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Thomas S. Word Jr.

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A BRIEF FOR PLAIN ENGLISH WILLS AND TRUSTS

*Thomas S. Word, Jr.**

We lawyers thrive on disagreement. But on this we are unanimous: clients are precious, hard to get and easy to lose.

A typical citizen asks a lawyer's help but seldom: to buy a house, face a traffic charge, or make a will. The will client comes emotionally charged. He deals with his most personal concerns: his family, his wealth, and his death. A will is the most personal of writings, save perhaps a love letter. And yet we respond to our client's simply expressed wishes about who gets what with a bewildering instrument that is:

1. Too wordy and redundant;
2. Flooded with lawyerisms, unfamiliar words and inactive verbs;
and
3. Poorly organized.

A will should be written for the client's eyes. Of course it must be sound technically, but it need not be written in Legalese.¹ By applying plain English principles in our wills (indeed in all our drafting) we can respond to our clients in language they will under-

* Partner, McGuire, Woods & Battle, Richmond, Virginia; B.S., Virginia Polytechnic Institute, 1959; LL.B., University of Richmond, 1961.

1. "Legalese" has been defined as "the language of lawyers that they would not otherwise use in ordinary communications but for the fact that they are lawyers." Robinson, *Drafting — Its Substance and Teaching*, 25 J. OF LEGAL EDUC. 514, 516 n.12 (1973). "Legalism" has been defined as "a word or phrase that a lawyer might use in drafting a contract or a pleading but would not use in conversation with his wife." Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 209 (1967).

stand. We will also improve our instruments technically.

The following examples came from wills drafted by Virginia lawyers of high esteem (who, for obvious reasons, will remain anonymous). Compare them to the plain English substitutes, and make your own judgments.

I. TOO WORDY AND REDUNDANT.

Last Will and Testament
of
John Quincy Doe

I, John Quincy Doe, now residing in the City of Richmond, State of Virginia, being of sound mind and mēemory, do hereby make, publish and declare this to be my last will and testament, hereby revoking, annulling and canceling any and all wills and codicils heretofore made by me.

That's 49 words. Would not the following do as well?

I, John Quincy Doe, of Richmond, Virginia, make this will, and revoke all earlier wills and codicils.

That's 17 words. They do as much as the 49. The distinction between "will" and "testament" left us long ago.² "Publish and declare" should come at the end, in the attestation clause, if at all. Do annul and cancel add anything to revoke? Why waste two bullets on a dead man? Would anyone think we were revoking someone else's will? ("And codicils" could be omitted,³ but I left it as a bow to tradition and because for some strange reason clients savor the word. In fact, the whole revocation clause is surplus — a complete will revokes all prior ones by operation of law.)⁴

In fact, we could say as much with:

I, John Quincy Doe, make this will:

2. VA. CODE ANN. § 64.1-45 (Repl. Vol. 1973).

3. *Id.*

4. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 450 (2d ed. 1953). The author does not advocate omission of a revocation clause.

One penchant for redundancy — a string of words with the same meaning — has a base in history. At various times the English had two languages to choose from — at first that of the Celts or Anglo-Saxons; later the choice was English or Latin; and still later English or French. Lawyers began using a word from each tongue, joined together, for a single meaning.⁵ Thus came legal tautology: free and clear (from Old English *freo* and French *cler*), full and complete, good and sufficient, kind and character.

Consider this, from the same will:

ARTICLE I.

Section 1. I direct my Executor, as promptly as practicable after my death, to pay from and out of my residuary estate all my just debts, if any there be, my burial expenses, including the cost of a marker and the engraving of the marker at my grave, all costs and expenses of administering and settling my estate and all lawful taxes assessed by reason of my death against my taxable estate or any part thereof, including estate, inheritance, succession, transfer and any other taxes, by whatever name called, whether levied by the Federal Government or by any State Government or political subdivision of any State, and such taxes shall not be charged against or collected from any legatee or devisee of any share or part of my estate, other than my residuary estate, or from the beneficiary or beneficiaries of any insurance policy or policies on my life and the proceeds of which are included as a part of my taxable estate, or from any person who receives or acquires at my death, in any manner whatsoever, any property or any interest in any property which is considered or treated as a part of my estate for the purpose of computing any one or more of the aforesaid taxes.

This gem contains at least two unnecessary directions, a half dozen unnecessary phrases, and 18 redundancies.

We need not direct the executor to pay debts; the law does that. But it may be desirable not to pay off a mortgage with a favorable interest rate. We may also want to avoid seeking contribution from a jointly obligated surviving spouse, thus avoiding the contribution

5. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 38-39, 121-22 (1963); R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 18 (1979).

rule of *Brown v. Hargraves*.⁶ We need refer to burial expenses only in the will of a married woman, and then only if we want to negate the husband's obligation (perhaps now unconstitutional) to pay for his wife's funeral.⁷

Aside from its redundancy, this provision demonstrates another common error in will drafting: overspecificity.⁸ When we draft to cover in detail every contingency, we may overlook something, thereby invoking *ejusdem generis*,⁹ a doctrine invented by a vengeful judge to punish lawyers for poor drafting. For example, the tax payment provision last quoted is quite specific about the kinds of taxes covered. But when the draftsman became specific about the taxing entities, he did not mention foreign governments. Since Americans often own Canadian securities that are subject to Canadian death taxes, the draftsman's over-specific references to taxing entities may have invoked *ejusdem generis*, rendering the Canadian taxes subject to apportionment.

Consider this 39 word alternative for the 208 words about taxes quoted above.

My Executor shall pay all death taxes assessed because of my death, including taxes on assets that do not pass under this will. The taxes shall be paid as a cost of administration, and not charged against the beneficiaries.

This much will often do. In some cases this might be added:

My Executor shall not ask my wife to pay any part of our joint debts. My Executor need not pay off mortgages on real estate if my

6. 198 Va. 748, 96 S.E.2d 788 (1957). In *Brown v. Hargraves* the Virginia Supreme Court held that the personal debts of a decedent are to be paid from the decedent's personal estate and, if such debts are joint, a surviving debtor may be liable for contribution to the estate.

7. *Hall v. Stewart*, 135 Va. 384, 116 S.E. 469 (1923).

8. See E. Schlesinger, *English as a Second Language for Lawyers*, 12 INST. ON EST. PLAN. ¶ 708 (1978) for a discussion of overspecificity as a defect in will drafting.

9. See BLACK'S LAW DICTIONARY 464 (5th ed. 1979) which says:

In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

wife wishes to receive it subject to the mortgage and if it is practical not to pay off the mortgage.

II. LAWYERISMS, UNFAMILIAR WORDS AND INACTIVE VERBS

Lawyerisms in wills are inexcusable. They should be replaced with everyday words, or eliminated entirely.¹⁰ The result will be a document more readable and more technically sound. Consider these "lawyerisms":

said	aforesaid
such	therefor
thereof	to-wit
hereinabove	viz
hereinafter	and/or

If a draftsman does no more than vow he will not use these, his drafting will improve dramatically.

Consider this provision in a wife's will, designed to express the right of a husband to her furniture for life:

In the event my *said* husband continues to occupy *said* property, it is my desire, and I so direct, that my furniture remain in the *said* dwelling house while the *same* is occupied by my *said* husband. In the event my *said* husband moves to another dwelling house or an apartment, it is my desire, and I so direct, that he take such of my furniture . . . from the dwelling house to completely furnish the other dwelling or apartment to which he may move. My husband shall have the use and possession of the *aforesaid* articles of personal property for and during the term of his natural life, and at his death I give and bequeath the *same* to the following persons in the following manner, *to-wit*:

Witness nine lawyerisms (the words in italics), not to mention the tautologies (use and possession, for and during the terms of, natural life). Could not the lawyer say as much, and to his client's greater satisfaction, with this:

My husband shall have the right to use my furniture for life. At his

10. R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 28 (1979).

death or when he ceases to use any item, I give it as follows:

Some will say that unfamiliar words (technical legal terms) are necessary evils in wills. A few of them, like *per stirpes*,¹¹ may be. But most unfamiliar words can be replaced with simple, familiar words that say the same thing. Consider these terms and the alternatives:

Last will and testament	will
devise	give (or leave)
bequeath	give (or leave)
give, devise and bequeath	
nominate, constitute	name
appoint	
corpus	principal (capital)
in the event that	if
prior to	before
issue	descendants (or children and their descendants)

Lawyers seem compelled to use inactive verbs, unfamiliar words and lawyerisms in drafting trust provisions. For example:

I give, devise and bequeath unto Green National Bank, IN

11. Even if we can't find a substitute for *per stirpes*, perhaps we owe the client an explanation of what it means. A distinguished New York lawyer who advocates plain English has suggested the following in his firm's form of a plain English will:

. . . I give my residuary estate to my children and their descendants as follows:

(a) One equal share is to be paid to each child of mine who is then living at the time of my death.

(b) One equal share is to be paid to the then living descendants, if any, of each child of mine who may have died before me. That share is to be divided among those descendants according to the branches of the family and not equally according to the number of persons, in other words, according to what is known in legal terminology as division *per stirpes*.

Reprinted with permission of Lawrence X. Cusack, of the New York Bar, author of *The Blue-Pencilled Will*, 118 Tr. & Est. 33 (1979).

TRUST NEVERTHELESS, [description of the trust assets] . . .

This Trust shall be known as Trust A, and shall be held, administered, managed, controlled, disbursed and paid under and according to the powers, authority and discretion hereinafter given and granted to the Trustee, in the following manner and upon the following terms and conditions.

(1) I direct that said Trustee shall pay unto my wife the net income from this trust, the same to be paid as nearly as possible in equal monthly installments so long as she shall live. In the event, however, that my wife shall determine that the income or payments received by her under this clause of my will, and other sources are not sufficient for her proper comfort, maintenance and support, upon her written request the Trustee shall pay unto her such additional sum as she may request, but not to exceed \$15,000 in any one calendar year

(2) In the event my wife shall be in need of additional funds by reason of injury, incapacity, sickness or from any other cause, I give the power and discretion to the Trustee to pay over to her for her benefit such portion of the principal and/or corpus of this trust as the Trustee may deem right and proper, and the Trustee shall have the sole judgment of what amount, if any, will be right and proper to pay under this provision of my will.

(3) I direct that my wife shall have the right and power by her will, referring specifically to my will, to direct how such funds remaining in this trust shall be distributed after her death. In the event my wife shall fail to exercise such power of appointment by her will, designating the beneficiaries to receive any balance or residue of this fund, then such balance or such residue shall be paid into and become a part of the trust set out in clause Third of this will, hereinafter known as Trust "B"

Had the draftsman steeled himself to eliminate lawyerisms and unfamiliar words, and to use active verbs, he might have written:

I give to my Trustee [description of trust assets] . . . The Trust shall be known as Trust "A". I direct the Trustee to manage Trust A as follows:

(1) Pay the income to my wife monthly. Pay to her as much principal as she may request in writing, but not more than \$15,000 in any calendar year. In addition, pay to my wife as much principal as the Trustee in its discretion considers necessary to provide for her medical or other needs.

(2) Upon my wife's death, distribute the principal as my wife shall specify in her will, making reference to this power. She may specify to her estate or in any other manner. To the extent my wife does not effectively so specify, add the principal at her death to Trust "B" under this will.

III. ORGANIZATION

Language specialists point out that several factors affect the degree of difficulty in understanding written material, including:

1. The conceptual difficulty of the subject.
2. Information load, or the amount of information in the writing in relation to its length.
3. Readability, or method of presentation. (Two sub-factors influence readability — word familiarity and complexity of writing style).¹²

Aside from using familiar words and simple writing style, we can help our clients' reading comprehension by:

1. Putting the dispositive terms at the beginning.
2. Using introductory headings as signposts.
3. Extracting technical material from the basic dispositive terms, and placing the technical material toward the back.

I recommend the following scheme or organization for a typical will (the designation of the articles being set out as underlined headings in the instrument).

Article I. Distribution of my Estate.

Article II. Payment of Charges Against my Estate.

Article III. Directions for Division of my Residuary Estate into the Marital Trust and the Residuary Trust.

Article IV. Miscellaneous Technical Provisions.

Article V. Executors and Trustees and Their Authority.

By tradition, the first article of a will deals with payment of

12. Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841, 850 (1977).

charges and taxes. While this can be expressed simply, we should begin with the disposition of the client's property. This is what interests him. A reader's attention span is short — don't waste it.

And now for a confession. Despite what I have said, I do not believe that the typical client can understand fully the technical aspects of a relatively complex will, even when it is written according to plain English principles.¹³ But most clients can understand the basic dispositive terms if the technical niceties are extracted and put in separate sections toward the end. (When you send the client a draft for review tell him in the covering letter that the important part is in the first article. With an infirm or obtuse client it may be wise to send the first article alone.)

For example, few clients understand fully a marital deduction formula clause. (The most astute will understand it right after you have explained it, but when they look at the will a year later they will not remember what it means). For this reason, we should remove the marital deduction formula from the dispositive provisions, and put it in a separate article.

Other miscellaneous technical provisions should be extracted from the dispositive terms. A facility of payment clause is a good example. Rather than repeating "pay to or expend for the benefit of, with or without the intervention of a guardian or committee" throughout the dispositive terms of a trust, just say "pay to". Then place a definition of "pay to" in the technical terms section. Do the same with other technical items such as relationships (effect of adoption or illegitimacy), spendthrift provisions, directions against apportionment of income on the death of an income beneficiary, directions for payment of taxes out of the marital deduction trust when the surviving spouse dies, and any specific tax-related directions to the fiduciaries.

Listing the powers of the Executor and Trustee contributes mightily to the length and complexity of wills. Incorporating Section 64:1-57 of the Code of Virginia by reference simplifies mightily.

13. For a discussion of the difficulty of writing technical legal documents in the vernacular, and of the overriding consideration of certainty of meaning, see GOWERS, *THE COMPLETE PLAIN ENGLISH WORDS* 18 (Pelican ed. 1962).

Incorporation by reference has its advantages (primarily simplicity) and its disadvantages (primarily risk of misleading a client, or having him or his beneficiaries say you did). In most cases I follow the modern trend and incorporate. If you decide against it, at least express the powers in simple and logical sequence, using active verbs and short segregated clauses, perhaps with underlined headings.

IV. A WORD ABOUT TRUST AGREEMENTS

What I have said about wills applies to trust agreements. In fact, traditional trust agreements are more difficult to understand than wills, because they are not written in the first person. The client gets confused about who is the grantor and who is the trustee. He will do much better if the trust agreement is written in the first person, like a will. Begin the trust agreement something like this:

I, John Quincy Doe, desiring to create a trust, agree with General National Bank (my Trustee) as follows:

Then proceed to write the trust agreement with the client speaking his directions to his Trustee. Aside from improving readability, this makes it easier to develop and use consistent forms for wills and trust agreements.

V. CONCLUSION

Recent cries for plain English in legal documents and government regulations¹⁴ suggest plain English is something new. It is not. Good writers and good lawyers have practiced and advocated it for a long time.¹⁵ But the public now demands it, under penalty of law.¹⁶

Wills and trust agreements are consumer documents. They can and should be written in plain English.

Converting your will and trust agreement forms into plain En-

14. See R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 4 (1979).

15. See, for example, Justice Cardozo's statement of the facts in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

16. See, e.g., N.Y. GEN. OBLIG. LAW § 5-701(b) (McKinney Cum. Supp. 1979) requiring consumer credit contracts to be written in plain English.

glish can be hard work, but it is fun. Give it a try. Start by reading these:

1. R. Wydick, *Plain English for Lawyers* (1979) - 91 pages.
2. W. Zinsser, *On Writing Well* (Harper & Row 1976) - 151 pages.
3. Gibson, *Elements of Legal Style*, 22 *The Business Lawyer* 547 (1967).¹⁷

Then sharpen a gross of red pencils, and perform radical surgery on your will and trust agreement forms.

17. If you become a devotee of plain English, you will want these for your bookshelf: T. BERNSTEIN, *THE CAREFUL WRITER* (Ateneum 1972); R. FLESC, *THE ART OF PLAIN TALK* (Harper & Bros. 1946); H. FOWLER, *MODERN ENGLISH USAGE* (Oxford 2d ed. 1965); W. STRUNK & E. WHITE, *THE ELEMENTS OF STYLE* (MacMillan 2d ed. 1972).

