM (Jack Riemer & Nathaniel Stampfer eds., 2009) (explaining the underlying value of composing ethical wills). See also Judith A. Frank, *The Human Legacy: Using Ethical Wills to Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65, 66 (2003); Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 AM. C. TR. & EST. COUNS. J. 154, 154 (2007); Kathleen M. Rehl, *Help Your Clients Preserve Values, Tell Life Stories and Share the “Voice of Their Hearts” Through Ethical Wills*, 5 J. PRAC. EST. PLAN. 17 (2003); Patricia Wilhite McCartney, *What Every Lawyer Should Know About Ethical Wills*, 28 WYO. LAW., Dec. 2005, at 56.

171. 20B AM. JUR. 2D LEGAL FORMS § 266:376 (2012).

172. Malcolm A. Moore, *The Will Regenerate: From Whipping Boy to Workhorse*, 7 PROB. LAW. 3 (1981); Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155 (2008) (asserting the will is the best unifying legal document to transfer property upon death and calling upon legislation to relieve wills from the burden of probate to facilitate the unified transfer of property).

173. See Schenkel, *supra* note 172, at 172.

174. For an examination of the formalities, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

175. For an examination of the formalities of execution, see John V. Orth, *Wills Act Formalities: How Much Compliance is Enough?*, 43 REAL PROP. TR. & EST. L.J. 73 (2008); see also James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541 (1990); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994).

“my diamond and emerald ring to my sister.”<sup>176</sup> This change is not an innocuous slip in language but a seismic shift.<sup>177</sup> Removing the first person breaks the connection between the testator and the beneficiary.<sup>178</sup>

Consider the following language from three forms:

- My home at 100 South Street, Blackacre, Washington, is hereby devised and bequeathed to my children, RAY B. SMITH and SUSAN B. BROWN, equally, share and share alike. If either of my children should predecease me or die within twenty (20) days of the date of my death, I leave that child’s share to his or her then-living children (my grandchildren). If the deceased child has no surviving issue, then I leave this share to my surviving child.<sup>179</sup>
- My Executor shall distribute the following described property to the following persons who survive me:<sup>180</sup>
- To \_\_\_\_\_, of \_\_\_\_\_, my college ring and my [specify].<sup>181</sup>

Although the provisions contain some self-referencing, the first person does not reverberate throughout the form. In a similar fashion, using lists of specific bequests, such as the following form, also encourages less use of first person by including only one instance of first person.

I give and bequeath to the following named persons the amount set opposite their respective names: *[list of names of beneficiaries and respective dollar amounts of bequests]*.<sup>182</sup>

The Last Will and Testament of crooner Bing Crosby dated June 27, 1977 uses the list format for gifts of cash bequests, as follows:

176. See Lindgren, *The Fall of Formalism*, *supra* note 175, at 1019 (providing example of will with the word “give”).

177. See Mann, *supra* note 175, at 1057 (noting major import of “intent” theory).

178. For the perspective of the beneficiaries of inherited wealth, see BARBARA BLOVIN, *THE LEGACY OF INHERITED WEALTH: THE INTERVIEWS WITH HEIRS* (Barbara Bovine & Katherine Gibson eds., 1995) (project of the Inheritance Project).

179. Cheryl C. Mitchell & Ferd H. Mitchell, *Will with Special Needs Trust for Margaret A. Smith Article Five: Specific Bequest*, in 26A WASHINGTON ELDER LAW HANDBOOK (2010).

180. 16 WEST’S LEGAL FORMS, EST. PLAN. § 8.7 *Will for Married Person Without Children—All to Surviving Spouse with Contingent Bequest to Named Beneficiaries or UTMA Custodianship for Any Minor Beneficiary*, at 2.2 (4th ed. 2011).

181. 5B MASS. PRAC., METHODS OF PRAC. § 31:33 *Bequest of Personal Property—Form* (4th ed. 2011–2012).

182. 20B AM. JUR. 2D LEGAL FORMS § 266:376 (2012).

I make the following cash gifts:

To my Wife, KATHRYN GRANT CROSBY, \$150,000.

To my niece, CAROLYN MILLER, \$15,000.

To my niece, MARILYN McLACHLAN, \$15,000.

To my sister, MARY ROSE POOL, \$20,000.

To my niece, CATHERINE CROSBY, the daughter of my brother, TED, \$10,000.

To my niece, MARY SUE SHANNON, \$10,000.

To SAINT ALOYSIUS CHURCH, Spokane, Washington, \$5,000.

To GONZAGA UNIVERSITY, Spokane, Washington, \$50,000.

TO GONZAGA HIGH SCHOOL, Spokane, Washington \$50,000.<sup>183</sup>

The list, bearing resemblance to a to-do list, eliminates the repetitive framing of “I give” in front of each specific bequest. The omission places distance between the testator and the beneficiary, as demonstrated in the physical distance from the use of the first person and the last bequest. An emotional distance results from such construction that is not seen in Katherine Hepburn’s will, which creates a series of specific bequests:

SECOND: A. I give and bequeath the sum of One Hundred Thousand Dollars (\$100,000) to NORAH CONSIDINE MOORE, if she survives me.

B. I give and bequeath the amount of Ten Thousand Dollars (\$10,000) to LAURA FRATTI, if she survives me.

C. I give and bequeath the amount of Fifty Thousand Dollars (\$50,000) to ERIK A. HANSON, if he survives me.

D. I give and bequeath the amount of Ten Thousand Dollars (\$10,000) to CYNTHIA A. McFADDEN, if she survives me.

E. I give and bequeath the amount of Five Thousand Dollars (\$5,000) to VALENTINA FRATTI, if she survives me.

F. I give and bequeath the amount of Five Thousand Dollars (\$5,000) to FREYA MANSTON, if she survives me.

G. I give and bequeath the amount of Two Thousand Five Hundred Dollars (\$2,500) to SHARON POWERS, if she survives me.

H. I give and bequeath the sum of Four Thousand Five Hundred Dollars (\$4,500) plus One Thousand Dollars (\$1,000) for each full year that he shall have been employed by me since January 1, 1991 to JIMMY LEE DAVIS, if he survives me and is employed by me at the time of my death.

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183. HERBERT E. NASS, *WILLS OF THE RICH AND FAMOUS 180–83* (2000) (reproducing portions and summarizing the implementation of the terms of the will). For a time, Bing Crosby studied law at Gonzaga University. *Id.* at 181.

I. I give and bequeath the amount of Two Thousand Five Hundred Dollars (\$2,500) to WEI FUN KOO, if she survives me.<sup>184</sup>

Technology permits the incorporation of more first person. For instance, for purposes of increasing effective automation with modular forms, one author recommended writing trusts in the first person, so the settlor becomes “I,” and the same language from wills and *inter vivos* trusts can be used interchangeably.<sup>185</sup> Another expanded use of first person is presented in the definitions section and other administrative sections of the will.<sup>186</sup> The deliberate inclusion of first person can cultivate a stronger sense of ownership in the testator’s selection of the definition. Additionally, the inclusion of the first person serves to remind the drafter that the client should be affirmatively selecting the definitions and opt-out of default rules to govern the document. The following example inserts the first person in front of the definition of representation in the Uniform Probate Code:

I define the phrase “by representation” to mean that property will be divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.<sup>187</sup>

The insertion of “I define” re-frames stock phrasing of a definition into a personal choice. The first person showcases a sense of self.

The present tense used in wills creates a sense of timelessness.<sup>188</sup> Indeed, a will is “ambulatory,” meaning that the will walks through life with the testator until the will is called to be operative upon the testator’s death.<sup>189</sup> Even though wills may be executed decades before

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184. LAST WILL AND TESTAMENT OF KATHARINE HEPBURN (1992), available at <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-katharine-hepburn.html>.

185. EVANS, *supra* note 162, at 77.

186. LAST WILL AND TESTAMENT OF JEROME J. GARCIA (1994), available at <http://www.willsandtrustslawfirms.com/famous-wills/jerry-garcia-will.cfm>.

187. The definition in this example can be found in the Uniform Probate Code. UNIF. PROBATE CODE § 2-106 (1991) (defining “representations”).

188. As with most aspects of our language and grammar, the Ancient Greeks shaped our thoughts on tense. ROBERT I. BINNICK, TIME AND THE VERB 3 (Oxford Univ. Press 1991). It is from the Greeks that we inherited the past, present, and future divisions of tense. *Id.* at 3–4.

189. Percy Bordwell, *Testamentary Dispositions*, 19 KY. L.J. 283, 284–85 (1931).



the wills are probated, the present tense creates a sense that the testator is sharing his or her thoughts at the moment of probate.<sup>190</sup> The present tense, with its “variable and indefinite duration,”<sup>191</sup> evokes this timelessness. From the perspective of the client, the present tense underscores the need to be circumspect and deliberate in the wording, for the wording should not alienate a future reader.<sup>192</sup> From the perspective of the beneficiary, the present tense mimics a current timing where the testator is speaking directly to the beneficiary.<sup>193</sup> The use of first person and present tense endow a universality to the text that relates to the connection the reader associates with personal narrative.

*b. Title*

The commonly used title of the document, “Last Will and Testament,” announces the personal nature of the document.<sup>194</sup> While some justification for the pairing of “will” and “testament” has been attributed to the different types of property passable under each device in Medieval England,<sup>195</sup> the original pairing of the words as well as the continued pairing of the words relates to the narrative or performance aspect of the will.<sup>196</sup> Use of binomials and melodic phrasing<sup>197</sup> is reminiscent of oral speech “where mnemonic devices facilitate performance.”<sup>198</sup> The oral residue of these phrasings better explains binomial use in wills rather than attributing binomial use to the infusion of Norman French into the English language.<sup>199</sup> The binomials were necessary memory triggers for the oral recitations; seemingly ritualistic incantations set the tone.<sup>200</sup>

The words “will” and “testament” elicit images associated with a sense of self.<sup>201</sup> In common parlance, the term “will” is often associat-

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190. Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665, 675 (2011).

191. BINNICK, *supra* note 188, at 5.

192. See Sneddon, *supra* note 168, at 733; Sneddon, *supra* note 190, at 704.

193. See Sneddon, *supra* note 190, at 704.

194. *Id.* at 694–96.

195. *Id.* at 694–95.

196. See Danet & Bogoch, *supra* note 89, at 106 (referencing binomials and how they increase performance capacity).

197. *Id.*

198. *Id.*

199. *Id.*

200. See Sneddon, *supra* note 190, at 693.

201. See *id.* at 690, 711–12.

ed with an individual's actions, as in "free will."<sup>202</sup> The "will" is an empowering word.<sup>203</sup> Likewise, the word "testament" similarly conveys a strong sense of the individual.<sup>204</sup> The word *testamentum* used in ancient Rome was the reference to "a very formal form for an expression of the will (*voluntas*) or last will (*ultima voluntas*, or plain *voluntas*)."<sup>205</sup> The word "testament" is often defined as "the *personal* written statements an individual makes in the context of estate planning."<sup>206</sup> For instance, Dr. Alfred Nobel's will, referenced above, carries the sole title of "Testament."<sup>207</sup> Although "last" is inherently ambiguous because its accuracy cannot be determined until the death of the testator,<sup>208</sup> the inclusion of "last" announces the importance of the document to the testator. "[T]his *last* was associated with the imminence of death, the *last words* of the dying man . . . ."<sup>209</sup>

Consequently, stringing together "last," "will," and "testament" acknowledges the historical custom and reminds the reader about the importance of the document.<sup>210</sup> In addressing the use of stylization and binomials, such as the title "Will and Testament," "the poetic features of language are mobilized to 'thicken' or give body to the document, to enhance its performative capacity."<sup>211</sup> From the perspective of the testator, the title underscores the importance of the testator's choices, and from the perspective of the beneficiary, the title reinforces the personal nature of the document for the testator.<sup>212</sup>

202. See *id.* at 712–14 (implying that the individual's decisions in will drafting reflect free will).

203. See *id.* (suggesting will drafting is empowering).

204. Dante & Bogoch, *supra* note 89, at 113.

205. MELLINKOFF, *supra* note 105, at 77.

206. Constance D. Smith, *New and Improved Testaments for Estate Planning Documents*, 32 COLO. LAW. 73, 73 (2003) (emphasis added).

207. *Full Text of Alfred Nobel's Will*, NOBELPRIZE.ORG, [http://nobelprize.org/alfred\\_nobel/will/will-full.html](http://nobelprize.org/alfred_nobel/will/will-full.html) (last visited Nov. 4, 2012) ("I, the undersigned, Alfred Bernhard Nobel, do hereby, after mature deliberation, declare the following to be my last Will and Testament with respect to such property as may be left by me at the time of my death . . . ."); see *id.* fig.1.

208. Kevin Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 378; see also ADAM J. FRIEDMAN, PARTY OF THE FIRST PART: THE CURIOUS WORLD OF LEGALESE 153 (2007) ("Every will you write is your last—until you write the next one.").

209. MELLINKOFF, *supra* note 105, at 332.

210. *Id.* at 333.

211. Danet & Bogoch, *supra* note 89, at 106.

212. *Id.*

*c. Overture*

In a will, the first section following the title is the overture, also termed the introduction, preamble, or exordium.<sup>213</sup> Phrasing the introduction as the “overture” draws from the terminology of narrative, specifically the phrasing draws from the fields of music and poetry that use “overture” to describe the introduction of a work.<sup>214</sup> “Overture,” derived from the Middle English word for “opening,” can be defined as an “[a]ct, offer, or proposal that indicates readiness to undertake a course of action or open a relationship.”<sup>215</sup> At a basic level, the overture identifies the person, the domicile, and the document.<sup>216</sup> With the declaration of the document as a will, the overture also evidences testamentary intent.<sup>217</sup> The value of the overture, however, is more than mere recitation of required components.

The construction of the overture assumes a ceremonial voice, harboring back to the oral tradition of wills.<sup>218</sup> With the ceremonial voice, the overture focuses the reader, whether testator, beneficiary, or personal representative, on the importance of the document.<sup>219</sup> In a will executed in 1737, one overture began as follows: “*Testament and last will of me, Daniel Phifer (Phifner), inhabitant of Hampstead in the province of Georgia . . .*”<sup>220</sup> The repetition of the title and the slight twisting of the language to “[t]estament and last will of me” relates to a personal narrative. Even the standard overture phrasing of today relays a sense of a person embarking on a document of importance. A commonly used introduction reads as follows: “I, Margaret A. Jones of Bibb County, Georgia, declare this to be my Last Will and Testament and revoke all other Wills and Codicils previously made by me.” The coupling of the “I” and the individual’s full name not only identifies the person as the testator, but also builds a resonating sense of the occasion.

The will is a private expression in a public document and may use references and allusions meaningful to the testator, the beneficiar-

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213. Thomas L. Shaffer, *The Overture of a Well-Drawn Will*, 14 PRAC. LAW. 45, 45 (1968).

214. AMERICAN HERITAGE DICTIONARY, <http://education.yahoo.com/reference/dictionary/entry/overture> (last visited Nov. 4, 2012).

215. *Id.*

216. Shaffer, *supra* note 213, at 46.

217. *See id.* at 47.

218. *See id.* at 45.

219. *Id.*

220. ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA 1733–1777, at 111 (1981) (emphasis added).

ies, and the personal representative. For instance, the overture may reference a name or a place or an occupation or an honor that the individuals would recognize as relevant to the personal narrative.<sup>221</sup> The identification of the testator can begin the personal narrative, as in the overture of Vickie Lynn Marshall:

I, VICKIE LYNN MARSHALL, also known as Vickie Lynn Smith, and Vickie Lynn Hogan, and Anna Nicole Smith, a resident of Los Angeles County, California, declare that this is my Will. I revoke all prior Wills and Codicils. I hereby dispose of all property that I am entitled to dispose of by Will and exercise all general powers of appointment that I am entitled to exercise.<sup>222</sup> I have not entered into a contract to make or not revoke a Will.<sup>222</sup>

Likewise, the recitation of domicile can begin the personal narrative, as the overture of “empire maker” Cecil John Rhodes<sup>223</sup> reads as follows: “I am a natural-born British subject and I now declare that *I have adopted and acquired and hereby adopt and acquire and intend to retain Rhodesia as my domicile . . .*”<sup>224</sup> Similarly, a profession or career may reference a personal narrative. For example, the overture of George Washington’s Will reads: “In the name of God amen. I, George Washington of Mount Vernon—a citizen of the United States—and lately President of the same, do make, ordain and declare this Instrument; which is written with my own hand and every page thereof subscribed with my name, to be my last Will & Testament, revoking all others.”<sup>225</sup> By including the language “a citizen of the United States—and lately

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221. *Anna Nicole Smith Will and Trust (1967–2007)*, TRUETRUST.COM, [http://www.truetrust.com/Famous\\_Wills\\_and\\_Trusts/Anna\\_Nicole\\_Smith\\_Will.html](http://www.truetrust.com/Famous_Wills_and_Trusts/Anna_Nicole_Smith_Will.html) (last visited Nov. 4, 2012) (emphasis added).

222. *Id.* For an analysis of the impact of the actions of Vickie Lynn Marshall and the probate exception, see Ralph U. Whitten, *A Bunny’s Tale: The Impact of a Playboy Playmate on Federal Jurisdiction* (Jan. 5, 2011) (available on SSRN).

223. THE LAST WILL AND TESTAMENT OF CECIL JOHN RHODES WITH ELUCIDATORY NOTES TO WHICH ARE ADDED SOME CHAPTERS DESCRIBING THE POLITICAL AND RELIGIOUS IDEAS OF THE TESTATOR 55 (William Thomas Stead ed., London 1902) (“It was his distinction to be the first of the new Dynasty of Money Kings which has been evolved in these later days as the real rulers of the modern world.”).

224. *Id.* at 3 (emphasis added). The will also contained detailed instructions for Rhodes’s burial in the Matappos. *Id.* at 3–4.

225. LAST WILL AND TESTAMENT OF GEORGE WASHINGTON, *supra* note 101 (emphasis added). George Washington’s closing actually recites the date of execution as “this ninth day of July, in the year One thousand seven hundred and ninety [nine].” *Id.* However, this date has been declared a mistake. THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY 29, 41 (Dr. John C. Fitzpatrick ed., The Mount Vernon Ladies’ Association of the Union 1999) (1939); THE LAST WILL & TESTAMENT 174 (Robert A. Farmer & Associates, Inc. 1968) (citing the will of George Washington).

President of the same," the overture showcases the personal identification of George Washington. Similarly, the example below references an individual's occupation: "IN THE NAME OF GOD, AMEN, I, CHRISTOPHER ORTON, minister as Savannah, being infirm in health, but of perfect mind and memory, do make this my Last Will and Testament in manner following . . ."<sup>226</sup>

Even beyond the name and occupation, an individual may include a personal note in the overture.<sup>227</sup> Consider the following introduction from a will executed on October 30, 1842:

In the name of God, Amen. I, John Martin, being indisposed though of sound mind and calling to mind the uncertainty of my life, and praying the Creator preserve my soul when life is spent, and that He will protect my wife and children through life. I therefore (respecting my estate) make this my last will and testament.<sup>228</sup>

The overture includes the standard incantations of a nineteenth century will, including the opening phrase "In the name of God, Amen."<sup>229</sup> As with most nineteenth century overtures, the phrasing also acknowledges the poor health of the testator in a manner that no drafter would highlight today.<sup>230</sup> One non-standard phrase is the following: "that He will protect my wife and children through life."<sup>231</sup> This language is not simply a recitation of stock language, but a deliberately included phrase that calls attention to the importance of the

226. LAST WILL AND TESTAMENT OF CHRISTOPHER ORTON (July 24, 1742), reprinted in ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA 1733-1777 102 (Reprint Co. Publishers 1981) (capitalization and spelling in original).

227. LAST WILL AND TESTAMENT OF JOHN MARTIN (Oct. 30, 1841) (copy on file with author).

228. *Id.* John Martin and his wife Eliza Martin are buried in Rose Hill Cemetery in Macon, Georgia. For information about this historic cemetery, see Stephanie Lincecum, *Shocking Affair: The Fatal Stabbing of Robert Martin*, ROSE HILL CEMETARY; MACON, GEORGIA (Mar. 29, 2012), [rosehillcemeterymacongeorgia.blogspot.com/2012/03/shocking-affair-fatal-stabbing-of.html](http://rosehillcemeterymacongeorgia.blogspot.com/2012/03/shocking-affair-fatal-stabbing-of.html). Listed on the National Register of Historic Places, Rose Hill Cemetery is also the place of burial for Macon's infamous Augustus Octavius Bacon. For a photo of his grave marker, see <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GSIn-Bacon&GSIman=1&GScid=36699&GRid=7116389> (last visited Oct. 9, 2012).

229. For a tongue-in-cheek look at the spirit world, wills, and judicial opinions, see Harry Hibschan, *Spooks and Wills*, 64 U.S. L. REV. 471 (1930).

230. The following overture is a typical introduction from the eighteenth century that acknowledges the testator's state of health: "I John Mackay being at this time sick and weak, but by God's great blessing of perfect sense & memory, but yet uncertain how soon my change may come, do therefore make this my last will & Testament in manner & form following:" LAST WILL AND TESTAMENT OF JOHN MACKAY (July 25, 1733) reprinted in ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA 1733-1777, at 85 (Reprint Co. Publishers 1981) (capitalization and spelling in original).

231. LAST WILL AND TESTAMENT OF JOHN MARTIN, *supra* note 227.

wife and children to the individual testator. Indeed, the will continues with specific bequests to each of his four daughters and two sons and then a specific bequest to his "beloved wife."<sup>232</sup>

The example below from a will probated in Bibb County, Georgia highlights something of importance to the particular testator's personal narrative. "I, Joseph Norris Neel, Junior of the County of Bibb and State of Georgia, and now in the Military Service of the United States, being of sound and disposing mind and memory, do make this, my last will and testament, hereby revoking and annulling all others heretofore made."<sup>233</sup> With regard to the introduction above, the phrasing "and now in the Military of the United States" may have been included for several reasons. This phrasing could have been included to explain the necessity of the execution of the will, analogous to a conditional will.<sup>234</sup> The recitation could have been included to excuse any future problems in probating the will by tapping into the traditional relaxing of the formalities of military wills.<sup>235</sup> Although

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232. *Id.* The gifts are disquieting to read because the will disposes of those items John Martin considered to be of high property value. This includes real property (his plantation) and persons (his slaves). For an exploration of inheritance in Antebellum South, see BERNIE D. JONES, *FATHERS OF CONSCIENCE: MIXED RACE INHERITANCE IN THE ANTEBELLUM SOUTH* (Univ. of Georgia Press 2009); Stephen Duane Davis II & Alfred L. Brophy, *The Most Solemn Act of My Life: Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757 (2011).

233. LAST WILL AND TESTAMENT OF JOSEPH NORRIS NEEL, JR. (Mar. 16, 1918) (copy on file with author).

234. The phrasing of a military deployment as part of a conditional will is illustrated in the Last Will and Testament of John Robinson dated July 12, 1758. LAST WILL AND TESTAMENT OF JOHN ROBINSON (July 12, 1758) reprinted in *ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA 1733-1777*, at 119 (Reprint Co. Publishers 1981) (capitalization and spelling in original). A mariner living in Savannah, the will states that the testator is "imeadly going on a cruize against His Majesties Enemies." *Id.*

235. Ancient Romans recognized the issue of soldiers' wills. Roman Emperor Trajan mandated:

Following the openness of my heart toward those excellent and most faithful fellow soldiers, I thought that provision should be made for their inexperience [in legal matters], so that whatever the way in which they made their wills, their wishes should be confirmed. Therefore, let them make their wills in any way they wish, let them make them in any way they can, and let the bare wishes of the testator suffice to settle the distribution of their property.

ANDREW BORKOWSKI, *TEXTBOOK ON ROMAN LAW* 226 (2d ed. Blackstone Press Ltd. 1994). As a result, unlike the wills of other citizens that needed to conform to certain formalities, a simple statement of a Roman soldier could serve as a will. CHAMPLIN, *supra* note 103, at 57. Likewise, the English common law specially recognized soldiers' wills. BORKOWSKI, *supra*. For a modern look at military wills, see Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196

the testator's profession is not commonly included in the introduction, the recitation of military connection does appear in will overtures, such as in the Will of Robert E. Lee.<sup>236</sup> This will may have been styled in the tradition of military wills and includes the rote recitations of service.<sup>237</sup> There is, however, another possible explanation for inclusion of this particular language in this particular overture, one that relates to the testator's personal narrative. Below is a paraphrase of what could be Joseph Norris Neel Junior's personal narrative.

Born in 1892, Joseph Norris Neel Junior was the oldest of five children.<sup>238</sup> He grew up in a home designed by architects of the Georgia School of Classicists.<sup>239</sup> Today, his childhood home, 730 College Street, houses the headquarters of the Federated Garden Clubs of Macon.<sup>240</sup> At sixteen, he entered the Georgia School of Technology; he graduated in 1911 and subsequently enrolled at the University of Georgia.<sup>241</sup> He left the University of Georgia in 1912 to join the family business, a clothing store in downtown Macon, Georgia that continued to operate until the 1980s.<sup>242</sup> The company's slogan was "one price for everyone."<sup>243</sup> He was a community leader, especially among

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MILITARY L. REV. 91 (2008); Theresa A. Bruno, *The Deployment Will*, 47 AIR FORCE L. REV. 211 (1999).

236. The introduction of the will executed on August 31, 1846 reads: "I, Robert E. Lee of the U.S. Army, do make ordain & declare this instrument to be my last will & testament revoking all others." THE LAST WILL AND TESTAMENT 68 (Robert A. Farmer & Associates 1968) (citing the will of Robert E. Lee). For an exploration of modern military testamentary instruments, see Jonathan E. Cheney, *Beyond DL Wills: Preparing Wills for Domiciliaries of Louisiana, Puerto Rico, Guam, American Samoa, Northern Mariana Islands, and the U.S. Virgin Islands*, ARMY LAW. 1 (2005); see also Samuel W. Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW. 52 (2010).

237. See THE LAST WILL AND TESTAMENT, *supra* note 236, at 68. Recitations of military service are common in military wills and could be attributed to mere rote recitations.

238. For a photo of Joseph Norris Neel Jr., see UGA Libraries, *Joseph Norris Neel*, THE MEMORIAL BOOK OF REMEMBRANCE AT THE UNIVERSITY OF GEORGIA <http://servicememorial.libs.uga.edu/related-material/image/3/> (last visited Nov. 4, 2012).

239. WILLIAM R. MITCHELL, JR., J. NEEL REID: ARCHITECT OF HENTZ, REID & ADLER AND THE GEORGIA SCHOOL OF CLASSICISTS (1992); see also JAMES GRADY, ARCHITECTURE OF NEEL REID IN GEORGIA 8 (1973).

240. FEDERATED GARDEN CLUBS OF MACON, INC., <http://www.fgcmacon.org> (last visited Nov. 4, 2012).

241. UGA Libraries, *supra* note 238.

242. LUCIAN LAMAR KNIGHT, A STANDARD HISTORY OF GEORGIA AND GEORGIANS IV, at 2105 (1917).

243. FEDERATED GARDEN CLUBS OF MACON, INC., *supra* note 240.

the young people of the city.<sup>244</sup> America declared war in December 1917, but it was not until the summer of 1918 that there was a significant number of American troops in Europe.<sup>245</sup> He was working in the family business when, on May 11, 1917, he entered the first officer's training camp at Fort McPherson, Georgia. He was one of the many young men of Macon to join the army.<sup>246</sup> His father, Joseph Neel, signed a resolution regarding Macon's war effort.<sup>247</sup> Joseph Norris Neel Jr. was commissioned as a second lieutenant and arrived in France on his twenty-sixth birthday. Just months later, he died on September 15, 1918 and was buried in France.<sup>248</sup> The will, dated March 16, 1918, was probated on October 30, 1918.<sup>249</sup> All the property was to be given to his father, Joseph N. Neel, who was also named as the executor under the will.<sup>250</sup> Against this backdrop, an interpretation of the phrase "and now in the Military of the United States" could be a shorthand reference to his loved ones to tell them how important it was for him to join the military.<sup>251</sup>

One author lamented that "no more than one in a thousand [overtures] shows any humanity at all."<sup>252</sup> The overture could reference a name, a place, an occupation, or an honor relating to the testator's own personal narrative.<sup>253</sup> Seeds of the personal narrative within the will can be sown in the overture. As Thomas Shaffer wrote, "[t]he virtue of a good overture is that the family is now alert to . . . the disposition of the dead man's property that is the main performance."<sup>254</sup>

244. Full Text of "Macon's War Work: A History of Macon's Part in the Great World War," INTERNET ARCHIVE, [http://www.archive.org/stream/maconswarworkhis00spar/maconswarworkhis00spar\\_djvu.txt](http://www.archive.org/stream/maconswarworkhis00spar/maconswarworkhis00spar_djvu.txt) (last visited Nov. 4, 2012) ("Here he was firmly established as one of Macon's leading younger business men when war was declared on Germany.").

245. U.S. Army Campaigns: World War I, ARMY.MIL, [http://www.history.army.mil/html/reference/army\\_flag/wwi.html](http://www.history.army.mil/html/reference/army_flag/wwi.html) (last visited Nov. 4, 2012).

246. *Macon's War Work*, *supra* note 244.

247. *Id.*

248. WILLIAM COLLIN LEVERE, THE HISTORY OF SIGMA ALPHA EPSILON IN THE WORLD WAR 201 (1928).

249. LAST WILL AND TESTAMENT OF JOSEPH NORRIS NEEL, JR., *supra* note 233.

250. *Id.*

251. *See id.*

252. Shaffer, *supra* note 213, at 58.

253. *See generally id.*

254. *Id.*



*d. Sequencing*

Since Aristotle, sequencing has been necessary for the construction of a narrative.<sup>255</sup> Although the events of one's life are "not a purposive narrative that follows Chekov's canons,"<sup>256</sup> there are benefits to constructing a personal narrative that relates life events to help both the teller and the audience "see the outline of the stork."<sup>257</sup>

The will is an established genre of legal writing that relies upon fixed characteristics, especially a fixed structure.<sup>258</sup> The replication of the structure brings comfort to laypersons who, despite their inexperience, would necessarily recognize a will.<sup>259</sup> The structure, however, does not need to be immutable.<sup>260</sup> The sequencing can reflect client priorities to better share the client's story.<sup>261</sup> For instance, one client's dispositive provisions may begin with a series of cash bequests and another may begin with a bequest of tangible personal property.

Some draftspersons assert that replicating the headings and order of provisions ensures consistency; however, "[t]his consistency is for their own convenience, without regard to variation among clients and their property."<sup>262</sup> That is because the "virtue of the forms is also their vice. They are quick, cheap substitutes for knowledge and independent thinking."<sup>263</sup> In the bustle of deadlines, the duplication of forms may lead to sloppy lawyering.<sup>264</sup> For example, in the Georgia

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255. RIESSMAN, *supra* note 59, at 17 (referencing Aristotle's *Poetics* with a beginning, a middle, and end). In other words, "the event structure forms the spine of any narrative." Linde, *supra* note 58, at 186.

256. Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in LAW'S STORIES 99, 100 (Peter Brooks & Paul Gewirtz eds., 1996).

257. See *infra* notes 47–56 and accompanying text for the stork story of Isak Dinesen.

258. Baron, *supra* note 157, at 650–51.

259. For instance, "[t]he 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." *Id.*; see also Moore, *supra* note 156, at 8 (addressing expectations of the layperson to think of the will as disposing of his or her assets at death).

260. In a drafting textbook for law students, the authors outline seven basic categories of provisions. BRODY ET AL., *supra* note 116, at 134. The authors are careful to note that the outline of provisions does not constitute a required sequence of provisions. *Id.*

261. See *id.* at 151 (describing this method of ordering provisions as "client-oriented" organization).

262. BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 257 (2d ed. 1992).

263. MELLINKOFF, *supra* note 105, at 101 (observing that forms provide "the illusion of security").

264. The Model Rules of Professional Conduct require that an attorney has the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT 1.1 (2003).

Court of Appeals case of *Young v. Williams*, the attorney draftsman neglected to include the residuary clause in the will and admitted that failing to include the clause violated the attorney's own standard of care.<sup>265</sup> Similarly, in the District Circuit Court of Appeals case of *Knupp v. District of Columbia*, the attorney draftsman forgot to include a beneficiary for the residuary estate.<sup>266</sup> Computer generated forms may look complete,<sup>267</sup> nevertheless, all documents must be conscientiously and carefully reviewed before execution.<sup>268</sup> As a result, emphasizing the crafting of an individualized document, including the sequencing of those provisions, may encourage careful review to catch such blatant omissions and errors in drafting.<sup>269</sup> "Events become meaningful because of their placement in a narrative."<sup>270</sup>

## 2. PEOPLE

### a. Named Beneficiary

The beneficiaries named in a will reflect the individuals or entities with close relationships with the testator. For example, one is not surprised to find that the named primary beneficiary of Jane Austen's will is that of her beloved sister Cassandra<sup>271</sup> or that the sole beneficiary in the will of the Duke of Windsor is the demonized Duchess of Windsor, the former Wallis Simpson.<sup>272</sup> Likewise, much has been

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265. *Young v. Williams*, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007). In addition, by affidavit an expert testified that "the failure to include a residuary clause in the will violated the standard of care required of attorneys." *Id.*

266. *Knupp v. District of Columbia*, 578 A.2d 702, 703-04 (D.C. 1990).

267. Forms are "[s]o easy to skim, and—in the welter of law and language—to overlook defects of inclusion or omission." MELLINKOFF, *supra* note 105, at 101.

268. Evans, *supra* note 162, at 205-06 (cautioning lawyers to avoid "automating a malpractice").

269. Errors in will drafting include poor proofreading, use of ambiguous language, and failure to address issues of survivorship. For an exploration of these and other errors of drafting, see Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death—Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 61 (2008); see also Henry M. Grether, *The Little Horribles of a Scrivener*, 39 NEB. L. REV. 296 (1960).

270. RIESSMANN, *supra* note 59, at 18.

271. Jane Austen's will is less than one page. See Deidre Le Faye, *JANE AUSTEN: A FAMILY RECORD* 248 (2d ed. 2004).

272. See, e.g., J. Bryan III & Charles J.V. Murphy, *THE WINDSOR STORY* 594-95 (1979) (noting that all the Duke's property, including Queen Alexandra's jewels, was bequeathed to the Duchess). See generally *Ancient Royal Wills*, 12 GREEN BAG 64 (1900) (summarizing royal wills from the Anglo-Saxon King Alfred the Great to son of Henry II, the Earl of Salisbury). For a reproduction of the will of Diana, Princess of Wales, see NASS, *supra* note 183, at 24-37.

made of J. Edgar Hoover's gift of his "rest, residue, and remainder of my estate, both real and personal" to Clyde Tolson.<sup>273</sup> Regardless of the nature of the relationship,<sup>274</sup> inclusion of a named beneficiary in the will recognizes the role that particular beneficiary played in the testator's personal narrative.

For example, in a book to laypersons about wills, specifically explaining the "Options Your Will Offers You," the author explained that including statements or sentiments to individuals "enables you [the testator] to honestly say, 'I want you to know I have mentioned you in my will.'" <sup>275</sup> The naming of beneficiaries is part of the remembering that is central to a personal narrative.

*b. Identification of Family*

To accommodate the changing of circumstances between the date of execution and the date of implementation, class gifts, such as gifts to "my issue" or "my siblings," are often used in wills, rather than a named particular beneficiary.<sup>276</sup> To incorporate some of the names of class members, a section that specifically identifies the testator's family can be included.<sup>277</sup> This section may be styled as a definition section, declaration, "statement on family members,"<sup>278</sup> or simply a provision with the title of "my family" or "my beneficiaries."<sup>279</sup> Consider the following examples that identify the beneficiaries:

273. Curt Gentry, J. EDGAR HOOVER: THE MAN AND THE SECRETS 730 (2001). Further fueling this interest is the fact that Clyde Tolson was buried near J. Edgar Hoover. *Id.* at 736.

274. *Id.* at 511 (stating that the closeness between the two men "gave rise to rumors of a homosexual relationship").

275. BOVE, *supra* note 10, at 21. One of comedian Henny Youngman's famous routines involved the reading of a last will and testament.

A rich old garment manufacturer died, and his family met in the lawyer's office for the reading of his will. He left \$300,000 to his wife, \$100,000 to his brothers, and \$10,000 each to his sisters. Then the Will read, "to my nephew Irving, who always wanted to be mentioned in my Will, 'Hello, Irving.'"

NASS, *supra* note 183, at 227 (reproducing portions of the last will and testament and summarizing the implementation of the terms of the will).

276. See A. James Casner, *Class Gifts—Effect of Failure of Class Member to Survive*, 60 HARV. L. REV. 751 (1947). For a more recent analysis of class gifts, see Frederic S. Schwartz, *The New Restatement of Property and Class Gifts: Losing Sight of the Testator's Intention*, 22 QUINNIPIAC PROB. L. J. 221 (2009).

277. Schwartz, *supra* note 276, at 248.

278. NASS, *supra* note 183, at 450.

279. LAST WILL AND TESTAMENT OF GEORGE STEINBRENNER, LIVING TRUST NETWORK, <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-george->

- I am currently living in a committed partnership with \_\_\_\_\_ and we have two children, Molly Doe and Lewis Doe. The term “child” and “children,” as used in this will, shall refer to these two children.<sup>280</sup>
- I am married to the former Nancy Jane Jones (“my Wife”). We have two children, Mary and Carl, both of whom are minors; they and any other children born to or adopted by my Wife and me are referred to here as “my Children.”<sup>281</sup>
- I declare that I am married and that the name of my spouse is [name of spouse], that my spouse and I now reside at [address of testator], and that I have [number of children] children, whose names are [name of first child] and [name of second child]. By this naming I do not intend to exclude children of mine born after the execution of this Will but only to identify my children who are alive at the time of execution of this Will.<sup>282</sup>
- I am married to BARBARA SINATRA, who in this Will is referred to as “my Wife.” I was formerly married to NANCY BARBATO SINATRA, to AVA GARDNER SINATRA, and to MIA FARROW SINATRA, and each of said marriages was subsequently dissolved. I have three children, all of whom are the issue of my marriage to NANCY BARBATO SINATRA: NANCY SINATRA LAMBERT, FRANCIS WAYNE SINATRA, and CHRISTINA SINATRA. All of the above-named children are adults. I have never had any other children.<sup>283</sup>

The identification section provides a space to include the name of each loved one in the will.

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steinbrenner.html (last visited Oct. 1, 2012) (noting Article One of George M. Steinbrenner, III’s will titled “Family”).

280. MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA § 17:40 (7th ed. 2008).

281. Shaffer, *supra* note 213, at 47. For a similar formulation, see TEXAS PRACTICE GUIDE WILLS, TRUSTS AND ESTATE PLANNING § 4:545(1), available at Westlaw 1 Tex. Prac. Guide Wills, Trusts and Est. Plan.

282. 20A AM. JUR. 2D LEGAL FORMS § 266:44 (2012).

283. NASS, *supra* note 183, at 113 (reproducing portions of the last will and testament and summarizing the implementation of the terms of the will).

In addition, with the changing nature of families,<sup>284</sup> this identification section can serve to ease identification of the beneficiaries. While the typical American family has never been limited exclusively to the June and Ward Cleaver model,<sup>285</sup> there are increasingly diverse family patterns today.<sup>286</sup> Choice of living arrangements and formally recognized legal relationships are changing.<sup>287</sup> Technology has also altered our fundamental idea of family, such as in the case of posthumously conceived children.<sup>288</sup>

The identification of family may be combined with other sections of the will. For example, the identification of family may be coupled with the nominations of the executor, trustee, and guardian.<sup>289</sup> The identification may also be paired with the definition section, which often appears later in the sequence of will provisions. Relegating the identification to the definition section does lead to some rather odd juxtapositions, such as the definition of “descendants” being followed by the definition of the “Internal Revenue Code.” Nonetheless, having a separate section in the will that exclusively focuses on the identification of beneficiaries visually distinguishes this provision and

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284. In 1981, Mary Ann Glendon reflected that family was characterized by “increasing fluidity, detachability and interchangeability.” MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 4 (1981).

285. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2000) (using June and Ward Cleaver as an example of an old, nostalgic model of American families).

286. See generally RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* (2004).

287. “Today’s sexual and associational lifestyles differ so much that the State should not continue to deal with them as though they all were the role-divided, procreative marriage of history. That marriage may not yet be history, but it has become just one lifestyle choice among many.” Harry D. Krause & David D. Meyer, *What Family for the 21<sup>st</sup> Century?*, 50 AM. J. COMP. L. 101, 107 (2002).

288. See, e.g., Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367 (2009); Kristen M. Benvenuit Pytel, Note, *Left Out No Longer: A Call for Advancement in Legislation for Posthumously Conceived Children*, 11 J. L. SOC’Y 70 (2010); Jenna M. F. Suppon, Note, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM. CT. REV. 228 (2010); Morgan Kirkland Wood, Note, *It Takes A Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873 (2010); see also Charles P. Kindregan, Jr., *Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMEDICAL L. 147 (2011) (examining the issues involving the resolution of both moral and legal implications that flow from gametes of decedents and gametes of incompetent persons being used to produce genetically related children).

289. See, e.g., 7 WEST’S PA. FORMS, ESTATE PLANNING § 8:12. Although Appointments is first in the title, the section actually begins with the identification of the testator’s spouse and children. *Id.*

serves to highlight the importance of the beneficiary to the testator's personal narrative.

### 3. PROPERTY

Property is often viewed as an extension of the person.<sup>290</sup> The possessions become a representation of self.<sup>291</sup> For instance, in recommending that sound financial planning involves estate planning, one Kiplinger's article stated, "[y]our legacy will surely involve stuff, from the kitchen broom to heirloom jewelry."<sup>292</sup> Considering property as such, one is not surprised to find that the fifth article of Jerry Garcia's will bears the heading "guitars" and disposes of all his guitars.<sup>293</sup>

Descriptions of specific property can be used to complement the personal narrative of the will.<sup>294</sup> In addressing the wills of the past as "stiff and stereotyped,"<sup>295</sup> Lawrence Friedman wrote, "[o]ne finds in them an occasional flash of humanity, an insight into the era, or a fact of rare beauty, trapped in county archives as if in amber."<sup>296</sup> Friedman then follows this statement with examples of descriptions of property, such as "two hundred eight of pork" and "a pair of strong shoes."<sup>297</sup> The identification of property and the descriptions of property underscore the value the testator placed on the property and the relationship between the testator and the beneficiary. For example,

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290. See generally THOMAS L. SHAFFER ET AL., *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 19–24 (5th ed. 2007). See also Shaffer, *supra* note 213, at 46 (writing that "the property a man owns is as much a part of his life as his right leg or his brain is"). See Jeremy A. Blumenthal, "To Be Human": A Psychological Perspective on Property Law, 83 TUL. L. REV. 609, 612 (2009), for a summary of research, including empirical research on perceptions of "property" and "ownership." This includes research supporting the conclusion that ownership of property "can help individuals define themselves, maintain the continuity of the self, and express their self-identity to others." *Id.* at 615. See Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (exploring the relationship between property and personhood, for which personhood depends on a sense of self).

291. Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RESEARCH 139, 139 (1988) (noting that considering possessions as a reflection of self dates back to at least 1890); see also SHAFFER, *supra* note 129, at 4.

292. Jane Bennett Clark et al., *How to Die the Right Way*, Dec. 13, 2011, <http://finance.yahoo.com/news/how-to-die-the-right-way.html>.

293. LAST WILL AND TESTAMENT OF JEROME J. GARCIA, *supra* note 186.

294. Estate planners often remark that the division of personal property is a common source of contention in administration of an estate; see, e.g., BARNEY & COLLINS, *supra* note 112, at 19.

295. HISTORY OF AMERICAN LAW, *supra* note 111, at 182.

296. *Id.*

297. *Id.*

William Shakespeare's gift of his "second-best bed"<sup>298</sup> to his wife has piqued interest for hundreds of years.<sup>299</sup> Despite the fact that gifts of beds and bed furnishings were common at the time, much has been speculated about the story behind the gift of the "second-best bed."<sup>300</sup>

Just as with the identification of beneficiaries, the identification of property serves a substantive purpose.<sup>301</sup> The property must be described with sufficient specificity to allow for the identification of the property by the personal representative.<sup>302</sup> In analyzing wills from the Anglo-Saxon period, two authors noted that the description of property, as well as descriptions of beneficiaries, reflected unwritten knowledge that the community—not limited to the testator, the beneficiaries, and the personal representative—would recognize.<sup>303</sup> Thus, the readers would need to rely on the unwritten community knowledge to fully "decode" the descriptions in the will.<sup>304</sup> The decoding was required in reference to descriptions of property such as, "four horses, *the best I have*," and "*my best massbook*."<sup>305</sup> In modern wills, the danger of including descriptions that need to be decoded is illustrated by the last will and testament of Marilyn Monroe and her gift of her "personal effects and clothing to LEE STRASBERG . . . it being my desire that he distribute these, in his sole discretion, among

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298. See A. Wigfall Green, *Shakespeare's Will*, 20 GEO. L.J. 273 (1931–1932). Wills play a role in several of Shakespeare's plays, including *Twelfth Night*, *Merchant of Venice*, *Richard II*, *Julius Cesear*, and *As You Like It*. For a collection of Shakespeare's plays, see WILLIAM SHAKESPEARE, *THE NORTON SHAKESPEARE TRAGEDIES* (Stephen Greenblatt et al. eds, 2d ed. 2008). For an analysis of Shakespeare's play and jurisprudence, see John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825 (1987).

299. See Green, *supra* note 298.

300. Elmer M. Millier, *Wills: Witty, Witless and Wicked*, 7 WAYNE L. REV. 331, 335 (1960–1961).

301. See Annotation, *Character of Instrument as Will, or Its Admissibility to Probate as such, as Affected by Its Failure to Make Any Disposition of Property or by Fact that There Is No Beneficiary Entitled to Take Thereunder*, 147 A.L.R. 636 (1943).

302. See *id.*

303. Danet & Bogoch, *supra* note 89, at 109–10 (noting that some beneficiaries are identified as "son of," rather than a beneficiary's full name).

304. *Id.*

305. *Id.* at 109 (emphasis in original). Related to the decoding is the possibility that the testator intended to empower the personal representative to make the determination of "best" when implementing the terms of the will, an explanation that is dismissed by the authors. *Id.* Part of the reason that this may have been dismissed by the authors is also the practice of dating the documents in reference to local events, showing the reliance on community knowledge to supplement meaning. *Id.* at 112.

my friends, colleagues and those to whom I am devoted.”<sup>306</sup> Lee Strasberg did not distribute Marilyn Monroe’s personal effects and clothing to her friends or colleagues.<sup>307</sup> The justification for such action was that the language did not create a legally enforceable condition.<sup>308</sup>

While property must be described sufficiently for the personal representative to identify and ultimately distribute the property, a fuller description can highlight the importance of the property to the testator. For instance, the descriptions of “heirlooms and keepsakes” from a 1936 form book includes the following example:

I will and bequeath to my nephew, D.S.P., my fowling piece; which was presented to me by Colonel Riano, of the Spanish Royal Army; then to my nephew, W.P., I will and bequeath my sword and pistols, being the same which, I used at the siege of New Orleans; these I wish to have retained in the family, if possible . . . .<sup>309</sup>

Most items specifically described in a will could have been given by the testator to the beneficiary during life, for a birthday or holiday. The inclusion in the will shows not only the desire of the testator to retain the property during life, but to posthumously recognize the importance the item and person represent to the individual. For example, the will of Jacqueline Kennedy Onassis included the following provision:

I give and bequeath to my friend RACHEL (BUNNY) L. MELLON, if she survives me, in appreciation of her designing the Rose Garden in the White House my Indian miniature “Lovers watching rain clouds,” Kangra, about 1780, if owned by me at the time of my death, and my large Indian miniature with giltwood frame “Gardens of the Palace of the Rajh,” a panoramic view of a pink walled garden blooming with orange flowers, with the Rajh

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306. NASS, *supra* note 183, at 50 (reproducing portions of the last will and testament and summarizing the implementation of the terms of the will); see also Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN’S L.J. 1 (2007) (analyzing the phrasing used in the Last Will and Testament of Marilyn Monroe).

307. DiRusso, *supra* note 306, at 2.

308. *Id.* at 2–3. Marilyn Monroe continues to make appearances in court relating to a deceased celebrity’s right of publicity. For a consideration of the right of publicity, see Jessica Bozarth, *Copyrights and Creditors: What Will Be Left of the King of Pop’s Legacy*, 29 CARDOZO ARTS & ENT. L.J. 85 (2011); Laurie Henderson, *Protecting a Celebrity’s Legacy: Living in California or New York Becomes the Deciding Factor*, 3 J. BUS. ENTREPRENEURSHIP & L. 165 (2009); Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1 (2009).

309. George W. Thompson, *THE LAW OF WILLS AND THE MANNER OF THEIR DRAFTING, EXECUTION, PROBATE AND INTERPRETATION TOGETHER WITH TESTAMENTARY FORMS* 693 (2d ed. 1936).



being entertained in a pavilion by musicians and dancers, if owned by me at the time of my death.<sup>310</sup>

The pairing of the fully described property and the beneficiary reflects the role both had in the individual's personal narrative. Likewise, the listing of property also tells of the person's livelihood, such as the specific inclusion of store fixtures and livestock.<sup>311</sup>

Specific bequests of property are often reflections of the testator, and by giving these items of property in the will (rather than by lifetime gifting), the testator is infusing these items with a piece of themselves—hopefully to be treasured by the recipient—in recognition of the role of the property and person in the testator's personal narrative. One sees the humanity of an individual, such as when J. Edgar Hoover in his will included the request that Clyde Tolson “keep or arrange for a good home, or homes for my two dogs.”<sup>312</sup> The will of Doris Duke is filled with references to her real property, her personal effects, and her tangible personal property held in the real property.<sup>313</sup> This real property included Shangri Lai in Kaalawai, Honolulu, Hawaii; Falcon's Lair in Beverly Hills, California; Rough Point in Newport, Rhode Island; the Quarry in Whitehorse Station, New Jersey; Penthouse B in New York, New York; as well as homes in Montague City, New Jersey; Somerville, New Jersey, and Middletown, Rhode Island.<sup>314</sup> The first identified gift of property, however, in Doris Duke's will is the gift of her eyes to the Eye Bank for Sight Restoration, Inc. of New York, New York.<sup>315</sup>

The dispositive terms of wills give away property that had belonged to the testator to identified individuals, entities, and ani-

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310. LAST WILL AND TESTAMENT OF JACQUELINE K. ONASSIS, Art. 1st (A) (Mar. 22, 1994), [http://www.livingtrustnetwork.com/index.php?option=com\\_content&view=article&id=117&Itemid=1075](http://www.livingtrustnetwork.com/index.php?option=com_content&view=article&id=117&Itemid=1075) (last visited Nov. 4, 2012); see also NASS, *supra* note 183, at 38–44 (reproducing portions of the last will and testament and summarizing the implementation of the terms of the will).

311. LAST WILL AND TESTAMENT OF A.B. VAN VALKENBURG (June 14, 1934) (copy on file with author).

312. Gentry, *supra* note 273, at 730.

313. LAST WILL AND TESTAMENT OF DORIS DUKE Art. One (A) (Apr. 5, 1993), <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-doris-duke.html> (last visited Nov. 4, 2012).

314. *Id.*; For a biography of Doris Duke that relates to the story behind each of the real property holdings, see TED SCHWARZ, TRUST NO ONE: THE GLAMOROUS LIFE AND BIZARRE DEATH OF DORIS DUKE (1997).

315. *Id.*

mals,<sup>316</sup> which reflect upon the importance of the recipient.<sup>317</sup> For instance, Justice Oliver Wendell Holmes, Jr., who had no children and only one close relative,<sup>318</sup> left the residue of his estate to the U.S. government.<sup>319</sup> This gift reflects Justice Holmes's view that paying taxes is, in part, the price of civilization.<sup>320</sup> By his bequest in his will, he transmitted his wealth and encapsulated a legacy central to his personal narrative of service that included not only his service to the court but also his thrice-wounded service in the Civil War.<sup>321</sup>

The nature of property changes, as demonstrated today with digital assets. But those items kept through life become part of the personal narrative.<sup>322</sup> This first gift is of relatively little (or perhaps even no) dollar value compared to the gifts of the real property. The

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316. See Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 801 (2011) ("For many Americans today, their pets, not their human family members, are their nearest and dearest.").

317. CANTOR, *supra* note 93, at 39 (describing "the instructions and distributions contained in a will" as a "legacy" and noting that "[e]very human constructs a personal identity and an image that are projected to the world").

318. LIVA A. BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 642 (Harper Collins 1991).

319. MILLIE CONSIDINE & RUTH POOL, *WILLS: A DEAD GIVEAWAY* 58 (1974). Justice Holmes's will also included a few small gifts to his nephew, a cousin, and his servants. BAKER, *supra* note 318, at 642. The will bequeathed his library and prints to the Library of Congress. *Id.*

320. *Compania Gen. de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927) (Holmes, J.) ("Taxes are what we pay for civilized society."). For a history of taxation in the United States, see W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* (2d ed. 2004).

321. See generally SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 88–89 (1989). *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR.* 151–52 (Mark De Wolfe Howe ed., 1946) (referencing his choice to leave the army). In referencing the residuary bequest, one author noted:

A lot of people thought it was a queer thing to do. But he may have felt the gesture was some small compensation for his leaving the Army before the war was over, for surviving when so many had not. At last, perhaps, his duty was done. This was his final salute.

BAKER, *supra* note 318, at 642 (internal footnotes omitted from quote).

322. Auctions of personal property of celebrities garner a lot of attention and raise a lot of funds. NASS, *supra* note 183. In October 2011, numerous items of John Wayne's personal property were auctioned, ranging from the Golden Globe from "True Grit" to his American Express card. *American Icon John Wayne's Costumes, Awards and Documents in First Ever Public Auction this October*, PRWEB, Apr. 4, 2011, [www.prweb.com/releases/2011/4/prweb5228484.htm](http://www.prweb.com/releases/2011/4/prweb5228484.htm) (last visited Feb. 27, 2012). For a catalog of the auction, see *2011 October The Personal Property of John Wayne Signature Auction*, HERITAGE AUCTIONS, [entertainment.ha.com/common/auction/catalogprint.php?SaleNo=7045&src=](http://entertainment.ha.com/common/auction/catalogprint.php?SaleNo=7045&src=) (last visited Nov. 4, 2012) (noting the Golden Globe sold for \$143,400 and the American Express card sold for \$10,157.50).

prominent placement hints at a personal connection between the testator and the gift. It references what the testator would consider a gift reflective of her personal story.

#### D. Impact on Implementation

Oliver Wendell Holmes characterized a testator as a “despot.”<sup>323</sup> The power a testator wields is illustrated by another’s characterization of the testator as “like the man who calls his enemy on the telephone, tells him what he thinks of him, and then hangs up the receiver. For a will is a man’s one sure chance to have the last word. In it he can vent his spite in safety without his victims’ having a chance to answer back.”<sup>324</sup> While a testator may feel relief at venting anger and frustration, such language does not help the ultimate implementation of the will. Given this potential misuse, considering the will as a personal narrative may smack of self-indulgence. Rather than being viewed as a personal narrative, a will could also be characterized as an instruction manual. From this perspective, the true focus of the will would not be the personal journey of self-expression but rather the compilation of legally enforceable commands.<sup>325</sup>

Accordingly, an initial reaction to conceptualizing the will as a personal narrative is to summarily dismiss it as complicating matters of implementation. After all, “[l]ife is not a dramatic narrative.”<sup>326</sup> When pairing the words “personal narrative” and “will,” one thinks of odd, eccentric, and scandalous wills that berate, accuse, and rebuke beneficiaries.<sup>327</sup> Examples like the following come to mind:

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323. Charles P. Curtis, *IT’S YOUR LAW* 42 (Harv. U. Press 1945). For an exploration of the cold, numbing influence (and control) of the dead hand, see Lewis M. Simes, *PUBLIC POLICY AND THE DEAD HAND* (Univ. of Maryland Law School 1955); Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 *CARDOZO L. REV.* 1315 (2011) (arguing that gifts contingent on marrying and remarrying, traditionally considered against public policy, should be enforced).

324. Hibschan, *supra* note 24, at 362.

325. BRODY ET AL., *supra* note 116, at 154 (stating that estate planning documents “are essentially sets of instructions.”).

326. See Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW’S STORIES* 99–105, 100–01 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996); see also Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 *J. LEG. WRITING* 163, 164 (2010) (exploring the limits and opportunities that storytelling affords legal writing by examining the “New Journalist” movement in non-fiction writing).

327. *But see The Eccentricities of Testators*, 1 *COMMW. L. REV.* 265, 265 (1903–1904) (“Prosaic as most last wills and testaments are—except to fortunate legatees—

I have no exception to any person in town being at my Funeral, but John Hardy, carpenter who I despise on account of his bad character, & as I hate all villains as I do snakes, I desire that my Executors shall turn that Scoundrell from my funeral should he have the impudence to attend it.<sup>328</sup>

Collections of odd wills<sup>329</sup> demonstrate the folly, foolishness, and frailty of testators. As Mark Twain wrote: "Truth is stranger than Fiction, but it is because Fiction is obliged to stick to the possibilities."<sup>330</sup> This sentiment is illustrated by wills such as the often repeated gift of property to the wife of German poet Heinrich Heine on the condition that she remarry: "Because there will be at least one man to regret my death."<sup>331</sup> Although this condition never actually appeared in Heine's will,<sup>332</sup> despite its frequent quoting,<sup>333</sup> this language exemplifies the concern of equating a legal document with a personal narrative.<sup>334</sup> As one author states, "[t]he line between self-expression and self-indulgence can be hard to discern."<sup>335</sup>

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there are many amusing instances of eccentric bequests and curious disposals of property.").

328. LAST WILL AND TESTAMENT OF JOHN PETTIGREW (Sept. 11, 1775), reprinted in ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA 1733-1777, at 109-10 (Reprint Co. Publishers 1981) (capitalization and spelling in original).

329. See, e.g., CONSIDINE & POOL, *supra* note 319; FENTON BRESLER, SECOND-BEST BED: A DIVERSION ON WILLS (London 1983); ROBERT S. MENCHIN, WHERE THERE'S A WILL: A COLLECTION OF WILLS—HILARIOUS, INCREDIBLE, BIZARRE, WITTY . . . SAD (1979); see also Elmer M. Million, *Wills: Witty, Witless and Wicked*, 7 WAYNE L. REV. 335 (1960-1961); Elmer M. Million, *Humor in or of Wills*, 11 VANDERBILT L. REV. 737 (1957-1958); Hibschan, *supra* note 24; *The Eccentricities of Testators*, 15 GREEN BAG 583 (1903); *Some Singular Wills*, 15 GREEN BAG 430 (1903); John De Morgan, *Wills—Quaint, Curious and Otherwise*, 13 GREEN BAG 567 (1901).

330. Mark Twain, FOLLOWING THE EQUATOR vol. 1, at 137 (Harper & Brothers Publishers 1899).

331. LAST WILL AND TESTAMENT OF HEINRICH HEINE, published in Hyman, *Wacky Wills*, 10 KY. ST. B.J. 185 (1946).

332. DUKEMINIER ET AL., *supra* note 147, at 35 (acknowledging the assistance of Mike Widener of the University of Texas Tarlton Law Library for disproving this use of the language in Heine's actual will).

333. See, e.g., *Weird Wills—Terrible Testaments*, MYPOINTLESS, Sept. 4, 2009, <http://www.mypointless.com/2009/09/weird-wills-terrible-testaments.html>.

334. There seems to be a common belief that odd or curious wills are fairly prevalent. This is perhaps because of the newspaper publicity which is often given to an eccentric will, whereas little or no attention is paid to the ordinary kind of will. From a close examination of the 49 cases mentioned here [in this study], plus the reading of some 300 additional wills, it is evidence that the odd or curious will is the exception rather than the rule.

Stewart Henderson Britt, *The Significance of the Last Will and Testament*, J. SOCIAL PSYCHOLOGY 350-51 (1937).

335. CONSTANCE HALE, SIN AND SYNTAX: HOW TO CRAFT WICKEDLY EFFECTIVE PROSE 213-14 (1999).

When wills are contested it raises the specter of too much personal narrative. One thinks of cases such as *Shapira v. Union National Bank*, where a testator required his sons to be “married to a Jewish girl whose both parents were Jewish.”<sup>336</sup> Wills, such as the one in *Shapira*, raise speculation about the particular story behind the words and leave a beneficiary not only wondering about the story but often striking back through litigation.<sup>337</sup> One author stated, “[t]he law does not forbid such expressions of sentiment, nor does it require it. It seems preferable to limit the contents of a Will to the cold facts.”<sup>338</sup> Consequently, where an off-hand remark during the will execution may create grounds for a will contest,<sup>339</sup> incorporating any language that seems unconventional into a will may seem to be courting disaster. Here, however, is where the attorney drafts person serves an important role to ensure the re-narrated events are accurate by acting as an observer rather than a participant. One chief complaint of autobiographies is the inaccurate or incomplete misremembering.<sup>340</sup> The drafts person, using time-tested constructions, selected with care and tinged with personal choice, can construct a narrative that both acknowledges conventions and incorporates the person. This is in keeping with narrative, for even a personal narrative “is not entirely ‘new’ even though it is based on an experience that is seemingly personal and developed in a story that is seemingly idiosyncratic.”<sup>341</sup> Situating a will as a narrative conveys security in the manipulation of an accepted form.

One may also suggest that the formal will is not the proper document to consider a personal narrative and instead consider the non-

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336. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (C.P. Mahoning 1974).

337. *Id.* at 826.

338. FRANK GERD OPTON, *DECEDENTS' ESTATES, WILLS, AND TRUSTS IN THE U.S.A.* 26 (Kluwer Law and Taxation Publishers 1987) (specifically referencing use of the phrases “my beloved wife” and “my dear child”).

339. *See, e.g.*, *Levin v. Levin*, 60 So. 3d 1116 (Fla. Dist. Ct. App. 2011) (analyzing a testator's remarks to her attorney regarding the frequency of visits with her daughter that was inaccurate and ultimately the basis for a claim that the testator's will was based on an insane delusion).

340. *See, e.g.*, CHARLES OSBORNE, *THE LIFE AND CRIMES OF AGATHA CHRISTIE: A BIOGRAPHICAL COMPANION TO THE WORKS OF AGATHA CHRISTIE* 50–51, 379 (2001) (noting misremembering and other discrepancies in the 1977 autobiography penned by Agatha Christie).

341. Sandra K.D. Stahl, *Personal Narrative as Folklore*, 14 *FOLKLORE INST.* 9, 14 (1977).

binding ethical will as the proper place for such sentiments.<sup>342</sup> While the will is a personal document, it is also a public document.<sup>343</sup> In Ancient Rome, wills were read in public.<sup>344</sup> Like in Ancient Rome, executed wills of the Anglo-Saxon period were often read aloud as part of an oral ceremony.<sup>345</sup> Probated documents, unless specifically sealed by the probate court, are open to the public.<sup>346</sup> The “expressions of final wishes are extremely revealing, throwing open to public scrutiny emotions that a person may have kept hidden all his life—secret loves, hidden antagonisms, unexpected compassion.”<sup>347</sup> This fascination perhaps accounts for the numerous books that are written about the story behind wills<sup>348</sup> as well as the compilations of wills of the famous.<sup>349</sup>

342. For use of ethical wills in estate planning, see Judith A. Frank, *The Human Legacy: Using Ethical Wills to Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65 (2003).

343. For a consideration of the public nature of probate, see Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 562–66 (2008).

344. BRESLER, *supra* note 329, at 3; *see also* CHAMPLIN, *supra* note 103, at 5–6.

345. Danet & Bogoch, *supra* note 89, at 97–98.

346. For a critical examination of the probate process, see PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* (2003).

347. ROBERT A. FARMER & ASSOC., *THE LAST WILL AND TESTAMENT* 5 (1968) (including wills of such individuals as Andrew Carnegie, Ernest Hemingway, and Theodore Roosevelt). The revelations in a will can be surprising to the public. For instance, Article One of the Last Will and Testament of John Pierpont Morgan dated January 4, 1913, reveals a very religious individual.

I commit my soul into the hands of my Saviour, in full confidence that having redeemed it and washed it in His most precious blood He will present it faultless before the throne of my Heavenly Father; and I entreat my children to maintain and defend, at all hazard, and at any cost of personal sacrifice, the blessed doctrine of the complete atonement for sin through the blood of Jesus Christ, once offered, and through that alone.

NASS, *supra* note 183, at 494.

348. *See, e.g.*, ELIZABETH URBAN ALEXANDER, *NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES* (2001); PAUL ALEXANDER, *DEATH AND DISASTER: THE RISE OF THE WARHOL EMPIRE AND THE RACE FOR ANDY'S MILLIONS* (1994); JOSEPH A. COX, *THE RECLUSE OF HERALD SQUARE: THE MYSTERY OF IDA E. WOODS* (1964); SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT, AND POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST* (2006); DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993); DAVID W. PECK, *THE GREER CASE: A TRUE COURT DRAMA* (1955); JAMES R. PHELAN & LEWIS CHESTER, *THE MONEY: THE BATTLE FOR HOWARD HUGHES'S BILLIONS* (1997); *see also* MARTIN L. FRIEDLAND, *THE DEATH OF OLD MAN RICE: A TRUE STORY OF CRIMINAL JUSTICE IN AMERICA* (1994) (telling the story of the alleged murder of William Marsh Rice, benefactor of the Rice Institute, now known as Rice University, and his allegedly forged last will and testament).

349. *See, e.g.*, HARRIS, *supra* note 83; NASS, *supra* note 183; John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L. Q. 297 (1934).

Given that the touchstone in this area of law is intent,<sup>350</sup> conceptualizing the will as a personal narrative promotes the function of the will and embeds those personal notes that will facilitate implementation. Furthermore, “inclusion of expressive language, personal narratives, components of the testator’s life story, vision for the future, and guidance to fiduciaries and loved ones can also be a valuable addition to testamentary documents rather than strictly limited to an ethical will.”<sup>351</sup> The will, like all estate planning documents, is intended to represent the testator’s intent.<sup>352</sup> Conceptualizing the will as a personal narrative therefore more fully embeds the testator’s intent in document.

#### IV. Conclusion

Reconceptualizing the will as a personal narrative furthers the goal of the attorney-client relationship in the estate planning context. Through discussions of the testator’s relationships, accomplishments, disappointments, and hopes, the resulting documents—the will and related estate planning documents—are individualized in a manner that promotes the goals of the representation.

This Article asserts techniques that would promote the function of the will from the perspective of the testator and assist with the implementation of the will. These techniques are not precatory wishes, diatribes, justifications, or excuses, the type of expressive language that makes draftspersons nervous. This reconceptualization would force the attorney to more actively listen to the client’s goals and thereby channel those goals into a document that better serves the purposes of the estate planning representation. These suggestions

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350. Rules regarding formality and construction can undercut the ability of a court to interpret intent. See, e.g., Andre B. Mazoff, *A Common Thread to Weave Patchwork: Advocating for Testamentary Exception Rules*, 3 PHOENIX L. REV. 729 (2010) (advocating a uniform rule regarding the testamentary exception to the attorney-client privilege for a will contest to permit admittance of evidence relating to the testator’s intent). For a recent exploration of freedom of testation, see Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011).

351. Goffe & Haller, *supra* note 132, at 14; see also Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 410 (2011); Daphna Hacker, *Soulless Wills*, 35 L. & SOC. INQUIRY 957, 981 (2010) (“I believe that when testators and their lawyers would become more aware of the possibility of integrating personal and sentimental expressions and messages into material wills and the option of making separate ethical wills, they will be better prepared to circumvent and overcome any possible legal complications.”).

352. *Id.*

serve to enrich the effectiveness of all the estate planning documents, from the perspective of drafting a client-based document to the perspective of implementing a substantively operative and accurate document.

The will, the “vessel of truth,” is pivotal to the estate planning process. Each testator deserves to seize the opportunity afforded by the will in the same manner as Dr. Alfred Nobel: to share a personal narrative. For although each client may not have the opportunity to completely rewrite his or her story, as did Dr. Nobel, each will nevertheless offers the opportunity to memorialize a life’s story.