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KEEPING PEACE IN THE FAMILY WHILE YOU ARE RESTING IN PEACE: MAKING SENSE OF AND PREVENTING WILL CONTESTS

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Judith G. McMullen*

INTRODUCTION

Family members often fight over the estates of their departed loved ones. It is a safe guess, however, that many of these decedents had confidently assumed that their own families would *not* fight, even though newspapers and literature are replete with examples of warring heirs. Sometimes people believe that estate disputes occur only when huge fortunes are at stake, such as in the infamous dispute between the former topless dancer Anna Nicole Smith, and the children of her late husband, oil tycoon J. Howard Marshall II.[1] A recent survey of affluent Americans revealed that eighteen percent of them worry that their heirs will fight over their estates.[2] It is clear, though, that disputes frequently occur in smaller estates as well. In a column lampooning the dispute over the estate of George Halas (owner of the Chicago Bears franchise, among other things), the late Mike Royko had his alter ego Slats Grobnik declare:

> [Fighting about money] happens with little fortunes, too. You go over to Probate Court and what do you see? Some old guy leaves a three-flat and you got his

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1. Bruce Nichols, *Battle of Wills: Widowed Ex-Playmate, Tycoon's Sons Head for Court in Inheritance Feud*, DALLAS MORNING NEWS, Jan. 23, 2000, at A39.

2. Jennifer Harper, *Splitting Heirs Over Wealth: But Children Usually Inherit Most of It*, WASH. TIMES, June 28, 2006, at A1.

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> six kids in there, all fighting over who gets the top floor, who gets the basement and the wash machine, and how do they split up the garage and the tool shed? You got brothers and sisters filing motions for custody of a bowling ball or asking for an accounting of every lure in the old man's tackle box.[3]

There are, of course, countless ways to fight about money. This article focuses on post-mortem challenges to wills. In some cases, disappointed heirs[4] may be willing to allow probate of the will but may challenge a particular provision. This article discusses one such situation where a disappointed heir claims that a particular will provision is void, as it is against public policy.[5] The article also discusses another type of post-mortem challenge where a disappointed heir contests a will's admission to probate and subsequent operation. In such a case, the will is challenged on grounds of the testator's lack of mental capacity, failure to observe the necessary formalities of execution, or subjection to undue influence by a person who thereby unfairly benefits.

The aforementioned types of will challenges have this in common: they all involve a clash between the testator's stated intentions and the disappointed heirs' expectations and desires. It is important to understand at the outset that, while the legal issues may differ somewhat in individual cases, the claims are

3. Mike Royko, *Go for Broke – It's the Only Way to Die*, CHI. TRIB., Aug. 7, 1987, § 1, at 3.

4. Throughout the article, the term "presumptive heirs" is used to denote persons who would inherit under the intestate laws of the state, and "beneficiaries" to denote individuals who have in fact been given property under a will. The term "disappointed heirs" refers to persons who are presumptive heirs but have had their inheritances reduced or eliminated by a will.

5. Other examples of challenges to particular will provisions are outside the scope of this article. For example, situations where a testator attempts to disinherit a non-consenting spouse are typically addressed by various state statutes (such as community property rules, elective share statutes, homestead statutes, and statutes allowing spousal allowances during estate administration). None of these statutes are directly relevant to the discussion here. Similarly, this article will not discuss the unintentional omission of children (which is normally covered by pretermitted heir statutes) or cases governing interpretation of ambiguous will terminology (which is usually dealt with by having the court examine extrinsic evidence to clarify what the testator meant).

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almost invariably the result of a disappointed heir feeling that she has been treated unfairly or has not received what she expected to receive. Hence, clients and their lawyers must ask some difficult questions about fairness to, and expectations of, presumptive heirs.[6] Rather than focusing on the technical issues of will drafting or execution, this article reflects on the emotional causes of fighting over an estate, and suggests some ways to reduce the family fighting and hard feelings that result in will contests.

The first section below describes some of the common legal challenges used to prevent the enforcement of specific will provisions or to contest the will's admission to probate. The article then discusses the overarching issue of why surviving family members fight about property after the death of a loved one. Here, the article describes the legal concept of freedom of testation, and contrasts a testator's view towards property ownership and disposal with the views of potential family recipients. This section also discusses the implicit preference that the law gives to presumptive heirs – a preference that probably bolsters the resolve of disappointed heirs to engage in will challenges. In the final section, the article describes specific steps that typically are recommended for use by testators to reduce the likelihood of will challenges, and it concludes by asking clients and their lawyers to mull over the long-term emotional and social repercussions of proposed estate plans.

CHALLENGES TO WILLS

The typical family dispute occurs when a presumptive heir discovers that he is not getting something he expected, felt entitled to, or was promised. This might mean, for example, that the heir does not receive an equal share under the will or trust, or does not receive some particular piece of property that was

6. Of course, it is not only disappointed heirs who challenge estate plans; disappointed friends or disgruntled employees might attempt a challenge as well. For the sake of simplicity, I am focusing on intrafamily disputes, although many of the principles could apply also to challenges mounted by non-relatives.

promised. The disappointed heir will consult a lawyer, who will devise a challenge based on the type of instrument involved and the legal requirements surrounding it. If a will is the source of the proposed estate distribution, this challenge will take the form of either a challenge to specific will provisions or a challenge to the will's initial admission to probate.

CHALLENGES TO PARTICULAR WILL PROVISIONS ON GROUNDS OF PUBLIC POLICY

Sometimes a disappointed heir concedes that a will is a valid expression of the testator's intent but challenges a particular will provision. Freedom of testation allows a testator to freely dispose of property in any way that is not contrary to public policy,[7] so the usual argument against a provision is that it should be treated as void for reasons of public policy. Classic examples of successful challenges on public policy grounds include cases where a court negates will provisions that are wasteful or destructive in a way that harms surviving persons. For example, courts may overturn provisions that require an executor to raze the testator's house.[8] Similarly, at least one court has refused to enforce a will provision that required the testator to be buried with her valuable jewelry.[9] Still, provisions that are destructive in pursuit of a valid purpose may be upheld.[10]

7. *See infra* notes 128-142 and accompanying text.

8. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (concluding that will provision that instructed executor to raze testator's home, sell lot, and add proceeds to residue of estate went against public policy because damage to neighbors and diminished value of residuary estate were not counterbalanced by any benefits).

9. *In re* Estate of Meksras, 63 Pa. D. & C.2d 371, 372 (Ct. Com. Pl. 1974) (holding that burying jewelry or other valuables would lead to grave-robbing and other violation of cemeteries, in contravention of public interest).

10. *See, e.g.*, *In re* Estate of Beck, 676 N.Y.S.2d 838 (N.Y. Misc. 1998) The will provision directed the executor to demolish testator's house at the estate's expense and offer the property to the city, which had an option to purchase it. *Id.* at 839. The testator was a ninety-seven-year-old woman with no apparent heirs. *Id.* She previously agreed to give the city an option to purchase her home for $100 after her death in exchange for the city dropping a condemnation action against the property. *Id.* at 840.

Courts are indulgent of testamentary provisions that put conditions on bequests. An example of such a provision is a bequest that is to be paid upon a beneficiary's marriage or graduation from college.[11] Because these conditions usually are meant to influence behavior, they often are resented by presumptive heirs and may be challenged. However, courts tend to treat the conditional bequests as choices available to a beneficiary, rather than as restrictions of fundamental rights and therefore violations of public policy. For example, in *Succession of Augustus*,[12] the testator bequeathed a life interest in her separate property to her husband on the condition that he never allowed his former wife to enter the house.[13] The husband remarried his ex-wife after the testator's death and challenged the provision as violating public policy because it restrained his ability to marry.[14] The court upheld the provision, finding that it did not restrict the husband's right to remarry.[15] Similarly, in *Meade v. Pongonis*,[16] the testator's will provided that her son would take his residuary share only if he was divorced or widowed from his wife.[17] The court upheld the provision, noting that divorce is considered in the public interest in many circumstances.[18]

In *Shapira v. Union National Bank*,[19] the testator gave gifts to his two sons on the condition that, within seven years of his death, they each marry a Jewish woman whose parents were both Jewish.[20] One son challenged the provision as violating his constitutional right to marry and therefore void as against public

11. *See, e.g.* Shapira v. Union National Bank, 315 N.E.2d 825 (Ohio Misc. 1974).
12. 361 So. 2d 474 (La. Ct. App. 1978).
13. *Id.* at 475.
14. *Id.*
15. *Id.* at 476 (also stating that second marriages were not entitled to same protections under Louisiana law).
16. No. CV89 0263416 S., 1993 WL 171367 (Conn. Super. Ct. May 19, 1993).
17. *Id.* at *1 (citing Dadoll v. Moon, 91 A. 646 (Conn. 1914)).
18. *Id.* at *1-2.
19. 315 N.E.2d 825 (Ohio Misc. 1974).
20. *Id.* at 826.

policy.[21] The court refused to find that the restriction violated public policy and held that it was only a partial restraint on marriage.[22] In addition, the court noted that the testator's condition deserved to be upheld, coming as it did from deep convictions about his Jewish heritage.[23]

These examples illustrate several things about cases challenging specific will provisions. First, challenges of this type presuppose that the will has been admitted to probate, which means that appropriate proof has been offered that the document is a valid expression of the testator's desires regarding disposition of property. Second, once the will has been proved, there is a strong presumption in favor of honoring the testator's instructions. Finally, before courts will overturn specific provisions, they insist upon a showing of demonstrable and irremediable harm that is not counterbalanced by a demonstrable benefit to known individuals or some segment of society. In other words, it is very difficult to prevail in a challenge to a will provision as contrary to public policy. Disappointed heirs have another option open to them, however: they can challenge the will's initial admission to probate.

WILL CONTESTS

A will contest is a legal challenge to the will's validity, which, if successful, will prevent that will's admission to probate.[24] If the will is denied probate, the estate is distributed either according to the rules of intestate succession or, in some cases, according to the terms of an earlier will.[25] Obviously, the disappointed heir has a motivation to begin a will contest only if the alternative distribution will give him a larger share of the

21. *Id.* at 827.

22. *Id.* at 828–832. The court based its decision, in part, on an estimate of the number of Jewish residents in the area, which the court believed demonstrated that the son had plenty of opportunities to find a suitable Jewish girl to marry. *Id.*

23. *Id.* at 832.

24. *See generally* ROGER W. ANDERSON & IRA M. BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 15-16 (4th ed. 2005).

25. *See generally id.* at 39-40.

estate.

Three main ways to attack the will's admission to probate are: (1) a showing that the will was not executed with the required formalities; (2) a showing that the testator lacked the requisite mental capacity at the time the will was executed; or (3) a showing that the will was obtained through undue influence.[26] In each case, the opponent of the will is seeking to show that the will's execution or the testator's state of mind was defective so that, as a matter of law, the will cannot be accepted as a reliable expression of the testator's intentions.[27]

WILL FORMALITIES

State statutes prescribe the formalities necessary for a valid will. Generally, the will must be in writing, signed by the testator, and witnessed by two or more disinterested persons who may or may not be required to be present at the actual signing.[28] Will contests based on alleged execution defects, historically, were more commonplace than they are today; this is probably because many courts insisted on literal compliance with statutory will formalities even where this clearly frustrated the testator's intent.[29] Cases revolved around esoteric discussions about definitional issues such as what constitutes "presence" at the will's execution. Bruce Mann, a scholar of law and history, described the courts' behavior thusly:

> Was one of the attesting witnesses called from the room while the testator was in mid-signature? If so, the will is invalid because it was not signed in the presence of both witnesses. Did the witnesses sign separately, the

26. *See generally* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 4-39 to 4-81 (4th ed. 2006).

27. *Id.* at 4-39.

28. *See, e.g.*, WIS. STAT. § 853.03 (2004). *See also* UNIF. PROBATE CODE § 2-502 (revised 1990); MICH, COMP. LAWS § 700.2902 (2002). *Compare* VT. STAT. ANN. TIT. 14, § 5 (requiring three witnesses); OHIO REV. CODE § 2107.03 (1953)(allowing oral wills).

29. *See generally* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035-36 (1994).

> first one passing the second on the way out of the room? If so, the will is invalid because the witnesses did not sign in each other's presence. Did the attorney omit the attestation clause, although the witnesses signed a self-proving affidavit that they thought was an attestation clause, that looked like an attestation clause, and that was where the attestation clause would have been? If so, the will is invalid because not attested. Courts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding – always ruefully, of course – that the document clearly represents the wishes and intent of the testator.[30]

In the last part of the twentieth century, probate legislation began to shift in the direction of "dispensing power," a doctrine that had been analyzed and championed by legal scholar John Langbein, among others.[31] Basically, the dispensing power "allows the proponent of a purported will to prove what courts now infer from compliance with the formalities – that the decedent intended the document to be a will."[32] Formalities still may be important indicators of a testator's intent, but minor defects no longer automatically invalidate a will.[33] Incorporation of the dispensing power into the 1990 Uniform Probate Code Section 2-503 represented a huge shift in thinking about what constitutes a valid will.[34]

Disappointed heirs still may bring claims that a will is invalid because it was improperly executed, but the philosophical shift in the way formalities are viewed makes success more difficult.[35] *In re Estate of Shamoon*[36] provides an

30. *Id.* at 1036 (citing *In re* Colling, [1972] 1 W.L.R. 1440 (Eng. Ch.); *In re* Groffman, [1969] 1 W.L.R. 733 (Eng. P.); Wich v. Fleming, 652 S.W.2d 353 (Tex. 1983)).

31. *See* Mann, *supra* note 29, at 1040.

32. *Id.* at 1040-41.

33. *Id.* at 1040.

34. *Id.* at 1035 (describing this as "the most significant change in what constitutes a will since enactment of the Statute of Frauds in 1677").

35. However, not all states follow the more forgiving approach of § 2-503. *See, e.g.*, Smith v. Wharton, 78 S.W.3d 79, 87 (Ark. 2002). The testatrix, who had a broken arm, signed her will with an "X" in front of three attesting witnesses. *Id.* at 81. Because one witness typed the testator's name next to the mark outside of the

illustration. In *Shamoon*, a widow's son filed a will contest claiming that his mother's will was not properly signed and witnessed under Texas law.[37] The will was not self-proved;[38] hence, admission of the will to probate required testimony by the attesting witnesses. Both witnesses had forgotten certain details, but both testified about their usual practices in witnessing wills, such as the fact that they would not have signed if the testator had not signed first or appeared to be under duress or lacking in capacity.[39] The appeals court concluded that the evidence presented was both sufficient to support the jury's verdict that the will was properly executed and sufficient as a matter of law.[40] The court noted that the relevant section of the probate code "requires certain facts to be proved to the satisfaction of the court, showing, among other things not germaine [sic] to this appeal, that the testatrix executed the will with the formality and solemnity required by the law to make it a valid will."[41] In other words, even though certain details of execution were not documented in the record, the court was entitled to find that the formalities had been fulfilled.

Despite the trend in modern probate law that allows courts to look at will formalities in a more functional way, will contests continue to include claims of improper execution, often in conjunction with claims that the testator lacked testamentary capacity or was unduly influenced.[42]

other witnesses' presence, the court held that the will did not comply with statutory requirements for execution by mark. *Id.* at 87.

36. No. 13-03-312-CV, 2005 WL 1831705 (Tex. Ct. App. Nov. 17, 2005).

37. *Id.* at *1.

38. A self-proved will is accompanied by an affidavit, signed by the witnesses, attesting that the statutory formalities were satisfied. *See* ANDERSON & BLOOM *supra* note 24, at 102-103.

39. *In re* Estate of Shamoon, No. 13-03-312-CV, 2005 WL 1831705, at *4-5 (Tex. Ct. App. Nov. 17, 2005).

40. *Id.* at *5.

41. *Id.* at *2.

42. *See, e.g.*, Hensley v. Harris, 870 So. 2d 1227, 1229-30 (Miss. Ct. App. 2003).

LACK OF TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

In addition to fulfilling whatever formalities are required by the relevant state statute, a testator must possess the requisite testamentary capacity for the will to be valid.[43] The testator must be of sound mind and memory at the time the will is executed and may not be under the "undue influence" of any person. If a person is lacking in capacity due to illness (such as Alzheimer's disease or AIDS-related dementia), then any wills created after the onset of the illness are deemed invalid because they do not represent the voluntary, knowing expression of the testator's desires.[44] Will provisions that are the product of an insane delusion also are invalid.[45] In cases where the lack of testamentary capacity is proved, the court essentially finds that the testator (meaning the intact, competent testator) did not make the testamentary statement; it was instead the illness speaking.[46] Thus, a showing of testator incompetence results in the denial of the will's probate.

In re Estate of Washburn [47] provides one example of a successful will contest based on lack of capacity. There, the aunt had executed a series of three wills.[48] The first will gave $1000 bequests to several named individuals, the bulk of the estate to her sister, and a default gift to her niece, Catherine.[49] The second will (executed after the death of her sister) gave $1000 bequests to several individuals, $5000 to her caretaker, and the rest of the estate to Catherine.[50] The third will, executed three weeks later, left $5000 bequests to Catherine and another individual, the rest of the estate to her caretaker.[51] Catherine challenged the admission of the third will to probate, alleging that her aunt had

43. *See* WAGGONER ET AL., *supra* note 26, at 4-39.
44. *See generally id*. at 4-51 to 4-54.
45. *Id*. at 4-45 to 4-55.
46. *See generally id*. at 4-51 to 4-54.
47. 690 A.2d 1024 (N.H. 1997).
48. *Id.* at 1026.
49. *Id.*
50. *Id.*
51. *Id.*

Alzheimer's disease at the time of its execution and was therefore lacking in testamentary capacity.[52] Based on medical and other testimony presented by Catherine, the probate court concluded that the testator lacked testamentary capacity at the time she executed the third will because the testator was confused and forgetful both as to her property and as to her family members, who were the natural objects of her bounty.[53] The Supreme Court of New Hampshire affirmed.[54]

Undue influence is another form of will challenge that may be brought.[55] Usually a disappointed heir alleges undue influence when another beneficiary receives a disproportionate share of the estate. While various technical legal tests for undue influence exist, the claim amounts to a charge that the beneficiary who has been awarded a larger-than-expected share (that is, a larger share than was expected by the challenger) procured that share by pressuring the testator so that the testator was carrying out the beneficiary's desires rather than the testator's own intentions.[56] The difficulty, from a court's perspective, is distinguishing between cases in which a beneficiary engaged in deceit or duress and cases in which the beneficiary received a reward intended by the testator, even though the disappointed heirs believe the gift could be due only to the named beneficiary's manipulative behavior. A few cases illustrate this quandary.

In *Hensley v. Harris*,[57] a testator left most of his estate to his son Ricky, with a residual gift to one of his grandsons, David.[58] After the testator's death, his other children, who were disinherited, challenged the will, claiming *inter alia* that their father had been subjected to undue influence by Ricky.[59] The

52. *Id.* at 1026-27.
53. *Id.* at 1029.
54. *Id.*
55. WAGGONER ET AL., *supra* note 26, at 4-59 to 4-76.
56. *Id*.
57. 870 So. 2d 1227 (Miss. Ct. App. 2003).
58. *Id.* at 1229.
59. *Id.* at 1230.

appeals court affirmed a holding in Ricky's favor, noting that testimony by the will's scrivener showed that the testator disinherited his other children because he was upset with them for having put their mother in a nursing home prior to her death.[60] The court noted that although Ricky had begun to spend more time with his father around the time of the will's execution, there was no evidence that Ricky had been present at meetings to prepare the will or had anything to do with the preparation of the will.[61] The testator used his estate to reward one son for attentive behavior and to punish his other children for their decision to place their mother in a nursing home rather than caring for her themselves.[62] However, the disinherited children were convinced that their brother had engaged in fraud or manipulation of their father.

In re Estate of Glogovsek[63] provides another example of a will contest in the face of disappointed expectations. The testator had no children of his own but had been married for thirty-four years to a woman with two children.[64] The testator originally had instructed his attorney to draft a will leaving his estate to his wife, with his three nieces as contingent beneficiaries.[65] He never executed that will, however, and his wife later instructed the attorney to make changes both to her own draft and to her husband's.[66] After the changes, the will gave the testator's estate to his wife, but if she predeceased him, then to her two children (the testator's stepchildren).[67] The lawyer made the changes as directed, delivered the wills personally, and allowed the testator and his wife to read and discuss the wills privately.[68] Before allowing the testator to execute the will, the lawyer asked whether the testator read it and understood it, and whether it

60. *Id.*
61. *Id.* at 1230–31.
62. *See id.*
63. 618 N.E.2d 1231 (Ill. App. Ct. 1993).
64. *Id.* at 1233.
65. *Id.* at 1234.
66. *Id.*
67. *Id.*
68. *Id.*

was correct.[69] The testator responded affirmatively to all three questions.[70]

Later, the testator's brother, sister, and three nieces challenged the will's admission to probate, claiming that the wife exerted undue influence on the testator.[71] Persuaded by the fact that the wife managed the couple's financial affairs and had orchestrated the will's drafting, the lower court found that the nieces had raised a presumption of undue influence that the stepchildren did not rebut.[72] In reversing the lower court, the appellate court noted that spouses in a close marital relationship naturally exert influence upon each other, and this influence is not improper or undue.[73] The court further held that the lower court improperly found that the testator's blood relations had a better claim to the testator's property.[74] Testimony showed that the testator's stepdaughter was only thirteen at the time of testator's marriage to her mother, and for all intents and purposes, she had been the testator's daughter for thirty-four years.[75] Both she and her brother, who was older and had never lived with testator, were close to their mother and to the testator, visiting frequently and on holidays and special occasions.[76] Testimony from the testator's blood relatives revealed that while their relations were cordial, their contacts had been limited to holidays and special occasions.[77] Each of the nieces had inherited, through joint tenancy, property worth about $2,300.[78] Although the disappointed heirs viewed the estate plan as the result of manipulation by the testator's wife, the appellate court viewed it as a rational recognition that the wife and stepchildren had been the testator's closest family for the past thirty-four

69. *Id.*
70. *Id.*
71. *Id.* at 1233.
72. *Id.* at 1236.
73. *Id.* at 1237-39.
74. *Id.* at 1239-40.
75. *Id.* at 1240.
76. *Id.* at 1234-35.
77. *Id.* at 1240.
78. *Id.* at 1235.

years.[79]

Other cases show similar patterns. *In re Estate of Henke*[80] featured a testator who changed her will the day after her son committed suicide to exclude his children, who previously would have inherited the entire estate.[81] Instead, she left the property to her daughter, who had driven the testator to the lawyer's office in order to change the will.[82] In upholding the lower court's conclusion that any presumption of undue influence had been rebutted, the appellate court cited testimony from the testator's lawyer, who also was her neighbor.[83] He reported that testator had been unhappy with her grandchildren because they did not help their father enough with the farm.[84] He quoted the testator as having said, "They didn't come to see me when I was alive so I don't want them seeing me laying in the coffin."[85] Similarly, the court admitted the will to probate in *In re Estate of Loomis*,[86] a case where the testator "gave cash bequests totaling $26,500 to nine of her nieces and nephews," then left the bulk of her one million dollar estate to two charitable trusts.[87] Some of the nieces and nephews challenged the will, arguing that their aunt had been unduly influenced by her lawyer, who was named as a co-trustee of the trusts.[88] The challengers argued that their aunt was diagnosed with Alzheimer's disease four years after the execution of the will and was therefore susceptible to the lawyer's undue influence in the preparation of the will. The lower court's grant of summary judgment in favor of the will's proponents was affirmed by the appellate court, which noted that there was neither evidence that the testator was under any incapacity when the will was

79. *Id.* at 1240-41.
80. 561 N.E.2d 314 (Ill. App. Ct. 1990).
81. *Id.* at 316.
82. *Id.* at 316-317.
83. *Id.*
84. *Id.* at 319.
85. *Id.*
86. 810 P.2d 126 (Wyo. 1991).
87. *Id.* at 128.
88. *Id.* at 127.

executed nor any evidence that the lawyer engaged in any activity that unduly influenced the testator in her will's drafting or execution.[89] The aunt's apparently spontaneous charitable impulses were viewed by her disappointed relatives as the product of manipulative and self-serving behavior by her lawyer.[90]

In these cases and countless others like them, there is a discrepancy between what the testator intended and how the disappointed heirs interpreted the testator's intentions. In some cases, such as *Hensley* or *Glogovsek*, the testator may have intended only to reward a family member who was particularly close or solicitous during the testator's lifetime. In other cases, like *Henke*, the testator may have been punishing the disappointed heirs for things done or not done. Still in other cases, such as *Loomis*, the testator may have thought she was leaving appropriate bequests for the heirs, while leaving the rest of the estate to a more deserving entity. However, to the disappointed heirs, it seemed that the person who received unexpected benefits under the will "took over" or isolated the testator from the affections of the rest of the family, resulting in an unjust disposition of the testator's estate.

Why do the testators, the beneficiaries and the disappointed heirs have such different views of the ultimate will distribution? Perhaps the competing views result from different perspectives not only about their family relationships but also about property ownership within the family.

DISPUTES OVER ESTATE DISTRIBUTION: WHY DO FAMILIES FIGHT?

At this point, we must ask two questions: (1) why *would* a testator disinherit or otherwise disappoint the presumptive heir;

89. *Id.* at 129-30.

90. *See id.* at 128. The lawyer's actions were portrayed as self-serving by the disappointed heirs who claimed that the future trustee fees that would be paid to the lawyer and his partner were a benefit that the lawyer had manipulated for himself from the testator. *See id*.

and (2) why might a presumptive heir form feelings of entitlement so intense that he believes he is justified in challenging his ancestor's will?

One way to analyze these questions is to consider the attitudes that current property holders and their presumptive heirs have about property. There are many reasons a testator might reduce a presumptive heir's share or even disinherit a presumptive heir altogether. The larger question is why testators feel free to do so, rather than feeling obligated to their presumptive heirs. To put it another way, why do living property owners feel entitled to control their property after their deaths? Similarly, why do presumptive heirs feel entitled to receive anything at all from their ancestors? Why do they expect post-mortem gifts in addition to whatever lifetime support their older relatives have already provided to them?

FREEDOM OF TESTATION AND LIVING PROPERTY OWNERS

Much has been written about the relationship between owners and their property in Anglo-American law and society. There is a strong legal and cultural tradition of freedom of property disposition in American law.[91]

> Freedom of disposition, or donative freedom, encompasses several distinct yet related ideas – the right to give your property away during life and to pass it on at death, the right to choose who gets it, the right to choose the form in which they get it, and the right to give another person the right to make those choices even after your death.[92]

Various justifications have been offered for allowing broad powers over property to extend beyond the death of the owner. Some have argued that freedom of testation provides an incentive to acquire and save property, and that it encourages beneficiaries to provide the necessary social services, such as

91. WAGGONER ET AL., *supra* note 26, at 1-6.
92. *Id.*

care during the old age or illness of family members.[93] Of course, people accumulate property for many reasons. "Persons accumulate [property] to gratify their egos, to gain prestige, to gain power – and simply out of habit."[94]

A property owner's attitude toward the ownership and control of her property is often complicated. Property may represent self-image, status, or a sense of control over one's own life or over the behavior of others.[95] According to sociologist Juliet Schor, this is particularly true in a materialistic society like the United States:

> What [many Americans] acquire and own is tightly bound to their personal identity. Driving a certain type of car, wearing particular designer labels, living in a certain kind of home, and ordering the right bottle of wine create and support a particular image of themselves to present to the world.[96]

Ownership of any kind of property may symbolize success and power to the owner. Car ownership is but one example of the psychological dynamic of property ownership. People often buy a particular car because of its image.[97] Acquiring a driver's license is viewed as a gateway to maturity and independence, and surrendering a driver's license in old age is seen as a surrender of autonomy.[98]

Property may have increasing importance as people age.

> [F]or older people with physical or mental frailty, property is often virtually identical to liberty because assets are essential for liberty. Once isolated by a physical or mental disability, only the elder's assets can provide an avenue of access to human companionship and services, and a personal sphere of importance that

93. Adam J. Hirsch & William K. S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8-11 (1992).

94. *Id.* at 8.

95. *Id.*

96. JULIET B. SCHOR, THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON'T NEED 3 (2001).

97. *See* JOHN DEGRAAF, DAVID WANN, & THOMAS H. NAYLOR, AFFLUENZA 27 (2001) (quoting various people who describe a SUV as "a status symbol" that "makes me feel powerful").

98. Editorial, *Driving Past the Point of Safety?*, PLAIN DEALER, June 4, 2006, at H2.

> prevents isolation and, potentially, meaninglessness in continuing life.[99]

Anyone who has ever offered a material reward in exchange for good behavior knows that the power of property can control the behavior of others, such as family members. This control often occurs while the would-be benefactor is alive and can take an infinite variety of forms. For example, a parent, who agrees to support an adult child while the child is enrolled in college, is in effect using family wealth to influence the behavior of the adult child. It already has been noted that the incentive to provide care to the benefactor is one justification for freedom of testation, even though it also has been noted that social services "are forthcoming, in poor families as in rich, more or less irrespective of the suppliers' inheritance prospects. Just as an assortment of motives drives persons to produce wealth, so does a complex of motives and emotions stimulate persons to care for each other."[100]

Testamentary freedom includes the concept that property owners are free to attempt to influence beneficiaries' behavior from beyond the grave, by conditioning the receipt of bequests or trust pay-outs on specified behavior.[101] While such "dead hand" control often is criticized, we have seen that courts frequently allow it, treating it as generally within a property owner's rights as long as the restriction has a positive purpose and does not cause irremediable harm to living persons.[102]

Property owners may also exercise testamentary freedom in reaction to the past behavior of family members. A relative who cared for and visited the testator may be rewarded by a bequest; a relative who was less attentive or acted in a way displeasing to the testator may receive less, or nothing at all. Finally, the testator may attempt to distribute a greater portion of the estate to persons she perceives to be needier, while persons whom the

99. Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 2 (2003).

100. Hirsch & Wang, *supra* note 93, at 11.

101. *See* Mann, *supra* note 29, at 1037.

102. *Id.*

testator believes have plenty may receive less. The presumptive heirs' perception of what is "enough" may vary considerably from the testator's perception, as any survey of will contest cases demonstrates.

FREEDOM OF TESTATION AND PRESUMPTIVE HEIRS

The tradition of testamentary freedom in the United States makes it difficult to understand why anyone would feel entitled to inherit property or would feel secure in such an expectation. After all, as just described, property belongs to its owners, who are free to dispose of it as they please, either during life or at death.[103] In the United States, testators may freely disinherit their children, even if the children are minors.[104] How could such a system support any expectations?

One source of presumptive heirs' hopes of property ownership may be the legal system itself. It has been suggested that a testator's supposedly limitless freedom of disposition is in fact somewhat limited because the law favors predictable distributions to natural objects of a donor's bounty, namely close family members.[105] "Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent."[106] In other words, you can give your property away however you like, but the further you are from a "normal" disposition to your presumptive heirs, the more likely a court will be to entertain a challenge to the gift.

Courts rarely declare wills invalid unless they are contested, and relatives ordinarily do not contest wills that leave

103. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235 (1996).

104. Louisiana is the sole exception to this rule. LA. CIV. CODE art. 1493(A)(2006). *See also* Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 IND. L. REV. 344, 354 (2001).

105. Mann, *supra* note 29, at 1048-49.

106. Leslie, *supra* note 103, at 236.

shares to presumptive heirs and treat equally persons who are of an equal degree of relationship.[107] Disinheriting presumptive heirs, however, may well precipitate a will contest. Courts view "unnatural" dispositions with suspicion but give a tacit presumption of validity to "natural" distributions; thereby, courts are effectively imposing "upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse or persons related by blood to the testator."[108] This bias in the law probably discourages will contests when heirs receive reasonable shares of an estate, but it leaves the door open to will contests when disappointed heirs receive a lesser share or nothing.

Case law and other sources suggest that aside from expectations encouraged by this alleged bias in favor of presumptive heirs, there are other factors that influence the attitudes that family members have towards the property held by older generations. Family members who are potential objects of an owner's bounty may have complicated attitudes towards the property. Property received from an ancestor may signify independence or status in itself. The current generation of would-be beneficiaries may also regard an inheritance as an opportunity to be as well off as their parents. Due to various economic factors, such as the demise of individual pensions and higher medical costs, baby-boomers and their children may be counting on an inheritance to make ends meet as they age. They may be disappointed, because their aging parents are living longer and also have increased expenses for health care and daily maintenance.[109]

In acknowledging the diverse feelings that members of different generations may have about property, one author commented that "money, she says, is never about money. It's

107. *See generally* ANDERSON & BLOOM, *supra* note 24, at 118-19.

108. *Id.*

109. *Id.*; Bob Morris, *Stop Spending My Inheritance*, N.Y. TIMES, July 30, 2006, § 9, at 1.

about other things . . . [u]sually anger and guilt."[110] An inheritance also may represent the approval or love of the benefactor-relative. In a compelling essay about a mother-daughter relationship, writer Daphne Merkin makes the following observation:

> No wonder when it comes to love, we keep counting the ways, tallying up the total. When I bring up the issue of inheritance with my mother, then, I am asking her not to abandon me to wanton circumstance, to mother me from the grave. It is a fantasy of absolute safekeeping I am requesting, one that will cradle me from life's indignities.[111]

The case law supports these characterizations of the symbolic aspects of an inheritance. In *Nelson v. Daniels*,[112] a disinherited son contested his mother's will alleging lack of testamentary capacity and undue influence.[113] The will was executed sometime after the son and his mother had been embroiled in a legal dispute over some of the mother's property over which the son had had a power of appointment.[114] The son allegedly transferred the property to himself.[115] Despite the admitted conflict, the son apparently expected to inherit from his mother's estate, and he contested the will even though he had no material facts to support his claims.[116] When asked if he knew of any other individual who could testify to his mother's lack of capacity, he responded: "Well, put it this way. You're not going to make me believe that my mother hated me the day she died."[117] Thus, to the son, a portion of his mother's estate symbolized her love, and presumably her forgiveness for their

110. Bob Morris, *supra* note 109, § 9, at 3 (citing ROBERTA SATOW, DOING THE RIGHT THING: TAKING CARE OF YOUR ELDERLY PARENTS EVEN IF THEY DIDN'T TAKE CARE OF YOU (2005)).

111. Daphne Merkin, *Mother of All Surrogates*, N.Y. TIMES, May 14, 2006, § 6, at 74.

112. No. 94CA29, 1995 WL 535200 (Ohio Ct. App. Sept. 5, 1995).

113. *Id.* at *1.

114. *Id.*

115. *Id.*

116. *Id.* at *2.

117. *Id.* at *3.

past conflicts.

Similarly, *In re Estate of Glogovsek*, discussed earlier, involved a conflict between two stepchildren and their father's sister and nieces.[118] In deposition testimony, the testator's sister said the following:

> [S]he had always maintained a close relationship with Frank, as had her daughters, and that she thought Frank would leave her something in his will. The reason for the will contest, in her opinion, was that she and her daughters had been close to Frank and felt that Frank should have "thought of" them in his will.[119]

The disappointed heirs in this case appeared to be looking for affirmation of their importance to the testator as much as they were looking for money.

This symbolic quality of gifted and inherited property is one factor that compels family members to battle on until the property itself is used up in the process. Other factors include differing notions of financial need, ideas about fairness, sibling rivalry, and unrealistic expectations about how large the estate will be.[120] As a practical matter, these disputes must be avoided even if the claims are losing claims because the legal battle can consume a large percentage of the disputed property.[121] Even if the dispute is settled, intended recipients will sacrifice part of their shares both for the settlement and for the court costs and attorneys fees. So how do you keep them from fighting after you are gone?

AVOIDING POST-MORTEM PROPERTY DISPUTES

Wills are designed to enable the testator to direct property distribution after her death, and the testator naturally expects those directions to be followed. As we have seen, however, merely having a will is not enough to prevent family fights over

118. *In re* Estate of Glogovsek, 618 N.E.2d 1231, 1233 (Ill. App. Ct. 1993).
119. *Id.* at 1235-36.
120. *See generally* ANDERSON & BLOOM, *supra* note 24, at 118-21.
121. *Id.*

the property. The testor's will must be drafted and executed in a way that is most likely to result in compliance with the testator's last wishes. Testators need to take necessary technical steps to ensure that their wills will be admitted to probate. Testators also need to consider emotional issues and other family issues, in order to ensure that the family peaceable complies with the will after the testator's death.

TECHNICAL STEPS

Estate planning manuals contain many suggestions for assuring that the client's wishes are carried out after the death of the client. Many of these focus on using the most appropriate estate planning vehicle for a particular purpose.[122] For example, a client who is ready to give property away during her life may benefit from transferring title to joint tenancy with the intended beneficiary or from setting up an inter vivos trust.[123] In either case, the fact that the property is transferred before the client's death makes the client's intent very clear, and makes later challenges more difficult and therefore less likely.[124] Clients who wish to retain ownership and control until the moment of death are encouraged to use wills, with or without testamentary trusts, which spell out every conceivable contingency with extreme detail.[125] Clients who are concerned about will contests may be advised to use *ad terrorem* clauses, which cancel the testamentary gift of any beneficiary who challenges the will.[126]

However, these different estate planning tools do not address the emotions that arise in the context of estate planning. Remember that the disappointed heir is facing a disposition that is likely to be unwanted from a psychological as well as a monetary point of view. With this in mind, the client and her

122. *Id.* at 118-22.

123. *See generally* JESSE DUKEMINIER, ET. AL., WILLS, TRUSTS AND ESTATES 299, 344-45 (7th ed. 2005).

124. *See generally* ANDERSON & BLOOM, *supra* note 24, at 121.

125. *Id.* at 120-121.

126. *See generally* DUKEMINIER & JOHANSON, *supra* note 123, at 167.

lawyer must write the estate plan in a way that clearly demonstrates that the testator did in fact leave these directions, that she meant them, and that it is only fair that the directions operate as intended.

Once the testator settles upon a particular distribution, a great deal of future conflict can be avoided if she includes clear directions and statements of intent in the will. The lawyer should explore every imaginable fact pattern with the client in order to discern what the client intends. Then, careful attention should be given to observing formalities and creating a record showing that everything was in order.

Proving that the will was properly executed should be as simple as having an attestation clause within the document itself, in which the witnesses attest not only to the will but also to compliance with statutory formalities.[127] In some states, an affidavit signed by the testator and witnesses, which affirms that the will was executed according to statutory formalities, is conclusive evidence that the will was executed in compliance with the applicable statute.[128]

Establishing that a person is of sound mind and memory also is fairly simple: it need only be shown that the testator knew the nature and extent of her property, recognized the natural objects of her bounty, understood the relationship between the two, and was not suffering from insane delusions that affected her distributions under the will.[129] These requirements are interpreted rather generously and can be documented with simple statements in the will by the testator (such as, "I am aware that I have two nieces who are the children of my late sister") or attorney file memos (such as, "On December 13, Mr. Smith was lucid, and talked at length about his real estate holdings and who he would like to receive them"). In cases

127. *See generally* WAGGONER ET AL., *supra* note 26, at 4-6 to 4-12.

128. *See, e.g.*, WIS. STAT. § 853.04 (setting out appropriate form for affidavit). *See also* UNIF. PROBATE CODE § 2-504 (Revised 1990); 755 ILL. COMP. STAT. 5/6-4 (amended 1980).

129. *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 292-293 (3d ed. 2004).

where the testator is known to have some illness that might affect thought processes, a videotape documenting her lucidity might be to supplement the will. Because videotaped wills are not recognized in lieu of written wills, any tape must only supplement the estate planning documents.[130]

Where a testator omits a potential beneficiary, or gives unequal gifts to persons with the same degree of relationship, the usual approach in establishing the testator's intent is a simple statement of acknowledgement in the will.[131] For example, the testator may eliminate any concerns about drafting mistakes or erroneous omission by stating "I am aware that I have another daughter, Marjorie, who is not inheriting property under my will." Statutory remedies for omitted descendants are limited to inadvertent or mistaken omissions, and a statement that the testator is cognizant of the omission ordinarily eliminates these remedies.[132] Giving a reason for a reduced gift or disinheritance in the will itself usually is discouraged. This is because the accuracy of the statement may be challenged after the testator's death, and deliberately negative statements about any person expose the estate to claims of testamentary libel.[133]

Testamentary libel deserves special mention because some testators use explicit testamentary statements to vent their wrath at presumptive heirs. The statements may provoke disappointed heirs to challenge the will on principle. The literature provides many examples of such antics. For example, one testator included the following language in his will:

> Unto my two daughters, Frances Marie and Denise Victoria, by reason of their unfilial attitude toward a doting father, . . . I leave the sum of $1.00 to each and a father's curse. May their lives be fraught with misery, unhappiness, and poignant sorrow. May their deaths be soon and of a lingering malignant and torturous nature. May their souls rest in hell and suffer the

130. *See generally* WAGGONER ET AL., *supra* note 26, at 4-9.

131. *See generally* ANDERSON & BLOOM, *supra* note 24, at 121.

132. *See* DUKEMINIER & JOHANSON, *supra* note 123, at 474-81.

133. *See generally* Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749 (1994).

torments of the condemned for eternity.[134]

Another example can be found in the will of Mr. Garvey B. White, which included the following bequest:

> Before anything else is done fifty cents be paid to my son-in-law to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.[135]

In these cases, the disappointed heirs had powerful emotional as well as monetary motivations for challenging either the will or the offending language. Obviously, inflammatory language in wills should be avoided by testators who want to preserve peace in the family.

NON-TECHNICAL CONSIDERATIONS

When the share of a disappointed heir has been reduced or eliminated, he likely is responding not only to the loss of property but also to the perceived rejection and injustice that this implies.[136] Therefore, any client who is considering a testamentary distribution that reduces or eliminates shares of presumptive heirs must consider the emotional realities of such a plan.

Obviously, a testator should have sound reasons for treating natural heirs unequally or disinheriting any or all of them. Sometimes the reasons are very sound, and the testator should proceed with the cautions described in the previous section.[137] Because unequal dispositions invite will contests, the testator should be honest with herself about whether the message she intends to send with her testamentary plan will be received the way she imagines. As described above, a testator

134. *Id.* at 752 (citing Our Daily Bread, February 1994, at entry for February 18, 1994).

135. *Id.* at 751 (citing John Marshal Fest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 311 (1934)).

136. *See supra* note 115-28 and accompanying text.

137. *See supra* notes 128-42 and accompanying text.

might want only to reward good family behavior or equalize the financial positions of her beneficiaries.[138] Those beneficiaries, though, might think the will shows that the testator did not love or value them.[139]

The testator should be sure that an unexpected distribution really is what she wants. She should think long and hard about the bitterness and fighting that might result after her death when it is no longer possible for her to explain or defend her position. Nor will it be possible at that late date to soften the position or soothe hurt feelings and feelings of rejection. Moreover, the testator (who has presumably gone to a better place) will not be around to deal with the bitterness and contentiousness that result from an unexpected will distribution. One criticism that has been leveled against testamentary freedom is the fact that it is exercised by people who are exempt from the consequences. "[A] testator may also lack inhibitions at death that tempered her course of conduct during life. As one astute observer has remarked, 'Making a will is an exercise of power without responsibility.'"[140]

It has been argued that parents cannot reliably control the behavior of their children once the children have attained a certain pre-adolescent age.[141] Attempts from beyond the grave at ancestral control of one's relatives are even less likely to be successful, but they are more likely to yield bitterness, resentment, and will contests.[142] The *Shapira* case, described above, provides a cautionary tale.[143] There, the father may have intended for his son to end up happily married to a woman from within his own tradition. The actual results were otherwise. The son challenged the terms of the father's gift, and lost.[144]

138. *See supra* note 105-09 and accompanying text.

139. *See supra* note 115-27 and accompanying text.

140. Hirsch & Wang, *supra* note 93, at 13 (quoting M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173).

141. Judith G. McMullen, *"You Can't Make Me!": How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L.J. 603 (2004).

142. *See generally* Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ohio Misc. 1974).

143. *Id.*

144. *Id.*

Twenty years later, the authors of a leading trusts and estates casebook contacted the son's attorney to obtain the son's comments on the case, but Mr. Shapira refused to discuss the case.[145] The author stated, "It was a bitter experience, he said, which he wanted to forget."[146] Few testators would knowingly choose that legacy for themselves.

Testators should exercise particular caution in circumstances where they are tempted to condition gifts under wills or testamentary trusts on the behavior or accomplishments of the prospective beneficiaries. There has been a recent trend among some testators, like the elder Mr. Shapira, to create incentive trusts that require heirs to reach milestones or take certain actions, like marrying or graduating from college, to receive money.[147] Sometimes, heirs receive payments commensurate with what they earn themselves.[148] As mentioned above, where trusts are created during the grantor's lifetime, it is more difficult to challenge them later.[149] Where trusts are created by a will, they inherently are subject to the same challenges as to a will described above. In other words, where a will creates a trust, the trust fails if the will is not admitted to probate. A prospective heir who expected an outright gift or a steady flow of trust income may not be happy with a conditional "incentive" gift and may try to contest the will. "[C]hildren can be resentful if they feel that their parents did not trust them."[150] Critics of incentive trusts point out that parents may be too controlling and may unintentionally treat their children or grandchildren unfairly.[151] "The problem is that there are too many what-ifs. What if one sibling can do something and the other can't? What if one becomes disabled,

145. DUKEMINIER, *supra* note 123, at 31.

146. *Id*.

147. Catherine M. Allchin, *In Some Trusts, the Heirs Must Work for the Money*, N.Y. TIMES, Jan. 29, 2006, § 3, at 6.

148. *Id.*

149. *See supra* note 130 and accompanying text.

150. *Id.* (quoting George S. Holzapfel, an estate planning lawyer at Lasher, Holzpfel, Sperry & Ebberson in Seattle).

151. *Id.*

depressed, or has an accident?"[152] Where a prospective heir is young or inexperienced with money, it may make more sense to use a conventional support trust with a great deal of flexibility for the trustee's distribution decisions.

When a disappointed heir's share has been reduced or eliminated, she may be unpleasantly surprised and view the unexpected disposition as unfair. Therefore, it is important for the testator to encourage reasonable expectations among presumptive heirs. Ideally, the testator should communicate her intentions, and the reasoning behind those intentions, to any heirs close enough to have a reasonable expectation of inheritance. In most families, this surely would include spouses and children; it might also include grandchildren, nieces and nephews, and siblings. Warren Buffett, who has long derided dynastic wealth, provides an example of this.[153] He has announced the transfer of property valued at thirty-one billion dollars to the Bill and Melinda Gates Foundation, which will utilize it for charitable pursuits.[154] Buffett also set up charitable foundations for each of his three children to administer, and has announced gifts of one billion dollars to each of these foundations.[155] Although Buffet certainly provided many benefits to his children over the years, he consistently made it clear to them that they will not inherit the bulk of his wealth.[156] "He signaled early and often to his children what his intentions were. They built their lives accordingly."[157]

Understandably, many clients of lesser means than Mr. Buffett resist having financial discussions, especially with their descendants, believing firmly that their assets are nobody's

152. *Id.* (quoting Ralph M. Engel, an estate planning lawyer in the New York City office of Sonnenschein, Nath & Rosenthal).

153. Jeff Bailey, *Buffett Children Emerge as a Force in Charity*, N.Y. TIMES, July 2, 2006, § 1, at 1.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (quoting Sherry S. Barrat, president of personal financial services at the Northern Trust Company, a large bank in Chicago).

business but their own.[158] Others feel uncomfortable discussing the issue or want to avoid family fights or hard feelings.[159] Children may be reluctant to inquire into the matter for fear of seeming greedy.[160] Having the discussion anyway may temper expectations and result in fewer shocks, hurt feelings, and will contests in the end. This is not a magical remedy for family feuds; however, it is just one more precaution that can be undertaken. As a review of will contest cases reveals, some disappointed heirs challenge wills even though the testator may have signaled or informed the disappointed heirs that they would receive no inheritance. For example, in *Nelson*, one suspects that the mother told her son not to expect an inheritance during the course of the mother-son litigation over the son's improper appropriation of the mother's property.[161] Sometimes even a frank discussion will fall on deaf ears.

CONCLUSION

We are mortal creatures and, the pharaohs notwithstanding, we cannot take our material wealth with us into the next world. Under American law we have a significant, although not infinite, amount of control over who will receive our remaining property after we are gone. While many articles focus on the way to accomplish a testator's objectives, this article encourages the reader to reflect on the emotional consequences of some of those objectives. The emotional legacy left to family members can be as important as the financial legacy. The testator who is realistic about the likely effects of an unequal distribution of wealth among family members, and honest with family members about her intentions, has the best chance of leaving a peaceful family behind. A peaceful family is a wonderful legacy indeed.

158. *See generally* ANDERSON & BLOOM, *supra* note 24, at 69-73.

159. *Id.*

160. Bob Morris, *supra* note 109, § 9, at 1.

161. *See* Nelson v. Daniels, No. 94CA29, 1995 WL 535200, at *2 (Ohio Ct. App. Sept. 5, 1995).