

This article examines the use of personal testaments to express or document the client's values, family concerns or history, and individual preferences. It discusses reasons to use them and roles of both attorneys and clients in drafting of such statements.

TESTAMENTS FOR YOUR ESTATE PLANNING DOCUMENTS

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A person's will contains the last words his or her family will ever hear from the deceased. Unfortunately, estate planning documents typically include a lot of legalese and tax planning language and little that "speaks" to the deceased person's family. Although often titled "Last Will and Testament", individual testaments have gone out of fashion.

Attorneys may draft and redraft, so that their documents are legally precise without addressing the family's emotional needs. Some wills provide for disowning a child or adding restrictive provisions for a child who has committed an offense against society or the testator with little or no reason provided. Provisions may also be added to induce behavior favored by the testator, called "incentive trusts". These are not testaments – they are legal tools. A common misconception is that testaments are only religious statements of faith, but testaments can address almost anything the client wants to say to his beneficiaries.

Clients usually come to an attorney because they need help with legal and tax technicalities and document formalities – and that is what attorneys are trained to do. In recent years, it has become more common for financial and legal providers to delve into the emotional dynamics of a family to better provide services to them, but little, if any, of this personal information may get incorporated into a estate planning documents.

What is a Testament? They statements are written by the testator (person creating a will) or a settlor (person creating a trust) that express that individual's personal values, expectations, history, desires, etc. A testament is often thought of as a person's "last words" to the family, but can also be a personal expression.

Why Have a Testament? Legal documents may either soothe or aggravate the survivors' stress. Avoidance of litigation is an important reason for the inclusion of testaments. This is particularly important when assets will not be divided equally among children, any child has unusual circumstances, or there is a remarriage. In the absence of an explanation, most surviving heirs find a message in the assets left to them. For example, when everything is left to charity, a child might feel disinherited. If all assets are left or not left in trust (for tax and creditor protection) a beneficiary might feel untrusted. Reasons provided by the testator or settlor can alleviate suspicions.

Statements of personal values by the client can also reduce administrative costs and future friction among the beneficiaries. Such statements can streamline the fiduciary's decisions and provide objective reasoning for discretionary determinations. When a fiduciary understands the values and priorities from which the decedent operated, determining a distribution course acceptable to the family (within the confines of the document) is likely to be more effective and efficient.

Value of a Testament: Litigation may be necessary to ultimately accomplish the clients' objectives, but clients rarely have estate planning documents drafted for the desired purpose of being litigated. A testament provides a deterrent to litigation. The two most likely claims against a will are incapacity of the testator to execute a legal will and undue influence of others so the will isn't the testator's real desire. Often the words of the testator resonate with the family and unlike a typical probate litigation, the main player (the decedent) IS able to have a voice in a question of capacity, of interpretation or intent. A common assumption is that blood relatives will receive everything equally, and beneficiaries often have no knowledge of the decedent's trusted relationships. The testator's explanation for an atypical disposition may reduce the emotionally charged allegation of undue influence and his words may rationally explain a disposition, thus dispelling incapacity concerns.

Another value of testaments is the healing and continued relationship of the beneficiaries. We often see the children voice their separate interests when the parents are no longer present to negotiate or quash disputes. A testament IS the voice of the parent for grieving or dysfunctional children, and it may provide an explanation for the legal disposition or provide an expectation for the family's behavior. This "voice from the grave" can be very powerful for both legal evidence and family divisions. It can even provide a unifying legacy for the survivors.

Lastly, trustees greatly appreciate the inclusion of the settlor's values and priorities upon which they can base future decisions in administering a decedent's documents. It is impossible to predict all the circumstances for decisions a trustee might have to make over the life of a trust, but by giving guidance of the family's core values, expectations and history, the trustee will be better able to determine and defend a decision to the beneficiaries.

Preparing a Testament: Sometimes testators already know what they want to say and can write it down easily. Others need some help identifying their intent and overcoming "writers block". For them, the attorney may be able to provide samples of testaments. The testator then takes the samples home to do the writing.

There is value in having clients put their thoughts, priorities, and convictions into their own words, because such statements are more credible to family members. The attorney's legally exact but impersonal choice of words will sound like someone put words in the decedent's mouth--because the attorney did.

Attorney Review: Once the testator provides the draft of a testament, attorney review is important. Sometimes the testament will highlight an asset disposition or distribution plan that does not effectuate the client's intent stated in the testament. This is a great opportunity for clarification to avoid future conflict. The attorney can also add a sentence or two indicating that the client's statement is not legally binding and will not control over any possible conflict with the legal provisions.

The attorney should review the testament in light of the legal asset disposition and fiduciary appointments. Any inconsistencies provide an opportunity for discussion and revision of the provisions or testament. An attorney should also review the client's statement for potential legal issues and use his or her judgment to include only statements that are likely to defuse or ease the situation for surviving family members. Without attorney review, there is a significant chance the statement drafted by an untrained person will either conflict with or revoke part or all of any legal estate planning document.

The attorney should also determine the best document to place it in. The estate planning document chosen for a testament may direct the statement to the appropriate beneficiaries or facilitate the client's desire for privacy. A will that is probated typically becomes public record in the county where it is probated. A revocable or irrevocable trust agreement may be provided only to named beneficiaries. Tangible personal property memoranda may become public with a will or may never be disclosed to anyone but the executor. Health care powers of attorney and living

wills may not be seen by anyone other than the health care providers who are also bound by patient privacy rules or may be read by all persons provided a copy.

Many attorneys prefer not to include a client's personal testament in the wills they draft. They may be uncomfortable with the legal implications and tell the client to put their testament in a letter to the family separate from the legal documents. There are risks that a separate letter may not be found or may be found too late. There is also the risk that a separate letter might conflict with and control over the legally drafted documents.

Client Privacy: Some clients may want to maintain privacy concerning family matters related to a specific statement in a document. However, with very rare exceptions, attorney-client confidentiality applies to all family matters disclosed to the attorney. Because an attorney is skilled in drafting with carefully chosen words, he or she could assist in revising the testament to accomplish the desired statement while maintaining privacy from third parties. Examples include:

- Limiting distributions for beneficiaries who have been convicted of a felony, rather than mentioning a child's struggle with drug abuse.
- Stating the desire for fiduciaries to comply with the tenets of a specific religious doctrine, rather than referring to a child's third divorce or out-of-wedlock child.

Types of Statements: Several kinds of testaments have value in reducing estate and trust administration conflicts and litigation, promoting family healing and harmony, and leaving a legacy of the decedent's life. Five basic types of testaments may be particularly beneficial: (1) explanations; (2) affirmations; (3) expectations; (4) historical; and (5) values.

An explanatory statement describes the circumstances and logic behind an action in the legal document. If the actual disposition may appear unfair to an heir, an explanation can go far to dispel or resolve disputes. An example of an explanation might be:

I have intentionally not provided for my child X under this provision, because I want to be fair to all of my children, and I previously paid for a home for X and her family.

A testament may provide healing words of value from the decedent. Affirmations are the words many grieving family members long to hear. If they did not hear the words in life, or in the decedent's documents, those left behind may seek such affirmations in the dispositions of estate assets. Seeking more assets to prove personal worth can taint not only the probate process, but also the future relationships of surviving relatives. Where there are tensions in the family, such as new spouses with children from prior marriages, affirmations can be valuable in defusing hurt that leads to disputes. Words of affirmation may include acknowledgment of a person's accomplishments, actions, values, or character. Examples could include recognition of a child's success at overcoming an addiction, pride at a person's educational accomplishments or business success, or appreciation for a family member's support, persistence or talents.

An expectation is a statement of how the testator would like the beneficiary to use the inheritance or providing an aspirational goal for a recipient. This often includes or builds on words of affirmation, but goes further by stating a desired goal. This is especially useful for parents and grandparents who want to pass along their values or place value on certain virtues. It can create a legacy of family values while providing the means to accomplish them. Such a statement can bridge the generations and make the inheritance personal, not just monetary. Examples might be as simple as the desire for each beneficiary to obtain the best education desired, or it could voice support for hard work, pursuit of the arts or missionary work.

The historical statement can be a genealogy of family members, expanded with personal traits, geography, experiences, or values, or it might be a statement by the client concerning the history or background of a specific item--perhaps a family heirloom, collection or other prized possession. Similar to statements of expectations, which create a future goal, historical statements can create a legacy for a family by documenting the family's past accomplishments, traditions and values. An example might be:

In 1853, my great, great grandfather, Bob Jones, at age 20 left the love and security of his family and home in Baltimore, Maryland. Taking his new bride, Sue, with him, they traveled west, seeking a new future in ranching. After many months of difficult and dangerous travel, Sue found herself with child (my great grandmother, Jane) and the young couple decided to settle in Colorado to raise their new family. The ranch my brothers and I inherited from my grandparents, Dick and Mary Brown, was the result of the pioneering spirit and lifelong work and sacrifices of Bob and Sue Jones. I want my descendants to always know the character of their ancestors and the sacrifices made for their benefit.

Finally, a statement of a testator's personal faith and values is often a reflection of his or her own life. Such a statement can include declarations of religious faith, work ethics, belief in the family unit, charity or education. The statement often includes the events that formed such character values (historical) and why they were important to the client. Above all, these statements are a chance for the client to document his or her core values for posterity. An example might be:

As a born again follower of Christ, I know that when I am absent from the body, I will be present with the Lord in heaven, so please do not grieve my passing. Instead, celebrate the life given to me and to each of you, to live abundantly in God's blessings by confessing your sin and seeking His grace and forgiveness for your mistakes and His strength for your trials. I pray that God will now provide for my children as their Father in every way I am absent. I anticipate our joyous reunion in heaven.

Conclusion: As estate taxes are reduced and as wealthy families plan during life to avoid estate taxes, tax planning becomes less important in the preparation of legal documents for estates. However, the family's emotional and historical values will never cease to be important to the family. Documenting a person's desires and reasoning for estate disposition and providing for family harmony, emotional healing and growth can be facilitated through testaments in estate planning documents. Minimizing the potential for family disputes and litigation after a family member's death is an added reason to have added personal testaments to your documents, but attorney review and assistance is needed to accomplish these benefits.

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