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“Letters Non-Testamentary”

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## Letters Non-Testamentary

Deborah S. Gordon\*

Dear Shuhra and Shaharзад,

Today I am going on political business to Faizabad and Darwaz. I hope I will come back and see you again, but I have to say that perhaps I will not. There have been threats to kill me on this trip. Maybe this time these people will be successful . . . . As your mother it causes me such bitter pain to tell you this. But please understand I would willingly sacrifice my life if it meant . . . a better future for the children of this country. I live this life so that you—my precious girls—will be free to live your lives and to dream all of your dreams.

If I am killed and I don't see you again, I want you to remember a few things for me. . . . You have my authority to spend all the money I have in the bank. But use it wisely and use it for your studies.<sup>1</sup>

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Letters, compared to other genres, may appear humble, because they are so overtly tied to particular social relations of particular writers and readers, but that only means they reveal to us so clearly and explicitly the sociality that is part of all writing—they give the game away so easily.<sup>2</sup>

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\* Assistant Professor of Law, Drexel University Earle Mack School of Law. I would like to thank Tabatha Abu-El Haj, Al Brophy, Clare Coleman, Dan Filler, Jonathan Offenkrantz, and the Drexel University Earle Mack School of Law junior scholars group for reading and commenting on earlier drafts of this Article. Thanks also to Pamela Bagdis and Kaili Janus, who provided valuable research assistance, and to Peter Egler, professional staff of Drexel's Legal Research Center. Finally, I would like to dedicate this Article to the Maxwell family, for whom a last letter brought some measure of peace.

1. FAWZIA KOOFI WITH NADENE GHOURI, *THE FAVORED DAUGHTER* 1 (2012).

2. Charles Bazerman, *Letters and the Social Grounding of Differentiated Genre*, in *LETTER WRITING AS A SOCIAL PRACTICE* 16, 27 (David Barton & Nigel Hall eds., 1999) [hereinafter Bazerman, *Letters*].

## I. INTRODUCTION

The first time Fawzia Koofi wrote a letter to her young daughters, Shuhra and Shaharзад, was when she heard that Taliban militants had launched a “realistic threat” to destroy the vehicle transporting Koofi from her home to a political meeting with her constituents in Northern Afghanistan.<sup>3</sup> Koofi, one of Afghanistan’s few elected female politicians and a candidate for president, fills her memoir with letters to her children composed each time she departed from relative safety to participate in political activities that both helped rebuild her native land but also exposed her to countless yet very genuine risks. Originally titled *Lettres à mes filles* (“Letters to my Daughters”),<sup>4</sup> Koofi’s memoir is vivid in its depiction of the war-torn country’s daily reality and haunting in its portrayal of the human reaction to such stresses, most notably the heart-felt letters that Koofi chose to place at her book’s core.<sup>5</sup>

This epistolary response to an awareness of impending death appears frequently in literature, history, and popular culture.<sup>6</sup> Some of the most startling and unusual examples of letters come from victims of imminent harm,<sup>7</sup> who might scrawl a letter to a loved one on any writing surface

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3. KOOFI WITH GHOURI, *supra* note 1, at 250; *Author Interviews: A “Favored Daughter” Fights for Afghan Women*, NAT’L PUB. RADIO (Feb. 22, 2012), <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=147060923&m=147247493>.

4. KOOFI WITH GHOURI, *supra* note 1, at ii.

5. Private letters, especially when written by a person publicly known, are a source of fascination and have engendered their share of property disputes. See, e.g., *Property Rights in Letters*, 46 YALE L. J. 493 (1937). The author Willa Cather’s letters, for example, will appear in a new anthology, notwithstanding that their publication “‘flagrantly’ violates Cather’s wishes, expressed in a will. . . .” See Jennifer Schuessler, *O Revelations! Letters, Once Banned, Flesh Out Willa Cather*, N.Y. TIMES, Mar. 21, 2013, [http://www.nytimes.com/2013/03/22/books/willa-cather-letters-to-be-published-as-an-anthology.html?\\_r=0](http://www.nytimes.com/2013/03/22/books/willa-cather-letters-to-be-published-as-an-anthology.html?_r=0). In support of their decision to take advantage of the will’s expired proscription, which did not appear in the trust to which the letters passed, the editors of the collection contended that the “lively, illuminating letters” will show Cather to be “a complicated, funny, brilliant, flinty, sensitive, sometimes confounding human being.” *Id.*

6. See Sylvie Crinquand, *Introduction* to LAST LETTERS 2–6 (Sylvie Crinquand ed., 2008) (“Because of their significance, last letters have also been widely chosen by writers in fiction, as a narrative device, often used to dramatic effect.”); Tilda Maria Forselius, *When Authors Say Good-Bye to Readers: Last Letters in The Swedish Argus and Letter Exchange, Two Swedish Eighteenth-Century Essay Papers*, in LAST LETTERS 11, 11–12, *supra* (observing that fiction writers use personal letters as a “device to gain authority,” because letters appear to readers as authentic and accessible). The essays Crinquand compiles in her book examine all forms of “last letters,” real and fictional. See generally LAST LETTERS, *supra*.

7. See, e.g., Crinquand, *supra* note 6, at 3–4 (describing how letters from persons on the eve of execution “express love for those who will live on, and offer some guidance, not unlike a will, on how to dispose of the letter-writer’s belongings, and how to face the future once he has been executed”); ROSE ROUSE, LAST LETTERS TO LOVED ONES 203–08 (2008) (quoting letter from

available<sup>8</sup> or use today's digital equivalents to react and reach their intended recipients.<sup>9</sup> Suicide notes,<sup>10</sup> war-time dispatches,<sup>11</sup> and correspondence from terminally ill patients<sup>12</sup> provide dramatic examples of so-called "last letters." Equally memorable but perhaps more prosaic epistles stem from people who, simply mindful of death, seek to leave guidance to those who survive them.<sup>13</sup> Many last letters include instructions about the writer's material belongings, as Koofi's does when she extols her daughters to "spend all the money I have in the bank" and cautions them to use the money "wisely . . .

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Captain Robert Falcon Scott to his wife at the end of a failed attempt to get back from the South Pole).

8. See *infra* notes 238–39; see also, e.g., *SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM* 48 (Jack Riemer & Nathaniel Stampfer eds., 2009) (quoting messages from Holocaust victims about to be executed, including one carved into a synagogue wall by a woman to her husband, letting him know that "in this place, your wife Gina and your son Imosz were murdered. Our child cried bitterly; he did not want to die. Go forth to battle and avenge the blood of your wife and your only son. We die for no crime whatsoever."). For a case law example, see *Breeden v. Stone*, 992 P.2d 1167, 1168 (Colo. 2000) (following hit-and-run accident, participant locked himself in his home, scrawled a note stating "I want everything I have to go to Sydney Stone . . . P.S. I was not driving the vehicle," and shot himself in the head). For a picture of the note, which the court found to be a will, see *JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES* 278 (9th ed. 2013).

9. Consider, for example, the many telephone calls that were placed on September 11, 2001 as the tragedies of that day unfolded. Maria Hinojosa, *On September 11, Final Words of Love*, CNN (Sept. 10, 2002, 8:58 AM), <http://www-cgi.cnn.com/2002/US/09/03/ar911.phone.calls/>; see also *Text Messages Reveal the Emotional Timeline of September 11, 2001*, SCIENCE DAILY (Sept. 2, 2010), <http://www.sciencedaily.com/releases/2010/09/100901121517.htm> (last visited Feb. 19, 2013).

10. ROUSE, *supra* note 7, at 145–60, 176–78, 184–92, 198–200; see also *In re Button's Estate*, 287 P. 964, 965 (Cal. 1930) (quoting a four-page suicide note from a wife to her former husband which extolled the recipient to keep his "loving arms around [the boys] and protect them as I know you will and always have" and then providing "I'm wearing you out dear and when I am gone you can just breathe one long sigh of contentment. I'd like to be cremated. You can have the house on 26th ave. and all the things of value so you won't be out any money on burying me.").

11. ROUSE, *supra* note 7, at 3–88.

12. ROUSE, *supra* note 7, at 123–41; see also BARRY K. BAINES, *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* app. 1 at 94 (2d ed. 2006) (quoting letter from terminally ill patient to her family stating that: "During the time of my illness, I have loved more deeply. My heart feels as if it has exploded. . . . As I lay dying, I think of all of you, each special in your own way . . ."); see also *Crites v. Faulkner*, 245 S.W.2d 1013, 1013 (Tex. Civ. App. 1952) (letter to decedent's "Dear Brother" written after several cardiac attacks, stating: "I am not feeling very good and I might pass away any time, and if I go before Rose does, I want you and Thelma [to] look after her and give her all the care. . . . When she is gone I want you [to] have charge of everything I have and do with it as you think best. I would like for . . . Roses brother to have something. But you do as you think best, about giving away my money. . . . Your loving Bro.").

13. See generally BAINES, *supra* note 12, app. 1; *SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM*, *supra* note 8; Zoe M. Hicks, *Is Your (Ethical) Will in Order*, 33 ACTEC L.J. 154, 154 (2007) (describing letters written by a dying father to be given to his daughters at significant life events).

and for your studies.”<sup>14</sup> Letter writers also may mention regrets for tasks they have not yet undertaken and explanations for the preferences they have expressed elsewhere.<sup>15</sup>

Letters, including last letters, are equally ubiquitous in American case law, but the roles they play are curious and diverse. While there is no question that homemade letters have influenced inheritance law,<sup>16</sup> just how and why has not been examined, particularly where the letter writers make clear that the informal communications are intended to supplement—but not replace—their formal documents or, in other words, where the letters are deliberately “non-testamentary.”<sup>17</sup>

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14. KOOFI WITH GHOURI, *supra* note 1, at 1.

15. See, e.g., *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (App. Div. 1964), *aff'd* 205 N.E.2d 864 (N.Y. 1965) (finding decedent's letter to his brothers explained “unusual provisions” in decedent's will, specifically that “a sizeable portion” of the estate is devised to a man “not a member of [decedent's] family”).

16. One common appearance of letters in inheritance cases is when they are offered to serve as wills for decedents who leave no other written indication of testamentary intent. While such letters often do not satisfy the required formalities of the relevant jurisdiction's statute of wills, a majority of states excuse the lack of formalities and admit the documents as “holographs” so long as the entire writing, or at least its material provisions, are handwritten and signed by the testator. Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93; 108 (2006) (citing UNIF. PROBATE CODE § 2-502 (amend. 1993), 8 U.L.A. 145 (1998)); *cf.* Estate of Wilt-Fong, 148 P.3d 465, 466 (Colo. App. 2006) (applying a liberal “harmless error” standard to uphold a typed letter as a will, even though it did not meet strict requirements of a formal will or a holographic one). Letters also may be codicils—addenda—to the more traditional documents, though such letters sometimes contradict or substantially alter the original wills. See *infra* text and accompanying notes 49–54. Courts have used letters as tools for interpreting ambiguous instruments. See *Wells Fargo Bank v. Marshall*, 24 Cal. Rptr. 2d 507, 510–14 (1993); *Cornell v. Cornell*, 334 A.2d 888, 891 (Conn. 1973); *Estate of Robbins*, 544 N.Y.S.2d 427, 429 (Sur. Ct. N.Y. Cnty. 1989); *Milligan v. Greeneville Coll.*, 2 S.W.2d 90, 94 (Tenn. 1928). Courts have also used letters as mechanisms for determining whether a formal property arrangement, a trust or conveyance for example, exists in the first place. See *Thomas v. Dye*, 127 N.E.2d 228, 232–34 (Ohio Ct. App. 1954). Finally, courts have admitted letters into evidence to assess claims that a testator lacked capacity or suffered other testamentary infirmities. See *Dorsey v. Dorsey*, 156 S.W.3d 442, 446 (Mo. Ct. App. 2005); *Russell v. Russell*, 197 S.W.3d 265, 269 (Tenn. Ct. App. 2005); *In re Estate of Steed*, 152 S.W.3d 797, 811 (Tex. App. 2004); *Estate of Davis*, 920 S.W.2d 463, 466 (Tex. App. 1996).

17. This term plays on the term “letters testamentary,” which refers, in probate parlance, to the documents that authorize a fiduciary to act on behalf of an estate. See *infra* text and accompanying notes 34–36. There is a long-standing body of scholarship describing and analyzing how courts have determined whether a letter writer demonstrates adequate testamentary intent to cause the unattested and potentially ambiguous letter to be a will. See, e.g., Brown, *supra* note 16, at 110–11; Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 14 & n.40 (1941); Katherine R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 333–51 (2011); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1073–74 & 1074 n.50 (1996); Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 284–89 (1996); Charles M. Soller, *Letters as Holographic Wills—Testamentary Intent*, 46 MICH. L. REV. 578 (1947); see also *infra* notes 72–76 and accompanying text. This Article takes the next step and considers letters that are not intended to serve as formal documents.

That such letters non-testamentary proliferate should come as no surprise not only because some professionals in this field have been championing their use, but also because letter writers seem to understand that the genre offers them a unique opportunity to convey their last wishes in a way that will be read, remembered, and effectuated by the recipients. In a January 2013 issue of CBS Moneywatch, an expert financial planner advised individuals that once they had “followed through with getting [their] estate documents in order,” the next step was to “prepare a letter that will help your family settle your affairs by letting them know what they need to do after you have departed.”<sup>18</sup> Explaining that the instructions in such a letter “are more of a personal wish, and therefore cannot be included in a legal document,” the author urged letter writers to incorporate not only lists of assets, individuals to be contacted, funeral arrangements, and instructions to trustees, but also “personal thoughts and messages for [the] beneficiaries” and even “history relating to each memento” or “autobiographical information for future generations.”<sup>19</sup>

Unlike property owners who opt out of the formal legal system altogether, the authors of the letters examined in this Article and recommended by professionals like the Moneywatch Advisors know and accept the law’s purpose and effect: they choose to execute formal wills to leave property to their loved ones; they choose to sign trusts to interpose a fiduciary between their beneficiaries and their wealth. Yet the authors of these letters supplement the legal documents with a genre that is less formal, less traditional, and ostensibly not legally binding. Recognizing the potential ambiguities and contradictions that homemade and informal communications may engender, this Article nevertheless argues that letters

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18. Ray Martin, *Estate Plan Letter to Your Family: What to Include*, CBS (Jan. 15, 2013), [http://www.cbsnews.com/8301-505146\\_162-57563900/estate-plan-letter-to-your-family-what-to-include/](http://www.cbsnews.com/8301-505146_162-57563900/estate-plan-letter-to-your-family-what-to-include/); see also Donna Pagano, *Helping Clients Leave a Lasting Legacy with the Family Love Letter*, 8 J. PRAC. EST. PLAN. 43, 44 (2006–07) (describing the role of the “family love letter” which is “not a legal document and is not intended to replace or supersede other legal documents such as wills or trusts, but it is intended to supplement these documents with potentially helpful information at a difficult time”). But see Alexander A. Bove, Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?*, 35 ACTEC L.J. 38, 39 (2009) (“As important and helpful as [letters of wishes] might be, however, the sad fact is that trust and estate attorneys rarely employ, or even suggest, a letter of wishes in connection with the typical discretionary trust.”).

19. See generally Martin, *supra* note 18. Consider, too, a recent Alabama case where a mother who was embarking on a vacation wrote to one of her seven children to thank him for investing \$160,000 for her and to tell him to keep the balance “should anything happen to [her],” although her twenty-year-old will provided otherwise. *Porter v. Black Warrior Farms, L.L.C.*, 976 So.2d 984, 990 (Ala. 2006). Bemoaning that the letter writer had not been sufficiently explicit about her wishes, the court refused to allow the letter to affect the legal disposition of the property, though the letter significantly altered the family’s interactions. *Id.*

non-testamentary play an important role in planning for death—a role that has persisted throughout time and is likely to continue, even as the genre shifts form in today’s digital age.

The choice to write a letter non-testamentary may be seen as a lay person’s way to reconcile the competing demands of structuring and planning one’s legacy. Like other private areas of the law,<sup>20</sup> inheritance law has both economic and social components. Most obviously, it involves the distribution of property that a person has amassed during life among the people and entities with which the decedent has shared some social relationship. The property owner must balance economically rational reasons and social and emotional reasons when devising property to particular beneficiaries or in particular ways. For example, one of the primary motivations for estate planning is maximizing family wealth, which might mean choosing to leave property to a spouse over a child, grandchild, or friend regardless of the dynamics of the relationship. Even if an estate is modest such that federal transfer taxes are not applicable, maximizing economic benefit to the family might mean choosing beneficiaries who do not cause state inheritance taxes to be incurred, who have the ability to alter the estate plan through a right of election, and who might seek to derail the plan through litigation if they feel slighted or forgotten. Other “rational” incentives for a testator’s choices include preserving family harmony, providing support, structuring the estate to protect susceptible beneficiaries from waste or inefficiency, and encouraging growth of the overall estate property.

Against all of the worthy, understandable, and efficiency-promoting goals, however, is the dueling notion that documents disposing of property on death are executed by real people contemplating their own mortality. Accordingly, estate maximizing goals sometimes conflict with emotional goals that infiltrate the process and affect the property owner and the structure and distribution of her estate. Deciding how to direct assets may be affected by fear (of death or loss of control), distrust about how a spouse or other beneficiary will act after one’s death, romantic love, vengeance, anger at the objects of one’s bounty or at the fact of one’s death in general, remorse, gratitude, or nostalgia. In his article *The Psychiatry of Writing a Will*, psychotherapist Nathan Roth observes how writing a will is necessarily a “conflict-ridden activity.”<sup>21</sup> As human beings, we are reluctant to

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20. See, e.g., Chapin F. Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703, 732–33 (2010) (contract law involves both private relations—those within families—and social relations—those between individuals and the state).

21. Nathan Roth, *The Psychiatry of Writing a Will*, 41 AM. J. PSYCHOTHERAPY 245, 250

recognize our own mortality; we therefore have a corresponding temptation to penalize anyone who will outlive us by imposing conditions that will survive us or by expressing hatred and vengefulness; and we also possess a self-preservation mechanism which compels us to take care of those who might remember or help us beyond the grave.<sup>22</sup> There are virtually no limits on the type of emotions that might affect how a property owner decides what to do with her estate at death. While inheritance doctrine has long recognized that a testator can be whimsical or irrational in her gifting,<sup>23</sup> the emotional and, correspondingly, the therapeutic components of estate planning have just started receiving attention.<sup>24</sup> And yet in the genre of informal letters, these components have been ever-present.<sup>25</sup>

Letters non-testamentary are invocations of trust in the true, and non-legal, sense of the word: “an assured reliance on the character, ability, strength, or truth” of the recipient.<sup>26</sup> This humble, intuitive, and accessible genre allows writers to connect to their readers and confront their mortality in a way that the standard instruments often do not. Because a family has much to lose when a will is challenged and much to gain when the probate process is easy and uncontested, a writer who builds empathy in her survivors through a letter non-testamentary may accomplish far more than if she relied solely on her formal documents.<sup>27</sup>

This Article proceeds in three parts. Part II provides a background on how informal letters have influenced the development and coherence of inheritance law, focusing specifically on letters that have been offered and construed as wills, codicils, and trusts. Be they “testamentary” or not,<sup>28</sup>

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(1987).

22. *Id.* at 245–50.

23. See Harry Hirschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932).

24. See, e.g., Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012) [hereinafter Glover, *Testamentary Formalities*]; Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012). Professor Thomas Shaffer, though, has written about these issues for decades. See, e.g., Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345 (1969).

25. Similarly, inheritance law scholars have been writing about the fall of formalism for the past forty years. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1033–34 (1994); see also John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1014 (1992). But the truth is that informality has pervaded cases about death for far longer, primarily in the garb of homemade letters.

26. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

27. See Justin D’Arms, *Empathy and Evaluative Inquiry*, 74 CHI-KENT L. REV. 1467, 1483, 1498 (2000) (describing how emotion can be a source of knowledge about value, as opposed to a distortion of judgment).

28. By referring to letters “non-testamentary” in connection with both wills and *inter vivos*



letters reveal how individuals organize their personal affairs by making social connections without interference or help from lawyers. Courts, as the unintended third-party readers of those letters, wrestle with their import.<sup>29</sup>

Part III describes the letter as a specific generic form and explores the characteristics, social and formal, of “last letters” in particular. The purpose of this genre analysis is to “uncover[] the pathways that guide [writers’] lives in certain directions,” so as to “identify the possibilities for new turns and the consequences of taking those turns.”<sup>30</sup> In other words, the rhetorical analysis looks at the unique communicative purposes that the letter genre offers the writer.<sup>31</sup>

Part IV examines letters from cases in which the respective property owners execute some form of more traditional estate planning documents—like wills and trusts—but also choose to write letters that are deliberately “non-testamentary”; such letters may appear in cases as the courts struggle to decide capacity issues, resolve will or trust ambiguities, or determine standards for fiduciary conduct. But the letters provide valuable information about the writers too. In fact, the language and form of these letters reveal that the property owners turn to the genre to fill emotional, rhetorical, and even legal gaps. As such, these letters non-testamentary help outside readers learn about deficiencies that the current system promotes, such as the writers’ lack of confidence with their formal documents or fear of including explanations and feelings in those writings.<sup>32</sup> While others have bemoaned the inconsistencies that such homemade letters produce, this Article takes the opposite position: it argues that letters non-testamentary highlight a productive tension between lawyer-created documents that are clear and tax-efficient but often devoid of feeling and the reality of death as a frightening event that involves messy emotions and relationships. Revealing in this

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trusts, some readers may understand me to be implying that such trusts are testamentary when technically they are not. See David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 65 n.24 (2012) (“Some readers may chafe at the fact that I call the execution of a trust ‘testation.’ After all, courts once had to perform spectacular intellectual gymnastics to explain why *inter vivos* trusts were not ‘testamentary’ and did not need to conform to Wills Act formalities. . . . Moreover, there are meaningful differences between wills (which funnel a dead testator’s estate through court-supervised probate) and *inter vivos* trusts (which become effective during a settlor’s life and give beneficiaries equitable title to the trust property).”). Like Professor Horton, many of the ideas I put forth about how letters relate to the more traditional documents are similar for both devices, though I will try to note distinctions when they affect my analysis.

29. See *infra* text and accompanying notes 34–77.

30. Charles Bazerman, *Systems of Genres and the Enactment of Social Intentions*, in *GENRE AND THE NEW RHETORIC* 100 (Aviva Freedman & Peter Medway eds., 1994) [hereinafter Bazerman, *Systems of Genres*].

31. See *infra* text and accompanying notes 78–159.

32. See *infra* text and accompanying notes 160–62, 168–203.

regard is a specific form of correspondence, called a trustee “letter of wishes,” that is used primarily when property dispositions are designed to extend over time rather than pass outright. Deliberately non-binding, these writings nevertheless allow the property owner to provide input to her trusted and selected designees about what she envisions her legacy to be.<sup>33</sup>

The Article concludes by embracing letters non-testamentary, even though they may perplex the formal institutions of the law, because the genre allows writers the freedom to confront and resolve issues that death naturally elicits.

## II. TESTAMENTARY LETTERS: UNINTENDED READERS FIND TESTAMENTARY INTENT

“Letters” represent boundaries in inheritance doctrine. On one end of the spectrum are “letters testamentary,” a term that refers to the instruments that empower an estate’s representative.<sup>34</sup> Before a court with jurisdiction over a given estate grants such “letters,” that estate’s fiduciary lacks authority to act on behalf of and bind the estate.<sup>35</sup> Although more akin to a legal writ than a social exchange,<sup>36</sup> the “letter testamentary” provides an apt symbol of the highly formulaic and structured characteristics of the law of

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33. See *infra* text and accompanying notes 163–67, 204–22.

34. BLACK’S LAW DICTIONARY 989 (9th ed. 2009); UNIF. PROB. CODE § 1-201(27) (2010). “Letters testamentary” are issued to the fiduciary appointed under a decedent’s will, either an “executor” or “personal representative,” depending on the jurisdiction. When a decedent dies without a will, the fiduciary is known as an “administrator” and the appropriate term is “letters of administration.”

35. *In re Kennedy’s Will*, 174 N.Y.S. 429, 431 (Sur. Ct. N.Y. Cnty. 1919). The Probate of Testament Acts of 1357 is credited with having created the concept of letters of administration (and, by association, letters testamentary). BLACK’S LAW DICTIONARY 989 (9th ed. 2009). The original text of the act, which along with an early 1800s translation can be found in “The Statutes of the Realm,” does not use the term “letter” at all. Rather, it refers to the power of the religious figures—known as “ordinaries”—to administer any property not disposed of before death. 1 THE STATUTES OF THE REALM 350 (1357). Prior to such a grant, the only entity empowered to handle a decedent’s property was someone far less “ordinary”: the decedent’s priest. *Id.* The first American cases to reference “letters” in connection with inheritance proceedings appear in the early to mid-1700s. See, e.g., *Carroll’s Lessee v. Andrew*, 4 H. & McH. 485, 485 (Md. 1731) (referring to letters testamentary); see also *Kennedy’s Will*, 174 N.Y.S. at 431–32 (discussing the history of the term “letters testamentary”).

36. A letter testamentary is issued by a court rather than written by an individual, contains no meaningful substantive content, and does not contemplate a particular recipient or recipients. See *infra* text and accompanying notes 77–113. Charles Bazerman describes how similar varieties of legal “letters,” like letters patent and letters of credit, have “provided the medium for development of major genres of law, government, and politics” and “instruments of money and credit.” See Bazerman, *Letters*, *supra* note 2, at 20–21 (discussing how informal letters have had a “pervasive and important” influence on the law).

descent and distribution.

On the other end of the spectrum, and as idiosyncratic, informal, and intimate as any text that appears in or intersects with the law, are the homemade letters that permeate cases about death.

Once law moved from being a primarily oral to a primarily written tradition, most legal writing “tended toward the depersonalized, the objectified and systematic, the controllable and inflexible, and the abstract.”<sup>37</sup> Homemade letters, perhaps because they derive primarily from non-lawyers even though they influence and sometimes even change the law, retained characteristics of the oral tradition, which has been described by words like “customary,” “participatory,” “ceremonial,” “adaptable,” and “contextual.”<sup>38</sup>

Homemade letters have perplexed courts for more than a century.<sup>39</sup> Although these informal documents do not look or read like lawyer-drafted wills or trusts, they often have the same effect so long as the court construing the document in question finds the writer had the requisite intent.<sup>40</sup> Where letter writers “merely intended to give information, or to

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37. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 516 (1992).

38. *Id.* at 515–16.

39. For examples of older cases in which courts admitted homemade letters to probate, either as holographic wills or as codicils (amendments) to existing but more formally executed documents, see *Arendt v. Arendt*, 96 S.W. 982, 982–83 (Ark. 1906) (will); *Byers v. Hoppe*, 61 Md. 206, 210 (1884) (will); *Barney v. Hays*, 29 P. 282, 283–84 (Mont. 1892) (codicil); *Alston v. Davis*, 24 S.E. 15, 16 (N.C. 1896) (will). For examples of older cases in which courts have relied on letters to establish trust relationships, in which the person who receives title to the property is deemed to hold it not for her own unfettered benefit but instead as a fiduciary for the benefit of one or more third parties, see *Van Cott v. Prentice*, 10 N.E. 257, 260–61 (N.Y. 1887); *Grafin v. Heilmann*, 1 A.D. 260, 263–64 (N.Y. App. Div. 1896).

40. For example, a letter is construed as a will if the letter writer “intended the . . . instrument to have testamentary effect.” Soller, *supra* note 17, at 579–80. According to Soller, “The testator need not know that he is performing a testamentary act, but his intention with reference to the instrument must be such that the court will say that a final disposition of property was meant to be effectuated.” *Id.* (footnotes omitted) (citations omitted); *Estate of Wilt-Fong*, 148 P.3d 465, 469 (Colo. App. 2006) (finding informal typewritten letter to be a will because proponent established that “the decedent intended the document to be a will”). For examples of cases where letters were found to be holographic wills, see generally *Letter as a Will or Codicil*, 40 A.L.R. 698 (originally published 1955) [hereinafter *Letter as Will*]; see also *Weems v. Smith*, 237 S.W.2d 880, 881–82 (Ark. 1951); *In re Estate of Cook*, 160 P. 553, 554–55 (Cal. 1916); *In re Estate of Crick*, 41 Cal. Rptr. 120, 122–23 (Cal. Dist. Ct. App. 1964); *In re Estate of Smilie*, 222 P.2d 692, 694–96 (Cal. Dist. Ct. App. 1950); *Bogges v. McGaughey*, 207 S.W.2d 766, 767–68 (Ky. 1948); *In re Estate of Ramirez*, 869 P.2d 263, 265 (Mont. 1994); *In re Estate of Melton*, 272 P.3d 668, 671–74 (Nev. 2012). For examples of cases where letters were deemed not to be wills, see *In re Bliss’ Estate*, 268 N.W. 783, 784 (Mich. 1936); *In re George’s Estate*, 45 So. 2d 571, 571–74 (Miss. 1950); *Wolfe v. Wolfe*, 448 S.E.2d 408, 409 (Va. 1994); *In re Briggs’ Estate*, 134 S.E.2d 737, 739–40 (W. Va. 1964). For an article discussing the many problems caused by holographic wills generally and casual letters in particular, see Brown, *supra* note 16, at 110–11.

make a request or casual statement,” or where the instruments stated “only a desire or intended future action,” the letters will not be admitted to probate or accorded the force of testamentary documents.<sup>41</sup>

Regardless of whether they are found to reflect a writer’s intent to dispose of property or simply to share a writer’s views about death, homemade letters are interesting because their language often is unadorned and accessible.<sup>42</sup> These letters often illustrate vividly the writer’s relationship to her reader and views on their impending separation. An “(in)famous”<sup>43</sup> example of such a “last letter” is provided by the 1924 Pennsylvania case, *In re Kimmel’s Estate*.<sup>44</sup> Embedded in directives from the father to his sons about how to prepare for the upcoming winter was the

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A letter is construed as a trust if the letter writer’s direction to the property recipient is mandatory and not precatory. *See* *Wood v. Am. Nat’l Bank*, 125 Cal. App. 248, 251 (Cal. Dist. Ct. App. 1932); *Hall v. Hall*, 93 P. 177, 178–79 (Kan. 1907); *see also* *Colton v. Colton*, 127 U.S. 300, 308 (1888) (decedent’s statement “I recommend to [my wife] the care and protection of my mother and sister, and *request* her to make such gift and provision for them as in her judgment will be best” imposed a trust on the property (emphasis added)). Trust law has generally been more forgiving about the type of documents required to prove a trust. *See* *Van Cott*, 10 N.E. at 260–61. In contrast, strict rules govern whether a separate writing, like a letter, is incorporated or integrated into the formal will. *See In re McVoy’s Estate*, 145 N.Y.S.2d 181, 183 (Sur. Ct. N.Y. Cnty. 1955).

41. Soller, *supra* note 17, at 579–80.

42. *See, e.g., Arendt v. Arendt*, 96 S.W. 982, 982–83 (Ark. 1906) (affirming probate court’s determination that husband’s suicide letter to wife was a will, where letter stated “Whatever I have in worldly goods, it is my wish that you should possess them. I have hoped against hope that everything would come out all right, but I see it is useless.”); *Byers v. Hoppe*, 61 Md. 206, 210 (1884) (“In our opinion these concluding sentences: ‘And Ann, after my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death,’ accompanied with the direction, ‘To Eliza Ann Byers,’ evince just as effectually, in legal contemplation, that the writer wrote them *animo testandi*, as if he had said in terms, ‘I hereby will and bequeath to Eliza Ann Byers forty thousand dollars, to be paid to her at my death out of my personal estate.’”); *In re Bliss’ Estate*, 268 N.W. 783, 784 (Mich. 1936); *In re George’s Estate*, 45 So. 2d 571, 571–74 (Miss. 1950) (letter stating “I think you so much Honey for all you have done for me & I want to say right now that I want to give you Aldridge’s interest in Runnymede & I want you to begin fixing things” was “merely an expression of a desire with the purpose to later effectuate it, which was never done”); *Wolfe v. Wolfe*, 448 S.E.2d 408, 409 (Va. 1994) (testator wrote: “As executor, I am asking you to do much for me and the girls, perhaps Gordon can help. God bless you, I know you will do your best. My will is out of date, but I think it will still stand up. I want my daughters to share 1/3, 1/3, 1/3.”); *In re Briggs’ Estate*, 134 S.E.2d 737, 739–40 (W. Va. 1964) (testator wrote to niece: “We never know how long we are going to live. I will be 61 next month. Hence the end cannot be too far away. If you are the longer liver I would like for you to take my affairs in hand and see to it my wishes are carried. I will have a will drawn up and you will be named the sole executrix of my last will and testament. . . . You keep this letter for use if anything should happen to me before the will is drawn up.”).

43. Hirsch, *supra* note 17, at 1074 n.50. The *Kimmel* case appears in the holographic wills discussion in various popular trusts and estates texts. *See, e.g.,* DUKEMINIER & SITKOFF, *supra* note 8, at 198; ROGER W. ANDERSEN & IRA MARK BLOOM, *FUNDAMENTALS OF TRUSTS & ESTATES* 110 (3d ed. 2007); *see also* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 43–44 (2008).

44. *In re Kimmel’s Estate*, 123 A. 405 (Pa. 1924).

notice that “I have some very valuable papers I want you to keep fore me” and the instruction that “if enny thing happens all the scock money in the 3 Bank liberty Iones Post office stamps and my home on Horner St goes to George Darl & Irvin Kepp this letter lock it up it may help you out.”<sup>45</sup> Emphasizing the father’s reference to “valuable papers” and his admonition to his children to keep the letter safe because it may “help you out,” the *Kimmel* court reasoned that the father intended the letter to have testamentary impact.<sup>46</sup> The court therefore admitted the informal letter to probate, citing cases that found the “informal character of a paper” to be “of no moment” when the “decendent’s purpose” is to make a gratuitous transfer.<sup>47</sup> The decision quotes the letter in its entirety, including the portion in which the father tells his sons that he is “well as you can spec for the time of the Year” and explains how to preserve their pork for the winter which he anticipates will be “one of the hardest. Plenty of snow & Verry cold very cold!”<sup>48</sup>

There is no mystery that a court, like the one in *Kimmel*, might choose to honor the testator’s stated preferences over her default heirs at law, especially if the testator explains those desires and even if they appear in an informal letter that spends more time discussing food and weather than the writer’s property dispositions. When a testator has executed a formal will or trust and then writes a homemade letter that is inconsistent with that plan, however, one might predict a court to be more inclined to follow the formal plan. To the contrary, courts often respect letters as codicils, notwithstanding that they may contradict the existing testamentary instruments.<sup>49</sup> In *Henderson v. Henderson*, for example, the testator executed a will that created trusts for the benefit of her four brothers and their respective families.<sup>50</sup> Some time thereafter, the testator wrote a letter to one brother, expressing that she would “now have to make a change” to her will.<sup>51</sup> The testator’s letter explained the reasons for the change as stemming from her anxiety “for you, Annie and your family to be cared for

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45. *Id.* at 405.

46. *Id.* at 406.

47. *See id.* at 405–06. As one nineteenth century court explained when it found a letter to be a holographic codicil that revived an otherwise ineffective will, “a ‘testameent’ [is] just sentence of our will, touching that we would have done after our death.” *Turner v. Scott*, 51 Pa. St. 132 (quoted in *Barney v. Hayes*, 29 P. 282 (Mont. 1892)).

48. *Kimmel*, 123 A. at 405–06.

49. *Henderson v. Henderson*, 33 S.E.2d 181, 182 (Va. 1945) (“It is more or less to be expected, then, that there shall be some conflict between a codicil and a will.”).

50. *Id.*

51. *Id.*

in your old age.”<sup>52</sup> In addition to describing how and why she wished to eliminate two beneficiaries from the existing will, the testator advised the recipient to “just keep this [letter] for business like transfer” and “just hold this little piece of paper in case there should be trouble.” She also noted that the letter “is a private note for you. I do not want it known in Hancock.”<sup>53</sup> When the testator ended up not executing a formal codicil, the brother who benefited from the intended change disclosed the “private note” and argued that it amended the will. The *Henderson* court agreed, finding the letter to be a valid codicil because the testator used the term “now” and because “when the writer of the letter twice emphasize[d] the importance of preserving the letter in order to avoid trouble, she intend[ed] the letter as a codicil to her will then in existence.”<sup>54</sup>

Notwithstanding the fairly simple and undisputed directive that an informal writing must reflect its author’s intent that the document function as her will, the specific criteria that dictate when and why certain letters (and not others) constitute wills have proven particularly “nettlesome”<sup>55</sup> and “elusive.”<sup>56</sup> Just a glance at the American Law Reports articles collecting

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52. *Id.*

53. *Id.*

54. *Id.* at 183. Another (also rather infamous) example of an informal and unrefined letter that was found to be a codicil appears in the curious case of Charles Kuralt, whose last letter to his long-time “intimate and personal” companion derailed the formal estate planning documents Kuralt had executed with his wife three years earlier. Estate of Kuralt, 15 P.3d 931, 933 (Mont. 2000). Acknowledging that “[s]omething is terribly wrong with me and [the doctors] can’t figure out what,” Kuralt wrote from his hospital bed of his intention to “have the lawyer visit the hospital to be sure you inherit the rest of the place in [Montana] if it comes to that.” *Id.* Kuralt died two weeks after writing the letter and failed to have a formal codicil prepared. *Id.* at 934. The trial court found that the letter demonstrated Kuralt’s “present testamentary intent” that the Montana property pass to his companion, notwithstanding his reference to future actions; the Supreme Court of Montana affirmed. *Id.* Concluding that Kuralt “was reluctant to consult a lawyer to formalize his intent because he wanted to keep [the] relationship secret” and relying on his use of the term “inherit,” the court held that the “letter expressed Kuralt’s desire” to transfer the property and therefore had testamentary effect. *Id.* Incidentally, because the Kuralt letter did not address how taxes would be apportioned, Kuralt’s wife and children, as recipients of the estate’s residue, also were responsible for any transfer taxes associated with the gift of the property to Kuralt’s mistress. *DUKEMINIER & SITKOFF, supra* note 8, at 214.

55. See Hirsch, *supra* note 17, at 1073–74 (“[C]ourts must contend with nettlesome questions concerning the intent of authors to render legally effective holographic documents that are offered for probate as wills. (Those nettles are most prickly when a holograph mixes testamentary declarations with ordinary communication, as when the alleged will appears within . . . a letter to the alleged beneficiary.)”).

56. See Guzman, *supra* note 17, at 329 (“The problem of whether a letter discloses testamentary intent is a difficult and elusive one and it is hard to reconcile all the cases or even to classify them.” (quoting THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESACY AND ADMINISTRATION OF DECEDENTS’ ESTATES 210 (2d ed. 1953))).

these cases shows how scattered and inconsistent the decisions and doctrines they announce can be.<sup>57</sup> Simply as an example of this sort of paradox, one test for whether a last letter has a “testamentary character” is whether the writer expects that the letter be “published” as a will except that, as other courts have recognized, the writer’s intent that the letter be kept secret will not bar the letter from being deemed testamentary.<sup>58</sup> Likewise, where a letter does not specify its recipient, it may be more likely to be construed as a will,<sup>59</sup> although including a recipient does not bar a finding of testamentary intent.<sup>60</sup> Like the letters found in them, each case is unique and therefore unsettling to those who take comfort from delineated rules.

The difficulty in deriving clear rules is just as prevalent where the issue involves whether language in an informal last letter creates a trust,<sup>61</sup> thereby imposing fiduciary constraints on the use of the property by the legal owner.<sup>62</sup> In *McKinsey v. Cullingsworth*,<sup>63</sup> for example, the decedent wrote a letter to her nephew saying “im verry sick if anything happen to me . . . I want you to have my home and every thing and you and you take care of

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57. See generally *Letter as Will*, *supra* note 40, §10 (discussing many tests for finding testamentary intent in letters and acknowledging that, notwithstanding such tests, “intent is the chief signpost to which the courts look for guidance in determining the character of the instruments, and the informality of the language will not prevent a finding that the instrument is testamentary in character if the intent is plain”); see also *Letter as a Will or Codicil*, 54 A.L.R. 917 (originally published 1928); Brown, *supra* note 16, at 110–16 (describing and documenting the difficulty courts have in defining testamentary intent in holographs).

58. *Letter as Will*, *supra* note 40, §4 (discussing *Lawless v. Lawless*, 47 S.E.2d 431 (Va. 1948), in which court stated that writer’s intention that contents of letter be kept secret is inconsistent with testamentary intent, and *Langfitt v. Langfitt*, 151 S.E. 715 (W. Va. 1930), in which court found testamentary intent notwithstanding letter’s request that its “arrangement be kept a profound secret”).

59. See *In re Knox*, 18 A. 1021, 1022 (Pa. 1890) (finding wife’s letter to be “clearly testamentary” even though it was “not a command, but a request, addressed to no special person by name, but plainly to those who should have the possession or control of her property,” reasoning that “it has the essential element of being a disposition of property to take effect after death”).

60. See, e.g., *In re Estate of Smilie*, 222 P.2d 692, 694–96 (Cal. Dist. Ct. App. 1950) (finding testamentary intent where letter to friend stated “I want you to see that all my bills are paid and that [my wife] does not get thing. I want you to have all of my after my bill are.”).

61. A trust is a tripartite arrangement where a property owner, called a settlor (also known as a donor, grantor, trust creator, and/or trustor) transfers some property, called the trust corpus or res, to one or more fiduciaries to hold, manage, and distribute for the benefit of one or more beneficiaries. Far less ritualized than wills, trusts require only the interposition of a fiduciary between the property owner and the beneficiary, can appear in wills or as stand-alone instruments, and can function while the property owner is alive or after she dies. See generally *DUKEMINIER & SITKOFF*, *supra* note 8, at 384–434 (describing history, forms, and parties to trusts).

62. See, e.g., *In re Estate of Marti*, 61 P. 964 (Cal. 1900) (discussing cases and explaining that “[w]hat precatory words annexed to a bequest or devise will create a trust in reference to the property bequeathed or devised, has been the subject of frequent discussion . . . and it is impossible to harmonize the several decisions upon the subject”).

63. 9 S.E.2d 315 (Va. 1940).

Lula the best you can.”<sup>64</sup> When Lula claimed that this language created a trust, the court disagreed, finding the “care” to be “not only discretionary” but also “contingent upon [the nephew’s] ability to help [Lula], and subject to his own needs.” Because the letter simply “suggest[ed] a course of conduct, but impose[d] no legal obligation . . . to provide for [Lula] out of the property devised,” the court found that the testator’s last letter did not restrict the nephew’s use of the property.<sup>65</sup> In contrast, in *Estate of Campe*,<sup>66</sup> the New York Surrogate’s Court found a bequest in a will to be subject to fiduciary obligations based on seemingly non-binding, precatory language in both the will and a side letter. The *Campe* testator executed a formal will leaving certain property outright to two named individuals but stated his “wish and desire” that those individuals follow instructions about the bequest that the testator would include in a letter.<sup>67</sup> The letter recounted the “testator’s desire that the net proceeds received by the legatees” be paid to a Ms. Davis.<sup>68</sup> Explaining that a “non-testamentary paper cannot affect any disposition of property *pursuant to the will*,” the court refused to rely on the letter to change what it found to be an outright “unfettered and unembellished” bequest to the two named beneficiaries.<sup>69</sup> But the *Campe* court nevertheless refused to disregard the letter because it “constitute[d] evidence of testator’s reliance upon the legatees.”<sup>70</sup> Because ignoring that compelling evidence would undermine both the testator’s purpose and the legatees’ moral and legal duty, the court decided that the legatees held the property in constructive trust for Ms. Davis.<sup>71</sup>

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64. *Id.* at 316.

65. *Id.* at 316–17; *see also* Hood v. Nichol, 34 S.W.2d 429 (Ky. 1930) (finding decedent uncle’s transfer to his “favorite niece” of a parcel of real estate, called the “Boulevard Property,” not to be made in trust for the benefit of other relatives; even though the predeceased aunt’s will and a series of letters from the uncle to his attorney and niece referred to property owned by the uncle, none imposed a fiduciary constraint).

66. 146 N.Y.S.2d 222 (Sur. Ct. N.Y. Cnty. 1955).

67. *Id.* at 224; *see also* *In re Beringer’s Estate*, 9 A.2d 342, 343 (Pa. 1939) (“Neither is there any merit in the contention of appellant that the words ‘desire’ and ‘want’ as used in the letter of 1937 were merely precatory. While generally such words are so considered, yet when, as here, it obviously appears their use was expressive of the intent of the testator, they are mandatory.”); *Russell v. U.S. Trust Co.*, 127 F. 445, 446 (S.D.N.Y. 1904) (“Although a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it in whole or in part to the benefit of others, may create a trust, if the subject and object are sufficiently certain, they will not do so unless the words appear to have been intended by the testator to have been imperative . . .”), *aff’d* 136 F. 758 (2d Cir. 1905).

68. *Campe*, 146 N.Y.S.2d at 224.

69. *Id.* at 225–27.

70. *Id.* at 227.

71. *Id.* at 227–28; *see also* *Estate of Orcutt v. Commissioner*, 36 T.C.M. 746 (1977) (finding letter from mother to daughter stating that insurance policy “is presented to you, as beneficiary, for



Inheritance law scholars have struggled to define and provide coherent explanations for the often inconsistent results in the case law about how to treat homemade letters.<sup>72</sup> One approach attributes the differences to the jurisdiction's (or individual court's) view on whether extrinsic evidence is admissible to prove testamentary intent.<sup>73</sup> Another more cynical but persuasive explanation posits that results depend on whether the court views the named beneficiaries as "worthy" or, in other words, entitled to the property in a normative sense.<sup>74</sup> Yet another view argues that regardless of what appear to be random inconsistencies, having a broad approach to respecting letters, and thereby allowing the informal documents to replace the more ritualized instruments, serves the valuable goal of allowing for "equal planning under the law."<sup>75</sup> Perhaps least helpful but most convincing are the decisions and commentary observing that each case is different and turns on its specific language, context, facts, witnesses, juries, and jurists.<sup>76</sup>

Regardless of what motivates a court to find that a decedent "intended" a last letter to have "testamentary" impact, the letters featured in these cases shed light on writers, as they contemplate death, and on the writers' relationships to their respective recipients. Consider, for example, the following letter from a brother to his sister, ultimately admitted to probate by an 1886 North Carolina court, explaining the writer's dreams for his property and his family:

I am sorry you will have to sell your land that you got from our father's estate to make the payments. I don't think I will ever sell mine. When I

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the purpose, and with the distinct understanding that you will use the proceeds . . . for the welfare of your children" to be a trust and therefore not taxable in deceased husband's estate).

72. See Gulliver & Tilson, *supra* note 17, at n.40; Guzman, *supra* note 17, at 305; Hirsch, *supra* note 17, at 1073–74 & 1074 n.50; Leslie, *supra* note 17, at 284–89.

73. See Guzman, *supra* note 17, at 337–38 (discussing *Edmundson v. Estate of Fountain*, 189 S.W.3d 427, 428–29 (Ark. 2004), in which the court refused to look past the four corners of a homemade document labeled "Last Will," because "extrinsic evidence is appropriate only when the instrument contains some words expressing an intent to dispose of property"); cf. *Minton v. Minton*, 374 S.W.3d 818, 821–22 (Ark. Ct. App. 2010) (refusing to admit extrinsic evidence but finding holographic codicil).

74. See Leslie, *supra* note 17, at 284–85 ("[C]ourts found that letters evinced the requisite testamentary intent where the letters arguably satisfied the testator's moral obligations and/or where the distribution according to the intestacy statute arguably would have been 'unjust.'").

75. See Hirsch, *supra* note 17, at 1074–75; see also Clowney, *supra* note 43, at 55 ("Handwritten wills . . . remain a vitally important cog in estate planning machinery because they allow testators to deviate from intestacy laws without paying costly attorneys' fees.").

76. See, e.g., *In re Smilie's Estate*, 222 P.2d 692, 696 (Cal. Dist. Ct. App. 1950) ("There is no definite, fixed rule by which testamentary intention may be gauged, but each case must stand upon its own peculiar facts."); Brown, *supra* note 16, at 116 ("Simply put, the law in this area lacks coherence." (footnotes omitted)).

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get old I am going to build on it, so I can have it as a home when I get old. If I should die or get killed in Texas, the place must belong to you; and I would not want you to sell it. I don't care about tenants put on it. I am afraid they will destroy the timber on it. If I could walk over the tract, and pick out a place that suited me to build, I would not mind allowing a good tenant to build, and open a small field on the tract, and I am willing for you to pick out a pretty place to build on for me. . . . My sweet sister, I don't want you to trouble yourself, or to allow these little trifles of mine that I speak to you about to bother you in the least. I merely mention them that you may know how to act in case you should feel like attending to them for me or should have a convenient opportunity.<sup>77</sup>

Equally compelling, albeit entirely different, concerns can be found in a 2012 Nevada Supreme Court case in which the writer “on the way home from Mom’s funeral” explained in his informal letter that “Mom died from an auto accident so I thought I had better leave something in writing so that you . . . will receive my entire estate. I do not want my brother . . . or any of my other relatives to have one penny.”<sup>78</sup> In short, the language in these personal letters brings to life the position of the writers and documents their connections to their chosen recipients. In one sense, such letters are primitive because they are unrefined and non-legal, at least as traditionally defined. In another sense, the letters are literate, communicative, and compelling to a reader. Testamentary or not, they reveal a diversity of voice and resourcefulness that testifies to their authors’ unique humanity and overwhelming desire to reach their recipients.

Before moving from the letters “testamentary” quoted above to letters “non-testamentary”—in other words, letters that do not purport to supplant or replace formal testamentary documents but deliberately seek to supplement and refine them—it is helpful to look at the rhetorical characteristics that define letters generally and “last letters” in particular. As discussed in the following Part, letters, as a distinct written genre, involve communication solely between writer and recipient; personal letters, intended to be private, do not contemplate a third-party audience, like a court. This and other elements of the genre, discussed below, help show why a writer might choose this format over another, since “individuals perceive homologies in circumstances that encourage them to see these as

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77. *Alston v. Davis*, 24 S.E. 15, 16 (N.C. 1896).

78. *In re Estate of Melton*, 272 P.3d 668, 671–72 (Nev. 2012). When the friend ended up predeceasing the author, the court, which found the letter to be a will, allowed the property to escheat to the state rather than pass to the writer’s daughter, who would have inherited under the governing intestacy rules. *Id.*

occasions for similar kinds of utterances.”<sup>79</sup>

### III. LAST LETTERS: GENRE AND COMMUNITY

Last letters comprise a distinct, if rudimentary and unsophisticated, genre that follows certain formal and functional strictures derived from their shared subject matter: separation. Although they bear similarities to the legal genres that govern inheritance—wills as the most formal and trusts as somewhat less so—last letters reflect an awareness of the social, communal relationship between the writer and her chosen audience and a heightened and emotional recognition of that relationship ending as the separation looms. This primitive but tenacious genre allows writers to invoke empathy in their readers. Case law is correct to recognize the legitimacy of these expressions, even as it struggles with how to use them.

#### A. *Letters Generally and Generically*

Resting on the concept that “meaning is constructed out of the interaction of reader and writer, text and context,” rhetorical analysis facilitates society’s understanding of the role and importance of any written instrument.<sup>80</sup> Originating in the fifth century B.C.E. with Corax of Syracuse<sup>81</sup> and extending to Aristotle, who systematized the classical standards of rhetoric approximately a century later,<sup>82</sup> this area of study looks at how individuals use symbols to communicate<sup>83</sup> and the effect of those choices on an audience.<sup>84</sup> Crucial to the understanding of any text, be it a

79. Bazerman, *Systems of Genres*, *supra* note 30, at 82.

80. Linda L. Berger, Linda H. Edwards, & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 J. LEGAL WRITING INST. 521, 521 (2010); *see also* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999).

81. SONJA K. FOSS, KAREN A. FOSS, & ROBERT TRAPP, *CONTEMPORARY PERSPECTIVES ON RHETORIC 4–7* (3d ed. 2002) [hereinafter FOSS ET AL., *CONTEMPORARY PERSPECTIVES*].

82. *Id.* at 7.

83. *See, e.g.*, SONJA K. FOSS, *RHETORICAL CRITICISM: EXPLORATION AND PRACTICE 3* (4th ed. 2009) [hereinafter FOSS, *RHETORICAL CRITICISM*] (“How we perceive, what we know, what we experience, and how we act are the results of the symbols we create and the symbols we encounter in the world . . . . We choose to communicate in particular ways based on what we have discovered. This process is called *rhetorical criticism*.”).

84. *See, e.g.*, Herbert A. Wichelns, *The Literary Criticism of Oratory*, in *LANDMARK ESSAYS ON AMERICAN PUBLIC ADDRESS 1* (Martin J. Medhurst ed., 1993); *Introduction to METHODS OF RHETORICAL CRITICISM: A TWENTIETH-CENTURY PERSPECTIVE 24–25* (Bernard L. Brock, Robert L. Scott, & James W. Chesebro eds., Wayne State Univ. Press 3d rev. ed. 1990) (discussing Herbert Wichelns’s essay). Rhetorical analysis can take many forms, including “metaphor criticism, ideological criticism, narrative criticism, and pentadic criticism.” Karen J. Sneddon, *In the Name of*

speech, statute, will, or letter, is not only an analysis of the specific language and syntax used by the creator but also an analysis of the genre that the creator selects to house that language.<sup>85</sup> So-called “generic” rhetorical criticism posits that by looking at “traditions and affinities” of a genre, a critic can “bring[] out a large number of literary relationships that would not be noticed as long as there were no context established for them.”<sup>86</sup> For example, a eulogy will convey different meaning, receive different treatment, and shed different insights on author, audience, and situation than a sonnet, even if both texts commemorate the same individual. Rhetorical genre studies, which seek less to “classify as to clarify,”<sup>87</sup> look at different

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*God Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665, 673 (2011) [hereinafter Sneddon, *In the Name of God*]. Modern scholars have used different rhetorical strategies to analyze communications as diverse as inaugural addresses, laboratory reports, television programs, popular music, and patents. See, e.g., Karlyn Kohrs Campbell & Kathleen Hall Jamieson, *Inaugurating the Presidency*, in METHODS OF RHETORICAL CRITICISM: A TWENTIETH-CENTURY PERSPECTIVE, *supra*, at 343 (inaugural addresses); Catherine F. Schryer, *The Lab vs. the Clinic: Sites of Competing Genres*, in GENRE AND THE NEW RHETORIC 105 (Aviva Freedman & Peter Medway eds., 1994) (laboratory reports); Tamar Liebs, *Cultural Differences in the Retelling of Television Fiction*, in METHODS OF RHETORICAL CRITICISM: A TWENTIETH-CENTURY PERSPECTIVE, *supra*, at 461 (television programs); Erin E. Bassity, *Rhetorical Strategies for Generating Hope: A Cluster Analysis of Pink’s “Dear Mr. President”*, in FOSS, RHETORICAL CRITICISM: EXPLORATION AND PRACTICE, *supra* note 83, at 92 (popular music); Bazerman, *Systems of Genres*, *supra* note 30, at 79 (patents). For an exploration of the theory and skills involved in the different forms of critical inquiry, see generally FOSS, RHETORICAL CRITICISM, *supra* note 83. For an introduction to the proponents of contemporary rhetorical theory, see generally FOSS ET AL., CONTEMPORARY PERSPECTIVES, *supra* note 81.

85. A genre is defined as a “group of discourses which share substantive, stylistic, and situational characteristics” that are distinctive because they are always found together. KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, FORM AND GENRE: SHAPING RHETORICAL ACTION 20 (1978); see also *id.* at 19 (“[R]hetorical forms that establish genres are stylistic and substantive responses to perceived situational demands.”). Analyzing a genre can force us “to reanalyze and rethink the social, cultural, political purposes of previously taken-for-granted genres, and leads to an archeological unearthing of tacit assumptions, goals and purposes.” Aviva Freedman & Peter Medway, *Locating Genre Studies: Antecedents and Prospects*, in GENRE AND THE NEW RHETORIC 2 (Aviva Freedman & Peter Medway eds., 1994).

86. NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 247–48 (1957); see also CAMPBELL & JAMIESON, FORM AND GENRE, *supra* note 85, at 26–27 (“Recurrence of a combination of forms into a generically identifiable form over time suggests that certain constants in human action are manifest rhetorically. . . . Whatever the explanation, the existence of the recurrent provides insight into the human condition.”); Bazerman, *Letters*, *supra* note 2, at 16 (citing multiple studies) (“Genres help us navigate the complex world of written communication and symbolic activity, because in recognizing a text type we recognize many things about the institutional and social setting, the activities being proposed, the roles available to writer and reader, the motives, ideas, ideology, and expected content of the document, and where this all might fit in our life.”); Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 245–55 (2012) (describing the history and development of genre theory and explaining that “[i]dentifying the genre to which a communication belongs adds to the repertoire of tools available to explain the meaning of that communication”).

87. FRYE, *supra* note 86, at 247.

types of written discourse, “characterized by similarities in content and form,” and situate those similarities in a broader social and cultural context.<sup>88</sup>

Letter writing is a broad “primary” genre.<sup>89</sup> As compared with other forms of written discourse, letters are characterized by the fact that they are grounded in relationship and contemplate an exchange between participants.<sup>90</sup> In the words of Peter Goodrich, “the letter is a messenger” and “necessarily engages sender and recipient in a relationship with both a personal and a public dimension, with both an emotional and a cognitive content.”<sup>91</sup> While all written genres involve a delicate balance between author and reader, letter writing might be characterized as the most deliberately social.<sup>92</sup> When a letter writer sits down to pen her missive, she

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88. Freedman & Medway, *supra* note 85, at 1; *see also* Carolyn R. Miller, *Genre as Social Action*, in *GENRE AND THE NEW RHETORIC* 23, 23–24 (Aviva Freedman & Peter Medway eds., 1994) (“[G]enre study is valuable not because it might permit the creation of some kind of taxonomy, but because it emphasizes some social and historical aspects of rhetoric that other perspectives do not.”) (article originally published in 70 *QUARTERLY J. OF SPEECH* 151 (1984)).

89. *See* David Barton & Nigel Hall, *Introduction* to *LETTER WRITING AS A SOCIAL PRACTICE* 6 (David Barton & Nigel Hall eds., 1999); *see also* George Kamberelis, *Genre as Institutionally Informed Social Practice*, 6 *J. CONTEMP. LEGAL ISSUES* 115, 122–23 (1995) (discussing the work of Mikhail Bakhtin, among others, which describes “primary” genres as arising from everyday communicative activities). In addition to personal letters, primary genres would include conversations, service interactions, and other such communicative activities, written or spoken. Secondary genres derive from the primary genres and are described as specific to a discipline, for example “legal documents, constitutional amendments, novels, and laboratory reports.” *Id.* at 123. Speechmaking, for example, may be considered a genre but it can be divided into “forensic, deliberative, and ceremonial forms” which also can be broken down into subtypes. *Introduction to FORM, GENRE, AND THE STUDY OF POLITICAL DISCOURSE* 8 (Herbert W. Simons & Aram A. Aghazarian eds., 1986). What matters, scholars of rhetoric agree, is not specificity but rather the “presence of a characteristic set of formal elements given systemic play in response to a recurring situation.” *Id.* at 9.

90. In his article *Epistolary Justice: The Love Letter as Law*, Professor Goodrich writes that the letter, as a

rhetorical form . . . was designed principally to plead or state a cause, to persuade or to move to action. In both civil and common law, the numerous offices of writing, of sending, receiving, noting, proclaiming, and filing letters are organized, therefore, around the act or message which the letter performs or announces. Early legislation thus took the form of letters patent and was addressed to specific officials.

Peter Goodrich, *Epistolary Justice: The Love Letter as Law*, 9 *YALE J.L. & HUMAN.* 245, 267 (1997) [hereinafter Goodrich, *Epistolary Justice*].

91. *Id.* at 272.

92. Barton & Hall, *supra* note 89, at 6–8; *see also* Bazerman, *Letters*, *supra* note 2, at 16 (“The letter, in its directness of communication between two parties within a specific relationship in specific circumstances (all of which could be commented on directly), seemed to provide a flexible medium out of which many functions, relationships, and institutional practices may develop—making new uses socially intelligible at the same time as allowing the form of communication to develop in new directions.”).

not only chooses her artifacts of writing,<sup>93</sup> which might be a favorite pen or a special desk or a new computer, and her subject matter, but also she chooses her recipient. In contrast, although the authors of other forms of discourse unquestionably consider their respective audiences as they aim to craft always coherent and sometimes transformative prose, the audience is theoretical and therefore incidental to, rather than a fundamental part of, the rhetoric. By making the pragmatic decision to write a letter, rather than a poem, speech, or will, for example, the author chooses a specific reader. Her activity is therefore more communal, less solitary.<sup>94</sup>

Present in all letters are certain formal elements, including a sender, a recipient, and a body of text linking the two.<sup>95</sup> Some linguistic analysts have been even more specific, identifying the five components of letters as “Salutation, Securing of good-will, Narrative, Petition and Conclusion.”<sup>96</sup> Letters as a genre also explicitly involve a consciousness in time and space because “spatial distance is often the main reason for the letter’s existence and there is a time lag between the writing and the reading.”<sup>97</sup> Charles Bazerman traces the history of letters back to the ancient Near East and Greece and recalls how early letters delivered commands and military projections from an authority in one location to a recipient in another.<sup>98</sup> From an invention designed primarily to “mediate distance,” letters evolved to include “expressions of personal concerns” and scholarly lessons on topics ranging from philosophy to rhetoric to mathematics.<sup>99</sup> Indeed, a special branch of rhetoric, the “*ars dictaminis*,” emphasized the important components of a letter, including the social roles of sender and recipient; “letter writers were advised to build the bond of good will with the recipient by invoking sentiment and obligation.”<sup>100</sup> Goodrich describes the art of

93. Barton & Hall, *supra* note 89, at 6–8.

94. Goodrich, *Epistolary Justice*, *supra* note 90, at 264–65 (letter’s primary focus is “with the mapping of relationships, with a war against distance, with communications between absent parties”).

95. See Bazerman, *Letters*, *supra* note 2, at 18 (“The ongoing relationships and transactions are directly brought to mind to writer and reader through the salutation, signature, and content of the letter.”).

96. Barton & Hall, *supra* note 89, at 6.

97. *Id.*

98. Bazerman, *Letters*, *supra* note 2, at 17–18.

99. *Id.* at 18; Amanda Wilcox, *Sympathetic Rivals: Consolation in Cicero’s Letters*, 126 AM. J. PHILOLOGY 237, 237–55 (2005).

100. Bazerman, *Letters*, *supra* note 2, at 20. Medieval Europe saw many forms and instructions about letter writing, with rising popularity and use among women in particular. See generally Janet Gurkin Altman, *Women’s Letters in the Public Sphere*, in GOING PUBLIC: WOMEN AND PUBLISHING IN EARLY MODERN FRANCE 99 (Elizabeth C. Goldsmith & Dena Goodman eds., 1995); Shawn D. Ramsey, *The Voices of Counsel: Women and Civic Rhetoric in the Middle Ages*, 42 RHETORIC

letter writing as a “medieval development of a branch of rhetoric” which, “[i]n classical rhetorical terms,” contained only two types: “official or intimate, negotiales or familiares.”<sup>101</sup> When a letter writer opts to pen a letter “familiar” with its intimate “flourish of the pen,” especially in “this age of remorseless mechanical reproduction, despite the ease of e-mail and of all the other facilities of word processing,”<sup>102</sup> her choice of form reflects an attitude of openness and intimacy.<sup>103</sup> In other words, even if the letter’s language does not acknowledge intimacy,<sup>104</sup> the genre continues a conversation with “an absent friend” and thus is an eloquent recognition of the relationship between author and reader.<sup>105</sup>

The genre of letters can be further divided to include countless secondary genres, including but not limited to business letters, love letters, demand letters, invitations, complaints, letters of condolence, letters to editors, thank you notes, and, most importantly for the purposes of this Article, last letters, which are written in contemplation of separation or death, looming or otherwise.<sup>106</sup>

#### B. “Last Letters” or Letters Non-Testamentary as a Distinct Sub-Genre

Most of the secondary genres of letters, whether official or intimate, might be characterized as bilateral. The letter writer intends to engage in a dialogue with a recipient from whom a response is anticipated; it is the exchange of two or more epistles that comprises a dedicated whole.<sup>107</sup>

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Soc’y Q. 472 (2012).

101. Goodrich, *Epistolary Justice*, *supra* note 90, at 266.

102. Peter Goodrich, *The Immense Rumor*, 16 YALE J.L. & HUMAN. 199, 231–32 (2004) [hereinafter Goodrich, *Immense Rumor*].

103. *Id.* at 232.

104. *Id.* (“[W]hen it comes to talking of the role or practice of friendship . . . analysis runs out and words fail.”).

105. *Id.* (quoting DE LA SERRE, LE SECRETAIRE LA MODE 6 (1632)).

106. Barton & Hall, *supra* note 89, at 7 (describing typologies of letter sub-genres); *see generally* JENNY & TIM SAVILLE, COMPLETE LETTER WRITER (1995); GREVILLE JANNER, THE ART OF LETTER WRITING (1989).

107. Crinquand, *supra* note 6, at 2 (“Writing a letter is an act of communication between a letter-writer and an addressee, and the letter-writer expects a response to his letter, so that the epistolary contract may be fulfilled.”). One scholar, who analyzed letters by ancient rhetors like Pliny and Jerome, explained that “there was an unspoken understanding among friends that whoever received the ‘gift’ of a letter incurred a debt of gratitude to the sender, a debt that could be paid only by reciprocation with a reply.” Andrew Cain, *Vox Clamantis in Deserto: Rhetoric, Reproach, and the Forging of Ascetic Authority in Jerome’s Letters from the Syrian Desert*, 57 J. THEOLOGICAL STUD. 500, 504–05 (2006). In fact, a letter’s content “was not nearly as important as the friendly gesture of sending it.” *Id.* at 505 n.28 (noting how ancient friendship letters, like today’s holiday cards, show “it is the thought that counts”). If a letter writer claimed to have nothing to write, he

Another sub-genre of letters includes those written by authors who are particularly cognizant of the public nature of their discourse. Examples of this type of letter, which might be called omni-lateral, have prompted intense rhetorical scrutiny, because the writing employs formal techniques to further its persuasiveness and, therefore, its effect on a larger audience of readers.<sup>108</sup> While social interaction is essential to the writers of this type of letter too, the writer's primary purpose is to persuade not only the specific recipients but also other unidentified readers to act or think in a particular way.<sup>109</sup>

The letters that feature most commonly in the inheritance context prompt yet a third category, which "seems to contradict the very essence of the epistolary genre"<sup>110</sup> because, although the author shows an awareness of and a desire to connect with her specified recipient, she neither solicits nor expects a response. These letters, which might be called unilateral, are defined by their subject matter; they focus on imminent or at least upcoming terminations, such as the author's impending death, relinquishment of power, or intent to sever emotional ties. They may involve a simple plan, like the father's letter about farming to his sons in *Kimmel*, or an expression of emotion, like the private letter from the sister to her brother in *Henderson* in which she expressed anxiety that her family receive adequate care on her demise.<sup>111</sup>

To a letter writer, a last letter helps bridge that anticipated separation, thereby providing a strategy for dealing with the distance between the person

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was reproached with not writing "this very thing, that you had nothing to write." See *id.* at 510.

108. See, e.g., Diane Marie Blair, *I Want You To Write Me: Eleanor Roosevelt's Use of Personal Letters as a Rhetorical Resource*, 72 W. J. COMM. 415 (2008); David Charles Gore, *Joseph Smith's Letter from Liberty Jail as an Epistolary Rhetoric*, 43 DIALOGUE: J. MORMON THOUGHT 43, 43–70 (2010); Kristin S. Vonnegut, *Poison or Panacea?: Sarah Moore Grimkes's Use of the Public Letter*, 46 COMM. STUD. 73 (1995).

109. Martin Luther King, Jr.'s *Letter from a Birmingham Jail*, for example, was written as a strategic response to a public statement from the white clergy of Birmingham, Alabama advocating patience in civil rights agenda, and numerous scholars have dissected the letter as a model of rhetorical devices. See, e.g., Edward Berry, *Doing Time: King's Letter from Birmingham Jail*, 8 RHETORIC & PUB. AFF. 109, 109–31 (2005); Michael Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King, Jr.'s Letter from a Birmingham Jail*, 7 RHETORIC & PUB. AFF. 37, 37–51 (2004); Michael Osborn, *Rhetorical Distance in Letter from Birmingham Jail*, 7 RHETORIC & PUB. AFF. 23, 26 (2004); John H. Patton, *A Transforming Response: Martin Luther King Jr.'s Letter from Birmingham Jail*, 7 RHETORIC & PUB. AFF. 53, 53–54 (2004); Martha Solomon Watson, *The Issue Is Justice: Martin Luther King Jr.'s Response to the Birmingham Clergy*, 7 RHETORIC & PUB. AFF. 1, 2 (2004). Omni-lateral letters were published by their authors as forms of propaganda to promote their public personae and objectives. Cain, *supra* note 107, at 513–14.

110. Crinquand, *supra* note 6, at 2.

111. *In re Kimmel's Estate*, 123 A. 405, 405 (Pa. 1924); *Henderson v. Henderson*, 33 S.E.2d 181, 182 (Va. 1945).



who is leaving, dying, severing contact, or ceding control, and the person or people left behind.<sup>112</sup> Unlike formal legal documents, this rhetorical purpose is achieved without intrusion from third parties, such as a spokesman, scrivener, or court. As such, this intimate form of communication “illuminates the situations of others . . . and is a means of relating to another or making another intelligible.”<sup>113</sup> In this way, last letters are a mechanism for empathy, which means that they “tend to influence the emotional reactions of one person . . . [to] produce a match (roughly, some sort of congruence) between these emotions and those of another person.”<sup>114</sup> Intensely focused on the recipient, the genre helps convey to that recipient the writer’s practical concerns about property and the writer’s feelings about dying.

To a third-party reader who comes upon this writing, last letters are “far more dramatic than ‘ordinary’ letters” because a last letter signifies “the end of an exchange” and shares “an attitude towards closure.”<sup>115</sup> As Sylvie Crinquand puts it,

The writer’s awareness of entrusting the letter with [her] ultimate words makes these texts emotional, not so much because the letter-writers express their emotion in touching terms—very few of them mention their fear, for instance, although sadness is a common feature—but because the knowledge of what happened to them after writing the letter cannot be dissociated from the reading experience.<sup>116</sup>

In the non-legal context, for example, Crinquand points to letters from members of the French Resistance about to be executed, who expressed “love for their country and belief in higher ideals” which “helped to put their own death in perspective,” thereby “transcend[ing] the individual and sometimes becom[ing] emblematic of both human mortality and human

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112. See FOSS, RHETORICAL CRITICISM, *supra* note 83, at 63–64.

113. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1580–81 (1987); see generally Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (describing how empathy—legal, and rhetorical—allows for an understanding of each individual’s unique humanity).

114. D’Arms, *supra* note 27, at 1480. Empathy has been defined as “the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another . . . without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner.” Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1958 (2012) (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 408 (11th ed. 2003)).

115. Crinquand, *supra* note 6, at 2–3 (compiling essays on different forms of “last letters,” real and fictional).

116. *Id.* at 3.

resilience.”<sup>117</sup> In the legal context, as Part I shows, courts cannot resist quoting the language even when the effect is unclear.

*C. Examples: Sir Thomas More and the Kay Jewelers Heir*

Two “last letters” that reflect characteristics of, and thereby help illustrate and delineate, the genre of letters non-testamentary are Sir Thomas More’s July 5, 1535 letter to his favorite daughter Margaret, written the day before he was executed,<sup>118</sup> and Richard Kaufmann’s 1961 letter to his two brothers, explaining why his estate plan benefitted his lover and not his blood relatives.<sup>119</sup> Separated by continents, centuries, and circumstances, both letter writers found themselves in a form of prison and used the emotional relief of the letter non-testamentary as a type of escape mechanism. The two letters contain the specific markings of the genre in form and substance.

Thomas More, the former Lord Chancellor of England, was confined to the Tower of London for more than a year because he refused to recognize Henry the VIII’s authority over the Church of England.<sup>120</sup> While incarcerated, More exchanged letters with his family in which he both consoled them about his absence and informed them of the interrogations to which he was regularly subjected.<sup>121</sup> These letters have been characterized as “functional rather than personal” because they appear to have been written “with great circumspection” and “for an audience that extended well beyond the family circle.”<sup>122</sup> For example, in these letters More does not denigrate or complain but rather refers with respect to his visitors;<sup>123</sup> the letters do not argue or scold but rather echo More’s allegiance to the realm and to his “gracious . . . Prince.”<sup>124</sup> In all, the regular correspondence with his family reflects More’s public persona.<sup>125</sup>

More’s last letter, though, has a far more intimate, if ultimately prosaic,

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117. *Id.*

118. Terence McCarthy, “No Leisure to Look to Worldly Courtesy”: *The Last Letter of Sir Thomas More, July 5<sup>th</sup> 1535*, in *LAST LETTERS*, *supra* note 6, at 100.

119. *In re Will of Kaufmann*, 247 N.Y.S.2d 664, 671 (N.Y. App. Div. 1964), *aff’d* 205 N.E.2d 864 (N.Y. 1965).

120. McCarthy, *supra* note 118, at 101–02.

121. *Id.* at 101–03 (citing *THE CORRESPONDENCE OF SIR THOMAS MORE* (E.F. Rogers ed., Princeton Univ. Press 1947) [hereinafter “CORRESPONDENCE”]).

122. McCarthy, *supra* note 118, at 103.

123. *Id.* at 102–03.

124. *Id.* at 104 (quoting *CORRESPONDENCE*, *supra* note 121, at 542).

125. *Id.* at 103–04 (prison letters “clearly written with posterity in mind”).

tone.<sup>126</sup> Although this letter lacks a conclusion because More was killed before completing it, the letter contains the other formal markers of the letter genre: salutation, securing of good will, narrative, and petition.<sup>127</sup> For example, More opens the letter to his daughter Margaret by asking for a blessing on her and her family as follows: “Owr Lorde blisse you goode dowter and your goode husbände and your little boye and all yours and all my children and all my godchildren and all owr friendis.”<sup>128</sup> This greeting affirms More’s connection to his daughter and recognizes both of their places within a broader web of connections. The words More selects to salute Margaret and secure her good will reappear throughout the text; the short epistle contains some form of the words “good,” “loving,” and “bless” in nearly every line.<sup>129</sup> Although this redundancy has led the letter to be characterized as “stylistically numb”<sup>130</sup> and written by someone who appeared “scarcely able to handle a pen,”<sup>131</sup> the commonplace language and lack of complexity<sup>132</sup> reveal the primacy of More’s end-of-life narrative: blessings to all of his “goode” daughters and sons and their “goode” husbands, wives, and children whom More beseeches to pray for him until they “maie merily meete in heauen.”<sup>133</sup> Reaffirming the intimate and trivial, More refers in the letter to tangible items, like a handkerchief (“handkercher”), a “picture in parchemente,” and other “tokens.”<sup>134</sup> More notably, though, More uses the letter to tell his beloved daughter that he is ready “to goe to God” and “neuer liked your maner towarde me better than when you kissed me laste for I loue when daughterly loue and deere charitie hath no laisor to looke to worldely curtesye.”<sup>135</sup> A public figure for most of his existence, More uses his last letter for the private purpose of being remembered and of remembering Margaret and, through her, the other women and men in his life. He achieves connection not by anticipation of a response, for none was expected, but rather through direct, simple, and highly accessible prose and in the most amiable of forms.

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126. *Id.* at 100–01 (quoting letter in full); *see also id.* at 109–10.

127. *See supra* text and accompanying notes 95–99.

128. McCarthy, *supra* note 118, at 100.

129. *Id.* at 100–01, 108.

130. *Id.* at 110.

131. *Id.*

132. *Id.* at 109 (“The vocabulary is simple and predominantly monosyllabic; only 49 words out of 418 have more than one syllable.” (footnote omitted)).

133. *Id.* at 100.

134. *Id.*

135. *Id.*

While Robert D. Kaufmann, heir to the Kay Jewelers fortune,<sup>136</sup> did not pen his last letter from prison or on his deathbed, he did write the memorable letter in anticipation of his death.<sup>137</sup> Kaufmann, who died in a fire when he was in his mid-forties, left the bulk of his estate to his live-in companion and business manager, Walter Weiss.<sup>138</sup> With money on their side, the “natural” objects of the testator’s bounty, his blood relatives, contested the probate of his will by arguing that Weiss had exerted “undue” influence over Kaufmann. Two separate juries<sup>139</sup> and several appellate courts agreed.<sup>140</sup> Starting in 1950 and until he died, Kaufmann had executed a series of formal wills leaving increasing portions of his estate to Weiss.<sup>141</sup> In 1951, at the time he first changed the will to leave a sizeable portion of his estate to a man “not a member of my family,” Kaufmann wrote a letter to his relatives explaining the reasons for this shift.<sup>142</sup>

The Kaufmann letter, which has been described as a “coming out of the closet at death” letter,<sup>143</sup> also contains many of the formal markers of the last letter genre. Although the full writing is not reproduced in any of the published court decisions, the letter was addressed to Kaufmann’s brothers, who were the recipients and intended readers. Kaufmann starts his narrative by recounting that when he met Weiss, Kaufmann was a “frustrated time-wasting little boy,” but that Weiss gave him “the courage to start

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136. See Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 593 & n.72 (1997).

137. *In re Will of Kaufmann*, 247 N.Y.S.2d 664, 671 (App. Div. 1964), *aff’d* 205 N.E.2d 864 (N.Y. 1965). For several of many commentaries on this case, see, e.g., DUKEMINIER & SITKOFF, *supra* note 8, at 298–99; LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 97 (2009); ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGE CROSSES STATE LINES* 1–4 (2006); STEWART E. STERK, MELANIE B. LESLIE, & JOEL C. DOBRIS, *ESTATES AND TRUSTS* 493–501 (4th ed. 2011); Horton, *supra* note 28, at 94–99; Madoff, *supra* note 136, at 592–600.

138. *Kaufmann*, 247 N.Y.S.2d at 666.

139. *Id.* at 665; see also *In re Will of Kaufman*, 221 N.Y.S.2d 601, 603 (App. Div. 1961).

140. *Kaufmann*, 247 N.Y.S.2d at 684 (finding Kaufmann’s will to have resulted from “an unnatural, insidious influence operating on a weak-willed, trusting, inexperienced [testator]”); see also *In re Will of Kaufmann*, 205 N.E.2d 864, 864–65 (N.Y. 1965) (“Where, as here, the record indicates that testator was pliable and easily taken advantage of, as proponent admitted, that there was a long and detailed history of dominance and subservience between them, that testator relied exclusively upon proponent’s knowledge and judgment in the disposition of almost all of the material circumstances affecting the conduct of his life, and proponent is willed virtually the entire estate, we consider that a question of fact was presented concerning whether the instrument offered for probate was the free, untrammelled and intelligent expression of the wishes and intentions of testator or the product of the dominance of the beneficiary.” (citations omitted)).

141. *Kaufmann*, 247 N.Y.S.2d at 670–80.

142. *Id.* at 671.

143. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 191 (8th ed. 2009).

something” and to “supply for myself everything my life had heretofore lacked.”<sup>144</sup> In Kaufmann’s words, Weiss provided him with “an outlet for [his] long-latent but strong creative ability in painting” and helped him achieve “a balanced, healthy sex life which before had been spotty, furtive and destructive.”<sup>145</sup> Kaufmann described the “[p]eace of [m]ind,” “delight,” maturity, and “relief” Weiss brought to his life and the gratitude he felt towards this “dearest friend” and “best pal.”<sup>146</sup> He ends the letter with a petition, asking his brothers “[w]hat could be more wonderful than a fruitful, contented life and who more deserving of gratitude now, in the form of an inheritance, than the person who helped most in securing that life,” and entreating them to be “glad and happy for my own comfortable self-determination and contentment and equally grateful to the friend who made it possible.”<sup>147</sup> Like More, Kaufmann solicited no response from his recipients. Like More, Kaufmann highlights what is important to him through redundancy; in place of “good,” “loving,” and “bless,” though, Kaufmann repeats the words “life,” “contentment,” and “gratitude.”<sup>148</sup>

Although the language of the Kaufmann letter is somewhat more varied and cheerful than that of the More letter, it reflects many shared characteristics that go beyond the decision to use the letter form with its general qualities but overriding informality. First, like More’s letter to his daughter, Kaufmann’s letter to his brothers is highly personal. Second, the letter acknowledges that a termination is at hand and recognizes that this termination will change the writer’s relationship to the recipient or recipients; Kaufmann’s repetition of the word “life” indicates this retrospective approach. Third, the letter reflects the writer’s priorities at a significant moment and tries to establish a connection with the recipients so that they may share those priorities; in that way, the letter attempts to build empathy in the readers and bridge a gap that death will engender. A memorandum, speech, will, or poem might have provided greater solemnity; the writers here instead chose to use the far simpler letter form to reaffirm their important social relationships. Fourth, although Kaufmann opens theatrically in the first few paragraphs, he reverts to more basic language (e.g. “best pal”) by the end of the letter, perhaps in an effort to make himself more accessible to his brothers, the recipients. Finally, because the letter does not contemplate a response, it voices the writer’s final thoughts, even

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144. *Kaufmann*, 247 N.Y.S.2d at 671.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

though it was written years before his death. Although Kaufmann signed four new wills over the remaining years of his life, he retained the 1951 letter in an envelope that always accompanied the formal wills.<sup>149</sup> The letter nevertheless did not sway the court, which invalidated Kaufmann's most recent will.<sup>150</sup>

Genres can help identify “the possible intentions” a creator may have.<sup>151</sup> The More and Kaufmann letters were written by individuals who were aware of the formal strictures of the law—More was a lawyer himself,<sup>152</sup> and Kaufmann had undergone extensive estate planning<sup>153</sup>—but perceived their impending deaths as occasions to write letters that were intimate in form, structure, and content.

The primary legal genre that addresses the moment of separation—from property and life—is the last will.<sup>154</sup> Much has been made of the ritualized nature of wills, even leading one scholar to characterize them as “creatures of form rather than substance”<sup>155</sup> and another to describe the psychological comfort and therapeutic benefit that comes simply from the safe harbor that will formalities provide.<sup>156</sup> Wills, in their standard form, do not refer to or contemplate a particular reader, other than indirectly in the form of a probate court, registry, and fiduciary.<sup>157</sup>

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149. *Id.*

150. *Id.* at 685–86.

151. Bazerman, *Systems of Genres*, *supra* note 30, at 82.

152. McCarthy, *supra* note 118, at 110.

153. *Kaufmann*, 247 N.Y.S.2d at 670–82.

154. Like letters, wills comprise a distinct genre that has existed since ancient times. Sneddon, *In the Name of God*, *supra* note 84, at 675–80 (tracing history of wills from ancient times to present).

155. Mann, *supra* note 25, at 1035.

156. Glover, *Testamentary Formalities*, *supra* note 24, at 150–57.

157. Professor Sneddon, in her rhetorical analysis of 168 Bibb County, Georgia wills spanning the years 1821 to 2003, observed that there are certain patterns that define the wills genre, including “(1) the lyrical title of ‘Last Will and Testament,’ (2) the invocation in the introduction, (3) the weighty gift, bequest, and devise of the rest, residue, and remainder, (4) the duty-laden nomination of executors and trustees, and (5) the resonating closing.” Sneddon, *In the Name of God*, *supra* note 84, at 694–711 (examining each of the ritual points in the sample); *see also id.* at 687–88 (noting that wills are written in the present tense first person and contain an “introduction; gifts of tangible personal property; gifts of cash, stocks, or bank accounts; gift of the residue estate; nomination of fiduciaries (executors, trustees, and guardians); administrative provisions (such as the waiving of bond); closing; attestation clause; and self-proving affidavit”). Although the wills that Sneddon analyzed revealed increasing complexity over the years, *id.* at 687, and contained personal markers of the individual testators, *id.* at 711–17, the genre reflects these “five preserved ritual points,” *id.* at 694, providing draftspersons with a certain level of comfort that the documents will function and be recognized. In Sneddon's words, “estate planning is the closest ritual of death that modern society has” and “[a]s befits this recognition, the will continues to incorporate framing and phrasing that illustrate this ritual.” *Id.* at 723.

Letters, in contrast, are deliberately social. The writer reaches out to an identified reader to share her most intimate views as she contemplates their impending separation.<sup>158</sup> The letter genre also allows and even seems to attract personal narrative, explanation, and emotion. Finally, unlike wills (though akin to trusts), letters between private individuals are not available to the public.<sup>159</sup> Accordingly, to the extent that the writer is reluctant to express preferences openly, the letter offers the writer a “private” forum<sup>160</sup> and more intimate form of exchange. As one nineteenth century court recognized, “[t]he law and society attach deserved inviolability to private correspondence, and courts of justice are careful rather to guard than invade that inviolability.”<sup>161</sup> This privacy cannot be underestimated, for estate disputes “not infrequently [bring] to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial.”<sup>162</sup>

Bearing in mind these models and characteristics of the last letter genre,

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158. Rhetorical and literary critics have examined other genres grounded in death in an attempt to use the “generic approach to rhetorical criticism . . . to generalize beyond the individual event which is constrained by time and place to affinities and traditions across time.” CAMPBELL & JAMIESON, *FORM AND GENRE*, *supra* note 85, at 27. The eulogy, for example, has been characterized as a genre that responds to “a situation in which a community is ruptured by death.” *Id.* at 20. Because a eulogy is written and performed after death and by those who survive, the genre juxtaposes “past and present tense which recasts the relationship to the deceased to one of memory.” *Id.* A trait of the eulogy is also to “reknit the sundered community through rhetorical devices which appeal to the audience to carry on the works, to embody the virtues or to live as the deceased would have wished.” See FOSS, *RHETORICAL CRITICISM*, *supra* note 83, at 63–64 (discussing the work of Kenneth Burke, who looked at the “basic motive for rhetoric” as a creative strategy for eliminating division or alienation—and correspondingly for promoting identification). Like last letters, eulogia address separation directly and relationally by invoking both memory and community. See CAMPBELL & JAMIESON, *FORM AND GENRE*, *supra* note 85, at 20.

159. See Frances H. Foster, *Trust Privacy*, 93 *CORNELL L. REV.* 555, 559 (2008) (“Publicity is the price a decedent pays for using ‘court-regulated devices’ such as wills or testamentary trusts as opposed to a ‘private arrangement’ such as a revocable trust.”); Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 *ARIZ. ST. L.J.* 713, 722 (2006) (“Once a will is filed for probate, it becomes public record for all the world to see.”).

160. See, e.g., *Henderson v. Henderson*, 33 S.E.2d 181, 182 (Va. 1945); see also *In re Crick’s Estate*, 41 Cal. Rptr. 120, 121–22 (Cal. Dist. Ct. App. 1964) (letter to “Dear Ada: This is just for you to read don’t let lawyers or no one else know or there will be tax on it to. [sic] Cora Mitchell 623 North Harvard St. L.A. telephone no. NO-50587. She has \$24,000 of mine in her box give her \$500 & the rest devide [sic] 3 ways as in rest. I may put some more in box next fwew [sic] day if I do I will let you know. As soon as things are settled so I can will make a real will . . .”).

161. *Lucas v. Brooks*, 23 La. Ann. 117, 121 (1871).

162. *Smithsonian Inst. v. Meech*, 169 U.S. 398, 402 (1898); see also Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 *ARIZ. ST. L.J.* 629, 637 (1994) (“The recognition of the importance of this factor to testators by the United States Supreme Court is quoted in almost every case involving a no-contest clause . . .”). Of course, because the letter is the property of the recipient, she may choose to open the writing to the world or to maintain its privacy. See *Property Rights in Letters*, *supra* note 5, at 493.

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the next section returns to case law and its abundant supply of examples. In contrast to the letters featured in Part I, however, those that follow were written by individuals who also executed formal testamentary documents which they decided to supplement with letters. By focusing on the writers' decisions to use the informal genre, as reflected in the selected letters' rhetoric, content, and context, we can see not only skepticism about and gaps in how traditional estate planning documents function, but also some real and practical benefits of working outside inheritance law's more traditional structures.

#### IV. LETTERS NON-TESTAMENTARY: CONVEYING EMOTION, PURPOSE, AND MEANING TO A DESIGNATED RECIPIENT

As the quotation at the opening of this Article reminds us, letters “compared to other genres, may appear humble, because they are so overtly tied to particular social relations of particular writers and readers, but that only means they reveal to us so clearly and explicitly the sociality that is part of all writing.”<sup>163</sup> The letters that appear below are in part archeological in that they convey a “human quality,” but also “betray some sense of [the writer's] history and historical context.”<sup>164</sup> But because writing a letter is a choice and not an accident, each letter also evidences the writer's attitudes towards her social situation: the author is anticipating death; she has chosen to execute formal estate planning documents; but she also knows something is missing. Like Kaufmann, who wrote his letter to accompany but not replace his will, the letter writers described in this Part had an awareness of the law and a desire to transcend it.<sup>165</sup> Some use their letters to avoid what might be characterized as the law's complications. The balance, though, are writers who choose the genre because they wish to mediate between achieving an efficient property distribution and imbuing that distribution with meaning. These letters, which in general avoid theatricality for simplicity and performance for connection, reinforce the social relationship between writer and recipient without disrupting the estate plan or manipulating the beneficiaries.

This result is demonstrated persuasively by focusing on one commonly

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163. Bazerman, *Letters*, *supra* note 2, at 27.

164. Crinquand, *supra* note 6, at 3; *see also* Barton & Hall, *supra* note 89, at 1 (discussing the pervasiveness and historical significance of letter writing).

165. *See* Goodrich, *Epistolary Justice*, *supra* note 90, at 252–53 (describing how the love letters he examines are “both more than law and in breach of law”).



used last letter, called a “letter of wishes.”<sup>166</sup> Letters of wishes come into play when property is intended to be distributed over time rather than outright, so appear most often in a trust context. Such letters are seen as one way to add flexibility to irrevocable trust instruments without binding the fiduciary’s hands.<sup>167</sup> Although not legally binding on the recipient, letters of

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166. As suggested in the “Moneywatch” article referred to *supra* in notes 18–19 and the accompanying text, estate planners regularly recommend such letters, especially for the most substantial, longest lasting trusts. In a survey conducted by Jeffrey Pennell for the American College of Trust & Estate Counsel (ACTEC), estate planners responded that settlors preferred a “letter of intent/wishes” over incentive provisions in the trust itself. Jeffrey N. Pennell, *The Joseph Trachtman Lecture—Estate Planning for the Next Generation(s) of Clients: It’s Not Your Father’s Buick, Anymore*, 34 ACTEC L.J. 2, 31 (2008). Although references to letters of wishes appear frequently in case law, their content unfortunately is rarely quoted or discussed. See, e.g., *Dexia Credit Local v. Rogan*, 624 F. Supp. 2d 970, 973 (N.D. Ill. 2009) (“At the time the [irrevocable trust] was created, [settlor] submitted a ‘letter of wishes’ stating ‘[p]lease distribute all of the income of the Trust to me upon receipt by the Trustee.’”); *United States v. Berscht*, No. 04–098 JIF, 2008 WL 523435, at \*2 (D. Del. Feb. 25, 2008) (discussing evidence that defendant controlled Enron-related funds, such as “account opening forms and a letter of wishes from the Defendant instructing [the] Trust how to dispose of [Enron-related] assets in the event of the Defendant’s demise”); *IFG Network Sec., Inc. v. King*, 282 F. Supp. 2d 1344, 1346 (M.D. Fla. 2003) (“Although the trust agreement accorded [the Panamanian trustee] broad powers to invest trust assets, in a ‘Letter of Wishes for Trust’ the [settlor] indicated a desire to invest in government securities.”); *Sec. & Exch. Comm’n v. Ballesteros Franco*, 253 F. Supp. 2d 720, 723 (S.D.N.Y. 2003) (referring to various letters of wishes from settlor to trustees of two trusts delegating to settlor’s husband the “authority, acting alone, to issue investment instructions to the Trustees,” allowing settlor’s husband veto power, and designating trusts’ beneficiaries); *Multi-Fin. Sec. Corp. v. Brown*, No. Civ. A. 02-3828, 2002 WL 32130291 (E.D. Pa. Dec. 20, 2002) (referring to two “Letter of Wishes” documents); *Estate of Obregon*, 662 N.Y.S.2d 750, 751 (App. Div. 1997) (Settlor “then executed a Letter of Wishes directed to Private Bank, a non-binding instruction under the law of the Caymans given to assist trustees of discretionary trusts”), *aff’d sub nom. In re Stern*, 91 N.Y.2d 591, 696 N.E.2d 984 (1998).

167. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 670 n.249 (2004); Charles D. Fox & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 300 (2002) (describing how a settlor can provide “nonbinding written guidelines to the trustee” through letters of wishes, which typically “cover the settlor’s intent with respect to the investment of the assets and the making of distributions to family members”). Settlors and their advisors have created other mechanisms to achieve similar goals, most of which, like letters of wishes, arose in the offshore trust context. See Sitkoff, *supra*, at 670 & n.249; see also JAMES WADHAM, *WILLOUGHBY’S MISPLACED TRUST* 141–54 (2d ed. 2002) (discussing letters of wishes in offshore context); Antony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT’L L. 879, 910 (1999) (same); David Hayton, *The Irreducible Core Content of Trusteeship*, in *TRENDS IN CONTEMPORARY TRUST LAW* 47, 52–53 & n.35 (A.J. Oakley ed., 1996) (same). Examples include: granting powers of appointment, see Jonathan G. Blattmachr, Kim Kamin & Jeffrey M. Bergman, *Estate Planning’s Most Powerful Tool: Powers of Appointment Refreshed, Redefined, and Reexamined*, 47 REAL PROP. TR. & EST. L.J. 529 (2013); using a quasi-fiduciary watchdog called a “trust protector,” see Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 68 & n.1 (2010); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006); and including decanting provisions that allow the trustee to pour an old trust into a new one, see Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 196–99 (2012); William R. Culp, Jr. &

wishes allow writers to communicate their “cultural beliefs, values, and practices.”<sup>168</sup>

Such last letters have been encouraged by practitioners but virtually ignored by scholars.<sup>169</sup> Alexander Bove, in an excellent article published by the organization representing the scholarly arm of the trusts and estates bar, urges estate planners to encourage their clients to use such “non-binding written expression[s]” to indicate how she would “like to see the trustee exercise . . . discretion so that the administration of her trust will have a good chance of reflecting the manner in which the settlor herself would have administered it.”<sup>170</sup> Moral and emotional accompaniments to a formal distribution scheme, these supplemental letters have an important role to play in the planning process.

A. *Why Writers Use the Letters Non-Testamentary Genre: A Qualitative Analysis*

This section examines letters from cases in which individuals chose the letters non-testamentary genre, even though they have already and otherwise arranged their legal affairs. Because last letters are written to a specified individual who is not intended to reply, the communication is uniquely directed and focused. The writers appear to understand that the genre offers

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Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 46 (2010).

168. Barton & Hall, *supra* note 89, at 1 (“[T]he writing of letters is embedded in particular social situations, and like all other types of literary objects and events the activity gains its meaning and significance from being situated in cultural beliefs, values, and practices.”).

169. See Alexander A. Bove, Jr., *Letters of Wishes*, 145 TR. & EST. 46, 47 (Jan. 2006) (“[T]here is absolutely no mention of, reference to, or information on letters of wishes (to a trustee) in any of the trust treatises, reference works, reported cases or legal encyclopedias. Furthermore, I could find no articles on the subject in any of the recognized U.S. professional legal journals or magazines.”). In contrast, inheritance scholars have examined and debated the utility of most of the other devices. See *supra* note 167; see also Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807 (2006) (discussing the utility of trust protectors); Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. EST. & TR. L.J. 319, 338–40 (2010) (same); Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77, 91 (2011) (same); Melanie Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 83 (2005) (same). The only explanation for the lack of scholarly attention to “letters of wishes” is that these non-binding writings are seen as legally irrelevant. See WADHAM, *supra* note 167, at 142–43; Duckworth, *supra* note 167, at 882; Hayton, *supra* note 167, at 73–76. But this view is not entirely accurate, either in the eyes of the letter writers or the courts. See, e.g., Sec. & Exch. Comm’n v. Ballesteros Franco, 253 F. Supp. 2d 720, 723 (S.D.N.Y. 2003) (although individual was not a trustee and derived investment powers from non-binding “letters of wishes” and not formal trust instruments, court nevertheless refused to dismiss insider trading claim against trusts because complaint alleged that trusts were “dominated” by that individual).

170. Bove, *supra* note 18, at 44.

them an opportunity to convey their last wishes in a way that will be heard and remembered. In fact, this simple and accessible genre allows the writers to confront death in a way that the standard dispositive instruments may not.

Although the signature characteristic of a dispute involving a decedent's property is the absence of the star witness, the law of evidence ordinarily does not impose special rules for admissibility in inheritance cases.<sup>171</sup> To the contrary, even though these cases often pose a "worst evidence" problem,<sup>172</sup> the rules governing what evidence is legally cognizable generally mirror the rules governing other civil claims involving, for example, contracts or property arrangements.<sup>173</sup> Accordingly, last letters will not be admissible for the truth of their content<sup>174</sup> but may be used by courts to resolve other issues in inheritance disputes by, for example, showing that a testator has or lacks capacity<sup>175</sup> or clarifying the meaning of ambiguous provisions in the dispositive instrument<sup>176</sup> or even, curiously, to

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171. *But see* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remediating Wrongful Interferences with Inheritances*, 65 STAN. L. REV. 335, 378 (2013) (describing rule in inheritance cases that bars evidence from interested parties).

172. *See* Goldberg & Sitkoff, *supra* note 171, at 344, 365 (describing how posthumous litigation involving a donor's rights of disposition pose a "worst evidence" problem because the donor cannot "authenticate or clarify" her declarations and because it is difficult to find the "true intent of a deceased person").

173. In any will contest, testamentary documents govern, and extrinsic evidence is irrelevant unless there is a so-called "latent" (as opposed to a "patent") ambiguity. *See, e.g.,* Dozier v. Dozier, 77 So. 700, 701 (Ala. 1918) (refusing to admit letter, written by testator at the same time as the will and enclosed in the same envelope, because "[t]here is no latent ambiguity in the will that the letter could serve to clear up"); Citizens' & S. Nat'l Bank v. Clark, 158 S.E. 297 (Ga. 1931) (finding testator's letter to trustees named in his will, indicating testator's desires about property, inadmissible to show intention different from that expressed in the will); McKinsey v. Cullingsworth, 9 S.E.2d 315, 316 (Va. 1940) ("If the words and language of the testator are clear, the will needs no interpretation. It speaks for itself."). A patent ambiguity appears just by reading a document, while a latent ambiguity exists when a document appears clear on its face but is ambiguous in fact. *Eckels v. Davis*, 111 S.W.3d 687, 695 (Tex. App. 2003).

174. *See, e.g.,* Sylvester v. Newhall, 85 A.2d 378, 386 (N.H. 1952) (referring to "memorandum of wishes" that was found to be inadmissible by trial court "without examination"); Bajakian v. Erinakes, 880 A.2d 843, 846-48 (R.I. 2005) (upholding trial court's ruling that statements of memory in a letter were inadmissible hearsay even though letter purported to explain basis for unequal treatment of children in will); Bickler v. Scully, 527 N.W.2d 399 (Wis. Ct. App. 1994) (*per curiam*) (unpublished decision affirming trial court's determination that letter from father to trustee of trust holding jewelry, among other items, was inadmissible hearsay, because statement in letter that \$5,000 broach was "worth more than all the other jewelry [in trust] put together" and that daughter who did not receive broach should "get the rest of the jewelry" lacked indicia of reliability).

175. *See* cases cited in note 16 *supra*. *But see In re Hoffman's Estate*, 2 N.W.2d 442, 445 (Mich. 1942) (finding that a series of letters between decedent and grandson, who was sole beneficiary of decedent's will until decedent executed revocation days before her death, "might be considered, but not to establish the fact of [son's] undue influence" in procuring that revocation).

176. *See* cases cited in note 16 *supra*.

bear upon the letter writer's intent<sup>177</sup> or feelings.<sup>178</sup> Courts also frequently examine and discuss evidence that has been proffered—here, last letters—before or without deciding the issue of whether that evidence is admissible in the first place.<sup>179</sup> In short, case law provides a broad selection of raw material to be analyzed because homemade letters make frequent appearances, especially in older cases, even if they end up not being admissible or relevant.<sup>180</sup>

One motivation that surfaces in these letters is a perception that including specific wishes, ideas, emotions, and explanations in formal documents will complicate or even undermine the probate process.<sup>181</sup> This

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177. See *Lowenthal v. Rome*, 471 A.2d 1102, 1114–15 (Md. Ct. Spec. App. 1984) (describing how lower court found testator's letter to his brother explaining that his revised will "pertains to all my property in Spain which accordingly goes to you" to be "the single most important exhibit in evidence pertaining to the Decedent's intent"); *In re Briggs' Estate*, 134 S.E.2d 737, 741–42 (W. Va. 1964) ("Where a will on its face appears to be in due form and in accordance with statutory requirements, the authorities are divided on the question whether parol or extrinsic evidence may be admitted on the question of the presence or the absence of testamentary intent. On the other hand, the authorities are practically unanimous to the effect that if a writing is not in the usual form of a will, and if on its face it is ambiguous on the question of the presence or absence of testamentary intent, extrinsic evidence, including statements of the alleged testator, is admissible on that question."). Of course, arguably the most famous of such letters is the one that appears in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1903), which gave rise to the hearsay exception for a "present intent to act." For a fascinating book that looks at the unique aspects of this famous letter, see MARIANNE WESSON, *A DEATH AT CROOKED CREEK: THE CASE OF THE COWBOY, THE CIGARMAKER, AND THE LOVE LETTER* (2013).

178. See, e.g., *Shulman v. Shulman*, 193 A.2d 525, 529–30 (Conn. 1963) (because letter was properly authenticated, it was admissible for the purpose of showing the feelings of the testator toward the will contestants).

179. See *Rice v. Allen*, 28 N.W.2d 91 (Mich. 1947) (reversing trial court's application of constructive trust by relying on letter admitted into evidence because "where fraud is alleged, much latitude is allowed in the admission of circumstantial evidence" including "the letter and other testimony"); Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 410, 425–27 (2011) (discussing multiple cases); see also *Burger v. Comm'r*, 12 B.T.A. 1391, 1393 (1928) ("It is also very doubtful whether the letter would be admissible, over objection, to show the testator's intention . . . but inasmuch as it had been set out as a part of the petition, and the respondent has admitted the existence and finding of it and its terms as pleaded, it was apparently intended by the parties that we should consider it as a part of the case."); *Brown v. Tuckerman*, 157 N.E. 626, 627 (Mass. 1927) ("The letter was inadmissible in evidence had objection been made . . . [b]ut having been admitted without objection, it is to be weighed with the other evidence."); *In re Estate of Shepherd*, 823 N.W.2d 523 (Wis. Ct. App. 2012) (allowing attorney's testimony to determine whether surviving spouse effectively exercised power of appointment when surviving spouse's will was silent as to exercise but predeceased spouse required there be specific mention of the power). To the extent that letters are offered as homemade property dispositions, courts quote them at length as *supra* Part II demonstrates.

180. Two other ways letters appear in case law is to direct how tangible personal property will be distributed, see *Deal v. Huddleston*, 702 S.W.2d 404, 406 (Ark. 1986), and to address decedent's remains. See *Bennett v. Gibson*, No. 385419, 1996 WL 532374, at \*2 (Conn. Super. Ct. Sept. 11, 1996).

181. See, e.g., *In re Sack's Estate*, 199 P.2d 420, 421–22 (Cal. Dist. Ct. App. 1948); *In re*

advice may stem from attorneys, who advise clients to “to leave testamentary statements with their loved ones, out of the will, so as not to clutter the will with unnecessary features”<sup>182</sup> or from the testator’s own idea about how the law operates.

In *Sack’s Estate*, for example, nine days after executing a holographic will, the decedent wrote a letter addressed to his sister, which was subsequently found in the decedent’s safe deposit box. Fearing that what he “exactly . . . wanted” would “complicate the will,” the decedent used the letter to explain that the will should “stand as written” but that the “simpl[e] . . . letter of instructions” should guide the “disposition of [his] estate.”<sup>183</sup> Although the decedent left his “entire estate” to his sister “for obvious reasons,” he went on to instruct his sister as to limitations on her gift as follows: “[A]fter you have received the property I *wish* you would give a part to A and B and a larger share to my daughter if you consider her worthy of it.”<sup>184</sup> The question with which the court wrestled was whether the last letter imposed any limitation on the gift to the sister. If the decedent’s use of the word “wish” were interpreted to be a “request,” the letter would have no legal effect; if the language demonstrated the decedent’s intent to modify the gift, the sister would have fiduciary (although highly discretionary) obligations towards the decedent’s daughter.<sup>185</sup> Ignoring the testator’s proffered concerns about not wanting to complicate the original document, the *Sack* court found the testator to have intended that the property pass to his sister absolutely and without restriction because “the terms of the gift in the will were explicit” but the “terms of the letter were qualified and uncertain.”<sup>186</sup> The letter writer, for his part, was able to share his concerns

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Loud’s Estate, 161 P.2d 49, 50, 53 (Cal. Dist. Ct. App. 1945). Cf. *Bennett*, 1996 WL 532374, at \*1 (in dispute over decedent’s remains, describing how decedent, who was given option to sign will or non-binding letter, chose letter); *Rice v. Allen*, 28 N.W.2d 91, 92 (Mich. 1947) (decedent used a deed and “letter of wishes” rather than a will because, plaintiffs alleged, she “was advised by [her attorney] that it would be less expensive to convey her property” in this fashion).

182. T.P. Schwartz, *Testamentary Behavior: Issues and Evidence about Individuality, Altruism and Social Influences*, 34 SOC. Q. 337, 347 (1993); see also Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 407 (2013) [hereinafter Sneddon, *Personal Narrative*] (quoting FRANK GERD OPTON, *DECEDENTS’ ESTATES, WILLS, AND TRUSTS IN THE U.S.A.* 26 (1987)) (“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.’”).

183. *In re Sack’s Estate*, 199 P.2d 420, 421–22 (Cal. Dist. Ct. App. 1948).

184. *Id.* (emphasis added).

185. *Id.* at 423 (“The case thus presents the frequent one in which a testator leaves the estate to a devisee without restrictions but later ‘requests’ the devisee to make other disposition of part of the devise.”).

186. *Id.*; see also *McKinsey v. Cullingsworth*, 9 S.E.2d 315, 316, 318 (Va. 1940) (finding August 29 letter to nephew stating “I want you to have my home and every thing [sic] and you and

with his sister without tying her hands. His choice of “utterance,”<sup>187</sup> the simple and accessible homemade letter, provided him with the platform for communicating those desires.

*In re Loud's Estate* provides another example of a letter writer who sought to reach out to his recipients past the legal documents.<sup>188</sup> Although the testator, a practicing attorney, drafted the will himself, the court did not hesitate to accept that document as a holograph, undoubtedly because the testator used recognizable will rhetoric and form, including separate articles that authorized payments of debts, named executors, bequeathed a specific sum of money, devised real property, and distributed the residuary estate.<sup>189</sup> The testator chose, however, to write a “further holographic instrument . . . bearing the same date as the will.”<sup>190</sup> This “last letter” was addressed to the writer’s two brothers and told them that they had “both been good brothers and we have had a wonderful mother. It all goes to have made life worth while.”<sup>191</sup> Along with asking the brothers to have his “old ashes scattered to the four winds” or, upon objection, “do with my remains as you will. After all it can’t make much difference to me,” the testator also asked the brothers to “see that Margaret,” the beneficiary of the cash bequest, received the money promptly because she had “been a good friend for a number of years and it is my hope and wish that she shall never be in want.”<sup>192</sup> Offering this letter as a codicil, Margaret argued that the last letter established a trust by which the brothers were commanded to keep Margaret free from want.<sup>193</sup> The brothers responded that the letter’s language simply expressed the decedent’s hopes about his friend and so was non-binding. The court agreed with the brothers, fearing that to read fiduciary obligations into this personal language would “create a precedent the dangers of which are too obvious to require comment.”<sup>194</sup> Although the letter writer’s words to his siblings therefore did not alter their legal obligations towards Margaret, the homemade letter evinced the testator’s priorities, including his emotional connection to his family. Chosen by a lawyer who knew that the letter

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you take care of [niece] the best you can” to be a holographic will in favor of nephew and unrestricted by any obligations towards niece, notwithstanding letter written ten days earlier that “expressed an intention” to leave the same property to niece).

187. *See supra* note 78 and accompanying text.

188. 161 P.2d 49 (Cal. Dist. Ct App. 1945).

189. *Id.* at 50–51.

190. *Id.* at 50.

191. *Id.* at 50–51.

192. *Id.*

193. *Id.* at 51–52.

194. *Id.* at 52.

would have no binding effect, the humble writing allowed the testator to express how his life was made worthwhile through his relationships and bonded the writer to these family members.

Like the *Loud* testator, the authors of many of the letters that appear in case law, although not explicit about their reasons for writing, end up providing private and emotional narratives to the recipients that shed light on the writers' decisions about how they hoped their respective legacies would be handled.<sup>195</sup> The testator in *Russell v. Russell*,<sup>196</sup> for example, explained to his daughter that he had "worked hard all [his] life . . . to add to the wealth of this family with no compensation," and the testator in *Hecht v. Everett*, addressed a "last letter" to his children, including his two living children and any posthumous offspring he hoped would be created through sperm he froze and bequeathed to girlfriend, to "leave you with something more than a dead enigma that was your father."<sup>197</sup> The expositions that appear regularly through letters non-testamentary add a rich and personal dimension to the lives the letter writers enjoyed and allow the specific recipients of those letters to understand fully how those lives were lived.<sup>198</sup>

Choosing the genre, to accompany a more formal expression of testamentary intent, provides each letter writer with an opportunity to speak directly to her recipient about the plans she has made and, in that way, to build the recipient's understanding and empathy. Even (or especially) where the writer's words are unusual, they provide a fuller picture to the recipients about what the writer was thinking as she anticipated her death. *Hecht* again

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195. See, for example, the letters quoted *supra* in footnotes 10, 12, and 42 and in text accompanying notes 42–48, 50–54, 63–69, and 77–78.

196. 197 S.W.3d 265, 269 (Tenn. Ct. App. 2005).

197. 20 Cal. Rptr. 2d 275, 277 (Cal. Ct. App. 1993). The *Hecht* facts are particularly interesting not only because they involve the ownership of the decedent's sperm after his death, but also because, in addition to the "last letter," the decedent's will contained a section that was called "Statement of Wishes" which set forth the decedent's "intention" that "samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "diplomas and framed mementoes,"] to the extent that she wishes to preserve any or all of my mementoes and diplomas and the like for our future child or children." *Id.* at 276–77.

198. See, e.g., *In re Morey's Estate*, 82 P. 57, 59–61 (Cal. 1905) (describing last letter from wife to husband, stating that she wished him to be "first in all respects and plans, pleased, satisfied and always comfortably restful" and last letter from husband to his executors stating "I leave many dear friends whom I love and respect. We hope to meet on the other side of the dark river. Goodbye to all."); see also *McNeill v. McNeill*, 87 S.W.2d 367, 367 (Ky. 1935) (describing typewritten but homemade letter to sister from decedent, which was denied probate for lack of testamentary formalities, as "replete with affection for the addressee, as well as all other members of the writers family"; the letter "also volunteered kindly and considerate advice," "draws a picture of the writer," and "revealed that hers had been a life of helpfulness and self-denial").

provides a potent example. In his letter non-testamentary, Mr. Hecht shared childhood memories and family history with his children.<sup>199</sup> He also used the letter to shed light on his decision to die, explaining that he wanted to end his life “like I have lived it -on my time, when and where I will, and while my life is still an object of self-sculpture-a personal creation with which I am still proud. In truth, death for me is not the opposite of life; it is a form of life’s punctuation.”<sup>200</sup> The last letter provided his children, if not a court, with an understanding of his state of mind.

Where a letter writer lacks confidence in how her formal property disposition will work, she may use a letter non-testamentary to bolster or explain her plan to the recipient, even if she does not intend to modify it.<sup>201</sup> This technique is precisely the one that Robert Kaufmann used when he wrote to his brothers to explain his will and ask that they respect it. By using this more direct form of address, rather than a mediated legal structure, the letter writer may perceive herself to be more powerful and perhaps freer to invoke the recipient’s understanding and empathy. Kaufmann’s letter did not necessarily indicate a lack of trust in the legal system but did show that Kaufmann reposed greater, albeit misplaced, trust in his brothers not to mount a challenge to the formal documents.

Another reason writers appear to choose the letter non-testamentary genre to convey their last wishes is the writers’ frustration with existing legal rules. Consider, for example, *In re Benton’s Estate*, in which the letter writer sought to avoid a “dangerous” situation and admonished the recipient, his brother, “Not a soul but yourself to know of the contents of this letter.”<sup>202</sup> The situation that the letter writer and ultimately the decedent feared and wished to avoid was his wife’s legal right, should she survive him, to elect to take a one-third outright share of the property he owned on death.<sup>203</sup> The wife would then be free to use or pass on the property as she wished, including to the letter writer’s ill-favored stepson.<sup>204</sup> Because “in no event

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199. 20 Cal. Rptr. 2d 275, 277 (Cal. Ct. App. 1993).

200. *Id.*

201. *See, e.g.*, Estate of Robbins, 544 N.Y.S.2d 427, 429 (Sur. Ct. N.Y. Cnty. 1989) (observing purpose of letter written by the decedent to her son as “explain[ing] her motives in making the will and her somewhat bitter feelings towards her daughter”); Cornell v. Cornell, 334 A.2d 888, 891 & n.6 (Conn. 1973) (letter from testator to sister explaining that testator was only providing for wife as mandated by law and was “now leaving the house and all of the furnishings to you, not for her use. I am leaving one-third of my estate in trust, she to have the income from same for her life & then the principal to you. You will get more besides.”).

202. 84 N.E. 1026, 1027 (Ill. 1908).

203. *Id.* at 1028.

204. *Id.*



was it the wish or desire of the decedent that the stepson should have any part of his estate,” he used a letter to “take[] his brother into his close confidence and tell[] him his secret thoughts and wishes” outside and apart from the existing testamentary documents.<sup>205</sup> The *Benton* court used the letter as evidence that other gifts by the decedent were made in contemplation of death and therefore subject to inheritance tax; the letter, however, helps to show the decedent’s desire for privacy, his knowledge of inheritance law, and his trust in family which helped to reach his goal of “plac[ing] his estate . . . in the hands of those whom he desired to enjoy it after his death.”<sup>206</sup>

A letter writer may also choose the informal genre because she hopes to avoid what she sees as a restriction on the use of formal documents, even if that restriction was self-imposed. In *Jackson v. Tibbling*, for example, the plaintiff, a widow, refused to revise her will because she wanted to adhere to an agreement she had with her deceased husband not to change their reciprocal wills after the first death.<sup>207</sup> Having no descendants, the widow planned to leave a piece of real property to her husband’s friend, should the friend survive her; if the widow outlived the friend, however, she wanted the property to pass to some distant relatives.<sup>208</sup> Although the widow refused to make the formal change to her estate planning documents so as not to break the promise to her husband, she did not hesitate to deed the property to the friend, based on his return promise that he would leave it to her in his will, and to write a letter explaining that she had done so hoping that the friend and his wife “will make [my home] their home.”<sup>209</sup> In other words, the widow saw the use of a letter non-testamentary as somehow morally distinguishable from changing her formal will. When the friend instead left the property to his own family, the widow sued. Finding that the friend breached his promise and shared a confidential relationship with the widow, the court imposed a constructive trust on the property for the widow’s benefit.<sup>210</sup> Although the court did not specifically rely on the letter as evidence of the relationship that gave rise to the breach, the letter demonstrated the widow’s real wishes for her property and the trust she

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205. *Id.*

206. *Id.* at 1028; *see also* Hahn v. United States, 123 F. Supp. 767, 769–70 (S.D. Ohio 1954) (denying tax refund to daughter where recorded deeds showed transfer of mother’s real property to daughter but daughter’s letter written on recording date described ownership as a trust, reasoning that letter was “a mere self-serving declaration”).

207. 310 S.W.2d 909, 912 (Mo. 1958).

208. *Id.*

209. *Id.* at 913.

210. *Id.*

placed in the letter recipient notwithstanding her reluctance to include those wishes in a formal will.<sup>211</sup> The simple form of the letter offered her a moral freedom that she could not find elsewhere.<sup>212</sup>

### B. *Letters of Wishes*

One of the most interesting examples of the last letters genre is the so-called “letter of wishes,” which is used primarily when property is to be distributed over time rather than simply upon the owner’s death. Ordinarily, the vehicle to effectuate this arrangement is a trust.<sup>213</sup> By conveying property in a trust, which is administered and distributed by one or more trustees rather than outright, the property owner places distributional discretion in a person, persons, or entity other than the beneficiaries.<sup>214</sup> The choice of fiduciary and the guidance conferred on that fiduciary become important, especially when the trust is designed to be long-term rather than simply to last until a beneficiary reaches majority. One challenge of a long-term trust,<sup>215</sup> though, is maintaining flexibility to deal with changed circumstances after the trust becomes irrevocable.<sup>216</sup> From a drafting

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211. *Id.*

212. Informal letters have also played a role when the letter writer lacked the legal right to execute official documents. A vivid and entertaining example of such letters is provided in *Campbell v. Taul*, 11 Tenn. 548, 551 (1832), an early nineteenth century case that involved a twenty-one-year old female who died in childbirth, intestate; the decision explains “[a] will she could not make,” because the Married Women’s Property Act had not yet been passed. *Id.*

213. Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 217 (2011) (“The most vivid definition of a trust is the one advanced by Oxford University professor Bernard Rudden, who explained that a trust is ‘essentially a gift, projected on the plane of time and so subjected to a management regime.’” (quoting John P. Dawson, *Bernard Rudden, Gifts and Promises*, 44 MOD. L. REV. 610, 610 (1981) (book review))).

214. If the settlor of the trust, for example, wanted to leave all of her property to her descendants (children and their children) but did not want these (young, inexperienced) beneficiaries to have immediate access to it, interposing a trustee who can manage and distribute the property addresses the settlor’s concern about unbridled use and premature exhaustion of the funds. Often beneficiaries serve as co-trustees, but are subject to fiduciary duties that would not apply if they held and managed the property outside the trust vehicle. Although the settlor may play an active role in trust administration, by serving as trustee or retaining the right to change or revoke the trust, the law recognizes as a key point the time at which the settlor parts with dominion and control over the trust property, either on death or when the trust becomes irrevocable. See Treas. Reg. § 25.2511-2(b) (1983) (gift is complete for transfer tax purposes when “donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another”).

215. Professor Friedman provides a helpful characterization of such trusts as either “caretaker,” meaning that they are designed to terminate when the beneficiaries are able to care for themselves, and “dynastic,” meaning that the settlor’s primary motive is “to perpetuate and control the estate as long as possible.” See FRIEDMAN, *supra* note 137, at 113.

216. Charles D. Fox IV, *How “Revocable” Is “Irrevocable”? Obtaining Flexibility in*

perspective, the less restrictive the trust instrument, the more leeway a trustee has to deal with unanticipated future circumstances; moreover, flexible investment and distribution standards mean less vulnerability to a claim by the beneficiary that the trustee misbehaved. On the other hand, by reposing absolute discretion in a trustee, the property owner must “trust” that the fiduciary will get to know the beneficiaries and their needs and serve those beneficiaries appropriately over trust’s duration.<sup>217</sup> Even leaving aside the so-called “dead hand” effect—that is, the property owner’s desire to control the future—real concerns arise, especially when an institutional trustee, like a professional trust company or a megabank, employs numerous trust officers to manage wealth for people with whom they have had little to no contact.<sup>218</sup>

The “letter of wishes” is one way to strike a compromise between including explicit and binding preferences in the trust agreement, on the one hand, and allowing a trustee complete and absolute discretion, on the other.<sup>219</sup> These letters non-testamentary give property owners a way to convey the stories and rationales underlying their planning to the letter recipients, their “trusted” designees. A letter that supports this analysis is quoted at length in *Edelman v. Merrill Lynch Bank and Trust Co.*<sup>220</sup> The *Edelman* case pitted the remaindermen of a trust established by their Argentine grandmother against the trust’s Cayman Islands trustee and New Jersey investment manager, alleging that the defendants had breached their fiduciary duties by making questionable asset allocations and investments that had eroded the trust’s value.<sup>221</sup> Originally funded in 1992 with \$3.5

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*Irrevocable Trusts*, 33 OHIO N.U. L. REV. 943, 944 (2007) (“It is difficult if not impossible to address all of the possible changes that will occur during the existence of the trust.”).

217. Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. TR. & EST. L.J. 319, 320 (2010) (“[V]esting greater powers and discretion in trustees can also increase the risk that a trustee will fail to carry out the settlor’s intent.”).

218. Another mechanism for controlling trustee discretion is granting broad trustee removal rights either in the trust instrument or by statute, but even a permissive right of removal requires thought. See Sitkoff, *supra* note 167, at 663–64 (“The difficulty, then, is setting the threshold for trustee removal high enough so that the trustee can carry out the settlor’s wishes (including the protection of future beneficiaries) in the teeth of a contrary preference of the current beneficiaries without setting it so high as in effect to sanction shirking or mismanagement.”).

219. G. Warren Whitaker, *Classic Issues in Family Succession Planning*, 17 PROB. & PROP. 32, 32, 37 (2003) (“If clients want to give specific instructions to future trustees regarding the management of the trust, they should be encouraged to do so in a nonbinding, precatory letter of wishes. . . . In this way the client can satisfy his need to kibbitz and cajole from beyond the grave without robbing the fiduciary of discretion, as mandatory directions in the trust agreement would do.”).

220. No. L-7233-06, 2009 WL 425906, at \*1 (N.J. Super. Ct. App. Div. 2009) (per curiam).

221. *Id.* at \*2–4.

million in liquid assets, the trust was governed by a document that directed the trustee to pay all income and discretionary principal to the settlor during her lifetime. On the settlor's death, the trustee had absolute discretion to make income and principal distributions to the settlor's son and his wife; any property remaining on the death of the survivor of the son and his wife was to be distributed to the settlor's grandchildren, the plaintiffs.<sup>222</sup> Although the formal trust instrument did not contain additional or more specific directions about what was meant by the term "discretion," the document specifically recognized that the trustee "would manage and invest the trust in accordance with any written instructions it might receive from [the settlor] or if it received none, as its sole discretion indicated" and "conveyed very broad powers upon defendant Bank with respect to investing and managing the trust assets."<sup>223</sup>

Revealed in the settlor's separate letter to the trustee was the fact that the settlor's son, Alberto, a scientist and physician, had suffered from paranoid schizophrenia for years, had never supported himself or his family, and would be unlikely to do so in the future.<sup>224</sup> Written three years after signing the trust agreement, this guidance memorandum also expressed the settlor's "concerns" and purposes for the trust and described to the trustee how she wanted the trust assets administered and distributed to effectuate those purposes.<sup>225</sup> In other words, the letter set forth the settlor's views on distributions, reasons, and investments. For example, instead of the absolute discretion to distribute principal that the trust instrument contained, the letter explained the settlor's desire that the income distributions to her son "be limited to thirty percent (30%) of the trust income" to serve her "wish that some of the capital eventually be distributed to Alberto's children." The letter also asked the trustee to "take into consideration Alberto's and his family's other sources of income, their specific needs, and the need to maintain the trust for the long term period described herein," and described how Alberto, although a "physician dedicated to clinical research," had "never really had the responsibility of earning his own money for his support."<sup>226</sup> The settlor established the trust, her letter explained, so that "there may always be funds available for the maintenance and general welfare" of Alberto and his family. The letter contained very specific instructions about distributions after Alberto's death too, including that his

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222. *Id.* at \*1.

223. *Id.*

224. *Id.* at \*1–2.

225. *Id.* at \*1.

226. *Id.* at \*2.

wife, also a schizophrenic in treatment, was not to receive payments if she and her husband were estranged or divorced, and that Alberto's children would receive outright distributions at ages twenty-five and thirty.<sup>227</sup>

As a result of the settlor's concerns that the trust last for a long time, the trustee had invested primarily in fixed-income securities which generated income but resulted in little growth to the trust corpus.<sup>228</sup> Following the settlor's death, the trustee and investment company diversified the fund but ultimately experienced a decline in value, which led to the lawsuit that found its way to the New Jersey Superior Court and was described in the appellate division's 2009 unpublished *per curiam* opinion.<sup>229</sup> Although the *Edelman* decision focuses primarily on whether the court had personal jurisdiction over the Cayman Islands trustee and whether New Jersey was the appropriate forum for suit,<sup>230</sup> the non-binding last letter that the court quotes at length is useful as it provides insight into some of the purposes served by letters of wishes. While the *Edelman* settlor gave the trustees absolute control in her formal trust, the letter indicates a very directed and specific purpose that motivated the settlor's estate planning. One might wonder why such information and direction was not included in the trust document if it motivated the settlor to create the trust, explained how to prioritize the competing beneficiaries' interests, and justified the trustees in their investment decisions. Certainly "absolute discretion" provides the trustees with even broader ambit; and yet that legal language, so valuable to protect the trustees from liability and to allow future flexibility, is somehow less complete until the letter is read as an accompaniment. On the other hand, reading the letter makes clear how the settlor of the trust decided to face her approaching death and reconcile how her absence would affect the people for whom she had cared during her life: Alberto, his wife, their children. Both helpful in describing the writers' purposes to a recipient and perplexing because those purposes were deliberately omitted from the binding documents, letters of wishes are just that: vehicles for letter writers to define their desires.

No published case holds a trustee to a standard set forth in a letter of wishes and, to make sure this rule continues to hold, Bove and others who recommend their use also caution that the letters should be explicitly non-

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227. *Id.* at \*1-2.

228. *Id.* at \*2.

229. *Id.* at \*3.

230. The appellate court reversed the trial court's dismissal of the motions to dismiss on jurisdictional and forum non conveniens grounds, finding that additional discovery was needed. *Id.* at \*10.

binding.<sup>231</sup> Letters of wishes, even in this quasi-legal, peripheral state, can be extremely useful, however. Although they do not set the standard by which outsiders (courts or beneficiaries) evaluate trustee conduct, the letters nevertheless offer the writers a vehicle to communicate their purposes, goals, and rationales to those they “trust.” The letters become the voice of the settlor after she is gone. Like Kauffman and More, Mrs. Edelman used a letter non-testamentary to share with the trustee her frank views on what needed to be done to help her son’s family.

## V. CONCLUSION

Property owners appear to understand that letters non-testamentary offer them a powerful way to convey their ideas about their impending deaths to specified recipients who will hear, understand, remember, and potentially effectuate those wishes. The genre does not anticipate a reply, because the simple act of writing is a way to confront this impending separation. And third parties—courts for example—are not relevant to this exchange, which is uniquely between writer and recipient.

Testators may and sometimes do use their wills to “testify” about far more than simply who should receive property and in what amounts. Indeed, there is a growing body of scholarship documenting past narratives in formal wills and expressive potential for future formal documents.<sup>232</sup> But in general, lawyer-drafted estate planning documents do not reflect that individuality, and much of the creativity comes from homemade wills that reflect individual voices.<sup>233</sup>

A letter non-testamentary can serve multiple purposes for the writer. Rather than a pronouncement or a testimonial, a letter is intimate and humble. At a moment when people cannot be together, letters bridge divides, not only between locations, but also between living and dying. Primarily a means of facilitating understanding and prolonging interaction, the genre is used by writers who are explicitly or implicitly navigating

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231. While research on the actual use of these letters by practitioners is an area for further study, that “letters of wishes” have not given rise to litigation in the form of beneficiaries claiming that trustees abused their discretion supports the idea that the letters are an effective way to provide the settlor’s input without unduly constraining the trustees.

232. E.g., Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 646 (1992); Gordon, *supra* note 179, at 410; Daphna Hacker, *Soulless Wills*, 35 L. & SOC. INQUIRY 957, 981 (2010); Horton, *supra* note 28, at 78–85; Sneddon, *Personal Narrative*, *supra* note 182, at 369–409; Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN’S L. REV. 683, 684–85 (2011).

233. See, e.g., Hacker, *supra* note 232, at 975.

perceptions about the restrictions that attend formal documents and finding liberation in the letter's form. As More faced his executioner, Koofi faced her war-torn Afghanistan, Kaufmann faced his metaphoric closet, and Edelman faced her child's debilitating illness, each used a letter non-testamentary to convey his or her unique vision to selected recipients. Like letter writing, law is primarily a social and communal activity and endeavor,<sup>234</sup> so it makes sense that letters are in some ways the law's ancestors and companions. Yet the genre remains unique, and its usefulness cannot be discounted, even as the law's role in recognizing its value is not always clear or neatly described.

Additionally, as messy as letters non-testamentary have been in the past, they are likely to continue to complicate inheritance law in the future, too. Just as the United States Post Office has announced its plan to reduce its services and outposts,<sup>235</sup> classic letter writing seems old fashioned, outdated, and unworthy of much interest. But people today are communicating with each other even more than ever, through online and digital forums. Consider, for example, the Facebook application called "If I Die," which allows users to record a video that will go to designated recipients automatically once the speaker's death is verified.<sup>236</sup> One user referred to her "If I Die" recording as her "her last digital will and testament" and another praised the application as an opportunity for people to leave an "intimate video message for their kids . . . to tell them one last time how much they loved them."<sup>237</sup> Like the hand or typewritten letters of days gone by, it is only a matter of time until modern missives, in the forms of e-mail messages, Tweets, status updates, and texts, start to appear in inheritance law cases.<sup>238</sup>

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234. As James Boyd White explains, law is a rhetorical endeavor that "is at once a social activity—a way of acting with others—and a cultural activity—a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works." James Boyd White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural And Communal Life*, 52 U. CHI. L. REV. 684, 691 (1985). He continues by observing that "the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested." *Id.* This fluidity means that "law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends." *Id.*

235. See, e.g., Ron Nixon, *Trying to Stem Losses, Post Office Seeks to End Saturday Letter Delivery*, N.Y. TIMES, Feb. 7, 2013, at A15.

236. Marc Ellison, *Now the Dead Can Send Facebook Messages Too*, SALON (June 16, 2013, 11:00 AM), [http://www.salon.com/2013/06/16/if\\_i\\_die\\_facebook\\_app\\_erases\\_digital\\_footprint\\_post\\_mortem\\_partner/](http://www.salon.com/2013/06/16/if_i_die_facebook_app_erases_digital_footprint_post_mortem_partner/).

237. *Id.*

238. See Crinquand, *supra* note 6, at 5 (describing the modern era as "a time when letters have

To date, this field has been slow to acknowledge what role, if any, digital communications will play.<sup>239</sup> As the modern equivalent of letters non-testamentary, these informal but intimate communications are likely to raise the same issues about testamentary impact and utility as the old-fashioned writings have raised for hundreds of years. And as years of cases show, even the most trifling and untraditional writings seep into and influence judicial decisions and, as importantly, property owners' conduct. Understanding the tenacious human desire to communicate in writing about an impending separation and how this desire has intersected with traditional doctrine can prepare us to deal with the potential roles modern letters ultimately may play. Moreover, by acknowledging the value in these communications but recognizing their corresponding limits, we can allow writers and recipients to reap the benefits of the genre while retaining the safe harbor that formal documents provide.

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been superseded by e-mails, and diaries by blogs"). For articles about how various courts have opined on the effect of digital communications at death, see Brad Dicken, *Judge Rules That a Will Written and Signed on Tablet is Legal*, CHRONICLE-TELEGRAM, June 27, 2013, <http://chronicle.northcoastnow.com/2013/06/25/judge-rules-will-written-signed-on-tablet-is-legal>; Rae Wilson, *Will done on iPhone before owner took his life ruled valid*, DAILY EXAMINER, Nov. 7, 2013, <http://www.dailyexaminer.com.au/news/will-done-iphone-owner-took-his-life-ruled-valid/2077241/>; and *SMS Not a Valid Last Will and Testament: Court*, THE LOCAL: SWEDEN'S NEWS IN ENGLISH (Mar. 26, 2014), <http://www.thelocal.se/20140224/sms-not-valid-last-will-and-testament-court>.

239. See Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 881 (2007) ("Although our evidence law has evolved to recognize the value of both audio and video recordings, wills law in the United States has yet to accept a will created and stored by such electronic medium as satisfying the writing requirement."); Christopher J. Caldwell, *Should "E-Wills" Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, 63 U. PITT. L. REV. 467, 467 (2002) ("The law of wills has universally been slow to accept change."); Joseph Karl Granta, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 110 (2008) ("[V]irtually all . . . states [other than Nevada] have refrained from statutorily allowing videotapes or other electronic media to substitute for a written will. The result is that in our 'digitized' and 'electronic' society where computers, PDA's, and e-signatures rule the day, the judicial system is nonetheless called upon to determine what constitutes 'writing' and a 'signature' for purposes of wills statutes."). But see Scott S. Boddery, *Electronic Wills: Drawing a Line in the Sand Against Their Validity*, 47 REAL PROP. TR. & EST. L.J. 197, 198 (2012) ("Probate law—despite its historically protracted evolution—has recently experienced a push towards adopting the conveniences attendant to this electronic age."); John A. Conte, Jr., *Is the 'Smartphone Will' in Our Future? (Or Is It Already Here?)*, 208 N.J.L.J. 43, 43 (2012) (providing anecdotal evidence of difficulties associated with electronic wills and describing current trends in courts' acceptance of the same); James W. Martin, *I Want to Sign an Electronic Will*, 55 No. 3 PRAC. LAW. 61 (June 2009) (describing growing effectiveness of electronic wills in multiple states).